THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 12

Case No. 6394 — Case No. 7009

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HERBERT—ILLINOIS

Case No. 6,394—Case No. 7,009

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FEDERAL CASES.

BOOK 12.

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

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

Case No. 6,394.

HERBERT v. ADAMS.

[4 Mason, 15;[1] 1 Robb, Pat. Cas. 505.]

Circuit Court, D. Massachusetts. Oct. Term, 1825.

PATENTS—SUIT FOR INFRINGEMENT AFTER ASSIGNMENT BROUGHT IN NAME OF ASSIGNEE—VALIDITY OF ASSIGNMENT BEFORE PATENT IS OBTAINED.

1. A patentee of an invention cannot maintain a suit, after he has made an assignment, for any violation of his patent; but the suit must be brought by the assignee.

[Cited in Wilson v. Rosseau, Case No. 17,832, 4 How. (45 U. S.) 703; Gayler v. Wilder, 10 How. (51 U. S.) 493; Moore v. Marsh, 7 Wall. (74 U. S.) 521.]

[Cited in Higgins v. Strong, 4 Blackf. 183; May v. Page, 60 N. Y. 629.]

2. An assignment made before the patent is obtained, is good, and binds the right.

[Cited in Newell v. West, Case No. 10,150.]

[Cited in Somerby v. Buntin, 118 Mass. 287.]

Case [by Obadiah R. Herbert against Charles Adams] for the infringement of a patent for an improvement in the making of bedsteads. Plea, general issue. Upon the trial it appeared in evidence, that the plaintiff had made an assignment of his invention on the 8th of July, 1824, and afterwards took out his patent in the patent office on the 14th of the same month, and the assignment was recorded the next day in the department of state, according to the patent act, 1793, c. 11, § 4 [1 Stat. 322].

Webster and Bliss, for plaintiff.

Warner and Gorham, for defendant.

STORY, Circuit Justice. Under these circumstances I think the present suit cannot be maintained. The suit should have been brought in the name of the assignee. The assignment is not void by being executed before the invention was patented. It was a good transfer of the right of the patentee immediately upon his obtaining the patent, and he would be estopped to set up any adverse title. The subsequent infringement, by the defendant, if any, was a violation of the right of the assignee, and not of the inventor; for by the fourth section of the patent act, after an assignment is recorded, the assignee stands in the place of the original inventor, both as to right and responsibility.

Plaintiff nonsuit.

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

Case No. 6,395.

HERBERT et al. v. The AMANDA F. MYRICK.

[1 Betts, D. C. MS. 32.]

District Court, S. D. New York. July 1, 1840.

SEAMEN—LIBEL FOR WAGES.

[A libel by seamen against a vessel, for wages, cannot be sustained where it appears that they failed to present their claims at the time other seamen libelled the vessel, and delayed their libel for many months, though the vessel was repeatedly in port, and her owner had advertised for claims against her, where such claims were supported only by the testimony of a former owner and master, who had previously declared that there were no liens against the vessel, and had threatened injury to the purchasers.]

[This was a libel in rem by Herbert, Tice, and Marvin against the schooner Amanda F. Myrick (Bishop and others, claimants) for wages.]

BETTS, District Judge. Herbert was mate, and Tice and Marvin, seamen, on board the schooner, when she was owned and commanded by Perry. Herbert alleges that he entered on board the 5th of September, 1838, and continued to the 29th day of

July, 1839, at the wages of $25 per month; Tice, that he engaged as steward, and served from Dec. 23, 1838, to April 12, 1839, at $20 per month. Marvin comes into the cause by petition, after the action has been commenced, claiming wages at the rate of $18 per month from December 6th, 1838, to February 19, 1839. The claimants purchased the schooner in the city of New York in May last, and in their claim and answer they aver they purchased bona fide without any knowledge of the libellants' demand against her, and believing there was no existing lien for wages against the vessel. They also allege that the vessel had been repeatedly in New York, to the knowledge of the libellants, since they were discharged from her, and at one time for a period of two months, and they never presented any claim for wages, and that though they knew of her sale, and the purchase by claimants, they did not make known their demands. The libellants' demands are supported by the testimony of the former master, Perry, who testifies that there was due Herbert over $100 when he left the vessel; to Tice, about $60; and to Marvin, above $30.

Independent of this evidence, the presumption, after such lapse of time, that the libellants had received their wages, would be so strong as to defeat their lien upon mere proof of services rendered, especially connected with their suffering a sale to be made of the vessel without any intimation of their claim upon her. To this is to be added the further circumstance that the vessel was arrested in Philadelphia by some of the crew, who served with the libellants and immediately following her return to the United States after the discharge of the libellants, and those wages were recovered, without the libellants uniting in the suit, or making known at the time the existence of any indebtedness to them. It is true, there is no direct evidence of their being in Philadelphia at the time, but the circumstances afford a strong presumption that they were cognizant of those proceedings. It is not intended to discuss the question whether seamen knowing of a suit in prosecution by part of the crew for the recovery of wages lose all remedy for their own wages on that voyage if they omit to join in such suit, but, at least, if their neglect does not amount to a bar to any after suit brought by them, it would be equitably a waiver of the lien on the vessel in the hands of a subsequent owner. It is strictly so if the vessel is sold under such proofs. Trump v. The Thomas [Case No. 14,206]; and it would well justify, in favor of any other purchaser, an implication of the waiver, if, knowing the proceedings to be afoot, in behalf of their fellows, the libellants did not interpose to prevent the discharge of the vessel until their wages, also, should be satisfied. Neither lapse of time, nor neglect to enforce a claim of wages with reasonable diligence, will necessarily be regarded as a bar to the lien of seamen, even where there has been a change of ownership. The Mary [Id. 9,186]. But they furnish reasons from which the court may justly infer that the privilege is waived, and a sailor, equally with all other suitors, will be prohibited using his privilege in a way to work a fraud upon innocent parties.

It is not, however, intended to place the decision of the cause upon any direct or implied waiver of the lien on the part of the libellants, inasmuch as the testimony of Capt. Perry, upon which their recovery must depend, is so far impeached and contradicted as not to justify rendering a decree upon his statements. He was owner of the vessel when the services of the libellants were rendered. Having become embarrassed, he conveyed her to Pratt Bros. & Co. to secure advances made in her behalf by them, with an understanding that she should be sold, and after their debt was satisfied the balance should come to him. He was put out of command as master, and Capt. Jolim was appointed in his place, but he was retained on board as chief mate. When the purchase of the claimants was under negotiations, and frequently at other times, Capt. Perry said there were no liens on the vessel, or claims against her. He had before told Capt. Jolim that he had been obliged to pay Tice his full wages, though unable to earn them, and had borrowed $15 of Capt. Jolim to pay off Herbert, as he then said. Herbert came on board, and Perry said he owed him that sum. Jolim lent it to him at the time, and for that purpose. It was furthermore proved that Perry made threats of injury to the purchasers immediately on the sale of the vessel, and said he would at least make her pay his wages, and that he had been to the office of the proctors to see what could be done. Immediately after these declarations, the suit was commenced. If these facts and circumstances do not establish affirmatively that the suit is prosecuted at the instigation of Capt. Perry, and for his benefit, they, at all events, contradict and impugn the evidence he now gives to support the action, in its material and vital part, because they show that either his plain and direct assertions with respect to the indebtedness of the vessel to Herbert or Tice, or his testimony now in court, one or the other, must be false. The declarations have a stronger relation to the probabilities of the case than the testimony, for it is difficult to believe that these seamen, both poor and out of health, would let a demand of $163 stand unsued for and unclaimer for more than a year, and that when it was well known where the vessel or owners might be reached, and when, also, it appears notice had been long published for all claims against the vessel to be brought in for adjustment to Pratt Bros. & Co. It would be most unsafe, upon the evidence of

a vexed and menacing witness, to sustain and give effect to demands preferred under such circumstances. I shall accordingly decree against these claims, so far as respects the vessel, leaving the libellants to seek their remedy at law against Capt. Perry, if there is, in truth, any just demand in their favor unsatisfied by him.

Let the proper decree be accordingly entered, discharging the vessel from this suit, with costs, without prejudice, however, to any action in personam in this court, or at law, which the libellants may be advised to prosecute for the same cause.

Case No. 6,396.

HERBERT v. BANNATYNE et al.

[2 Cranch, C. C. 12.] [1]

Circuit Court, District of Columbia. Nov. Term, 1810.

EVIDENCE—SUIT BY TRUSTEE OF INSOLVENT—CREDITOR AS WITNESS.

In a suit by the trustee of an insolvent debtor, a creditor of the insolvent is not a competent witness.

On the trial of an issue from chancery to ascertain for what sum the defendants could have sold a certain cargo of tobacco.

E. J. Lee, for complainant [William Herbert, Jr., assignee of John Potts], offered W. Wilson as a witness.

Mr. Swann, for defendants [Finlay Bannatyne & Co.], objected that W. Wilson was a creditor of Potts, the insolvent, and was therefore a cestui que trust, and as such directly interested in augmenting the fund.

THE COURT (THRUSTON, Circuit Judge, absent) decided that W. Wilson was not a competent witness.

HERBERT (BARNARD v.). See Case No. 1,347.

HERBERT (BERNARD v.). See Case No. 1,347.

Case No. 6,397.

HERBERT v. BUTLER.

[14 Blatchf. 357.] [2]

Circuit Court, E. D. New York. Dec. 5, 1877.

BILL OF EXCEPTIONS—ALLOWANCE AFTER LAPSE OF TWO AND A HALF YEARS.

After a lapse of two and a half years, this court refused to allow a bill of exceptions to be signed and filed, no step looking to that end having ever been before taken, and a writ of error in the case being pending in the supreme court.

[Cited in Linder v. Lewis, 1 Fed. 380; Whalen v. Sheridan, 5 Fed. 438.]

[Cited in Che Gong v. Stearns, 16 Or. 219, 17 Pac. 873.]

[This was an action at law by Jasper K. Herbert against Benjamin F. Butler.]

John H. Bergen, for plaintiff.

John E. Develin, for defendant.

BENEDICT, District Judge. This cause was tried before the court and a jury at the May term, 1875. During the trial various rulings were made by the court, to which exceptions were taken and then noted. At the close of the testimony, the court directed a verdict for the defendant, to which direction the plaintiff then excepted. Under the direction of the court the jury found a verdict for the defendant, and judgment was then entered in favor of the defendant, for costs. Neither at that time nor since was any application made for a stay of proceedings upon the verdict. Nor was any consent ever given, nor order ever granted, giving time either to make a bill of exceptions, or to make a case and turn the same into a bill of exceptions. Until now no application was ever made for the allowance of a bill of exceptions, nor has any bill of exceptions been presented for settlement and signature. On the 23d of June, 1875, a writ of error was duly issued and served, and thereafter the record, with the case to be hereafter referred to, was transmitted to the supreme court of the United States, where it remains. On September 19th, 1875, a case, bearing the endorsement: "Agreed to, Develin & Miller, Att'ys for Defendant," was presented to the judge who tried the cause, who then, upon the request of the defendant, wrote thereon, below the said endorsement, the further endorsement: "Settled as within, pursuant to the above consent." As before stated, this case has been transmitted to the supreme court, as part of the record. In this position of the cause the plaintiff moves the court for an order directing the signing, sealing and filing of a bill of exceptions herein, as of the 1st day of June, 1875, and presents the case above referred to to be now signed and sealed as a bill of exceptions. The motion is opposed by the defendant, mainly upon the grounds, first, that it was never consented, in behalf of the defendant, nor ordered by the court, that the case might be turned into a bill of exceptions, and that, in the absence of such consent or order, the court, now, after the lapse of several terms of the court, is without power to make such an order in the cause; second, that the cause has been removed from this court to the supreme court of the United States, and that, until the record shall be transmitted by the supreme court to the circuit court, the latter court can make no alteration of the record.

I am constrained, by the authority of decisions of the supreme court of the United States, to deny this motion. This case differs from the case of Williamson v. Suydam [Case No. 17,756], and [Suydam v. Williamson] 20

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

[2] [Reported by Hon. Samuel Blatchf. Circuit Judge, and here reprinted by permission.]

How. [61 U. S.] 427, relied on by the plaintiff. In that case, the right to make a case and to turn the case into a bill of exceptions was reserved at the trial, while, here, no such right was reserved, nor any such permission given. In U. S. v. Breitling, Id. 252, the signing of a bill of exceptions after the term was upheld only upon the ground that a consent to extend the time of settling a bill of exceptions was to be presumed from the circumstances of that case, but with the announcement from the supreme court, that "that case went to the extreme verge of the law upon this question of practice." Müller v. Ehlers, 91 U. S. 249.

The case last cited is decisive of the present application. In that case, an ex parte order, directing a bill of exceptions to be filed as of the date of the trial, was treated as a nullity, for want of power. In this case, the application is the same, but the defendant has notice of the application, and appears, to deny the power of the court to grant such an order. The order applied for, if granted, would also be a nullity, because the term at which the trial was had and the judgment rendered was allowed to end without any steps whatever being taken towards the allowance of a bill of exceptions, or to obtain an extension of time for that purpose, and there is no circumstance from which to infer a consent to such an extension. It is true, that a case was agreed to by the defendant after the expiration of the term, but a case is not a bill of exceptions, and cannot be turned into a bill of exceptions unless an order is made to that end, and, in pursuance of such an order, the bill of exceptions is duly signed and sealed. And, according to the decision of the supreme court, the power to sign and seal a bill of exceptions in this cause ceased with the term at which the cause was tried. I notice, indeed, that it is intimated by the opinion delivered in Müller v. Ehlers [supra], that, "under very extraordinary circumstances," the power to sign and seal a bill of exceptions may be exercised after the expiration of the term, but the action of the court upon the circumstances of that case appears to forbid me to consider the circumstances of the present case as sufficient to justify the order now applied for. If the correctness of my understanding as to the rule intended to be laid down by the supreme court of the United States is doubted, the plaintiff may think fit to disclose to that court the facts attending the case, upon an application to the court to have the record transmitted to this court, for the purpose of obtaining an allowance of a bill of exceptions, and the signing and filing of the same, in which case a direction by the supreme court that the record be transmitted for such a purpose would imply the existence of power in this court, under the circumstances of this case, to grant the relief sought, and would dispose of both the grounds of objection that have been taken to any action of this court at this time. The motion must be denied, with liberty to renew the same in case the record be transmitted as above indicated.

[NOTE. The action of the judge in directing a verdict for the defendant on the trial of the case was affirmed by the supreme court in an opinion by Mr Justice Bradley, who said there was not sufficient evidence to sustain a verdict in plaintiff's favor, even if the case had been submitted to the jury. 97 U. S. 319.]

HERBERT (DADE v.). See Case No. 3,532.

HERBERT (FOSS v.). See Case No. 4,957.

HERBERT (GILMAN v.). See Case No. 5,442.

HERBERT (HOOFF v.). See Case No. 6,670.

Case No. 6,397a.

HERBERT v. The JAMES LEAKMAN.

[18 Betts, D. C. MS. 141.]

District Court, S. D. New York. April 15, 1851.

MARITIME CONTRACT.

[The contract of the master, duly authorized by the vessel owners to sell the cargo, and transmit the proceeds to the shipper, as a part of the contract of shipment, for which service he is compensated in the freight received, is not a maritime contract, and not binding on the vessel, where the proceeds are not actually placed on board the vessel.]

[This was a libel in rem by Isaac Herbert against the schooner James Leakman (Robert Ferdeen, claimant) for breach of a contract of affreightment.]

BETTS, District Judge. The libellant being the manufacturer of brick at Caldwell on the North river in the summer of 1847, contracted with the master of the schooner Leakman, a vessel engaged in freighting brick, to carry brick to New York, there make sale of them at a scale of prices stipulated, and return the proceeds to the libellant, deducting $1 per thousand for the whole compensation both of freight and making the sales, and return of proceeds. During the season a large quantity of brick was carried by the schooner to New York under the contract. The libel charges the quantity to be 608,000, and the amount of proceeds to have been $2,292.84, from which, deducting the freight compensation, $608, there remained $1,684.84, net proceeds belonging to the libellant, of which sum there had been returned and paid to him only $1,242.22, leaving a balance due him of $442.62, for which he charges the schooner is liable to him. The libel alleges it to be the regular usage and custom of navigation and trade, between New York and places situated on the North river, for vessels to carry brick to market upon the terms and conditions above stated, and excuses the delay of this suit, because of disputes and controversies between third parties as to the owner-

ship of the schooner. The claimant, in his answer, avers that he became a bona fide purchaser of the schooner, some years after all the aforesaid transactions with respect to the carriage of the brick had been completed, and without notice of any claim of lien by the libellant on the said vessel therefor, and that the schooner has remained since, performing the services aforesaid, within this state and district. It also alleges that Joseph Andreus was master of the schooner at the time the brick was carried to New York for the libellant, but denies it was consigned and entrusted to him for sale, and avers that it was consigned to Charles Andrews, a resident in the city of New York, who was agent and partner of the libellant in the matter, and made sale of the brick partly for cash and partly on credit, and further denies, on information and belief, that any balance is due the libellant for the proceeds of said brick. Many other particulars are introduced into the pleadings, and were minutely inquired into upon the hearing, but in the view I take of the case it is quite unnecessary to settle the legal or equitable rights of the libellants under the agreement either with the master, Joseph Andreus, or the then owner of the schooner, and alleged agent of the libellant, Charles Andrews.

The case presents only two questions important to be considered here: The liability of the vessel to discharge this demand as a lien upon her; and the right of the libellant, if he had a lien originally, to pursue it against a bona fide purchaser, without notice, after a lapse of two years or more from the close of the transaction. The main point however, turns upon the question of law, whether a contract of the character entered into by the master of the schooner with the libellant enures as a lien or privilege against the vessel, holding her responsible for its performance in all its parts. This same subject came before this court in two causes in 1845. They were not contested, and decrees were rendered by default against the vessel; but, on recurring to the files, it is found that in one in which the undertaking and acts of the master of the vessel were charged to be carrying the brick to New York and selling the same, under an agreement to pay the proceeds to the libellant, the compensation for both services being the freight received alone, the libel was amended by inserting an averment that the master had received and taken in money on board the vessel, the proceeds of the bricks. Fanny v. The Catherine [unreported]. It is manifest from this very labored and full correction of the libel, that the court even on default refused to decree the vessel liable, except upon the fact that the proceeds were laden on board her to be returned to the libellant. The present case stands wholly clear of that feature. There is no proof that any money or other thing received by the master for the brick taken to New York, and there sold, was brought on board the schooner. The evidence goes no further than to show a transportation of the brick to New York, and a sale of them there, and the receipt of portions of the proceeds in cash by Charles Andrews in the city. The case is thus stated, in order to present distinctly the point of law to be decided, although it is proper to remark, that by the answer and the proofs it appears two vessels were employed by the libellant, at the same time, upon the same terms, and that the bricks carried by both were under charge of Charles Andrews in New York, he then being owner of both vessels, and were mainly sold by him. I do not take into consideration the argument pressed for the claimant, that the libellant fails disconnecting the portions of those proceeds arising from the bricks carried on board the schooner, which remain unsatisfied to the libellant, because, as already suggested, the decision of the cause will be placed on grounds covering both.

The only case cited on the argument which supports the doctrine contended for by the libellant is that of Kemp v. Coughtry, 11 Johns. 107. Emery v. Hersey, 4 Greenl. 407, is to the same effect, with the addition that the owner was held liable as a common carrier, although there was no proof that the proceeds had been received on board the vessel. In Kemp v. Coughtry, the sloop Washington, of which the defendants were owners, transported 156 barrels of flour, and a quantity of shorts for the libellants to New York, to be there sold, and it was proved to be the custom in such cases for the master to sell the property, and return the proceeds for the single compensation of the freight agreed. It was also proved that the cargo was sold for cash, and the money, except $186, paid the plaintiff, was brought on board the sloop at New York, to be taken to the plaintiffs at Albany. The vessel was broken open and robbed of the money in New York. The court held the owners were common carriers of the cargo down and its proceeds back, whether the proceeds were merchandize or money, and that in the sense of being laden on board the vessel to be returned, their liability as common carriers attached. The case is distinguishable from the present in two particulars: (1) It may imply that the owners are responsible for the contract of the master as their agent to return the proceeds, and can be charged with the damage sustained by the shipper because of the non-performance of that contract. If so, the liability resting upon agreement may be enforced at common law, without regard to the fact whether the master had ever had the money or proceeds of the cargo. The agreement could be a personal one, resting upon the consideration of the freight paid and enforced against the owners as the principals to the agreement, made by their agent. Or

(2) the decision goes only to the extent of charging the owners as common carriers for property actually placed on board the vessel. Neither feature exists in the case before the court. The action is not in personam against the owners, upon a contract made by the agent, in which the inquiry would be only as to the authority of the agent to bind the owners personally; nor is it founded upon the fact that the proceeds of the cargo were ever received on board the schooner. These particulars are of the highest importance in considering the principle upon which a vessel is liable in rem for the contracts or acts of the master. 13 Wend. 58. Judge Ware notes the distinction, and comments upon it with marked emphasis. He says the master acts as partner, when the goods are consigned to him for sale, and the ship or owners are not responsible for those acts. The Waldo [Case No. 17,056]. The ship is not bound by his acts on contracts out of the scope of his employment as master (Abb. Shipp. 125–127, and notes; 3 Kent, Comm. 162; Story, Ag. § 121); and that authority per se relates only to matters directly for the ship or on board the ship, appertaining to her fitment, navigation, affreightment, and safekeeping.

I can find no instance in which the engagements or transactions of the master, although authorized or sanctioned by the owners, are made liens on the ship, unless they are essentially maritime in themselves.

The acts of a master in selling a cargo in a foreign port, and investing or transmitting the proceeds otherwise than by the ship, are not maritime acts, affecting the vessel, however valuable they may be to the owner, or whatever may be his individual responsibility in regard to them. This principle is involved in the case of Williams v. Nichols, 13 Wend. 58. In my opinion, the undertaking of the master, if with the approval and ratification of the owner, which is charged to be unfulfilled, was not a maritime contract, which can be enforced against the vessel, and that the remedy of the libellant, if he has any, upon it, must be by an action at law against the owner. This point is conclusive of the merits of the case, and renders it needless to discuss the other topics put in issue by the pleadings. It does not appear there was any failure on the part of the master to carry and deliver the brick in New York, according to the contract. The down freight was all which was placed on board the schooner, and for which she could be charged in rem in the hands of her then owners. The gravamen of the action is a non-fulfilled contract of the master of a personal, and not a maritime character. The libel must be dismissed, with costs.

HERBERT (UNITED STATES v.). See Case No. 15,354.

Case No. 6,398.

HERBERT v. WARD.

[1 Cranch, C. C. 30.] [1]

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

DISTRESS FOR RENT—ATTACHMENT OF GOODS IN CUSTODY OF LAW.

Goods in the officer's hands under a distress for rent, are liable to attachment at the suit of the same landlord, for the rent not yet due; and may be condemned, although replevied by the tenant after the attachment levied.

At law.

Attachment to secure rents not due, by virtue of the act of assembly of Virginia of 29th of November, 1792. Rev. Code 1794, p. 162, § 8 (Ed. 1803, p. 154). On the 27th of March, the plaintiff distrained for more rent than was then due. On the 28th of March, the defendant replevied the goods. On the same day, the plaintiff issued an attachment to secure fifteen months' rent in advance and becoming due from and after the 1st of April. On the 1st of April, the plaintiff distrained for a quarter's rent due that day, and which had been included in the distress made on the 27th of March. On the 17th of April, the attachment for the fifteen months' rent was quashed. On the same day, the plaintiff took out another attachment for three months' rent in advance which was on the same day executed on the goods in the officer's hands under the distress. On the 25th of April, the defendant took out a new replevin for the goods distrained on the 1st of April, which were delivered to him, and he gave a receipt for them, but the marshal still retained them in his hands under the attachment of the 17th of April. The question was, whether the attachment was properly levied on the goods while they remained in the hands of the officer by virtue of the distress. It was contended that these goods were in custodiâ legis, and therefore could not be attached, and of this opinion was CRANCH, Circuit Judge.

But judgment was rendered by KILTY, Chief Judge, and MARSHALL, Circuit Judge, for all the goods attached, including those in the hands of the officer under the distress.

HERBERT (WHITTEMORE v.). See Case No. 17,602.

HERBERT MANTON, The. See Case No. 7,319.

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

Case No. 6,399.

The HERBERT MANTON and The J. H. GAUTIER.

[14 Blatchf. 37.][1]

Circuit Court, S. D. New York. Nov. 11, 1876.[2]

COLLISION — STEAM-TUG LASHED TO CANAL-BOAT AND SAILING VESSEL—RULE UNDER SUCH CIRCUMSTANCES.

1. A steam-tug and a canal-boat lashed to her side are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel.

2. A tug with a canal-boat so lashed to her must keep the canal-boat out of the way of a sailing vessel, when there is danger of collision between them, and the sailing vessel must keep her course.

3. The sailing vessel has a right to rely on the observance of the rules of navigation by the tug, and cannot herself safely depart from them.

4. Judgment as to the motion, or direction of motion, of one vessel, made from another, possesses the utmost uncertainty; for, the tendency is nearly irresistible for the observer to transfer to the other vessel the motion of that on which he stands, and thus to regard the compounded motion of the two as belonging to that one which he is observing.

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

[These were libels against the steam-tug J. H. Gautier and the schooner Herbert Manton for damages sustained by collision resulting in the total loss of the canal-boat Gettysburg and her cargo. The district court held the tug wholly in fault, the libel against the schooner being dismissed in each case, with costs. Case No. 7,319.]

Robert D. Benedict, for libellants.
Edward H. Owen, for the schooner.
Welcome R. Beebe, for the tug.

JOHNSON, Circuit Judge. On the 28th of November, 1871, between nine and ten o'clock in the forenoon, a collision occurred between the canal-boat Gettysburg, laden with coal, and the schooner Herbert Manton, within about fifty feet from the steamboat wharf at Astoria, Long Island, and a little above the end of Blackwell's Island, whereby the canal-boat and her cargo were lost. The weather was fair, the wind about northwest by north, and the tide the last of the flood, and running about four miles an hour. The canal-boat was lashed to the port side of the steam-tug J. H. Gautier, her bow extending some fifty feet beyond the bow of the tug, and in that position the tug was towing her from Twenty-Third street, New York, to the steamboat dock at Astoria. After leaving Twenty-Third street, the tug proceeded along up with her tow through the channel between Manhattan Island and Blackwell's Island, until she had reached a point above Blackwell's Island, when she ported her helm and swung around with her head towards Astoria and towards the dock to which she was bound, and where the boat's cargo was to be discharged. The river, at the place where she rounded to, is about one thousand feet wide. The tug, with her tow, was going at the rate of about five miles an hour. The pilot of the tug saw the Herbert Manton just as she came around Hallett's Point and had got straightened down. The schooner was then about 600 or 700 feet distant from the tug. He then blew his whistle, but kept on his course, his helm being all the time to port, and his vessel on the swing to starboard until the collision. He did nothing towards keeping out of the way of the schooner. The schooner was bound on a voyage to New York, and, after going through Hell Gate, and having rounded Hallett's Point, was proceeding on with a view to enter the channel between Blackwell's Island and Long Island, just as the tug was swinging around, as before stated, with the port side of the canal-boat towards the schooner. The schooner kept on her course without any change, except as hereinafter stated; and the tug, in attempting to reach her dock, brought the canal-boat right under the schooner's bows, and the schooner struck, stem on, the port side of the canal-boat. The course of the schooner, after rounding Hallett's Point, ranged along Long Island shore, which carried her near the dock at Astoria, where the collision occurred. The schooner changed her course aforesaid after she rounded Hallett's Point, only at the moment of collision and in the jaws of peril, and when a collision was inevitable. She had a competent and proper lookout, and was in all respects properly navigated. At the time of the collision there were a number of vessels in the vicinity, close to the Herbert Manton, and going the same way with her, and the tug-boat J. F. Whitney, with a tow, was approaching from New York, so that the schooner could not have safely luffed to avoid the collision.

It is quite clear, on settled principles, that the canal-boat and the tug to which it was fastened are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel; and that the rules which are to be by law applied to vessels under steam, with a view of securing safety in navigation, are applicable to the tug and her tow lashed to her so as to be governed and controlled by her motions. Sturgis v. Boyer, 24 How. [65 U. S.] 110; The Keystone State, 22 How. [63 U. S.] 461. Considering the tug and her tow as a steam vessel, the twentieth of the navigation rules (Rev. St. U. S. § 4233), requires that when there is risk of collision between a sailing vessel and a steam vessel, the latter shall keep out of the way. The correlative duty is imposed on the sailing vessel, by rule 23, to keep her course, subject

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

[2] [Affirming Case No. 7,319.]

to the qualification stated in rule 24, that, in construing and obeying the rule, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from it necessary in order to avoid immediate danger.

The libels allege, and the answers of the schooner admit, that the tug was in fault in turning in to the dock ahead of the schooner, instead of allowing her to pass close between them and the dock, as she otherwise would have done. This ends that question, as between the schooner and the libellants.

In respect to the tug, the evidence is entirely clear, that she held on her course towards the dock, apparently determined to force the schooner to assume her duty of keeping out of the way, while both in fact and in law she might have avoided the collision by stopping and backing, or by yielding the way to the schooner and passing under her stern instead of across her bows. But I do not find that the schooner could have avoided the collision by any act on her part, after it became apparent that the tug was intending not to yield the way. The schooner had a right to rely on the observance of the rules of navigation by the tug; and she could not herself safely depart from them for fear that the tug would fail to observe them, lest she should thereby precipitate the catastrophe which she was striving to avoid. When the law casts upon a steam vessel the general duty and responsibility of avoiding collision with a passing vessel, and a collision nevertheless occurs, the presumption is that the fault is that of the steam vessel. This presumption can only be overcome by proof of fault on the part of the sailing vessel, producing or contributing to the collision. Leavitt v. Jewett [Case No. 8,172]. Now, the only ground of this sort, of any gravity—for I deem the lookout to have been properly kept—consists in the allegation that the schooner, after rounding Hallett's Point, altered her course, in violation of the rule before cited. But, as matter of fact, I find this allegation to be unfounded, except at the moment before the collision actually occurred, and when it had become inevitable. Judgment as to the motion, or direction of the motion, of one vessel, made from another, possesses the utmost uncertainty; for, the tendency is nearly irresistible for the observer to transfer to the other vessel the motion of that on which he stands, and thus to regard the compounded motion of the two as belonging to that one which he is observing. I, therefore, give greater weight to the testimony of Captain Crowell of the Herbert Manton, who had the wheel, and says that he did not change the course of the vessel till just at the moment of collision, from the time he got around Hallett's Point, except to steady her to run down channel. By this I understand what is elsewhere referred to in connection with her rounding the Point, as straightening her on her course. Kelly, the mate, confirms the captain, saying that he stood by the captain, by the wheel, and saw no change of course after they rounded the Point. The lookout, E. B. Kelly, says: "I could not see any change in the course of our vessel. After I reported the tug, and before the collision, I thought she kept right along." On cross-examination, he testifies: "After we rounded Hallett's Point we kept a straight course." These witnesses were so situated, at the time of the occurrence, that they had the full means of knowing what was the fact. In my judgment, their testimony outweighs that of others who were not so favorably circumstanced for seeing what took place. In my opinion, the only change of course that took place was that spoken of by the witness Longstreet, who says that the man at the wheel of the Herbert Manton "hove his wheel, first, two or three spokes to the starboard and then to port; a second after that she struck the canal-boat."

The decree of the district court [Case No. 7,319], ought to be affirmed, with costs.

Case No. 6,400.

The HERCULES.

[Brown, Adm. 560;[1] 7 Chi. Leg. News, 419; 21 Int. Rev. Rec. 309; 7 Leg. Gaz. 306.]

District Court, E. D. Michigan. May 31, 1875.

STALE CLAIM—LIMITATION OF ACTIONS AS AGAINST BONA FIDE PURCHASERS WITHOUT NOTICE.

1. Creditors of vessels plying upon the Lakes must enforce their liens, as against bona fide purchasers without notice, during the current season of navigation, or within such reasonable time after the commencement of the next season as may be necessary to arrest the vessel. Circumstances may occur, which would greatly abridge or lengthen this time.

2. The fact that the former owner of the vessel told the buyer, when purchasing her, that there might be some small claims against the vessel, which he would pay—that he did not know what the claims were, or who held them—would not in the absence of negligence affect the purchaser with knowledge of any particular claim.

3. The fact that the purchaser takes a mortgage upon another vessel, indemnifying him against any claims upon the vessel purchased, does not operate to extend the time within which creditors should pursue their claims, or deprive him of his rights as a bona fide purchaser, without notice.

[Cited in The Bristol, 11 Fed. 164.]

4. Nor can mere notice of the existence of a certain claim affect his rights, unless such notice be had at the time of purchase or of payment.

5. Where a claim accrued in August, 1873, and the libel was not filed until September, 1874, and the vessel in the mean time was easy of access, and several times in the port where the supplies were furnished: *Held*, that as against a person who bought and paid for her

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

in January, without notice of the claim, the lien must be deemed waived.

[Cited in The Theodore Perry, Case No. 13,879; The Robert Gaskin, 9 Fed. 62; The Rapid Transit, 11 Fed. 335; The J. W. Tucker, 20 Fed. 134.]

On August 13th, 1873, certain fuel was furnished by libellant at Sarnia, in the province of Ontario, to the tug Hercules, then owned by one McCarthy, a resident and citizen of Michigan. No effort was made to enforce collection of the claim during that season, and on the 19th of January, 1874, the tug was sold to William A. Mills and Sarah E. Mills, claimants, resident in Detroit, who paid for her $6,000 in cash, taking a mortgage on the barge Eliza, to indemnify them against any bills that might be outstanding against the Hercules, and which should appear to be liens upon the tug in their hands. Libel was filed on the 10th of September, 1874. No question was made as to the value of the fuel, nor that the same was necessary and was furnished on the credit of the vessel. The answer averred, however, that the claimants were bona fide purchasers of the tug without notice of libellant's claim, and that the same had become stale by reason of his neglect to enforce it. This was practically the only defense set up in the case.

J. C. Donelly, for libellant.
H. H. Swan, for claimants.

BROWN, District Judge. Much discussion is found in the elementary books upon the question, when a claim against a vessel becomes stale as against a bona fide purchaser without notice. So much depends upon the facts and circumstances of each case, that it is exceedingly difficult if not impossible to lay down any general rule applicable even to a particular class of cases. The rule obtaining upon the seaboard, which forbids the libellant pursuing his claim, as against bona fide purchasers, after the end of the voyage next succeeding the contracting of the debt, served a good purpose when applied to the long voyages of sailing vessels, but is ill adapted to the exigencies of steam navigation, and I believe has become practically obsolete. Of course such a rule would be wholly inapplicable to lake navigation. Indeed, the short trips made by vessels here, can hardly be dignified with the name of voyages. Some other rule must be adopted, and it should be so well understood that persons giving credit may know how long it is safe to delay enforcing their claims without prejudice to their rights as against bona fide purchasers without notice. In the case of Stillman v. The Buckeye State [Case No. 13,445], Judge Wilkins, of this district, refused to enforce a claim that had lain dormant for three years, and observed that there was "great reason to limit these tacit liens to the season of navigation, and not to extend their obligation beyond a year. If in the commerce of the ocean the lien cannot with propriety be extended, except under special circumstances contradicting the presumption which delay creates, beyond the voyage and the return to the home port where it may be enforced, with equal propriety should a season on the Lakes, embracing the whole year, be conclusive, especially where the right of a purchaser without notice intervened." In the case of The Dubuque [Id. 4,110], my learned predecessor also refused to enforce a lien for wages after three seasons had elapsed, and held as a general rule that "a delay to enforce a maritime lien, after a reasonable opportunity to do so, shall be taken and deemed as a waiver of the same, as against subsequent purchasers or encumbrancers in good faith without notice, unless such delay is satisfactorily explained." I think, however, that this hardly gives sufficient latitude, as a reasonable opportunity may occur within a week by the return of the vessel to the port where the debt was contracted. In the case of The Favorite [Id. 4,696], the district court of Wisconsin refused to enforce a libel for the loss of goods, filed two years and ten months after the loss, and after a bona fide assignee of the bill of lading had seized the boat. The whole subject received an elaborate consideration at the last June term of this court in the case of The Detroit [Id. 3,832], decided by Mr. Justice Swayne. A claim for towage accrued against a vessel in May and June, 1865, while she was in the hands of a person who had contracted to purchase her. Having failed to fulfill his contract, she was returned to her owner, who took her to Canada within a month or two after the services were rendered, where she remained until June 27th of the following year. She was then resold to a bona fide purchaser without notice, who brought her within the jurisdiction of the court, and kept her during the residue of the summer. On October 6th, the libel was filed and the vessel attached. Held, that the lien was waived and that the action could not be entertained. The learned justice says: "In the case of The Buckeye State and The Dubuque a rule applicable to the Lakes is laid down, that where the vessel has passed into the hands of a bona fide purchaser, claims of this character should be prosecuted within the current season of navigation, or at least within a year. I think this rule is founded upon the most solid consideration of good sense."

In fixing the time within which creditors of lake vessels must pursue their claims as against bona fide purchasers, I think it should be borne in mind: (1) That the credit given to vessels for supplies and towage is often extended through the winter following the contracting of the debt, and until the opening of navigation in the spring, though this can hardly be called the general custom. (2) That transfers of vessels are usually made during the winter season. The first consid-

eration will lead the buyer to believe there may be outstanding claims against his vessel, and to protect himself accordingly; the second will induce the creditor to take prompt measures for the collection of his claim after the opening of navigation in the spring.

In view of these facts, I think it reasonable to hold as a rule applicable to vessels plying upon the Lakes, that lien holders should have the current season of navigation to enforce their security, and such reasonable time after the commencement of the next season as may be necessary to arrest the vessel. This would not ordinarily extend the time beyond the 1st of June of the following year. Circumstances, of course, may occur, which would greatly abridge or lengthen this time. If the debt were contracted early in the season, and the vessel were immediately sold with the knowledge of the creditor, it might be inequitable to postpone collection after the close of the current season. If, on the other hand, the debt were contracted late in the season, and the vessel were not readily accessible, a further time might be allowed. Whether it would be the duty of the creditor to pursue the vessel into other districts than his own it is not necessary to determine. Much will depend upon the circumstances of each case.

Applying this rule to the present case, it is clear that, as the debt was contracted in August, 1873, and the libel was not filed until September, 1874, the lien must be deemed waived as against the claimant, unless excusatory circumstances exist, taking the case out of the general rule. Such circumstances are claimed to exist in this case.

1. Although the present owners had no notice of this claim at the time of the purchase, McCarthy did tell them there were a few claims against the vessel of small amount, which he agreed to pay. He also said he did not know what the claims were, or who held them. To ascertain these claims Mr. Mills caused notices to be published for two weeks in two daily papers in Detroit. It would seem, although the evidence on that point is somewhat conflicting, that libellant or his agent had seen this notice or heard of the change of ownership. But whether this be true or not, I do not think the general notice that there were small debts against the tug is sufficient to affect Mills with knowledge of the claim in question, in view of his efforts to ascertain such claims.

2. Although the purchase money was fully paid, there was a mortgage taken on the barge Eliza, to indemnify Mills against any claims which might be outstanding against the tug. There is certainly much force in the argument, that, as the requirement of diligence is solely to prevent injury to innocent third parties, if the court can see that the third party is indemnified and cannot be injured, the rule should not apply. In the case of The Detroit, above mentioned, the collateral guaranty of a third party was taken to secure the purchaser against outstanding claims, and this same consideration was urged upon the learned judge who decided that case. He pronounced it unsound, however, and observed in his decision: "It is held in the authorities upon that subject that the very fact that the vendee accepts a quitclaim deed is strong evidence that he is not a bona fide purchaser, and such I conceive to be the law. I do not understand that a person, by taking the warranty of his vendor, or of a third party, loses the protection of the law applicable to bona fide purchasers." This question did not arise in the case of The Melissa [Case No. 9,400], as the proof showed that the suit was defended in fact by the vendor, and that the claimants had full protection by means of a balance of purchase money still remaining unpaid against the vessel. I see no reason why the remarks made in the case of The Detroit with respect to guaranties are not equally applicable where the guaranty is in the form of a mortgage. The difficulty in libellant's position is this: The mortgage is taken for the protection of the purchaser, and not of the creditor. It is taken, not to extend the time within which claims may be enforced, or to furnish an excuse for delay, but to protect the buyer against claims which may be presented within the time allowed by law. It is, in fact, something with which the creditor has nothing at all to do. To give it weight might involve the buyer in litigations which he would otherwise have avoided. I must hold, therefore, that it has no bearing upon the present case.

3. About the middle of May, 1874, one Hartness, an agent of the libellant, came to A. H. Mills' office in Detroit, and said he had a bill from Mr. Keys against the tug Hercules for wood bought in 1873. In reply Mills told him that the boat had changed hands and he must look to the previous owner. He said he knew she had been sold, and had seen the notice in the paper, and wanted to know where he could find McCarthy. Mills then showed him the barge which was lying opposite Detroit, on the Canadian side of the river, and told him McCarthy, the late owner, was living on board. He said he would go and present the bill, and as he left Mills told him to return and let him know whether the bill was paid or not, and if not, he would see about it. He promised he would, but did not return. I think his conduct was such as to mislead Mills and induce him to believe he no longer looked to him for payment of the claim. Had he at once returned, and upon Mills' refusal to pay libelled the vessel, I should have held his claim still in force.

4. On July 9th, the tug being at Sarnia, the bill was presented to William A. Mills, one of the claimants, who told libellant the boat had been sold, and that he had nothing to do with the bills. He replied he knew it, and had seen it in the paper. Mills then

told him that he was part owner; that he had bought her clear of debt, but that McCarthy and his boat were in Detroit, and that if he would send his bill to the tug office, care of A. H. Mills, McCarthy would straighten it. This was the first intimation that W. A. Mills had of the claim. On July 17th, libellant sent the claim to A. H. Mills, saying, "The captain of the tug Hercules instructed me to send the enclosed draft to you for collection." In reply Capt. Mills wrote him, under date of July 20th, that the "reason that the captain of the Hercules told you to send the draft to me was because Capt. McCarthy was in Detroit at the time with his barge, in dock; also that the Frankfort was there to get a new wheel, and was there for nearly a week; however, if you will send your bill to Mr. McCarthy, if it is correct, he will pay; he is, I consider, an honest man, and has paid all bills that come within his notice," etc. "If you have the draft in Detroit, I could try and see him about it." I do not know that it appears directly that Mills returned the draft in his letter, but such I think is the inference from the facts hereinafter stated. The claim appears to have been soon afterwards placed in the hands of an attorney in Port Huron, with instructions to present it, but not to sue it. After some ineffectual correspondence, he drew a libel and forwarded it to Detroit, September 10th, when this suit was commenced. After the debt was contracted, and during the residue of the season of 1873, the tug was plying upon Detroit river, occasionally stopping at this port. During the season of 1874, and prior to her seizure she was plying between Lake Erie and Lake Huron, and stopped at Sarnia no less than six times, her halts being from half an hour to three hours in length, and always in the day time. McCarthy received $6,000 in cash for her in January, and appears to have been in good credit, with money on deposit in Detroit until July or August. I think it is shown by a preponderance of evidence that libellant knew of the change of ownership shortly after it occurred. It was his duty under the circumstances to act with promptness in proceeding to enforce his lien. He should have filed his libel immediately after his interview with A. H. Mills in May, if not before. It is true that Mills had then, and also in July, notice of this claim, but I do not understand that mere notice can affect the rights of a bona fide purchaser, unless such notice be had at the time of purchase, or of payment. Blanchard v. Tyler, 12 Mich. 339. If any equities at all were raised by reason of the mortgage on the barge Eliza, they ceased by her disappearance from these waters, at or about the time the libel was filed. It would seem that Mills made persistent efforts to find her, and that she was reported lost. Upon the best consideration I have been able to give this case, I think it would be inequitable to enforce this lien, and the libel must therefore be dismissed with costs. Libel dismissed.

Case No. 6,401.

The HERCULES.

[1 Spr. 534.] [1]

District Court, D. Massachusetts. Nov., 1842.

SEAMEN—STATUTE DESERTION—ENTRY IN LOG-BOOK.

It is essential to a statute desertion, that there should be an entry upon the log-book stating the name of the seaman, and that he was absent from the ship at least forty-eight hours. Such entry may be controlled by parol evidence.

This was a libel promoted by Jno. Bramles, a seaman on board of the ship Hercules, for wages on a voyage from Charleston, S. C., to Copenhagen, and thence to Boston. The claimant set up a forfeiture by desertion at Copenhagen.

E. T. Dana, for libellant.
The claimant, pro se.

SPRAGUE, District Judge. The defence mainly relied upon by the claimant, is a forfeiture of wages by a statute desertion, as it is commonly called. To maintain this defence, it is essential that there should be an entry upon the log-book, stating the name of the seaman, and that he was absent from the ship, at least forty-eight hours, without leave. The name by which the libellant was called on board of the ship was Aleck. The entry in the log is as follows: "May 16th, Aleck and William absconded and defied us." "May 17th, men still away." This entry cannot be deemed sufficient; for it may be true that they were absent, as therein stated, on the 16th, and also on the 17th, and yet the absence may have covered only a part of each of those days, or the whole of one and part of the other, and thus have been less than forty-eight hours. This alone is fatal to the defence; and it is also questionable whether, in other respects, this entry is sufficient. Beside this, it has been satisfactorily proved by parol, that the absence was in fact less than forty-eight hours. Such evidence is admissible; for although the statute has prescribed an entry in the log-book, as an indispensable requirement, and made it prima facie evidence, yet it has not made it conclusive. Orne v. Townsend [Case No. 10,583]; The Rovena [Id. 12,090]. It has not the sanctity of a record, nor the force of a written contract. It is a mere statement by the mate, without the assent or knowledge of the libellant. By the maritime law, there can be no desertion, unless there be a leaving of the service of the ship, with an intention not to return. But the statute of 1790—chapter 29, § 5 [1 Stat. 133]—has inflicted a forfeiture of wages for a

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

mere absence without leave, although there may have been, from the beginning, an intention to return; and has made a certain statement in writing, a pre-requisite to such forfeiture. It has not made the forfeiture necessarily consequent upon such statement merely; but the statement must be true. Decree for the libellant, deducting three days' wages for one day's absence.

HERCULES, The (BRACKETT v.). See Case No. 1,762.

HERCULES, The (NELSON v.). See Case No. 10,108.

HERCULES, The (RAND v.). See Case No. 11,548.

HERCULES, The (WINTER v.). See Case No. 17,889.

Case No. 6,402.

In re HERCULES MUT. LIFE ASSUR. SOC.

[6 Ben. 35; 5 Am. Law T. Rep. 400; 16 Int. Rev. Rec. 148; 6 N. B. R. 338; 6 Alb. Law J. 358.] [1]

District Court, S. D. New York. April 12, 1872.

BUSINESS CORPORATION — NONPAYMENT OF COMMERCIAL PAPER—BONA FIDE DEFENCE.

1. A life insurance company is a business corporation, within the purview of section 37 of the bankruptcy act [of 1867 (14 Stat. 535)].

2. Under the amendment to the 39th section of the bankruptcy act, passed July 14th, 1870 (16 Stat. 276), even if the suspension of payment of commercial paper has continued for fourteen days, yet a bona fide denial of liability on the paper in respect to which the suspension occurs, is such an adequate legal excuse, that the party ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy court may be of opinion that, in fact, the debtor was liable on the paper.

[Applied in Re Westcott, Case No. 17,430. Cited in Mendenhall v. Carter, Id. 9,426; Re Hadley, Id. 5,894.

3. A corporation has power to make commercial notes, without express authority.

[4. Disapproved in Winter v. Iowa, M. & N. P. R. Co., Case No. 17,890, as to the holding that mere suspension or nonpayment of commercial paper shall be deemed an act of bankruptcy, although committed by a person not included in the six classes specified in the act.]

In bankruptcy.

J. D. Reymert, for petitioner.

A. R. Dyett, for debtors.

BLATCHFORD, District Judge. This is a petition by Rosalie Libline, for an adjudication of bankruptcy against the Hercules Mutual Life Assurance Society of the United States, a corporation organized under the laws of the state of New York providing for the incorporation of associations for transacting the business of life insurance. It is undoubtedly a business corporation within the purview of section 37 of the bankruptcy act.

The indebtedness alleged by the petitioner, is a promissory note made by the corporation, in its corporate name, and signed by its president, and by its assistant secretary, dated May 16th, 1871, for the sum of $1,000, payable six months after date, to the order of the petitioner. The act of bankruptcy alleged in the petition is, that the corporation "has stopped and suspended, and not resumed, payment of its commercial paper within a period of fourteen days, to wit, from the 19th day of November," 1871, "to the present time" (January 6th, 1872); "that a large amount of its commercial paper has been issued, while the said corporation was insolvent, which said commercial paper is past due and remains unpaid, and which the said corporation could not be able to pay in the ordinary course of its business, being insolvent at the time of making the same; that the corporation has property which it has fraudulently refused and neglected to appropriate towards the payment of its indebtedness." [2]

[The thirty-ninth section of the bankrupt act of March second, eighteen hundred and sixty-seven, as originally enacted (14 Stat. 536), provided, that "any person residing and owing debts as aforesaid," that is (section 11), "residing within the jurisdiction of the United States," and "owing debts provable under this act exceeding the amount of three hundred dollars," "who, being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy," &c. There was no doubt that the person to be proceeded against under this clause must in all cases have been a banker, merchant or trader. But various interpretations were given by the courts to the words "fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days"—that (in Re Wells [Case No. 17,387]; and in Re Cowles [Id. 3,297]; and in Doan v. Compton [Id. 3,940]; and in Re Weikert [Id. 17,361]; and in Re Thompson [Id. 13,936]; and in Re Sohoo [Id. 13,162]) the word "fraudulently" did not qualify the whole sentence, but an adjudication could be had where the suspension continued for fourteen days, although such suspension was not fraudulent, and also at once, where the original suspension was fraudulent; that (in Re Jersey City Window Glass Co. [Id. 7,292]; and in Re Leeds [Id. 8,205];

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Alb. Law. J. 358, contains only a partial report.]

[2] [Inasmuch as the 39th section of the act, as amended by the act of July 14th, 1870 [16 Stat. 276] has been repealed by the act of June 22d, 1874 [18 Stat. 178], the discussion which here followed, of the construction of that act of 1870, omitted from 6 Ben. 35, is here inserted from 6 N. B. R. 338.]

and in Re Cone [Id. 3,095]; and in Re Hollis [Id. 6,621]; and in Re Davis [Id. 3,615]) the suspension and non-resumption must in all cases be fraudulent; that (in Re Ballard [Id. 816]; and in Re Shea [Id. 12,729]) a suspension for fourteen days was prima facie evidence of fraud; and that (in Re Davis [supra]) a suspension for fourteen days was not prima facie evidence of fraud. In this condition of the statute and the decisions, congress passed the act of July fourteenth, eighteen hundred and seventy (16 Stat. 276), which provides, that the clause in the thirty-ninth section, "or who, being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," shall be amended so as to read as follows: "or who, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days."

[It is contended for the respondent, in this case, that it is not a banker, broker, merchant, trader, manufacturer or miner, and that, therefore, it is not within the clause in the thirty-ninth section, as amended. This corporation is, undoubtedly, not a banker, or a broker, or a merchant, or a trader, or a manufacturer, or a miner. The view on the part of the respondent is, that the words "banker, broker, merchant, trader, manufacturer or miner," qualify the whole of the clause as it now reads, as well that part of the clause which follows the second "who" therein, as that part which precedes the second "who." In the clause, as it stood before it was amended, there was but one "who," and it was followed by only one "has." In the clause as it now reads, each "who" is followed by its own "has," and each "has" has its own "who" preceding it. If the clause now read, "or who, being a banker," &c., "has fraudulently stopped payment, or has stopped," &c., omitting the second "who," and leaving the "who" preceding the words "being a banker," &c., to be the nominative to the second "has," as well as to the first "has," there could be no doubt that the words "being a banker," &c., would qualify all the provisions of the clause. So, also, if the clause now read, "or, being a banker," &c., "who has fraudulently stopped payment, or who has stopped," &c., the words "being a banker," &c., would qualify all the words of the clause. In the preceding part of the section the first time the word "who" occurs, it is nominative to the word "shall," as that word recurs, five times, before the word "who" recurs again, and each time the word "shall" precedes the declaration of a distinct act of bankruptcy. The second time the word "who" occurs, it is nominative to the words "has been," as those words recur, twice, before the word "who" recurs again, and each time the words "has been" precede the declaration of a distinct act of bankruptcy. The third time the word "who" occurs, it is followed immediately by the qualifying words, "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency," which apply to and qualify all the enumerated acts of bankruptcy which follow in the section down to the fourth "who." Those words qualify the words "shall make," &c., "or give," &c., "or procure or suffer," &c. It is, therefore, apparent, that congress was, at the time the act of eighteen hundred and seventy was passed, cognizant of the use, in the section, of qualifying words to qualify various acts of bankruptcy expressed in a clause containing but a single "who." And, when it came to amend the clause containing the fourth "who," with qualifying words in it, "being a banker," &c., which manifestly qualified the whole clause, it divided the clause, as distinctly as language can divide it, into two parts—(1.) A person, residing and owing debts as aforesaid, who, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment; (2.) A person, residing and owing debts as aforesaid, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days. It repeats the word "who;" and, the second time, without the qualifying words given to it the first time. The words "stopped payment" do not require the aid of the words "commercial paper" to give them meaning. Fraudulent stoppage of payment by a banker, &c., is, in such a statute, predicable only of the fraudulent stoppage of payment of debts. Congress seems to have taken up the whole subject of the stoppage of payment of debts, as an act of bankruptcy, in the act of eighteen hundred and seventy, and enacted that brokers, manufacturers and miners, as well as bankers, merchants and traders, shall, if they fraudulently stop payment of their debts, be liable to be adjudged bankrupts at once, and that any person who makes commercial paper, and then stops or suspends payment of it, and does not resume payment of it within a period of fourteen days, shall be liable to be adjudged a bankrupt. In respect to those classes of persons who are more immediately connected with commercial transactions, namely, bankers, brokers, merchants, traders, manufacturers and miners, the clause, as amended, provides, that, if they fraudulently stop payment of their debts, they shall be adjudged bankrupts. In respect to all persons, as well those more immediately connected with commercial transactions as all other persons, it provides, that, if they so far voluntarily enter the field of commercial transactions as to give out their commercial paper, then, if they stop or suspend payment of such paper, and do not resume payment of it within a period of fourteen days, they shall be adjudged bankrupts. This is a reasonable and consistent view of the relations of debtors, in respect to the stoppage of payment of debts. If a person, be he who he may, wishes

to be free from the liability of being put into bankruptcy for the stoppage or suspension and non-resumption for fourteen days of the payment of commercial paper, let him keep out of the domain of commerce, by not giving commercial paper. If he is not a banker, broker, merchant, trader, manufacturer or miner, and has given no commercial paper, he is not within this clause at all. If he is a banker, broker, merchant, trader, manufacturer or miner, and has fraudulently stopped payment, he may be adjudged bankrupt at once, without the delay of fourteen days. If he is a banker, &c., and has stopped payment without fraud, he cannot be adjudged a bankrupt, unless he has stopped or suspended for fourteen days the payment of commercial paper given by him. Whoever gives commercial paper is considered as, pro tanto, engaged in commerce, and, in the interests of commerce, must not permit it to lie over for more than fourteen days. But a direct fraudulent stoppage of the payment of debts is made an act of bankruptcy only when committed by a person belonging to one of the six specified classes. They are selected as the classes most directly engaged in the business of commerce. And these views are consistent with the only grammatical reading of the clause.

[Another suggestion is of force. In order to make the words, "being a banker," &c., qualify the words which follow the second "who," it is necessary that the second "who" should be eliminated, so that the structure of the sentence shall be, "who, being a banker," &c., "has fraudulently stopped payment, or has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days." But, there is as much warrant for eliminating, in addition, the second "has," as there is for eliminating the second "who" only. If the second "who" and the second "has" are both of them eliminated, the clause will read, "who, being a banker," &c., "has fraudulently stopped payment, or stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days." This would not only make the words, "being a banker," &c., qualify the whole clause, but would also make the word "fraudulently" qualify the whole clause, so that the two classes of persons subject to the clause would be; (1.) "a banker," &c., who "has fraudulently stopped payment" of his debts, and who could be adjudged a bankrupt at once; (2.) "a banker," &c., who has fraudulently "stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days." On such reading, there would be such an expression of an intention to confine a fraudulent stoppage or suspension on commercial paper to one continued for fourteen days, as to make it necessary to confine the meaning of the words "fraudulently stopped payment," in the first branch of the clause, to a fraudulent stoppage of the payment of debts other than commercial paper; otherwise, the second branch of the clause would be comprehended within the first, and would have no meaning. All this indicates, that the only proper rule of construction is to give the usual grammatical effect and meaning to every word in the clause, when, as here, the resulting interpretation is one which makes the clause not only sensible and consistent in itself, in all its parts, but reasonable and natural, in view of the subject matter to which it relates. I am aware, that in Re Chandler [Case No. 2,591], it is said by Lowell, J., that, by the act of eighteen hundred and seventy, any person is liable to be adjudged a bankrupt, who, being a banker, &c., has stopped and suspended and not resumed payment of his commercial paper within a period of fourteen days. But the question I have considered did not necessarily arise, because he found that the debtor in that case was a manufacturer. So, also, in Baldwin v. Wilder [Id. 806], the question here discussed did not arise, although Emmons, J., in the course of his opinion, says, that the act of eighteen hundred and seventy provides that, "if the merchant, &c., has fraudulently stopped payment, or has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, he shall be adjudged a bankrupt." In Re Kenyon [1 Utah, 47], the expression is used, that, if a banker, &c., allows his paper to go to protest and suspends for fourteen days, or if he has fraudulently stopped payment, in either case he has committed an act of bankruptcy. This is undoubtedly true, but the question raised in the present case was not considered. There is an absence of adjudication on the direct point involved. But with the view I take of the statute, I must hold, that the fact that the debtor in this case is not in one of the six specified classes, forms no objection to adjudging it a bankrupt, if it has stopped or suspended and not resumed payment of its commercial paper within a period of fourteen days.

[It is to be noted, that an interpretation of the clause, as amended, which would give to it the same meaning it would have if it read thus, "who, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment of his commercial paper, or has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," requires, not only that the grammatical effect of the second "who" in the clause shall be disregarded, in order to make the words, "being a banker," &c., qualify the words which follow the second "who," but that the words, "of his commercial paper," shall be adopted from the second branch of the clause and inserted in the first branch, after the word "payment." All doubtful and tentative constructions of the clause are avoided, if the natural and ordinary construction

of the language is adhered to, and full effect given to every word.] [3]

So much of the petition as alleges that the corporation has property which it has fraudulently refused and neglected to appropriate towards the payment of its indebtedness, must be regarded as an allegation of a fraudulent stoppage of payment. This is no allegation of any act of bankruptcy in respect to this corporation, for the reason that it is not a banker, broker, merchant, trader, manufacturer or miner.

The remaining allegations are, that the corporation, while insolvent, issued a large amount of its commercial paper, which paper is past due and unpaid, and which it could not be able to pay in the ordinary course of its business, and that it has stopped and suspended, and not resumed, payment of its commercial paper from the 19th of November, 1871, being more than a period of fourteen days.

The commercial paper shown to have been issued by the corporation consists of negotiable promissory notes, in the usual form of such notes, payable to order, at specified times after date, and running in the name of the corporation, and signed by its proper officers. The only consideration shown for such notes was loans of money to the corporation. On this it is insisted that the notes are not commercial paper of the corporation, within the act. One point taken is, that the corporation has no express power to make notes. But it is not shown that it is inhibited from borrowing money for the legitimate purposes of its business, and from giving notes as evidence of such indebtedness. In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper. Ang. & A. Corp. § 257. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends; and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt, in any form not prohibited by statute. Curtis v. Leavitt, 15 N. Y. 9, 62; Smith v. Law, 21 N. Y. 296, 298, 299. In the present case the evidence shows that the notes spoken of in the petition as commercial paper were given, either originally or by renewal, for loans of money made to the corporation for use, and used by it, for the legitimate purposes of its business.

In the view I take of the clause in question the decisions before the act of 1870 in regard to the meaning of the term "commercial paper," in the clause as it then read, to the effect that it must be commercial paper given by a banker, merchant, or trader, in the course of, or in connection with, his business as such, and not merely commercial paper in form given for loans of money, have no application to the term as found in the clause as amended by the act of 1870. There can be no doubt that, where the act declares that any person who gives his commercial paper, and then stops or suspends payment of it, and does not resume payment of it for fourteen days, may be adjudged a bankrupt, it means, by "commercial paper," bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which, by their form, and on their face, purport to be such instruments as are, by the law merchant, recognized as falling under the designation of "commercial paper." Under this definition the notes in this case were commercial paper, within the act.

The allegation that the corporation issued this paper while insolvent has no relevancy in this case, except as bearing on the allegation that it has stopped and suspended, and not resumed, payment of such paper, for fourteen days; and the same remark is true of the allegation that the corporation could not be able to pay such paper in the ordinary course of its business, the paper being overdue. The question then comes to this sole point—whether the corporation has stopped or suspended and not resumed payment of such paper within a period of fourteen days, within the true intent and meaning of the act.

One of the points most seriously contested, in this case, in the evidence, and on the hearing, was, whether the corporation was really liable to the petitioning creditor on the note set forth in the petition. I think its liability on that note is established by the evidence. The $1,000 which she loaned on the note of Mr. Homberg, for $1,000, indorsed by Mr. Reymert, of the 16th of December, 1870, was really loaned to the corporation, through Mr. Reymert, its president, and was used for the business of the corporation, the note being a note made to raise money for the corporation, and being one of three notes made by Homberg for that purpose, and loaned to the corporation in exchange for its note of the same date for $3,500, the aggregate amount of such three notes. This note for $3,500 was afterwards returned to the corporation, and the three notes of Homberg were extinguished, the note in the petition being given to the petitioner in exchange for the $1,000 note of Homberg on which she loaned the $1,000. In so giving its note to the petitioner, the corporation did what, in justice, it was bound to do, as respected both the petitioner and Homberg and Reymert, to give to the petitioner its liability for the $1,000; and, if she chose to take that and give up any liability of Homberg and Reymert, it was at her option to do so. She did so, and the corporation gave her the evidence of what was, in fact, a debt of its own to her.

This note set forth in the petition was not paid at its maturity, November 19th, 1871, and it had not been paid when the petition was filed, January 6th, 1872. Several other

[3] [From 6 N. B. R. 338.]

notes of the corporation were due when the petition was filed. But, in regard to all of them, as well as to the note held by the petitioner, I do not think the evidence makes out a case of the stoppage or suspension and non-resumption of payment of the notes, within the sense of the act.

When a person fails generally to meet his commercial paper according to the usual course of business, and suffers not some, but all of it, as it matures, to go to protest, and so comes to a general suspension, because unable to proceed further with his business, he is undoubtedly within the clause, the suspension continuing for fourteen days. But, on the other hand, the clause ought not to be used to enable a creditor to collect an ordinary debt on commercial paper, where the circumstances show that, although the paper is not paid, though due, there has been no stoppage or suspension of payment of the commercial paper of the debtor, within the meaning of the clause. In such case the ordinary remedy furnished through a suit to collect the note, is all that the creditor is entitled to. In re Compton [Case No. 3,940]. It is not a stoppage or suspension within the clause, when a sufficient excuse is shown why the paper was not paid; and, even though the suspension may have continued for fourteen days, yet a bona fide denial of liability on the paper in respect to which the suspension occurs is such an adequate legal excuse, that a person ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy court may be of opinion that, in fact, the debtor was liable on the paper. See Davis v. Armstrong [Id. 3,624]; In re Thompson [Id. 13,936]; In re Hollis [Id. 6,621]. The true view on this subject, is, in my judgment, that laid down in McLean v. Brown [Id. 8,880], by Judge Treat—that the suspension referred to in the act is a general suspension of commercial paper, not the refusal to pay paper in respect to which liability is denied; that the bankruptcy court will not sit to try the validity of the reasons alleged for the non-payment of the paper in respect to which the liability is denied; that it is not a court for the mere collection of debts; that each case must be considered by itself in connection with the circumstances surrounding it; but that, when a party fails to pay his paper for want of means, and continues unable to pay it, he has suspended, within the meaning of the act. It by no means follows, that a debtor may not, under certain circumstances, be considered as having really suspended payment generally of his commercial paper, although but a single piece of paper is shown to have lain over unpaid for fourteen days. On the other hand, the court must guard against being imposed upon by a denial of liability which is altogether sham, and not made in good faith. The denial of liability may, however, be founded on reasons which are not valid, and which would fail as a defence in a direct action on the paper, and yet the denial may be made in good faith, in such wise that the non-payment cannot be regarded as a stoppage or suspension, within the act.

In the present case, it is not shown that the corporation failed for want of means to pay the note held by the petitioner and the other paper referred to, nor is it shown that it was insolvent when the petition was filed. It is not alleged to have preferred any creditor, when insolvent, nor is it alleged to have committed any other act of bankruptcy than the suspension of payment for fourteen days of its commercial paper. Although subject to the supervision of the authorities of the state created for the purpose of investigating the affairs of insurance corporations and winding them up when insolvent, no proceedings had been taken against it as an insolvent institution, by the state authorities. Within a week prior to the maturity of the note held by the petitioner, the former president of the corporation resigned and a new president took his place. The affairs of the corporation seem to have been in much confusion, and its books were not kept in such form as to afford the information which they ought to have afforded in regard to its business. Its accounts had not been kept separate from the accounts of its former president, and, without imputing any misfeasance or malfeasance to any person, it is not too much to say, that the information, and want of information, on the part of the new president, in regard to all the commercial paper referred to, and its consideration, and his views and those of his associates, honestly entertained, as the proof shows, in regard to the liability of the corporation to pay the same, were such that the failure to pay it, and the continuance of such failure down to the time of the filing of the petition, cannot be regarded as a stoppage or suspension and non-resumption of its payment, within the act.

The petition is dismissed, with costs.

Case No. 6,403.

In re HERDIC.

[See 1 Fed. 242.]

HERETH (WITT v.). See Case No. 17,921.

Case No. 6,404.

HERIOT et al. v. DAVIS et al.

[2 Woodb. & M. 229.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

JURISDICTION—CITIZENS OF DIFFERENT STATES.

1. Where in a bill in equity the complainants, and part of the respondents, are described as of

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

one state, and those of the respondents, on whom service is made, and who appear, as of the state where the suit is brought, a demurrer to the bill for want of jurisdiction cannot be sustained.

[Cited in Pierpont v. Fowle, Case No. 11,152; Sands v. Smith, Id. 12,305.]

2. The case will proceed against the person appearing and notified, without prejudice to the others, where their interests can be severed and tried separately.

[Cited in Jewett v. Cunard, Case No. 7,310.]

3. It is doubtful, whether those can be regarded as parties who are not summoned, nor appearing, nor asked to be summoned, unless conditionally, if the court deem it proper.

4. If a want of jurisdiction over the case comes to the knowledge of the court in any way before trial, though not objected to by the proper person, the court will not proceed, being a court of limited powers.

This was a bill in equity [by Benjamin D. Heriot and others against J. A. Davis and others], describing the complainants as citizens of South Carolina, and the respondent, Davis, as a citizen of Massachusetts, but the two other respondents, Chapman and Welsman, as not belonging to Massachusetts, but believed to be residents of South Carolina. The service of the notice to appear was made on Davis alone; and the court was requested in the bill, to give such order in respect to notice to Chapman and Davis, as might conform to its usage and practice. The subject-matter of the bill consisted of a charge of fraud by one Smith, in procuring 100 bales of cotton of the complainants without payment therefor, and pledging them with an agent of Davis to obtain certain advances of money, and which cotton, being insured and lost, the value thereof was paid to Davis. This bill is brought to obtain a discovery and restoration of the balance of the proceeds, after returning the sum advanced by Davis's agent. The other defendants are introduced in the bill only as having been appointed assignees of Smith, he having become an insolvent after perpetrating the alleged fraud. Davis demurred to the bill, and assigned for cause the want of jurisdiction over Chapman and Welsman.

Mr. English, for complainants.
Sohier & Welch, for Davis.

WOODBURY, Circuit Justice. This being a court of limited jurisdiction as to parties, no less than matters, it is necessary to set out in writs and bills in equity enough as to the citizenship of the parties, to show that the court possesses jurisdiction over or between them. Story, Eq. Pl. § 26, note 3; Brown v. Noyes [Case No. 2,023]. Nor is it required that the objection should be made by the person himself, improperly joined in the writ or bill, because this court will not take jurisdiction over a subject or person where by law it does not appear to possess any, however the matter may come to the knowledge of the court, if before trial, or even if the parties themselves make no objection. Jackson v. Ashton, 8 Pet. [33 U. S.] 149; U. S. v. New Bedford Bridge [Case No. 15,867], and cases cited there. In order to be entitled to jurisdiction over this case, the constitution provides, that the proceeding must be "between citizens of different states." Article 3, § 2. The act of congress uses words somewhat different in conferring jurisdiction on the circuit court, as it introduces another limitation by providing it must be a suit "between a citizen of the state where the suit is brought, and a citizen of another state." The present bill, however, so far as regards all the parties now before this court, and all who have been notified to appear, comes within both the constitution and the act of congress, and thus gives to the court undisputed jurisdiction. But it is argued, that Chapman and Welsman, named in the bill as parties, though not served, nor appearing, must be considered, notwithstanding, as parties within the meaning of the provisions about jurisdiction. I entertain some doubt as to that point. Because there can be no pleadings, nor issues, nor trial, nor binding of any person, who has not been notified nor chosen to appear voluntarily in a suit. In short, no jurisdiction has been or can be exercised over him, and how then can he be regarded as a party to give jurisdiction or defeat it in the proceedings? The court do no more in respect to him or his rights, than they do as to a person sometimes named in a bill as one, who would have been joined and proceeded against, had he not been so situated as a citizen, that joining him would defeat jurisdiction over the whole case. Such a mention of a person never defeats jurisdiction. Here Chapman and Welsman are named as parties in interest, but not to be notified or proceeded against, unless the court deem it proper according to its usages and the law. But, supposing this view was not sound, and Chapman and Welsman are to be regarded as parties for the purpose of raising the question of jurisdiction; I entertain no doubt, according to some adjudged cases, that, belonging to the same state with the complainants, the bill could not proceed against them, and that unless they are severed and dismissed, a case so situated will not come within our jurisdiction. Ward v. Arredondo [Case No. 17,148]; Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267; [Corporation of New Orleans v. Winter] 1 Wheat. [14 U. S.] 94; Story, Eq. Pl. § 490–492; [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 84. But the correctness of those decisions has been called in question. Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497, 554. And the act of congress passed February 28, 1839 (5 Stat. 321), says expressly: When "there shall be several defendants, any one or more of whom shall

not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it," but without prejudice to others. Now, though this law has been once supposed not to change the judiciary act of 1789 [1 Stat. 73] as to where parties shall reside, and the former cases were upheld in Commercial & Railroad Bank of Vicksburg v. Slocomb, 14 Pet. [39 U. S.] 60; yet it manifestly meant, under certain facts, to relieve against the construction put on that act in [Strawbridge v. Curtiss] 3 Cranch 267; and it was suited to that very object. See [Louisville, C. & C. R. Co. v. Letson] 2 How. [43 U. S.] 497, 557.

The old cases must, therefore, now be held as to some extent overruled in the more recent one in 2 How. 555. Again, even before the act of 1839, it had been held, that where some of the defendants could be severed, and the case proceed well against those over whom the jurisdiction was clear, it might be done both at law and in chancery. Shute v. Davis [Case No. 12,828]; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Carneel v. Banks, 10 Wheat. [23 U. S.] 181; Hind v. Vattier [Case No. 6,512]. Here the interests of Davis are distinct from those of Chapman and Welsman; and the claim of the complainants against Davis can be litigated and settled with him alone, leaving Chapman and Welsman in subsequent suits, if dissatisfied with the decision so far as affecting Smith or his creditors, whom they represent, to interpose their own claims, and have them adjudicated on. Any decree will be without prejudice to their rights. Such, also, is virtually the 47th rule of this court on this subject, and still other decisions countenance this course. See West v. Randall [Case No. 17,424]; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 451, note. Indeed, Chapman and Welsman are here scarcely more than nominal parties, independent of Davis, for he cannot be required to pay over any balance to the complainants, except on facts and frauds by Smith, as to the property of the complainants, which would utterly bar them from receiving any thing as his assignee. Nominal parties are little to be regarded in such cases. [Browne v. Strode] 5 Cranch [9 U. S.] 303; Wormley v. Wormley, 8 Wheat. [21 U. S.] 421; Russell v. Clark's Ex'r., 7 Cranch [11 U. S.] 98. But however this last consideration may be applicable here with much force, the reasons and decisions before alluded to, in connection with the act of 1839, require me, on the facts in this case, to overrule this demurrer, and let the cause proceed only against Davis.

HERLD (RICE v.). See Case No. 11,752.

Case No. 6,405.

In re HERMAN et al.

[9 Ben. 436;[1] 17 N. B. R. 440.]

District Court, S. D. New York. April 13, 1878.

BANKRUPTCY—COMPOSITION—PROCEEDINGS TO SET ASIDE—DELAY.

A final order in composition was made in December, 1875. The composition was paid. In January, 1878, the court was applied to, by petition, to set aside the composition, by creditors who had received the amount due by it, on the ground that the votes of other creditors in favor of the composition had been purchased by the bankrupt, by notes given to them before such votes were given, which notes were afterwards paid, so that they received that money in addition to the amount of the composition. It appearing that the attorney who represented the petitioners in the proceedings for composition, was in possession, before the composition was confirmed, of facts sufficient to put him and them on inquiry as to the matters now alleged, in such wise that testimony might then have been taken as to such matters, and that the bankrupts had, after carrying out the composition, entered into a new business, with a new partner, and had incurred new debts, to a large amount, on the faith of the composition and of its payment, before the proceeding to set aside the composition was instituted, and that there had been delay in commencing it after an attorney had been employed to commence it, during which interval the bankrupt had contracted debts, and no notice had, during such interval, been served on him, the court held that it was too late for the petitioners to raise the question as to the purchase of the votes, and refused the application to set aside the composition, without examining that question.

[Cited in Re Shaw, 9 Fed. 497.]

[Cited in Farwell v. Raddin, 129 Mass. 8.]

[This was a petition to set aside a composition in the matter of Moses S. Herman and Simon M. Herman, bankrupts.]

Sedgwick & Curtis, for petitioners.

A. Blumensteil, for bankrupts.

BLATCHFORD, District Judge. The final order in composition herein was made on the 6th of December, 1875. The terms of the composition were forty cents on the dollar in money, payable in three equal instalments, in three, six and nine months, respectively, from the date of such final order, for which endorsed notes were given. The notes were given, and have all of them been paid, except the notes for A. T. Stewart & Co. On the 2d of January, 1878, a copy of a petition to this court, made by the firms of Whittemore, Peet, Post & Co., William Lottimer & Co., Bauendahl & Co., Lewis, Brothers & Co., and Low, Harriman & Co., was served on the attorneys of record for the bankrupts, with copies of three affidavits, and a notice that a motion would be made thereon before this court, on the 5th of January, 1878, that the prayer of such petition be granted. The prayer is, that an order be entered setting

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

such composition aside, or granting a reference to inquire into the truth of the allegations contained in such petition. The petition sets forth, that under said composition the petitioners received only forty cents on the dollar of their claims against the bankrupts; that they strenuously opposed the resolution of composition, and refused to sign it; that their counsel at the time, Messrs. Carter & Eaton, tried, by every argument available, to persuade the register before whom the proceedings were had to grant a postponement of the final vote on composition, in order that the bankrupts might be more thoroughly questioned touching their property; but that they were strenuously opposed by Kaufman Simon, who held a power of attorney from Converse, Stanton & Davis, and others, to the number of eight creditors, and by Seth B. Hunt & Co. and Brigg, Entz & Co.; that the final vote on the composition was taken under the protest of the petitioners; that had it not been for the vote of said Kaufman Simon, the resolutions would not have been passed, inasmuch as the requisite number of creditors required by statute would not have signed the resolution; that the resolution would not have been signed by said Simon had not the bankrupts paid him for so doing; that, within the last week, it has come to the knowledge of the petitioners, that the vote of said Kaufman Simon, and that of Seth B. Hunt & Co., was purchased by the bankrupts, and that the composition was a fraud upon the petitioners; that even without the vote of Seth B. Hunt & Co., the composition could not have passed, inasmuch as the creditors signing the resolution would not have represented the statutory amount required; that the petitioners were morally certain that the proceedings were fraudulent, and that the bankrupts could have paid much more than they did in composition, and that the composition was not for the best interests of all concerned, at the time of the passage of the resolution, but that all thorough investigation of the matter was arbitrarily suppressed in the manner before detailed; that the petitioners, immediately on being apprised of the facts set forth in the affidavits annexed to the petition, took steps to investigate the circumstances as to which they were informed; that the investigation of the affairs of the bankrupts' firm, even at the time of the passage of the composition, showed that they had not accounted for a large amount of goods in their list of assets, but it has been only within the last few weeks that the petitioners have received any information touching the disposition of such goods, sufficiently definite to present to the court; that they have used the utmost diligence in presenting said facts as soon as they became possessed of them; and that the bankrupts' firm, after the composition, started in business again, with an immense stock of goods, and are now abundantly able, as the petitioners believe, to pay their creditors in full. The petition is signed by a member of each of the petitioners' firms, and is verified on the 27th of December, 1877, the signature and verification on the part of Low, Harriman & Co. being made with the statement that they, by their attorney, voted for the composition, and did not oppose it, but that they would not have signed it had the circumstances set forth in the petition been brought to their attention.

The petition and affidavits were presented to the court in accordance with the notice of motion, and the bankrupts appeared and filed an answer to the petition and an affidavit, and, under an order of reference, proofs have been taken as to the matters in issue, on notice to the attorneys for the bankrupts, and to all the creditors named in the statement of debts filed by the bankrupts in the composition proceedings.

It appears by the composition proceedings, that Mr. S. B. Eaton, of the firm of Carter & Eaton, represented in those proceedings the four of the petitioners' firms which did not vote for the composition. The answer sets forth, that Carter & Eaton examined the bankrupts at full length, and were not obstructed in such investigation; that the vote was taken only after Carter & Eaton had stated that they desired to make no further inquiries; and that such examination was not opposed by Kaufman Simon, or any one of the creditors of the bankrupts. The answer denies the payment by the bankrupts to Simon, or any one else, of any money as an inducement to vote for the resolutions of composition, or to assent to their passage. It denies that the composition was fraudulently procured to be passed, or that any vote was purchased. It avers that the amount of the compromise was fixed and recommended by a committee of creditors, of which Mr. Low, of Low, Harriman & Co., was one, and after a thorough examination into the affairs, books and assets of the bankrupts. It denies that there was any concealment of goods, and avers that the assets with which the bankrupts started in business again were those set forth in the statement, or the proceeds thereof, and none other, together with the capital supplied by a new partner, and money subsequently borrowed. It alleges, that the final order was entered more than two years ago; that, shortly after the passage and recording of the resolutions, the bankrupts engaged in a new and different business from that theretofore conducted by them; that they paid the composition promptly, according to its terms; that, since then, they have created a large amount of new debts and new assets, obtained and incurred on the faith of such final order and such compromise; and that not only will said new claims and assets be greatly prejudiced by this proceeding, but the credit of the bankrupts will be greatly impaired thereby.

The record of the composition proceedings

shows that the first meeting of creditors was held on Saturday, the 13th of November, 1875; that Mr. S. B. Eaton appeared for ten creditors (including all of the present petitioners except Low, Harriman & Co.); that an adjournment was had to the 15th of November, to allow Mr. Eaton to make inquiries of the bankrupts; that Mr. Eaton, on the 15th, examined Moses S. Herman on oath, who, at the conclusion of his examination, signed his deposition; that Mr. Eaton then asked an adjournment for two days for the purpose of applying for an order for the examination of Mr. Field (the book-keeper of the bankrupts), and of Mr. Simon; that the register held that a sufficient reason for the adjournment was not shown and refused it; that the vote was then taken; that the composition was passed and confirmed by the requisite number and amount of creditors; that the papers were presented to the court and an order entered on the 20th of November, for a second meeting of creditors; and that the second meeting was appointed for, and held on the 29th of November. The files of the court show, also, that on the 26th of November, Mr. Eaton, as solicitor and attorney in fact for the creditors for whom he was acting (and which number included all of the present petitioners except Low, Harriman & Co.), presented to this court a petition setting forth that he represented claims amounting to about $35,000; that the total debts of the bankrupts were $199,681.06; that the clients of Mr. Eaton were opposed to the composition; that the first meeting for composition was held on the 13th and adjourned to the 15th, when it was closed after lasting from 10 o'clock a. m., to 6 p. m.; that Mr. Eaton was present at such meeting representing creditors as aforesaid, and opposed the composition; that when Moses S. Herman, the senior partner of the bankrupts, was under examination, Mr. Eaton asked of him the following questions and obtained the following answers: "Q. When did your firm take stock since December last? A. Not at all, the stock was taken by the committee. Q. What was the result of that stock-taking, as showing your surplus or your deficit? A. I have to refer to the expert who examined our books. Q. He made an examination after your failure? A. He did. Q. Please give his name? A. Mr. Albert O. Field;" that on the same examination of the bankrupt, the following testimony appeared of record, being questions asked by Mr. Eaton and answers made by the said bankrupt: "Q. Have you the statement of the committee who examined your affairs after you became bankrupt? A. I have not. Q. Who has it? A. I don't know. Q. Was Mr. Field the expert who went through your books on that occasion? A. Yes, sir;" that the books of the bankrupts showed that their surplus in business on the 31st of December, 1874, was $12,930.52; that they had now failed for $200,000 and offered to pay only forty cents on the dollar and on long time; that, when Mr. Eaton asked the bankrupt the questions above given, he believed he could obtain from the said bankrupt, facts showing a fraudulent concealment and a fraudulent disposition of his property; that at the close of said examination, Mr. Eaton asked for an adjournment for forty-eight hours to enable him to apply to the court for an order to examine Mr. Albert O. Field, above named; that this application was refused by the register, and the vote on the resolution was taken immediately afterwards and the first meeting ended; that a committee of creditors was appointed to examine into the affairs of the bankrupts immediately after their failure; that Kaufman Simon was secretary of that committee; that Mr. Eaton was informed and believed that said Simon made a careful examination into the affairs of the bankrupts and publicly stated to many of the creditors of said bankrupts that the proposed composition of forty cents on the dollar was less in amount than said bankrupts should pay and said creditors should accept; that Mr. Eaton was further informed and believed that said Simon was thoroughly acquainted with the secrets of the business of the bankrupts' firm, and was conversant with such taking of stock, and with the report of such committee; that at the close of the examination of said bankrupt, when Mr. Eaton asked for such adjournment of two days, he stated that he wished to apply for an order of the court to examine Kaufman Simon as well as said Field, but the register declined to grant the adjournment and immediately took the vote on the composition resolution and adjourned the meeting; that Mr. Eaton voted against said resolution; that important facts showing the frauds perpetrated by the bankrupts, and showing that the composition offered was less than it should be, and was, therefore, not for the best interest of the creditors, could be elicited by the examination of said Simon and said Field; and that Mr. Eaton wished to use such facts before this court against the composition when the report of the second meeting should be filed. The petition prayed for an order for the examination of said Field and said Simon at the second meeting for composition. On that petition an order was made by the court on the 26th of November, that Albert O. Field and Kaufman Simon be examined in this matter at the second meeting for composition, and that a copy of such order be served on said Field and said Simon directing their attendance at said second meeting for the purpose of said examination. The record of the proceedings on the second meeting shows that both of the bankrupts attended it in person; that the creditors represented by Mr. Field were present by Mr. Field; that no other creditor attended; that no objection was made that the composition resolution had not been passed in the manner directed by the statute; that the resolu-

tion had been confirmed by the requisite signatures, being sixty-nine out of ninety-four creditors exceeding $50, and $142,136.28 of indebtedness out of $199,681.06; and that it was agreed by the creditors of the bankrupts represented at said second meeting, that it was for the best interest of all concerned that the composition resolution should be recorded and that the statement of assets and debts should be filed.

On the proofs there is no evidence to support the charge of a concealment of goods, and the case is presented to the court on the question of the purchase of the votes cast by Kaufman Simon, which were ten in number and included that of Seth B. Hunt & Co. It is quite apparent, from the proofs, that it was for the best interest of the creditors to take the composition offered.

On the question of the purchase of votes the position is taken on the part of the bankrupts, that, no matter what the conclusion may be on that subject, on the evidence, it is too late for the creditors who present this petition to raise that question now.

It appears from the testimony of Mr. Stiastney, one of the firm of Bauendahl & Co., that Messrs. Carter & Eaton reported to Bauendahl & Co. at the time of the composition meeting, "that there were certain creditors who had been bought, and without them the composition would not have been carried," although the names and number of the creditors were not stated; and that, on the 27th of November, 1877, Bauendahl & Co. made a payment of money to the attorney for the petitioners towards his compensation in the present proceeding and with a view to have it brought.

It appears from the testimony of Mr. Eaton, that he did not attend the second meeting because of his belief "that it was impossible to defeat the composition, for the reason that the bankrupts, or their friends, would buy themselves through." He says: "The circumstances under which Brigg, Entz & Co. and Seth B. Hunt & Co. and some other firm whose name I do not now recall, changed their decision from one against the composition to one in favor of the composition impressed me with a feeling that the composition was being carried through by corrupt means. The vote on the statutory amount was exceedingly close, and during the first meeting there was a continual running in and running out on the part of the attorneys and friends of the bankrupts, followed by revocations, or certainly by a revocation, by means of which, as I recollect, the vote was changed from one fatal to the composition to one in favor of it." He further says, that his impression was that something corrupt was being done in the way of the purchase of votes; that he considered it would be impossible to get at the bottom facts; that, if there was any corruption, he considered that the attorneys in charge of the bankrupts' case would so manage the matter as to evade detection; and that that was his impression at the first meeting. Then occurs the following testimony: "Q. You knew, Mr. Eaton, what creditors there were who had changed their powers, didn't you? You knew that at the first meeting? A. I knew some. Q. You were present at the vote, were you not? A. I think I was. Q. Why didn't you individually examine those creditors who you believed had been purchased by corrupt means, between the first and second meetings? A. My first reason was that one of the parties, for instance, Brigg, Entz & Co., had been my clients, and, if they chose to sell me out, I did not choose to pursue them for it. Beyond that, it is a species of practice for which I have no fondness, and my clients not being particularly desirous that I should do it, I did not do it. Beyond that, I considered it substantially a hopeless case, as I had no doubt, in my own mind, that whatever was done was done in such a way as to avoid illegality or, certainly, discovery. Q. How do you know that your clients were not desirous that you should follow this matter out? A. I am not certain whether we called a meeting for that or not. Q. Give your best recollection, Mr. Eaton? A. Perhaps my best answer is that if they had been desirous I certainly should have done so. Q. You have stated that they were not desirous. Is there any fact in your recollection that they were not desirous that you should prosecute the matter any further? A. Perhaps a better expression would be, that they manifested no desire, although I fail to recall the circumstance. Q. Did you state to your clients your impression as to the manner in which you thought this composition had passed? A. I do not remember. Q. Did you make any statement to your clients as to the result of these proceedings at the time? A. I do not remember. Q. What is your recollection about it? Have you any recollection on the subject? A. I have a very faint recollection. Q. Give us the faint recollection, if that is the best you have. A. It is that I called upon certain ones of my clients. Q. Name them, if you can. A. Whittemore, Peet, Post & Co., but I do not even remember who it was that I saw there. My impression is that they were very conspicuous in opposing the composition. Whether I actually called upon them or not I am not certain about. Q. Is that all the answer? A. That is all. Q. Then, may I understand from you that you made no efforts whatever from the date of the first meeting, from the close of the first meeting, up to the time that the resolutions were confirmed, to examine any party in reference to the manner and the reasons of their voting, or of changing their power, or of revoking the power originally given to you or your firm? A. Such is my impression. Q. And subsequent to the confirmation of the resolutions down to the present time, what efforts have you made to discover the alleged fraud? A. None whatever."

Mr. Whittemore, one of the firm of Whitte-

more, Peet, Post & Co., testifies that he was informed, at the time of the composition, of the suspicions that were entertained by Mr. Eaton as to the manner in which the composition was passed; that the information was that there were parties that opposed the composition, and that at last they came in and voted for it; that his impression was that those parties had been bought off; that the general feeling was that money had been paid to purchase those votes; and that at the time he did not hear any mention of the names of the parties who had changed their votes, but he supposed there were parties who had been bought off and had been paid more.

It appears, from the proofs, that, after the composition had been carried out, the bankrupts engaged in a new business, with an additional partner, and obtained new assets and incurred new debts; that one of the bankrupts borrowed $25,000, which he still owes, and that such money was borrowed and lent on the faith of the fact of the compromise, and with a view to its employment in the new business; that the new partner put in money as capital; that the composition notes were paid out of the proceeds of the assets of the old firm; that, during the one month which elapsed between the time the attorney who conducts the present proceedings was employed to do so, and the time the bankrupts were first notified of these proceedings, they purchased between $10,000 and $15,000 worth of goods, and borrowed about $10,000 in money; that about $20,000 of that is still unpaid; and that the new indebtedness of the bankrupts, individually and as a firm, existing at the time these proceedings to set aside the composition were instituted, was $100,000 and over, incurred on the faith of the composition and of its payment.

In view of the foregoing facts, this is not a case where it would be proper to exercise the discretion of the court to set aside this composition. The facts which were before Mr. Eaton at the time, coupled with his suspicion that those facts indicated that money was being paid to purchase votes, were sufficient to put him and the creditors whom he represented, on further inquiry. The creditors whose votes it was seen were changed, and the attorneys who cast such votes, might have been examined. Mr. Simon is the witness whose testimony is mainly relied on as showing the purchase of his votes by money paid to him, and it is claimed that the testimony shows, that, before the vote on the composition was taken, Simon received notes, as a consideration that he should vote in favor of the composition, for the creditors whom he represented, which notes were afterwards paid; that, before receiving the notes, he had refused to vote for the composition; and that, after he received them, and because he had received them, he voted in favor of the composition, on behalf of all of his constituents. Mr. Eaton obtained a special order for the examination of Mr. Simon, but made no use of it. It must be presumed, that, if Mr. Simon had been examined at the second meeting of creditors, as to the matters which had excited the attention of Mr. Eaton, the matters now disclosed by Mr. Simon would then have been disclosed, as to the giving of the notes, as they are claimed to have been given before the first meeting in composition was held. If the examination had been had, and what is claimed now to be proved had not been disclosed, all would have been done that could then have been done, and the creditors who opposed the composition would stand differently. Under the above circumstances the opposing creditors accepted the composition payments. In view of the above facts, and of the further delay of a month after an attorney was employed for the present proceedings, without any notice being promptly served on the bankrupts, and of the great injustice which would result to the new creditors of the bankrupts, it would not be an exercise of sound discretion to disturb this compromise. In admiralty, where a lien is to be enforced, to the detriment of a purchaser for value, without notice of the lien, the defence of laches is held valid under a shorter time and on a more rigid scrutiny of the circumstances of the delay, than when the claimant was the owner at the time the lien accrued. The Key City, 14 Wall. [81 U. S.] 653. This principle is applicable to cases like the present. The present assets of these bankrupts are free from the debts embraced in the composition. To reinstate those debts as against those assets is substantially to enforce a lien against them, to the detriment of the new creditors, who occupy the position of purchasers for value without notice. In bankruptcy proceedings, both in England and in the United States, where the question is one of the exercise of discretion, laches of the kind existing in this case, especially when coupled with injury to innocent parties, is a circumstance always of controlling weight. Ex parte Banfield, 1 Ch. App. 154; Ex parte Davis, 2 Ch. App. 363; Ex parte Savin, 1 Ch. App. 616; Ex parte Williams, L. R. 10 Eq. 57; In re Sullivan, 36 Law J. pt. 1, Bankr. 1. In Re Thomas [Case No. 13,891], the principle was applied to a petition to set aside an adjudication for fraud. In Re Murray [Id. 9,953], in the circuit court for this district, it was applied to a petition for the review of an order granting a discharge. There had been a delay of nearly five months in taking proceedings for such review, and in the meantime the bankrupts had, with the assistance of their friends, engaged again in business. The court held that the delay was unreasonable, and added, that "to revoke the discharge which was granted to them in the regular course of the administration of the bankrupt law [of 1867 (14 Stat. 517)] would involve in misfortune not only themselves, but others, who, relying on their discharge, have aided them or entered into new business relations with them. See, also, In re Ewing [Case No.

4,588]. For the foregoing reasons the application to set aside the composition is refused, with costs to be paid by the petitioners.

Case No. 6,406.

The HERMAN.

ROBERTS et al. v. The HERMAN.

[2 Adm. Rec. 322.]

Superior Court, S. D. Florida. Feb. 24, 1840.

SALVAGE—DAMAGE WHILE IN CHARGE OF SALVORS.

[For assisting in navigating a ship to port after she got inside the Florida Reefs, with rudder unshipped and rudder pintle and upper gudgeon broken, libelants awarded $800 as a salvage service, and no deduction allowed for striking upon a shoal while in libelants' charge, where they were free from negligence.]

[Cited in The Mount Washington, Case No. 9,887; The Calcutta, Id. 2,298; Curry v. The Lock Goil, Id. 3,495.]

[This was a libel in rem by Roberts and Bethel against the ship Herman for salvage.]

S. R. Mallory, for libelants.

Walker J. Smith, for respondent.

MARVIN, J. It appearing to the court from the allegations and proofs of the parties that the libelants have rendered valuable and meritorious services to the ship Herman, in assisting to navigate her to this port, after she had got inside the Florida Reefs, and had unshipped her rudder, broken the rudder pintle and upper gudgeon, and her safety otherwise endangered, as is alleged in the libel in this case; and it also appearing that the ship's striking upon the shoal of rocks, while in charge of the libelants, off Jacob's Harbor, as alleged by the respondent Captain Allen, was not the result of carelessness, unskilfulness or negligence on the part of the libelants, so that the compensation ought, either in law or equity, to be affected thereby, but was occasioned by what may, under the circumstances, fairly be termed an unavoidable accident; and it further appearing that the interests of commerce, and the safety of vessels navigating these dangerous seas, require the court to reward liberally services like these rendered to this ship, that they may be saved from greater loss: Therefore, it is ordered, adjudged and decreed that the sum of eight hundred dollars is a reasonable compensation to be allowed the libelants, and that upon the payment thereof to the marshal, with the costs and expenses of this suit, the said ship be discharged from the attachment, and restored to Captain Allen, for and on account of the owners thereof.

Case No. 6,407.

HERMAN v. HERMAN.

[4 Wash. C. C. 555.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

AFFIDAVIT TO ANSWER—FOREIGN COUNTRY—BEFORE WHOM TAKEN.

Under an agreement of the solicitors, that an answer to be given in France may be taken and sworn to before any person authorised to administer oaths by the laws of France; the agreement is not complied with if the answer be sworn to before the American consul.

[Cited in Semmens v. Walters, 55 Wis. 681, 13 N. W. 889.]

The defendant resided in France, and the solicitor for the plaintiff consented that his answer might be taken and sworn to before a notary public, or other person authorized to administer an oath by the laws of France. The answer was taken by the American consul, and the question now was, whether it was properly taken and sworn to within the terms of the agreement.

Mr. Rawle, for plaintiff.

Mr. Duponceau, for defendant.

WASHINGTON, Circuit Justice. 1 Denisart, tit. "Consuls," p. 519, has been cited to prove that, by the French law, consuls are authorized to administer oaths. But it is quite obvious that the author, in the place referred to, is speaking of the power and duties of French consuls, residing in foreign countries; and not of foreign consuls residing in France.

It was contended, for the defendant, that the act of congress concerning consuls gives them a power to administer oaths. We think that it is not generally given by this act, but that it is confined to particular cases of a maritime or commercial character. But if the power were general, it would not remove the difficulty, the agreement being, that the answer should be taken by some person authorized to administer oaths by the law of France. But for this agreement, it must have been taken under a dedimus potestatem.

The answer was not allowed.

[The court refused to dismiss the bill filed in this case, because the complainant had omitted for three terms to proceed, unless one term's notice of the application to dismiss was given. Case No. 3,757.]

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

Case No. 6,408.

The HERMANN.

[4 Blatchf. 441.] [1]

Circuit Court, S. D. New York. Aug. 17, 1860.

COLLISION — BETWEEN STEAMER AND SAILING VESSEL—DAMAGES—LAY DAYS.

1. Where a steamer at sea, heading to the eastward, discovered an object about a point on her port bow, and immediately ported her helm, thinking the object to be a vessel standing to the eastward, and, on approaching nearer, discovered it to be a vessel under sail, but could not determine how it was standing, and still kept her helm to port, and then discovered that the vessel was standing by the wind, which was northwest, but could not tell on which tack, and still kept her helm hard to port, and then discovered that the vessel was on her starboard tack, and within a minute and a half struck her, the steamer not having slackened her speed, or slowed or backed, and it appeared that, if the true position of the vessel had been known, the steamer would have starboarded her helm and would then have gone clear: *Held*, that the steamer was liable for the collision.

[Cited in Hoben v. The Westover, 2 Fed. 93; The State of California, 1 C. C. A. 224, 49 Fed. 174.]

2. A charge for lay days in a charter party furnishes no test to determine the damages for detention during the repair of a vessel, in a case of collision.

[Cited in The James A. Dumont, 34 Fed. 429; The Margaret J. Sanford, 37 Fed. 150.]

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

This was a libel in rem, filed in the district court, by Peter Grant and others, owners of the bark Reindeer, against the steamship Hermann, for a collision between the two vessels. The district court decreed for the libellants, and the claimants appealed to this court.

Edward H. Owen, for libellants.

Daniel Lord, for claimants.

NELSON, Circuit Justice. The collision in this case occurred on the night of the 24th of August, 1854, in the chops of St. George's Channel. The bark was on her way from London to Boston; the steamship from New York to Southampton. The night was not very dark. I take the facts as stated by the chief officer of the Hermann, who was on deck at the time, and had the general charge of the vessel, and by the third mate, whose watch it was on deck, and who witnessed the collision. Their statements concur, and are clear and candid. The chief mate says, that he was walking on the port side of the quarter-deck, and that, on hearing the bells indicating an object in view on the port bow, he stepped forward on the port paddle-box, and discovered the object about a point on the port bow, and immediately gave the order to port the helm, which was obeyed. He thought the object was a vessel standing to the eastward. After the order, the Hermann began to come round to the southward, and was approaching the vessel, and he then discovered it was under sail, but not clearly enough to enable him to determine how it was standing. He, however, repeated the order, "Hard a-port," which was answered. After this he discovered that the vessel was standing by the wind, which was from the northwest, but could not tell on which tack, and he then gave the third order, "Hard a-port," which was also answered, and then, and not before, it became evident that the vessel was standing on her starboard tack, and this not over a minute and a half before the collision. The Hermann was going at the rate of eleven miles an hour, and, during all this time, neither slackened her speed, nor slowed nor backed, till after the collision. The night could not have been very dark, for both the chief officer and the third officer say that they discovered the object, which turned out to be a vessel on her starboard tack, close hauled, a mile and a half distant. The chief officer admits, that if he had known the position of the Reindeer, that is, that she was standing on the wind, he would have starboarded his helm instead of giving the order to port, and that, if he had done so, the Hermann would have gone under her stern. The fault of the Hermann is too obvious to require observation. She should have slowed, stopped, or backed, according to the necessity of the case, until the true position of the Reindeer could be discovered.

On the question of damages, I deduct the charge for demurrage both at Falmouth and at Boston, as not coming within the rule settled in Williamson v. Barrett, 13 How. [54 U. S.] 101, 111, 112. The rule was very deliberately settled in that case, and will be strictly adhered to. The charge for lay days in a charter party, as agreed upon by the parties, and which depends upon no principle, furnishes no test to determine the damages for detention during the repair of a vessel, in a case of collision.

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

HERMANCE (BUCK v.). See Cases Nos. 2,081 and 2,082.

HERMANCE (UNITED STATES v.). See Cases Nos. 15,355 and 15,356.

HERMANN (DELAUNEY v.). See Case No. 3,757.

HERMANN (MAYER v.). See Case No. 9,344.

Case No. 6,409.

The HERMINE.

[3 Sawy. 80; [1] 6 Chi. Leg. News, 398.]

District Court, D. Oregon. Aug. 18, 1874.

DESCRIPTION OF VOYAGE — SUIT FOR WAGES AGAINST FOREIGN SHIP — DESERTION — CONTRACTS WITH SEAMEN—QUANTUM MERUIT.

1. Under the merchant shipping act of England of 1873, the shipping articles need only

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

specify the maximum duration of the engagement of a seaman, and the places or parts of the world to which it does not extend: *Held*, that a specification of the places to which the voyage or engagement might extend, was an implied agreement that it was not to extend to any other, and therefore a sufficient compliance with the act.

2. A court of admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master.

3. Semble, that the court will not decline jurisdiction where it appears the seamen have been discharged with their own consent before the expiration of the voyage, without the payment of wages already earned, or any agreement or understanding concerning them.

4. A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not, and therefore where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion.

5. Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside or disregarded by courts of admiralty if inequitable.

6. Quantum meruit, what seaman entitled to on.

[Cited in The Topsy, 44 Fed. 636.]

Addison C. Gibbs and Ellis Hughes, for libellants.

William H. Effinger, for claimants.

DEADY, District Judge. Peter Whelan and five others bring this suit against the British bark Hermine to recover the sum of $489.98 alleged to be due them as wages for services as seamen on said bark, on a voyage from Liverpool to this port.

The libellants shipped on the Hermine at Liverpool on January 21, 1874, as ordinary seamen, "on a voyage from Liverpool to Portland (Oregon), and any ports and places in the Pacific, Indian and Atlantic oceans, China and Eastern seas; thence to a port for orders and the continent of Europe (if required), and back to a final port of discharge in the United Kingdom: term not to exceed three years;" at the monthly wages of 3 pounds 5 shillings.

It is alleged in the libel, that the libellants, during the voyage, were "fed upon very poor food, of such poor quality as to endanger their health and render them liable to scurvy and other sickness," and that therefore they asked for their discharge at this port, "unless they could be better treated and fed," and that thereupon the master discharged them, but refused to pay them their wages.

The answer of the claimants, G. H. Fletcher & Co., of Liverpool, denies that the libellants were poorly fed or otherwise improperly treated on the voyage, or that they left the vessel on that account, or that the master discharged them, and avers that the libellants deserted the vessel and thereby forfeited their wages.

The Hermine arrived at this port on August 5, and a few days afterwards the libellants asked the master—Alfred H. Hiscock—for their discharge. He replied that he was willing to discharge them if they would forfeit the wages earned, as he would have to pay double or more wages for seamen in this port, to take their place. Roberts wanted $15 but finally agreed to take $5. Rogers agreed to the same terms; and the others said they would forfeit their wages if the master would give them a legal discharge.

On the following day, Monday, August 10, the libellants, by the direction of the master, met him at the British consul's office. The matter was then stated to the consul, who declined to discharge the men unless they were paid in full. This the master declined to do, and the consul directed the men to return on board. Some conversation then ensued between the master and the men, the latter being still anxious to leave the vessel, the result of which was, that the former promised if the libellants left, he would not arrest them. Thereupon the libellants returned to the vessel, and after some hours the master followed. The result was that the master paid the men from $3 to $4 apiece, except Roberts, to whom he paid $8, when they took their effects and quietly went ashore on the same day. In addition to these sums they had each received a month's wages in advance, and $6 from the slop-chest on the voyage.

The master did not expressly assent to the libellants' quitting the ship, but he had good reason to believe they would do so, and took no means to prevent it. In fact, the money paid libellants was given to and received by them with the tacit understanding that if they were allowed to clear out without being troubled or arrested, they would make no further claim against the vessel.

The libellants had no cause to complain of their treatment on the voyage. On the trial they testified that the beef and bread were bad, but the weight of evidence is that both were as good as is usually furnished at the port of Liverpool. They were otherwise very well supplied and cared for, and were in good health during the whole of the long voyage. Neither did they complain of bad food or ill treatment of any kind to the British consul, although they had ample opportunity to do so, if they desired; nor did they leave the vessel on that account, but so far as appears, for the purpose of bettering their condition in a pecuniary point of view. The wages out of this port average $40 per month—more than twice the rate at which they were engaged to serve on board the Hermine for the next two and a half years.

It is admitted that the answer correctly describes the voyage set out in the shipping articles, but the libellants maintain that the

description of the voyage beyond this port is so vague and uncertain as to render the contract so far void, and therefore the libellants are entitled to their discharge and wages here as being the legal end of the voyage.

The contract having been made in a British port for service on a British vessel, its validity must depend upon the law of that country. This is the general rule of law, and it is particularly applicable to cases like this in the admiralty courts, which "are in some sense international courts charged with the duty of declaring the law applicable to ships." The Acme [Case No. 27]; The Jerusalem [Id. 7,293]; The Infanta [Id. 7,030].

Section 149 of the English merchant shipping act, 1854, provides that the shipping articles shall, among other things, contain the following: "The nature and, as far as practicable, the duration of the intended voyage or engagement."

The merchant shipping act, 1873, amends this section, so that the agreement, "instead of stating the nature and duration of the intended voyage or engagement," may "state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend."

No English authorities have been cited upon the construction of this provision, but I think that under the act of 1873, if not the one of 1854, the description of the voyage is sufficient. The maximum duration of the engagement is fixed at three years, and although the articles do not expressly "state the places, or parts of the world" to which it is not to extend, I think they do so sufficiently when they mention "the places, etc.," to which it may extend. By a necessary implication all other "places or parts of the world" than those mentioned are excluded from the engagement—it does not extend to them.

Upon this point counsel for libellants cite Snow v. Wope [Case No. 13,149], in which the agreement was held void, because the articles only described the voyage as being "from the port of Boston to Valparaiso, and other ports in the Pacific ocean, at and from thence home, direct, or via ports in the East Indies or Europe," without any limitation upon the time to be occupied in making such voyage. The court held that the agreement was void because it did not comply with the act which required that the agreement should declare "the voyage or voyages, term or terms of time," for which the seamen may have shipped. But in the case at bar, the duration of the engagement is limited, and it is to be inferred from the opinion of the court in Snow v. Wope [supra], that if there had been a like limitation in that case the court would have held the agreement valid notwithstanding no definite or specific voyage was described in it.

On the part of the claimant it is objected that this being a suit for wages earned by foreign seamen on board a foreign vessel, the court ought to decline the jurisdiction and remit the libellants to the tribunals of their own country. Upon this point counsel cites The Napoleon [Case No. 10,015]; Graham v. Hoskins [Id. 5,669]; Davis v. Leslie [Id. 3,639]; The Infanta [supra]; Bucker v. Klorkgeter [Id. 2,083].

The rule established by these cases is to the effect that the court will not take jurisdiction in such cases unless it is necessary to prevent a failure of justice, as where the voyage has been completed or abandoned, or the seamen discharged, or the contract otherwise dissolved by the wrongful act of the owner or master.

These cases were all decided in the same court, and they carry the rule against the jurisdiction to the extreme. In considering this question, in Ben. Adm. § 282, it is said that "nothing within the territory of a nation is without the jurisdiction. * * * In the present state of international intercourse and commerce, all persons, in time of peace, have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty." In The Jerusalem [Case No. 7,293], Mr. Justice Story states the rule as follows: "Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent in which foreign courts have sustained the claim for mariner's wages."

In any view of the matter, this appears to be a proper case for exercising the jurisdiction. The libellants allege that they were discharged by the master in this port without the payment of wages. If the libel be true the voyage is terminated as to them by the wrongful act of the master. Under such circumstances it would be mere mockery and a denial of justice to remit the libellants to the forums of Great Britain, for, being discharged in this port, they are practically denied the means of access to such forums. Indeed, I think the court ought not to decline the jurisdiction, even if it appeared that the libellants were discharged with their own consent without the payment of wages or any agreement or understanding upon the subject, or upon terms that are manifestly inequitable and unjust. In such case they ought to recover as upon a quantum meruit. Being separated from the vessel with the consent of the master, if they are not allowed to enforce any claim which they may have

against her, in this court, it is a practical denial of justice.

But upon the facts of the case the libellants appear to have been guilty of desertion. They cannot complain that the master was aware of their intention to quit the ship and took no means to prevent it or to compel their return after they had left. That is a matter between him and his owners. He may have had good reason to believe, as he stated in his testimony, that they would leave the ship in spite of him, and that it was no use to try to prevent it. That they shipped with the intention of making their way to this coast and then deserting the vessel.

However this may be, the libellants were bound by their contract with the owners to stay by the ship until the completion of the voyage, unless they were actually discharged by the master, or so mistreated as to justify their leaving without his consent. They had no right to leave the ship simply because they could do so, or because the master assured them that he would not trouble them for it if they did. Even if it could be said that the master connived at their quitting the ship, their act was none the less desertion. In so doing they willfully violated their contract with the owners, and they cannot now evade responsibility therefor, by showing that the master was aware of their intention, and took no means to prevent it.

Of course, the master is the agent of the owners, and if it appears that by any artifice or representation he had induced the libellants to quit the vessel under an impression that they had a right to do so, the case would be altered.

But I do not think there is any ground for supposing that the master desired to get rid of these men without paying them their wages. No motive is shown for any such conduct, and so far as appears, the vessel can gain nothing by their leaving, even without their pay. But with the libellants the case is otherwise. They evidently acted upon the fact that they could command more than double the wages, in or out of this port, they were receiving on the Hermine. The pretense that the food was substantially bad, or that they were otherwise ill-treated, is evidently an after-thought. If the food was bad they could and should have complained to their consul, especially when they were before him on this very subject of being discharged.

But supposing it to be true that the libellants not only left the vessel with the knowledge of the master, but also with his consent, still I do not think they are entitled to recover.

In the first place, upon this theory of the case all the circumstances attending the payments made them before leaving, go to prove that such payments were made and received in satisfaction of any claim the libellants might have against the ship for their services. It was competent for them to agree with the master to quit the vessel, and receive so much for their services. True, a court of admiralty, in the interest of the seamen, will look into such contracts and dealings, and if any substantial advantage has been taken of them, so far disregard them, and do justice in the premises.

In the second place, if the libellants were discharged without any understanding or agreement as to the payment of wages, then they ought to recover such sum, if any, as under all the circumstances they are equitably entitled to—as upon a quantum meruit. Under the circumstances what are their services worth to the vessel? Allowing the monthly rate of wages mentioned in the articles, according to the libel there is due the libellants about eighty-one dollars apiece at this port. To supply their places from here to Liverpool, allowing four months for the voyage, at forty dollars per month, will cost one hundred and sixty dollars per man. The difference between that and the price the libellants agreed to perform the same services for is ninety dollars per man—more than the sum claimed by the libellants. It follows that the libellants, having failed to perform their contract, are not equitably entitled to anything, because all the circumstances considered, their services are not worth so much to the vessel as they have received for them.

And this is so upon the supposition most favorable to the libellants—that the Hermine will return to Liverpool direct; for, by the terms of their contract, they might be required to serve two and a half years before being discharged, and to supply their places during all this time at the enhanced wages of this port, or the other seas mentioned in the articles, would add very much to the loss sustained by the vessel.

Let the libel be dismissed, and a decree entered for the claimants for costs.

Case No. 6,410.

The HERMITAGE.

[4 Blatchf. 474;[1] 44 Hunt, Mer. Mag. 73.]

Circuit Court, S. D. New York. Oct. 30, 1860.

CHARTER-PARTY—VIOLATION—LIBEL—MISTAKE IN AGREEMENT.

1. Where, under a charter of a vessel, the charterer put a cargo on board, and then took it out and refused to fulfil the charter-party, alleging that it had been violated by the owner of the vessel, and the charter-party gave to the owner a lien on the cargo for a breach by the charterer: *Held*, that the lien attached as soon as the cargo was put on board, and that the owner could libel the cargo in rem, in the admiralty, for the breach.

[Cited in Scott v. The Ira Chaffee, 2 Fed. 406; Blowers v. One Wire-Rope Cable, 19 Fed. 446; The Director, 26 Fed. 710; The Missouri, 30 Fed. 384.]

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

2. Where the meaning of a charter-party is clear, a claim that there was a mistake in it, or that it does not express the intent of the parties, cannot be set up in defence, in a suit in rem, in the admiralty, for a breach of it.

[Cited in The General Sheridan, Case No. 5,319; The Williams, Id. 17,710; The William Fletcher, Id. 17,692; The Monte A., 12 Fed. 332; The Baracoa, 44 Fed. 103; The Guiding Star, 53 Fed. 943.]

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

This was a libel in rem, filed in the district court, by Robert Latta, as owner of the bark Hermitage, against the cargo of that vessel, to recover freight under a charter-party, entered into between the libellant and Messrs. Abranches, Almeida & Co., merchants, for the employment of the vessel on a trading voyage from the port of New York to the west coast of Africa, and back to New York, with the privilege of continuing the voyage for a year. The owner engaged to keep the vessel well fitted, tight and staunch, and provided with every requisite necessary for such trading voyage, excepting captain, crew and provisions, and that the whole vessel (with the exception of the cabin, the deck, and necessary room for the accommodation of the crew and stowage of sails and cables) should be at the sole use and disposal of the charterers; and that no goods or merchandise should be laden on board otherwise than from them. The owner also bound himself to receive on board the vessel, during the voyage, all such lawful goods and merchandise as the charterers might think proper to ship. The charterers engaged, on their part, to provide the vessel at all times sufficient cargo for ballast, and to pay for charter or freight, during the voyage, $450 per month, and all foreign and domestic port charges, &c., &c., payable $800 at the expiration of every four months, in New York, and in full on the discharge of the vessel. The charter was to commence when the vessel was in her berth for loading and reported to the charterers, and was to cease when the vessel should have returned and discharged her cargo in New York. For the fulfilment of the several stipulations each party bound himself to the other, the one, the ship, freight and tackle, the other, the merchandise to be laden on board. The cargo was put on board of the vessel in New York, by the charterers, preparatory to the voyage, but, before she started on her voyage, a question arose in respect to the rights of the charterers under the charter, the latter claiming the use of the cabin for the accommodation of passengers to be received on board, which was refused by the owner. Thereupon the charterers commenced taking out the cargo and refused to fulfil the charter-party. The libel was filed to recover freight for the use of the vessel, and damages for the non-fulfilment of the charter-party. The claimants excepted to the libel, and the district court sustained the exception, and dismissed the libel. The libellant appealed to this court.

Erastus C. Benedict, for libellant.
Charles Donohue, for claimants.

NELSON, Circuit Justice. This case does not fall within that class of cases where nothing has been done under the charter of the vessel, that is, where no goods have been placed on board, and the voyage has not been entered upon; in which cases there can be no lien upon the vessel or cargo under the charter-party. In such cases, whether the breach of the agreement is on the part of the owner or of the charterer, there can be no proceeding in rem against the vessel or the cargo, as no lien has attached for the benefit of either party. Here, the voyage had commenced, upon the very terms of the agreement between the parties. The goods were put on board of the vessel, and, if the lien attached at all, it attached as soon as they were laden on board. So far as the form of the remedy is concerned, it is the same as if the voyage had been broken up by the charterers at any other point in the course of the voyage, after the vessel had been out a week, a month, or longer. The real question, therefore, in the case, is, whether the claim set up by the charterers to put passengers on board, to occupy the cabin, was well founded. If it was, then the refusal of the owner to allow such claim was a breach of the charter, and the charterers had a right to put an end to the contract. If not, they were in fault, and the cargo is chargeable for freight and damages.

The charter, which is a very special and well-drawn instrument, clear and readily understood in every part of it, in terms reserves the cabin. It is insisted, however, that this is a mistake, and is inconsistent with other parts of the instrument, and that without the use of the cabin by the charterers, the voyage could not be performed, and that thus the reservation would defeat the contract. But, if there has been any mistake in the charter, or if its terms do not express the intent of the parties, there is another mode of settling the question than calling on the court, in this proceeding, to disregard its clear and undoubted meaning, and that is, to institute a proceeding to reform the contract. As to the objection that the clear words of the charter would necessarily defeat the whole object of it, and the purpose of the parties in entering into it, I am unable to see this consequence. I do not think the reservation necessarily excluded the master from the cabin, for, although he was to be appointed by the charterers, he was, in a qualified sense, the master of the owner. The owner had duties to perform in respect to the vessel, and some of them appropriately belonged to the master, and in them he, as master, was specially concerned. The possession of the vessel was not to be exclusively in the charterers, neither by the terms of the instrument, nor necessarily, regarding the nature and purpose of the voyage. This construction arises

out of the words used by the parties to the contract.

As respects the lien upon the cargo on board, the charter is express. If the breach of the contract had been on the part of the owner, there would, by the contract, have been a lien upon the vessel.

The decree below must be reversed, and a decree entered for the libellant, with a reference to the clerk to ascertain the freight and damage.

Case No. 6,411.

The HERMON.

[1 Lowell, 515.] [1]

District Court, D. Massachusetts. 1870.

WAGES—SHORT ALLOWANCE—SETTLEMENT.

1. Seamen who were paid their wages in full in a foreign port and demanded their discharge there, but were refused it by the master and by the consul, and left the ship with the connivance of the master, were allowed by the court the two months' extra wages, though the case appeared to be one in which the consul might properly have remitted it; the men not having had the choice presented to them.

2. It seems, that bread carried in a locker which is in a well-built house on deck, is not stowed under deck as required by the act of 1790 [1 Stat. 131].

3. Where an insufficient quantity of bread was provided for a foreign voyage, the crew are entitled to the extra wages if put on short allowance, though the immediate cause of the deficiency was the spoiling of part of the bread by sea peril.

[Cited in Broux v. The Ivy, 62 Fed. 603.]

4. It seems, that flour cooked into good bread by the ship's cook, and served out in that form may be a substitute for ship-bread, though flour served out to the men would not be.

5. Where the crew had the full navy ration of meat, and a short allowance of bread and of other articles, like beans, rice, &c., they were held entitled to but one extra day's pay for each day's short allowance.

6. A foreigner shipped at a foreign port, and discharged at a foreign port in accordance with his contract, is not entitled to two months' extra pay.

[Cited in Gove v. Judson, 19 Fed. 524.]

7. A settlement deliberately made by a seaman with the advice of his proctor will not be opened.

[Cited in Wilson v. Borstel, 73 Me. 275.]

The libellants demanded a balance of their contract wages for the voyage from Baltimore to Acapulco, thence to Callao, the Chincha Islands, Gibraltar, and Valencia; two months' wages for their discharge at Valencia, and a very large sum for alleged short allowance of bread and meat during a considerable part of the fifteen months of the voyage. The answer averred that the men were paid in full at Valencia, and that each signed a receipt which was read by or to him and understood; that they afterwards deserted the ship, and so forfeited the two months' wages; that although there was short allowance for a few weeks, ending at Gibraltar, this was caused by a disaster, and was not in either bread or meat, but only in peas, beans, and rice.

The first question was whether the contract wages were paid in full at Valencia. Here, and throughout, there was an irreconcilable contradiction between the witnesses. The master promised to pay the men, and he produced their receipts in full. He and the mate swore that the crew were called separately into the cabin, and that their accounts were explained to them and the balances paid in gold or its equivalent, in some cases after discussion of items. Each man swore to the sum which he received, which in no single instance agreed with the receipt and with the master's statement. The judge found as matter of fact that the men had been paid in full at Valencia, and that the articles were ambiguous in their description of the voyage, so that it might well be a question whether it ended at Valencia, and continued:—

C. G. Thomas and J. J. Storrow, for libellants.

H. W. Paine and R. D. Smith for claimants.

LOWELL, District Judge. The next question is whether the men were entitled to two months' extra wages. It is said that the statutes of 1803 [2 Stat. 203], 1840 [5 Stat. 394], and 1856 [11 Stat. 52], taken together, admit of no other construction than that men who are discharged in a foreign port must have the statute compensation, even though the voyage, by its terms, ends in that port, unless the consul remits the payment in certain contingencies. This is a point of some nicety. The ninth clause of the act of 1840 gives the consul power to remit the extra pay if the seamen insist on their discharge and the master is in no fault. The present case seems to be one eminently fit for such action on the consul's part, because the seamen insisted that the voyage was ended, thus bringing themselves directly within section nine of the act of 1840, and I regret that it was not taken. Instead of this the master appears to have devised a fictitious desertion. It is plain that the desertion was planned beforehand with the master's consent, because he never would pay his men in full and let them all go on shore if he expected to reclaim them. Under these peculiar circumstances, I ought to give the men the two months' wages, because for some reason or other the master failed to get the consul's consent to their remission, and his defence of a desertion utterly fails. Perhaps I could remit the wages, though the consul had not been called on, in some cases; but in this the crew were not treated on the footing of persons discharged, but as deserters, which they were not. If the crew had been clearly shown the alternative, I do

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

not know what they might not have chosen to proceed in the vessel rather than forfeit the extra pay; nor can I tell what facts or arguments they had it in their power to exhibit to the consul or to me, why they should be discharged on the usual terms. The question has never been fairly presented to them, nor the issue fairly made up. I cannot say what the consul's views were. If he thought the voyage was not up, I do not understand why he should advise that the men be paid off; and if it was up, he should have adjudicated this matter of the extra wages. For deserters, the men were treated remarkably well; and for persons entitled to be discharged, not so well. They were to be deserters, I suppose, to the extent of forfeiting their extra wages, but for no other purposes. This desertion quo ad hoc is new to me.

The remaining question concerns the alleged short allowance. The seamen do not agree very well with each other or with the witnesses for the claimants on this matter. I have read over the evidence with some care, and am not satisfied that there was short allowance of bread or meat until some time after the disaster off Cape Horn, which occurred about seventy-two days before the ship arrived at Gibraltar. The libel which was first filed said nothing about short allowance. The others state it, as I have said, variously. Whether the time of the vessel's stay at the Chincha Islands, waiting for guano, can be called a voyage, and if so, how long a voyage, under the statute, I consider to be doubtful. But I do not find in the evidence that there was any short allowance at that time, nor until about sixty days from Gibraltar. Off Cape Horn, in a very severe gale, the ship was much injured, especially by heavy seas, which broke in the cabin doors and windows, and spoiled a good deal of the bread which was in the locker made for the purpose in a place usually adopted for lockers in large vessels in this trade. It has been a point of dispute whether this locker was under deck as required by the statute. The evidence shows that the cabin was on the main deck, in a very strong and well-built house, and that the poop deck came over a part of the cabin, but not over that part in which the locker was situated. In common speech, the locker was in a house on deck, and I am inclined to the opinion that it was not under deck in the sense of the statute. It was in almost as good a place; but, as was said in argument, a deck usually extends to the sides of the ship, and a house, with windows, is of a different construction, and, as the event proves, somewhat less secure. But this point need not be decided, because there was not enough bread provided. It cannot well be maintained that the voyage from Callao to Gibraltar is less than three Atlantic voyages;—the answer says between two and three—and there were twenty-three persons on board the ship. The answer puts the amount of bread at a little more than would be necessary for one voyage, and supposing bread to have been impossible to obtain, which the evidence perhaps tends to show, though not very clearly, and assuming that this would be a valid excuse, and counting flour to be a substitute, the amount of both stated in the answer is scarcely more than enough for two Atlantic voyages. I consider that the substitution of flour, which is cooked by the ship's cook into good and wholesome bread, may be a substitute for ship-bread. The intimation of Judge Sprague to the contrary was in a case where the flour itself was served out to the men, and it did not appear that they could prepare it conveniently: Foster v. Sampson [Case No. 4,982].

All the evidence shows that after the disaster the men were on allowance of bread while it lasted, and afterwards of flour, some witnesses say a pound, and some less. Judge Sprague has decided, and Judge Betts has expressed the opinion that while the navy ration is the usual standard for bread or meat, yet if there is a want of other articles, the deficiency ought to be made up in bread or meat. Which means, I suppose, that there is no absolute standard of quantity for those articles taken by themselves, and while somewhat less than the navy ration of bread, for instance, may do when there is abundance of other vegetable food, somewhat more must be given when there is a want of other things. And in this case it is clear that there was a short allowance in this sense, for about sixty days. If this could be attributed to the storm alone, it ought not to be visited upon the owners; but the statute requires very great quantities to be laid in, with a view partly to provide for accidents and contingencies, and if the requisite quantity of bread had been provided, there is every reason to believe that enough would have escaped injury to leave ample provision for the remainder of the voyage, since only a part of the bread in the locker and none in the poop was injured. Of meat the men appear to have had a pound a day throughout; and I am not prepared to say that this was short allowance to entitle the men to two days' extra pay, for that and bread too. The rule in this district, affirmed by the circuit court, is that every day's short allowance of each of the three articles mentioned in the statute entitles the men to a day's wages; that is, two days' wages for each day that two are short, and so on: Collins v. Wheeler [Id. 3,018]. But when the short allowance is general, and not specially of meat, but of beans, rice, &c., I do not consider it just to say that they are short of both bread and meat, when an extra allowance of bread would have sufficed to prevent their suffering. Of animal food they had all that the navy ration calls for: of bread or its substitute, it is doubtful whether they had even that, and at any rate they

had less than they ought to have had in the dearth of other articles. This is shown, among other things, by the captain's intention to put into Pico or Madeira had the wind and weather permitted; and indeed by the fair preponderance of all the evidence.

It seems to me, therefore, that the libellants, excepting Gardner and Peterson, are entitled to four months' extra wages; two for their discharge at Valencia, and two for short allowance of bread. Gardner has been paid, since action brought, a sum which he accepted with the advice of his proctor in full settlement. I do not feel at liberty to disturb such an arrangement. Peterson is not, in the language of the act of 1803, "designated on the list" as a citizen of the United States, but as living in Denmark. He shipped at Callao for Gibraltar and a port of discharge, and was discharged by the consul at Valencia, who certifies that he has been fully paid. If one so shipped were proved to be, in fact, a citizen of the United States, the contract might not in all cases be conclusive against him; but if a foreigner serves from one foreign port to another, perhaps to his own home, on an American ship, I do not know why he should demand payment beyond his contract for being discharged there, even if he in fact wishes to go to the United States. He can only have damages for the short allowance. Decree accordingly.

Case No. 6,412.

HERN v. The ANTHRACITE.

[2 Leg. & Ins. Rep. (1860) 58.]

Circuit Court, E. D. Pennsylvania.

COLLISION—TUG WITH TOW—FREE STEAMER.

1. Although it may be true, as a general rule, that a free steamer, meeting a tug incumbered by tows, must keep out of the way, yet it does not follow that the tug with the tows can monopolize the channel, or disregard the rules of navigation, going where and how she pleases, without regard to the rights and conveniences of others.

2. The rule that all steamboats bound up or down the river, with vessels in tow, should keep as near the right-hand shore as their respective drafts of water will permit, is a just and proper one.

3. Though a tug may be unable to stop or back tows attached to her by a hawser, and that duty, therefore, be cast upon the unincumbered boat, yet this inability will not justify the tug in disregarding the rule of porting her helm, and keeping to the right or starboard side of the river or channel.

[Cited in The Alleghany, Case No. 204.]

4. If it be necessary that tows shall be taken from one slip to another, attached in this manner, those who manage them should be bound to use the utmost care and caution. A course should be taken least likely to interfere with others, or imperil the tow.

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

[In admiralty. Suit by Henry Hern against the steamer Anthracite.]

GRIER, Circuit Justice. I cannot bring my mind to the conclusion that the blame of this collision is to be attributed wholly to the Anthracite. Although it may be true, as a general rule, and under many circumstances, that a free steamer, meeting a tug incumbered by tows, must keep out of the way, yet it does not follow that the tug with its tow can monopolize the channel, or disregard the rules of navigation, and go where she pleases,—spread herself as wide, and make herself as long, as may suit her convenience, without regard to the convenience and rights of others. Indeed, the existence of such a rule is denied altogether in the case of New York St. Co v. Philadelphia St. Co., 22 How. [63 U. S.] 472. Nevertheless, there may be cases in which the parties should be held to its observance. A tug is unable to stop or back tows attached to her by a hawser, and therefore that duty may be fairly cast upon the unincumbered boat. But this inability will not justify her in disregarding the rule of porting her helm, and keeping to the right or starboard side of the river or channel. It is truly said, in the case just quoted, "that those in charge of such boats ought to augment their vigilance in proportion to the embarrassments they have to encounter."

The rule laid down by Judge Kane in Flannery v. The Ontario [Case No. 4,856], "that all steamboats bound up or down the river, with vessels in tow, should keep as near the right-hand shore as their respective drafts of water will permit," is a very just and proper one. Those who thus incumber themselves should not unnecessarily embarrass others, and call out to all persons, "Keep clear of us, at your peril!" It was well observed in the last-mentioned case, "That to exempt herself from liability, the tug or towing steamboat must be careful not to heighten the risk of herself and others by any want of prudence either in the disposition of the convoy or in the manner of navigating it; the number and size of the vessels which she takes in tow, (and I would add the mode of their attachments,) should have careful relation to her power of regulating their movements, to the nature of the voyage, the number of the vessels to be passed by the way, and the facilities of the particular navigation." It may well be doubted whether the master of a tug which is conveying boats from one slip or dock to another in the crowded harbor of Philadelphia, is acting with prudence or caution in attaching them to his boat by a long hawser. His course is necessarily circular, his tow not under his control. He sweeps the harbor like a net; he embarrasses all others coming out or going in the dock, or passing down the river within the points of his departure and destination. If it be necessary, which I doubt, to the navigation of

this port that tows shall be taken from one slip to another attached in this manner, those who manage them should be bound to use the utmose care and caution. The person at the helm of the tows should have experience and judgment. The tug should take a course least likely to interfere with others, or imperil his tows. His maxim should not be "Caveat ille, ego non cavebo!" If he chooses to incumber himself with a tow which he cannot control, he has no right to impose upon others the duty of avoiding its eccentricities of motion, and the blame for accidents consequent thereon.

With these remarks on the general principles which have been ventilated in the argument as applicable to this case, let us proceed to notice more particularly the peculiar circumstances attending this collision. The Anthracite is a propeller, which navigates the bays and the canal across New Jersey, about twenty-three feet wide, slow and sluggish in her motion. She was coming down along the eastern shore of the river, in the harbor of Philadelphia. She was in her proper place, about fifty yards from the wharf, intending to pass between the wharves and a sloop anchored at some distance from them; but, the master finding that a line had just been run from the sloop to the wharf, he was compelled to run on the outside of her, and alter his course for this purpose; he then discovered the tug about four hundred feet below the sloop; it passed about sixty feet wide of her. It afforded ample room for the Anthracite, accustomed to pass through much narrower places, and under no great headway, to pass without danger. I don't think any very satisfactory result, as to the distance between the tug and the sloop, can be effected by averaging the conjectures of the witnesses. The libel alleges sixty feet, and if it was less than forty, as estimated by the captain of the sloop, the master of the tug was guilty of the first act of imprudence and negligence, in dragging his tows so near to the sloop that any want of skill or care by the steersman of the tows might bring them into a collision with it. Less than the distance alleged in the libel would leave the master of the tug justly liable to blame for want of care and judgment in conducting his tows, and if he was aware beforehand of the impediment connecting the sloop with the wharf, and saw the approach of the Anthracite, it was his duty to have gone further out in the channel, by porting his helm. The pine wood on the deck of the sloop hindered the master of the Anthracite from immediately perceiving the tows. When he first observed the tows shearing in towards the sloop, he was about three hundred feet from them, and he slowed his boat, supposing he could pass. He might have stopped her altogether, and ought to have done so. But, though this mistake in judgment may have been one of the causes of his collision, I am far from being of the opinion that the whole blame rests on him. The witness Taylor, captain of the sloop, was in a situation to see distinctly, and judge correctly of the persons who brought about this collision, and is without bias from any connexion with either party. He says, "When the tug went off from Vine street, she did so quartering across the river; she passed from thirty to forty feet from me, probably more. There was plenty of room for the Anthracite to pass. Just before the tug got up to me I hallooed out to the fellow steering the canal boat to keep her off or he would be into me. He was coming so much towards me that a man on deck of the canal boat went forward and picked up a fender to keep off of me; she got another shear on her, and cleared me about eight feet. I don't think the man at the helm of the tow was minding his business, or he would not have been so close to me; he sheared out again when I hallooed. He was gawking,—looking at the town,—instead of following the tug. If the tow had been properly after the tug, there would have been no collision. The Anthracite was going a little ahead; at the time of the collision they had partly stopped her. The tug was going at the rate of six miles an hour; the tug had stopped, pretty much so, but the canal boat was going by at the rate of six miles an hour. In my opinion the fault of this accident was that of the man at the helm of the canal boat." Now, here we have not only the man at the helm either totally incompetent, or utterly inattentive to his duty. But the master of the tug, when he saw there might be danger of a collision, did the only thing which could render it certain, —he stopped the tug. He might as well have cut the hawser. He left the tows under a high momentum, without any power to correct their course. A grosser case of mismanagement can hardly be imagined. It would be very improper for the propeller to have attempted to cross the bows of the tug; but her master had time, after he saw the tow approaching in this irregular manner, to have entirely stopped and backed his boat. But I do not think that there is such an unavoidable tendency of tows to shear or pursue a zig-zag course, if properly managed, that the master of the propeller was bound to anticipate it, or to have regulated his motions on the presumption that the tow will not follow the line of direction given it by the tug, or that the steersman is incompetent, or gazing or "gawking" around, and paying no attention to his duty. We cannot proportion the damages; the collision cannot be classed with those that are inevitable, or without fault on either side. Nor can the damages be assessed according to any ratio of degrees of blame; but where both are in fault, the damages must be equally divided. The case is referred to the clerk, as commissioner, to report the amount of damage to the propeller, if any; that of the tow appears to have been ascertained by the commissioner

on the trial in the district court [case unreported], and no exception has been taken to his report.

Case No. 6,413.

HERNANDEZ v. AURY.

[1 Jour. Jur. 131.]

District Court, D. South Carolina. March, 1818.

PRIZE—FOREIGN VESSELS.

The district courts of the United States will not assume jurisdiction of prize matters of foreign nations occurring upon the high seas flagrante bello.

In admiralty.

DRAYTON, District Judge. The defendant has been brought before me, by a writ of habeas corpus cum causa, upon which the marshal has returned that the body of the defendant is detained by virtue of a process from the court of admiralty, issued on the 16th inst., in the above case. Upon inquiring into the merits of that process, it appears to be founded on an affidavit and petition for process in the admiralty, of Hugh E. Vincent, in the following words: "That on the 19th day of May, in the year of our Lord one thousand eight hundred and fourteen, the Spanish schooner Conception, owned by —— Hernandez, merchant, at the city of Matanzas, in the island of Cuba, of which Juan Fabre was master, and your petitioner navigator, or second officer, sailed from Portland, in the district of Maine, bound to Matanzas, in the island of Cuba, with a cargo of beef, lumber, and other articles; that on the 20th day of June following, being in the Old Straits, fell in with the Carthaginian privateer schooner Velona, or a name very similar thereto, commanded by —— Aury, commonly called and known as Commodore Aury; that a considerable number of articles, belonging to the said schooner, were first taken from her by the crew of the said privateer; that the crew of the said schooner Conception were taken out of her, and carried on board the said privateer; when the said schooner was taken possession of by the said privateer and sunk. The crew of the schooner were put on board an open boat, and with considerable hazard and difficulty reached the shore on the island of Cuba. Your petitioner further states, that the value of the cargo was about four thousand dollars, exclusive of the probable profit, which would have accrued, if it had been carried to its port of destination. That the said schooner, at least, was worth four thousand dollars, being sound and stanch, and about one hundred and five tons burthen. Your petitioner further shows, that he has good reason to believe that the said —— Aury is now in the city of Charleston, within the jurisdiction of this court. Your petitioner therefore prays that a warrant to arrest the body of the said —— Aury may issue out of this honorable court, in order that he may answer to the said owner of the said schooner, and all others concerned, for the sinking of the said schooner and cargo; and your petitioner, as in duty bound, will ever pray. H. E. Vincent."

Two grounds have been relied on by Cross, counsel for the defendant: 1st. That both the plaintiff and defendant are foreigners; as appears by the petition for admiralty process, which has been sworn to. That the plaintiff is not within the territory or jurisdiction of the United States, and, although the defendant be at present under the process of the court of admiralty for this district, yet he is a foreigner, unwilling to submit his case to the consideration of the court. 2dly. That the present actor, H. E. Vincent, has no authority to institute a suit of this nature, from the nominal plaintiff, Hernandez, and others, owners of the said Spanish schooner Conception and cargo.

Upon the first ground, the arrest in this case must be dismissed; for it must be recollected, the gist of the matter in dispute is prize or no prize: and upon that, the charge of a marine tort or trespass is superinduced. And as a neutral tribunal, this court of admiralty will carefully avoid taking cognizance of prize matters of foreign nations, occurring upon the high seas, as this is stated to have been. Whatever happened on the occasion at sea, was flagrante bello, betwixt the contending parties; involving directly the question of prize: of course this court will not assume jurisdiction. On this point, the cases in the books are many. It might be otherwise, when a tort is only considered as a marine trespass, and not an incident of a case jure belli. The Invincible [Case No. 7,054]; [Waters v. Collot] 2 Dall. [2 U. S.] 248. Had, indeed, the Conception been brought into this port after the capture, and before condemnation, and any claims had been set up, on the principle of the jus post liminii, by citizens of the United States interested therein, it might have been otherwise; agreeable to the case of Rose v. Himely [4 Cranch, (8 U. S.) 241], and others, which may be cited; it would then have been a matter in rem, suitable for the consideration of this court. But it being otherwise, as for my present consideration, being one in personam, for damages as for a marine tort or trespass, arising from a capture at sea; which, being incidental to the question of prize, must be subjected to the conclusions which I have already drawn on that head.

It is not necessary to enlarge on the second point, as the case is disposed of on the first. It appears, however, that Vincent, who petitioned for admiralty process in this case, is unauthorized on behalf of the owner to do so; and he being a navigator or pilot, only, on board, I should presume, would not place him in that near affinity to the owners of the vessel and cargo, as would enable him to substitute himself for their benefit and be-

hoof in carrying on a suit in a foreign court, without any other authority. Before I dismiss the subject, however, it is proper to observe, this opinion has been entirely grounded on principles touching these two points, which have been argued, and upon them alone. Nothing has been considered as to the military grade of the defendant who is before me; or the authority by which he acted at the time the capture was made. To have touched these heads, would have been to lose sight of that line of neutrality, which the courts of the United States have holden on all matters relating to foreign nations, and particularly to Spanish collisions in the present contest in which the subjects of Spain are engaged. Let the defendant, Aury, be discharged, and the costs incurred be paid by Hugh E. Vincent, the actor in this cause. It is further ordered and adjudged, that the suit instituted in the admiralty against the said Louis Aury, be dismissed with costs.

Case No. 6,414.

HERNANDEZ et al. v. NEW YORK MUT. INS. CO.

[6 Blatchf. 326.] [1]

Circuit Court, S. D. New York. March 19, 1869.

MARINE INSURANCE—INTERPRETATION OF POLICY.

1. The case of Hernandez v. Sun Mut. Ins. Co. [Case No. 6,415], affirmed.

2. It makes no difference, on the question as to whether a policy insures against the loss of 6,000 boxes of lemons as a whole, or against the loss of each separate box, whether the policy, after naming the valuation of the lemons per box, does or does not name the total valuation, at that rate, of the 6,000 boxes.

This was an action [by Francisco Hernandez and Juan Pedro Hernandez against the New York Mutual Insurance Company] on a policy of marine insurance. The facts in the case differed from those in the case of the same plaintiffs against the Sun Mutual Insurance Company [Case No. 6,415] in particulars wholly unimportant. The insurance in this case was—"$3,800, on 4,000 boxes raisins, in wholes, ½s., and qrs., vald. 190c. ea., $7,600; $11,200, on 6,000 boxes lemons, @ $4.25 ea., $25,500. Gold. Raisins subject to ten per cent. average. Lemons free of particular average, but liable for any portion thrown overboard—" by the same vessel, from Malaga to New York. It was made September 27th, 1867. In all other particulars than those above mentioned, the two policies were substantially alike. There was no indorsement on the policy in this case. Of the 6,250 boxes of lemons which the vessel had on board, 6,000 were those insured by the policy in this case. Of such 6,000 boxes, 3,976 were saved, and delivered in a sound condition, except that a small portion thereof were partially damaged, and there was a physical total loss and destruction of the remaining 2,024 boxes, in consequence of the breaking up and destruction of the vessel before they could be got out. The fact of the subsequent insurance made by the Sun Mutual Insurance Company on said 6,000 boxes of lemons, and on 4,000 boxes of raisins, as set forth in the report of the case against the latter company, was proved at the trial. The insured value of the 2,024 boxes of lemons which were lost, amounted to $8,602, in gold, and the proportion thereof payable by the defendants, if they were liable for such loss, was $3,778.13, in gold. At the trial, a verdict was taken, by consent, for the plaintiffs, for $5,318.89, being the amount of the said $3,778.13, in currency, and with interest thereon to the date of the trial, subject to the opinion of the court, on a case.

Edward H. Owen and Stephen P. Nash, for plaintiffs.

Richard S. Emmet, for defendants.

BLATCHFORD, District Judge. The written words in this case, "liable for any portion thrown overboard," have no legal meaning or effect different from the words, "liable for loss of part by jettison;" and the mode of describing the valuation of the lemons and raisins in the policy in this case, is not different, in substance, from that found in the policy in the other case. All the considerations commented on in the opinion in that case have equal application in this case, except the one as to the provision for a return of premium in case of a prior insurance, the insurance in this case being the prior one. The valuation in the policy in this case, after naming the valuation per box, carries out the total valuation, which was not done in the other case, but such total valuation, and such valuation per box, are equally parts of the valuation, and the putting in of the total valuation can make no difference as to the effect of the valuation per box on the question of a separate insurance of each box.

The defendants, at the trial, offered in evidence the written applications made by the plaintiffs to the defendants for the insurance made in this case, but they were excluded by the court. As the judgment will be for the defendants, the point is unimportant. Judgment for defendants.

Case No. 6,415.

HERNANDEZ et al. v. SUN MUT. INS. CO.

[6 Blatchf. 317; [1] 11 Leg. & Ins. Rep. 108.]

Circuit Court, S. D. New York. March 19, 1869.

MARINE INSURANCE—INTERPRETATION OF POLICY—WRITTEN WORDS AND PRINTED ONES.

1. In this case, which was a suit on a policy of marine insurance on boxes of lemons, a valu-

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

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

ation of the lemons, by the policy, at so much per box, was *held* not to make the insurance an insurance on each box of the lemons, when it was otherwise a single contract of insurance on the entire number of boxes of lemons named in the policy, and not an insurance against the loss of any portion of the boxes less than the whole.

[Cited in Hernandez v. New York Mut. Ins. Co., Case No. 6,414; Neidlinger v. Insurance Co. of North America, Id. 10,086; New York Cent. & H. R. R. Co. v. British & Foreign Marine Ins. Co., 58 Fed. 918.]

[Cited in Haenschen v. Franklin Ins. Co., 67 Mo. 160.]

2. The case of Newlin v. Insurance Co., 20 Pa. St. 312, cited and approved.

3. All the words of a policy, the written ones and the printed ones, must be taken together, and, where there is a contradiction between them, the former must control.

4. The printed words of a policy, insuring against loss of the goods insured, "or any part thereof," commented on. Those printed words do not control the printed words in the memorandum clause, "free from average, unless general."

[Cited in Pearse v. Quebec S. S. Co., 24 Fed. 287.]

This was an action on a policy of marine insurance, made by the defendants, October 10th, 1867, insuring for the plaintiffs [Francisco Hernandez and Juan Pedro Hernandez] in the written words of the policy, "fourteen thousand three hundred dollars on 6,000 boxes lemons, free of particular average, but liable for loss of part by jettison—thirty-eight hundred dollars on 4,000 boxes raisins, subject to ten (10) per cent. average"—by the steamer Amsterdam, from Malaga to New York. The policy also contained, in writing, the words, "raisins valued at 1.90c. per box, in wholes; halves, and quarter boxes in proportion; lemons at $4.25, gold, per box." The premium was stated in writing in the policy, as follows: "one and one-fourth per cent. on lemons; one and one-half per cent. on raisins; less fifteen per cent. in lieu of scrip." The policy also contained the written words: "$18,100, eighteen thousand one hundred dollars, gold," and the written words, "premium payable in gold." It also contained the printed words, "loss, if any, to be paid in gold;" and, after the written descriptive clause and the written valuation clause, above quoted, printed words to the effect that the insurance was against perils to the damage "of the said goods and merchandise, or any part thereof;" and, after the said two written clauses, and the written premium clause, above quoted, the printed words, "but no partial loss or particular average, shall, in any case, be paid, unless amounting to five per cent.; provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Sun Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and the said Sun Mutual Insurance Company shall return the premium upon so much of the sum by them assured as they shall be, by such prior assurance, exonerated from." The printed memorandum clause in the policy contained these words: "It is also agreed that * * * fruits (whether preserved or otherwise) * * * are warranted by the assured free from average, unless general." On the back of this policy were endorsed, in writing, these words: "October 7th, 1867. Thirteen hundred and sixty dollars, gold, on almonds, and ten hundred and sixty-two dollars, gold, on lemons, valued at sum insured, per steamer Amsterdam, at and from Malaga to New York. Almonds subject to ten (10) per cent. average. Lemons free of particular average; otherwise, conditions as within. Loss payable to them. On 170 bales almonds, $1,360, valued at $8, gold, per package. On 250 boxes lemons, $1,062, valued at $4.25, gold, per box. One and one-half per cent. less 15 per cent., in lieu of scrip. $2,422, twenty-four hundred and twenty-two dollars, at 1½ per cent., $36.33. Premium payable in gold." On the 13th of September, 1867, the plaintiffs shipped on board of the steamer Amsterdam, at Malaga, for New York, 6,250 boxes of lemons, 6,000 of them being those named in the body of the policy, and 250 of them being those named in the endorsement. The steamer sailed from Malaga on the 22d of September, 1867, and, on the 20th of October, 1867, while on her voyage to New York, she was stranded and totally lost, near Montauk Point, Long Island. Of the 6,250 boxes of lemons insured, 4,071 were saved and delivered in a sound condition, except that a small portion thereof were partially damaged; and there was a physical loss and destruction of the remaining 2,179 boxes, (namely, 2,024 of the 6,000 insured by the body of the policy, and 155 of the 250 insured by the endorsement,) in consequence of the breaking up and destruction of the steamer before they could be got out. The plaintiffs had an insurance on the said 6,000 boxes of lemons, and on the said 4,000 boxes of raisins, in the New York Mutual Insurance Company, which was effected on the 27th of September, 1867, as follows: "$2,800 on 4,000 boxes raisins, in wholes, ½s and qrs., vald. a. 1.90c. ea., $7,600—$11,200 on 6,000 boxes of lemons, a. $4.25 ea., $25,500. Gold. Raisins subject to 10 per cent. average. Lemons free of particular average, but liable for any portion thrown overboard." The insured value of the 2,179 boxes which were lost amounted to $9,260.75 in gold, and the proportion thereof payable by the defendants, if they were liable for such loss, was $5,482.62, in gold. Evidence of the foregoing facts being given at the trial, a verdict was taken, by consent, for the plaintiffs, for $7,736.19, being the amount of the said $5,482.62, in currency, and with interest thereon to the date of the trial, subject to the opinion of the court on a case.

Edward H. Owen and Stephen P. Nash, for plaintiffs.

Joseph H. Choate, for defendants.

BLATCHFORD, District Judge. No claim is made in this suit as to the raisins. The sole question is as to the 2,179 boxes of lemons. It is contended, on the part of the plaintiffs, that the body of the policy is not a single contract of insurance on 6,000 boxes of lemons, and that the endorsement is not a single contract of insurance on 250 boxes of lemons, but that the body of the policy contains a separate insurance on each box of the 6,000 boxes named in it, and that the endorsement contains a separate insurance on each box of the 250 boxes named in it. Under the printed memorandum clause in the policy, these lemons, being fruits, and being warranted by the assured, by such clause, free from average, unless general, if the 6,000 boxes were insured in gross by the body of the policy, and the 250 boxes were insured in gross by the endorsement, the defendants would not be liable for the two several lots of 2,024 boxes and 155 boxes, physically totally lost, others of each of the two lots having been saved. But the plaintiffs rely on the written portions of the policy and of the endorsement, to take the case out of the general rule of law, and to show that the insurance was not of the 6,000 boxes in gross, and of the 250 boxes in gross. So much of the written portion of the body of the policy as describes the subject insured, and the amount of risk taken, states nothing except that $14,300 is insured on 6,000 boxes of lemons, with the words added, "free of particular average, but liable for loss of part by jettison." So much of the written portion of the endorsement as describes the subject insured, and the amount of risk taken, states nothing except that $1,062 is insured on 250 boxes of lemons, with the words added, "free of particular average; otherwise, conditions as within." These insurances can mean only, that 6,000 boxes of lemons are insured in one lot, and 250 boxes of lemons are insured in another lot, each lot free of particular average, except that if any part of either lot, that is, any number of boxes in either lot, is lost by jettison, the insurer is to be liable therefor. The words "free of particular average," written in, in both the body of the policy and the endorsement, as to the lemons, mean the same thing, and are to the same effect as the words "free from average, unless general," in the printed memorandum clause, in regard to the lemons, as fruits, and import that the contract is, that the insurer is to be liable for no loss of any part of the 6,000 boxes less than the whole, or any part of the 250 boxes less than the whole. It is specially provided, however, that the insurer shall be liable for a loss by jettison of a less number of the 6,000 boxes than the whole, and of a less number of the 250 boxes than the whole. But for such special provision, the words, "free of particular average," would apply as well to a loss by jettison as to any other loss. Thus far, then, there would seem to be no room for controversy as to the terms of the contract, and nothing to indicate an intention, by either party, to have an insurance made on any portion of the 6,000 boxes less than the whole, or any portion of the 250 boxes less than the whole, in regard to any loss, except a loss by jettison.

What, then, is there in any other part of the contract to indicate any different intention? The clause solely relied on by the plaintiffs, to show such different intention, is the written valuation clause, in the body of the policy, and also in the endorsement, valuing the lemons at $4.25 per box. They claim that such valuation clause indicates that the insurance was distributive, and on each box of lemons, while they do not contend that the fact that the lemons were contained in separate boxes, was alone sufficient to create a separate insurance on each box. Reasoning on principle, it would hardly answer to admit the valuation of each box in this case as conclusive evidence of an intention to insure each box separately; and that is what must be done if the claim of the plaintiffs is allowed. Other reasons occur why a valuation of each box of lemons, as well as a valuation of each box, each half box, and each quarter box of raisins, and of each bale of almonds, may have been inserted. The property was shipped on the 13th of September, at Malaga, the vessel sailed from Malaga on the 22d of September, and the insurances were effected on the 7th and 10th of October. The valuation of each separate package may very well have been inserted with a view to calculating the return premium in case it should turn out that less than 6,250 boxes of lemons, or less than the specified number of packages of raisins and almonds, had been shipped, or the return premium provided for in case of the existence of a prior insurance on the property, and which prior insurance, as appears from the evidence, in fact existed in this case. So, also, in case of a loss by jettison of some of the boxes of lemons, the valuation of each box of lemons was important, to fix the measure of the insurer's liability. The valuation did not correspond with the sum insured, as to the body of the policy, in respect to either of the articles insured; and, therefore, the valuation, per box, of the lemons and the raisins insured by the body of the policy, could not be arrived at by dividing the sum insured by the total number of boxes. The valuation of the 6,000 boxes of lemons, at $4.25 per box, was $25,500, while the sum insured thereon was $14,300; and, if the sum so insured had been taken as the valuation, in the absence of the valuation at $4.25 per box, it would have given a valuation of $2.38 per box. The valuation of the 4,000 boxes of raisins, at $1.90 per box, was $7,600 while the sum insured thereon was $3,800, which sum, if taken as the valuation, would, in the absence of the valuation at $1.90 per box, have given a valuation of 95 cents per box.

Moreover, the view urged on the part of the plaintiffs, leads to some results which it is impossible to believe could have been contemplated by the parties. The insurance, if distributive, and on each package, must have been made on each quarter box of raisins; that is, on each forty-seven and a half cents' worth of raisins. The insurance on the raisins is made "subject to ten per cent. average." By that, the insurer was not liable for any partial loss of any quantum of raisins insured, unless such loss should amount to ten per cent. of the value of such quantum, but the insurer was to be liable for such partial loss, if it should amount to such ten per cent. Now, if forty-seven and a half cents' worth of raisins was separately insured the insurer was made liable for a loss amounting to as little as four cents and three-quarters. With a printed memorandum clause such as is found in this policy, it requires clear and definite language to make a contract which shall take these fruits so wholly out of that clause, and out of the freedom from particular average therein stipulated, as to require a separate average on each one of a quantity of small packages, each valued at not more than forty-seven and a half cents. In regard to a loss of lemons by jettison, where the entire package would be thrown overboard, and presumably lost as a totality, the contract is clear; and the expression of a liability for a loss of part by jettison, excludes the idea that the insurer was to be liable for a loss of part by any other peril, especially in connection with the written clause, "free of particular average," and the like clause in the printed memorandum, in regard to the lemons.

Again, if each box of lemons was separately insured, there would necessarily be a liability of the insurer for each box jettisoned, without the insertion of the written clause, "but liable for loss of part by jettison." Such words would, in that case, be wholly useless; unless, indeed, each box being insured, the jettison of a part means the throwing overboard of some lemons out of a box—a construction hardly worthy of being advanced in a court of justice.

By the policy, the premiums on the lemons and the raisins severally would seem to have been adjusted with reference to the risk taken. The premium is 1¼ per cent. on lemons, and 1½ per cent. on raisins, both being fruits, and both in boxes. Thus a higher premium was charged on raisins. This was natural, on the view urged by the defendants. They insured the lemons, free from particular average, or partial loss, except that they were to pay for the loss of part by jettison; but, in regard to the raisins they were to pay for a partial loss, provided it amounted to ten per cent. of the value of the raisins insured. This warranted a higher premium on the raisins, the risk being greater. On the view urged by the plaintiffs, however, the risk as to the lemons would be greater than the risk as to the raisins; for, while each box of each article would be insured separately, the raisins would be subject to ten per cent. average, while the lemons would not be, and yet the raisins would have paid one-quarter of one per cent. more premium.

The case of Newlin v. Insurance Co., 20 Pa. St. 312, is directly in point against the plaintiffs, and no case directly in their favor has been referred to. On principle, the reasoning of the supreme court of Pennsylvania, in that case, is sound, and shows that such a valuation as is found in the policy in this case, cannot be construed as creating a separate insurance on each package so valued, in view of the language of the other portions of the policy. I have no doubt that this is the view generally held by assurers and assured, in practical business, and acted on daily, and it is so far a rule of property, that I am not willing to disturb it until so directed by superior authority.

The fact urged, that the printed portion of the policy insures against loss "of the said goods and merchandise, or any part thereof;" cannot control the case. The whole policy, written words and printed words, must be taken together; and, where there is a contradiction between the written words and the printed words, the former must control. 2 Pars. Mar. Law, bk. 2, p. 53, c. 1. It is the settled law of this court, under a policy like the present one, containing, respecting the lemons, the printed words, in the memorandum clause, "free from average, unless general," and also the written words, "free of particular average," that the insurer is free from all partial losses of every kind, which do not arise from a contribution towards a general average. Biays v. Chesapeake Ins. Co., 7 Cranch [11 U. S.] 415; Morean v. U. S. Ins. Co., 1 Wheat. [14 U. S.] 219. Yet, the claim on the part of the plaintiffs is, that by the printed words, "or any part thereof," the insurer is made liable for all partial losses of every kind. This is wholly contradictory of the written words as to the lemons, "free of particular average," and the latter must control. These words, "or any part thereof," are equally applicable, if capable of the construction insisted on by the plaintiffs, to the insurance, which they insist was made, of each separate box of the lemons; and then these words would effect an insurance of each separate lemon, which the plaintiffs would hardly contend for. These words, "or any part thereof," in the printed blank form of a marine policy, have coexisted, for a long time, with the printed words in the memorandum clause, "free from average, unless general,"—1 Arn. Ins. (2d Ed. by Perkins) p. 21,—and yet it has never been supposed that the former control the latter. Under the rule as to the construction of contracts, that, where one portion of a contract is wholly repugnant to the

rest of it, and is irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out, (Story, Cont. c. 20, § 660,) the former words would, in the present policy, be stricken out. It was said by Chief Justice Marshall, in Yeaton v. Fry, 5 Cranch [9 U. S.] 335, 342, in regard to policies of marine insurance, that they "are generally the most informal instruments which are brought into courts of justice;" and in regard to a marine policy, he also said, in Maryland Ins. Co. v. Woods, 6 Cranch [10 U. S.] 29, 45: "The contract of insurance is certainly very loosely drawn and a settled construction different from the natural import of the words, is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts." The remark of Mr. Justice Buller, made in 1791, in Brough v. Whitmore, 4 Term R. 206, 210, in regard to a policy of insurance, that it "has at all times been considered. in courts of law, as an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage," is as true now as it was then. It cannot be seriously contended, that any such construction is given, by the commercial world, or by assurers or assured, or in usage, or by courts of justice, to these ancient, formal, printed words, "or any part thereof," as is contended for by the plaintiffs. There must be a judgment for the defendants.

[See Case No. 6,414.]

HERNDON (RAMSEY v.). See Case No. 11,546.

HERO, The (TISDALL v.). See Case No. 14,059a.

Case No. 6,416.

The HEROINE.

[1 Ben. 226.] [1]

District Court, S. D. New York. June, 1867.

DAMAGES BY COLLISION—FREIGHT.

1. Where a vessel, while on a voyage was injured by a collision with the Heroine, and in a suit against the Heroine a decree was rendered in favor of her owners, with a reference to a commissioner to ascertain the damages, and the commissioner reported as an item of damage the gross freight, and the claimants excepted: *Held*, that the freight which a vessel, injured in a collision, was earning and has lost, is allowable as an item of damage; and that this must be net freight.

[Cited in Egbert v. Baltimore & O. R. Co., Case No. 4,305; The Gorgas, Id. 5,623; The Hope, 5 Fed. 825; The James A. Dumont, 34 Fed. 429.]

2. There must be deducted from the gross freight, the expenses the vessel would have incurred if the voyage had been successfully performed, and which would have diminished by so much the gross freight.

This case came up on exception to a commissioner's report. The suit was brought by Isaac Pratt, Jr., and others, owners of the bark Alma against the bark Heroine, to recover the damages occasioned by a collision between the two vessels. The court decided in favor of the libellants, and referred it to a commissioner to ascertain the damages. The commissioner's report included in the damages an item of $1,040 for freight lost, and the claimants excepted to the allowance of that item.

A. J. Heath, for libellants.

E. D. McCarthy, for claimants.

BLATCHFORD, District Judge. I think that the libellants are entitled, as part of the damages sustained by them by the collision, to an allowance on account of the freight their vessel was earning at the time of the collision on the cargo she was in the act of carrying. The libel expressly claims as damage the loss of the vessel and her freight, and states the aggregate amount of such damage at a larger amount than the commissioner has reported it to be. Upon the well-settled principle of allowing to the injured party as damages, in cases of collision, an indemnity to the extent of the loss sustained, the freight which the injured vessel was in the act of earning and has lost, is allowed as a just measure of compensation. The Gazelle, 2 W. Rob. Adm. 279; Williamson v. Barrett, 13 How. [54 U. S.] 101, 111. But this must be net freight, not gross freight. There must be deducted from the freight the vessel was engaged in earning, the expenses she would have incurred if the voyage had been successfully performed, and which expenses would have diminished by so much the gross freight. In the present case the amount of freight allowed is $1,040. The exception to the commissioner's report is to the allowance of freight to that amount. The $1,040 is the gross freight, as testified to by the master in a deposition given by him for the hearing on the merits. The questions as to the amount of the freight, and as to what was the gross freight, and what were proper deductions from it, and what was the net freight, were not raised before the commissioner. Hence the error in his report. Substantial justice will be done by referring the case back to the commissioner for re-examination on further evidence by both parties, in accordance with the principles of this decision. Order accordingly.

[Subsequently, on appeal to the circuit court, the decree of the district court, allowing damages to the libelants, was affirmed. Case No. 6,417.]

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

Case No. 6,417.

The HEROINE.

[6 Blatchf. 188;[1] 8 Int. Rev. Rec. 131.]

Circuit Court, S. D. New York. Oct. 1, 1868.

COLLISION—ROUGH WEATHER—LIGHTS—CONFLICT OF TESTIMONY.

1. In a collision case, where it appears that, at the time of the collision, the night was dark and rainy, with a high wind, and hazy, and the sea was running high, it should not be lightly presumed that the hands on board of a vessel would be remiss in their duty, and strong proof should be required to the contrary, in order to charge fault. Where, in such a case, several of the material witnesses were examined orally before the district court, and that court found that the vessel which was under obligation to avoid the other vessel, could have discovered her lights in time to avoid her, this court, although there was much evidence the other way, and the point was not free from doubt and difficulty, affirmed the decree.

[Cited in Gilman v. The Tyler, Case No. 5,446; The Maggie P., 25 Fed. 206; The Rockaway, 25 Fed. 776.]

2. Fault imputed, because of the want of vigilance in a lookout.

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

This was a libel in rem, filed in the district court, by the owners of the brig Almore against the barque Heroine, to recover for the damages caused to the brig, by a collision which took place on the morning of the 21st of November, 1865, about 3½ o'clock a. m., some sixty or eighty miles southerly from Montauk Point, between the barque and the brig. The brig was bound on a voyage from Turk's Island to Boston, with a cargo of salt. The barque, with a light cargo of hemp, and other goods, was going from Cronstadt, in Russia, to New York. The wind was east-northeast, and was free for the barque, which was heading about southwest by west. The brig was heading about southeast half south, and was close-hauled on her port tack. The brig was struck on her port bow by the starboard bow of the barque, her bowsprit was broken close to her bow, and was carried away, with rigging and sails, and fore topmast, and main topmast, and she sustained other injuries, so that her master and hands were compelled to abandon her as a derelict. The night was dark and rainy, with a high wind, and hazy, the sea was running high, and there was neither moon nor stars. Each vessel had a full complement of lights, placed, and burning, according to the act of congress [14 Stat. 228]. The district court decreed for the libellants [case unreported], and the claimants appealed to this court.

J. C. Dodge and Adoniram J. Heath, for libellants.

Benjamin R. Curtis and Edward D. McCarthy, for claimants.

NELSON, Circuit Justice. It is not to be denied, that the brig was on the privileged course, and that it was the duty of the barque to give way, and pass her in safety. This point is not contested. The ground of defence set up, and, earnestly and ably discussed, is, that, in consequence of the character of the weather, it was impossible for the barque to discover the lights of the brig, after the greatest diligence, and with a competent lookout, in time to make the proper movement to avoid her, and that the collision was the result of inevitable accident. There is much evidence, in the record, tending strongly to support this view, and, at best, the opposing view, cannot be said to be free from doubts and difficulties; and, if the question were an original one before me, resting upon the proofs as exhibited in the record, I might hesitate to reach the conclusion of the learned judge below. The darkness of the night, and the storm of wind and rain, as detailed by witnesses, must necessarily have greatly tended to embarrass the discovery of the lights of the approaching vessel. In such a state of the weather, and with such difficulties of navigation, it should not be lightly presumed that the hands on board of a vessel thus exposed to dangers involving life and property, would be remiss in their duty, and strong proof should be required to the contrary, in order to charge fault. In such cases, however, the question must mainly be one of fact, and, as several of the material witnesses were examined orally before the learned judge, his opportunity for determining the degree of credit to which their testimony is entitled, was, of course, much better than mine is. He has arrived at the conclusion that the barque could have discovered the lights of the other vessel, in the existing state of the weather, at least a quarter of a mile off, which would have afforded full time to execute the proper movement to avoid her. The weight of the proofs, as to the distance that the lights of a vessel might have been discovered at the time, is, perhaps, with this conclusion; and, in the relative position of the vessels, the starboarding of the barque a little earlier than it was done, would have enabled her to pass the other vessel clear. As it was, the bow only was struck.

What has influenced my mind in this case, more, perhaps, than any thing else, is the unsatisfactory account given of the lookout on the barque. Covered, as he was, with the main topsail, to protect himself from the storm, it is apparent that he was not in a condition, or free, to discharge the whole duty of a lookout. He was not, as he should have been, the first to discover the lights of the approaching vessel. Upon the whole, I think that the decree should be affirmed.

[See Case No. 6,416.]

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

HERON, The KATE. See Case No. 7,619.

Case No. 6,418.

In re HERPICH.

[7 Biss. 387; 15 N. B. R. 426; 9 Chi. Leg. News, 253; 4 Law & Eq. Rep. 29.] [1]

Circuit Court, S. D. Illinois. March 5, 1877.

BANKRUPTCY—WARRANTS OF ATTORNEY—ILLEGAL PREFERENCE.

1. Warrants of attorney given by a debtor to his creditor, even when given more than two months before bankruptcy proceedings, are fraudulent if the creditor knew at the time they were given that the debtor was insolvent.

2. If, under such warrant of attorney, the creditor gets judgment and levies an execution, he will not be allowed to have a preference.

[Cited in Re Hauck, Case No. 6,219.]

3. Conflicting decisions of the United States supreme court cited and commented upon.

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

Petition of several creditors of the bankrupt [August Herpich] for a review of an order of the district court, in refusing to allow them a preference.

Tenneys, Flower & Abercrombie, for petitioning creditors.

Littler & Paton, for assignee.

DRUMMOND, Circuit Judge. On the 5th of February, 1876, the bankrupt being indebted to various parties, gave to the petitioners in review, for a debt previously due to them for goods sold and delivered, eight promissory notes, amounting altogether to $1,893.35. These notes were respectively payable at sixty and ninety days, and at four, five, six, seven, eight and nine months after date. Accompanying these notes were warrants of attorney, authorizing judgment to be entered at any time after they were executed for the amount that might be found due at the time. Accordingly, on the 12th of April, a little more than two months after the notes were executed, judgment was entered up in the superior court of Cook county, for the sum of $2,078.48, being the amount due at the time, the notes all drawing ten per cent. interest from date. An execution was issued on the same day against the bankrupt, and a levy was made by the sheriff on his property. On the 22d of April, ten days afterwards, a petition in bankruptcy was filed against the bankrupt, and the petitioners in review were enjoined by the district court from proceeding further with the sale under their execution, and the property was placed in the hands of an assignee, who was afterwards appointed, and who sold it, and the proceeds were paid into court, and thereupon these petitioners in review made application to the district court to have the whole of their judgment paid in preference to the claims of other creditors. [Case unreported.]

This application was refused by the district court, and the question now is, whether the refusal was correct. I think it was. I have to assume upon the facts in the record of this case, that at the time these notes were executed and warrants of attorney given, the bankrupt was insolvent, and proceedings in bankruptcy imminent. It was not a case of actual insolvency, unknown to the bankrupt, but one of insolvency known to him to be such at the time the notes were executed. It was also known to the petitioners in review that he was insolvent at the time they took the notes and warrants of attorney, and the question is, whether on such a transaction taking place, notes given, and warrants of attorney to confess judgment, and insolvency known and understood on both sides, and a petition in bankruptcy filed, though more than two months afterwards, it can stand as a valid security against the other creditors. Now, it is true that the supreme court has decided in the case of Wilson v. City Bank, 17 Wall. [84 U. S.] 473, that an insolvent party may be sued, and the creditor may obtain a judgment, and there may be no defense, and the creditor may know the party to be insolvent, and yet, if the suit is thus brought in the usual course of litigation, and undefended, judgment obtained, and execution issued, the creditor has obtained a valid prior lien upon property levied upon, as against other creditors.

This case rather took the profession—certainly a great many of the district judges, who had decided otherwise—by surprise, as it seemed to be making an attack upon what was supposed to be one of the principles of the bankrupt law [of 1867 (14 Stat. 517)], that where a party was insolvent and did anything or intended to do anything by acquiescence merely, producing such a result, he thereby allowed, or suffered some of his creditors to get a preference over others; but in the case referred to, it will be observed, that the court qualified the decision by saying, that very slight circumstances on the part of the bankrupt might be sufficient to invalidate the lien. It is also true that in the case of Clark v. Iselin, 21 Wall. [88 U. S.] 360, and in the case of Watson v. Taylor, Id. 378, the supreme court has made decisions which some of us who are called upon to administer the bankrupt law practically, thought, was going very far and interfered seriously with the settlement upon equitable principles of the rights of creditors to a bankrupt estate. The court decided that a party might give notes with warrants of attorney to confess judgment when he was solvent at the time, and the creditor to whom they were given might put the warrants in his pocket and hold them for an indefinite time, unknown to all who dealt with the debtor, and as soon as there was any apprehension, or it was thought necessary for the protection of his interest, he could take out these warrants of attorney, file them and have judgment entered up and execution issued, and thus obtain a preference.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 29, contains only a partial report.]

These decisions were made under a strong dissent by three of the judges, who dissented upon a principle, which for my own part I have always thought sound, namely, that when a warrant of attorney to confess judgment was given, it was a continuing power, and when the creditor entered up judgment on the warrant of attorney, it was at the time the act of the debtor, through or by his attorney, the power continuing to operate;—but the majority of the court thought otherwise.

They say that it was the act of the debtor at the time it was executed, but did not become his act at the time that the warrant of attorney was entered up by a judgment; that was the act of the creditor, they say. We are bound, of course, by the decision, but it always has seemed to me a hard rule for the other creditors that a man should be permitted to go on and do business, indefinite in amount and time, with any number of warrants of attorney to confess judgment placed away in the pockets of some of his creditors, ready to be entered up at any time whenever his pecuniary condition should become precarious, but it has been so decided, and we submit, and if this were that case, we would follow that decision; but it is not. One of the grounds upon which the supreme court has put its decision in the cases named is, that at the time the warrants of attorney were executed, the party who gave them was solvent, though afterwards he may have become insolvent; that it was a valid security at the time; and although they refer to the 35th section of the bankrupt law, still it is very clear, both from the opinion of the majority of the court in Clark v. Iselin [supra], as well as of the minority in Watson v. Taylor [supra],—a minority which dissented in both cases,—that the decision of the cases was put upon two grounds. First, upon general principles of law, the majority declaring that, resting upon them, their conclusions were sound; and secondly, that the act in question was not rendered invalid by the 35th section of the bankrupt law. The minority maintained that it was invalid on both grounds.

It is to be observed that the judge who wrote the opinion in Wilson v. City Bank [supra] dissented in Clark v. Iselin and in Watson v. Taylor; and see his comment on his own opinion in Little v. Alexander, 21 Wall. [88 U. S.] 503. These warrants of attorney were not technically invalid under the 35th section of the bankrupt law as it now stands, for while formerly the act must have been done within four months of filing the petition in bankruptcy, as the section was amended in 1874 [18 Stat. 180], it required only two months in involuntary bankruptcy; but there is an element in this case which is not necessarily involved in the 35th section. It may happen that a man may be insolvent and not know it. He may be contemplating insolvency and be solvent at the time.

In the case now before us, however, there was something more than what was required by this section. Here the bankrupt was not only insolvent at the time he made the warrants of attorney, but he knew it, and the creditors knew it also. The bankrupt necessarily knew the consequences of his own act, and it is clear the warrants of attorney in this case were given and received for the purpose of enabling these creditors in review to obtain a preference over other creditors. It is manifest, too, if we examine the language of the majority of the court in the case of Clark v. Iselin, 21 Wall. [88 U. S.] 373, that they place great stress upon the fact that at the time there was something valuable passed from the creditor to the debtor, who gave the warrant of attorney, because, they say, the question of unlawful preference would depend upon whether there was a present consideration, or it was for a pre-existing debt.

Now in this case, these warrants of attorney were given for a pre-existing debt. So that I think upon general principles these warrants of attorney were a fraud upon the law by the bankrupt and the petitioners in review, and I do not feel inclined to follow the cases of Clark v. Iselin and Watson v. Taylor, unless it appears that the case before me is brought necessarily within their terms; and as this case is not, I hold that the district court decided rightly, and that these warrants of attorney were a fraud upon the law, and that these petitioning creditors would obtain an unjust preference if their petition to the district court to allow the whole of their claims to be paid were granted. Judgment of district court affirmed.

HERRERA v. The ACME. See Case No. 27.

Case No. 6,419.

In re HERRICK.

[7 N. B. R. (1873) 341.] [1]

District Court, S. D. New York.

BANKRUPTCY—APPLICATION TO ANNUL DISCHARGE.

When a certificate of discharge was duly granted to a bankrupt, and within the limited term of two years two creditors, whose debt was provable against the said bankrupt's estate, applied to have his discharge annulled and set aside, on the ground that he had wilfully sworn falsely in his affidavit annexed to his schedules of creditors and liabilities, in that, having knowledge of the residence of said creditors and his liability to them, he did not include in his schedules the names of said creditors, or their claim. *Held*, that the court finding the act as charged proven, and that the same was a particular fact concerning the debts, and that the creditors had no knowledge of the commission of said act until after the granting of the discharge, judgment must be given in favor of the creditors; and the discharge is therefore set aside and annulled.

In bankruptcy.

[1] [Reprinted by permission.]

BLATCHFORD, District Judge. This court having, on the twenty-sixth day of May, eighteen hundred and sixty-nine, granted to Charles K. Herrick a discharge from all his debts, except as provided in the act of congress hereinafter named, and having given to said Herrick a certificate thereof, under the seal of this court; and Patrick J. Cranitch and Jeremiah A. Cranitch, who were and are creditors of said Herrick, and whose debt was provable against the estate of said Herrick in bankruptcy, having on the twenty-seventh day of February, eighteen hundred and seventy-one, applied in writing to this court to set aside and annul said discharge, and such application having specified that the said creditors intended to give evidence in particular against the said Herrick of the following act mentioned in section twenty-nine of said act [of 1867 (14 Stat. 531)], and having set forth such act, as the ground of avoiding said discharge, namely, that the said Herrick wilfully swore falsely in his affidavit annexed to his schedules of creditors and liabilities, in this, that the said Herrick, well knowing the residence and place of business of the said creditors and his indebtedness to them, did not include in his said schedules the said creditors or their said claim; and this court having caused reasonable notice of said application to be given to said Herrick, and having ordered him to appear and answer the same within a time fixed by this court, and the said Herrick having appeared and answered in writing the said application, and proofs having been taken on the issues raised by said application and said answer, and the parties having been heard, the said creditors by Miron Winslow as their attorney, and the said Herrick by John Henry Hull, as his attorney, the court doth find that the act so set forth in said application by said creditors, against said bankrupt, is proved, and that the said Herrick wilfully swore falsely in his said affidavit in the particular so set forth, and that the said particular was a material fact concerning his debts, and concerning the said debt so due to the said creditors, and that the said creditors had no knowledge of said act until after the granting of said discharge; and judgment is hereby given in favor of said creditors, and the said discharge of the said Herrick is hereby set aside and annulled.

Case No. 6,420.

In re HERRICK et al.

[13 N. B. R. (1876) 312.] [1]

District Court, N. D. New York.

BANKRUPTCY — NOTE OF PARTNER — LIABILITY OF FIRM—JUDGMENT AGAINST PARTNERS AND OTHERS —SEVERAL CLAIM—UNAUTHORIZED DECLARATION OF DIVIDEND.

1. If a person loans money for the use of a firm, and accepts the note of one partner, he cannot maintain an action against the firm.

2. If a party who accepts the note of one partner is ignorant that the loan is for the firm, he cannot maintain an action against the firm after he has recovered a judgment against the partner on the note.

3. A judgment against partners and others jointly, is a several claim as against the bankrupts, and cannot receive a dividend from the joint estate.

4. If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment.

In bankruptcy.

WALLACE, District Judge. This is an application by a creditor of the separate estate of Hugh T. Herrick, to have the proof of debt against such estate filed by one Brooks expunged. By the petition and answer of the parties, it appears that Brooks proved a judgment recovered against the bankrupts and four others, and assigned to him, as a debt against the bankrupts jointly, and after a dividend had been declared, he proved the same judgment as a debt against the separate estate of Hugh T. Herrick, alleging in the second proof that the judgment was recovered upon a note made by Hugh T. Herrick individually, and indorsed by George Herrick. Brooks now insists upon his right to a dividend from both the joint estate and the individual estate of Hugh T. Herrick, and avers that the note upon which the judgment was obtained, though made by Hugh T. Herrick, and indorsed by George Herrick, was made and negotiated for the benefit of the firm of which they were partners, and that the firm actually received the avails of the note. Brooks contends that by reason of these facts, the bankrupts were liable to him both jointly and severally, and that he is, therefore, entitled to prove against both estates; while on the part of the petitioner, it is insisted that Brooks had his election as to which estate he would resort, and by proving against the joint estate exercised that election, and is now precluded from resorting to the individual estate. Numerous adjudications in the courts of the United States affirm the right of a creditor who holds the obligation of a partnership, and of one or of all of the partners severally for the same debt, when the several obligation is distinct from and cumulative to the joint obligation, to prove in bankruptcy against both the joint and individual estates. In England, the creditor in such case is put to his election, though the rule has been repeatedly reprobated by her judges as founded upon no sound principle or analogy. 9 Ves. 124; 10 Ves. 109. It has been repudiated in this country, because at law a creditor has always been permitted to pursue all his remedies upon a joint and several obligation for the same debt until he obtains satisfaction in full, and because his right to do so is contemplated by the parties to the obligation when it is created; the remedy being the controlling consideration which gives rise to a joint and a several security for the same debt.

[1] [Reprinted by permission.]

None of these reasons, however, sanction the position assumed by the creditor here. When the note which was the foundation of the claim was negotiated, if the person who advanced money upon it knew that it was for the firm, inasmuch as he accepted the individual liability of the member who signed it as maker, he could not have maintained an action against the other partner. It is not alleged that he did not know that the note was made for the benefit of the firm. But if he had been ignorant that the maker was, in fact, the agent of the firm, he could have maintained an action against all the partners. Instead of bringing such an action, he brought one against the partner who signed only, and obtained judgment in that action. His right of action upon the original consideration of the note merged in the judgment, and thereafter he could not have maintained an action against the other partner upon it.

Peters v. Sanford, 1 Denio, 224; Robertson v. Smith, 18 Johns. 459; Olmstead v. Webster, 8 N. Y. 413. If his right to prove rests, therefore, upon the recognition by this court of his remedies at law, he has no remedy against both estates. If it rests on the theory that the intention of the parties should be effectuated, here it was not the intention that the person who advanced money upon the note, should have the security of the joint and also of the several liability of the partners. The intent of the partners, as evinced by the note, was clearly that he should have only their several obligations, the one as that of maker, the other as that of indorser. The attempt of the creditor here, is one to obtain satisfaction from the joint estate and from the individual estate, of a demand which was originally either several or joint, but was never both several and joint. His position is not sanctioned by precedent, or by any analogy or principle; it would be repugnant to common honesty to sanction it, for, if his attempt were successful, it would be a fraud upon the other creditors of the bankrupt, who are all as much entitled to double dividends upon their debts as this creditor is to a double dividend on his. I sincerely regret that I am unable to hold that he is concluded, by his action, from receiving a dividend from the individual estate. Though he attempted to prove his claim against the joint estate, the proof deposed to and filed by him, shows upon its face a claim against the bankrupts severally and not jointly. While the deposition avers that the bankrupts are jointly indebted to him, it sets out as the particular statement of the demand, a judgment recovered against the bankrupts, and four other persons jointly. The averment of the facts and not of the legal conclusion must control to determine whether the claim is upon a joint or upon a several demand. The judgment described is not an obligation joint as to the bankrupts, but joint as to them and four other persons. It constitutes a debt against each, and against both, but not a joint debt. If an action were brought upon it, it could not be maintained against the two alone. Even in the case of a joint and several obligation, it is familiar doctrine that the liability is several as to each and joint as to all; it cannot be treated as several as to some of the obligors and joint as to the others; the obligee must proceed either severally against each, or jointly against all.

The liability disclosed in the proof was not one which could be enforced against the bankrupts as a joint liability, and therefore, not one upon which a dividend could be compelled from the joint estate. Of this the assignee and all the creditors had ample notice. It cannot logically be maintained that Brooks, by proving a debt which, upon the face of his deposition, was one against the bankrupts severally, thereby elected to resort to the joint estate. The dividend declared upon this debt from the joint estate, was unauthorized, and the assignee can now withhold its payment. That Brooks intended to obtain a dividend from the joint estate is not material; the law does not attempt to deal with intent, however culpable morally that intent may be, unless it culminates into some act that is injurious. Here no one could be prejudiced, in a legal sense, by the act of Brooks. Inasmuch as the second proof was for the same debt as that set forth in the first, it should be expunged. Order accordingly.

Case No. 6,421.

In re HERRICK et al.

[17 N. B. R. (1878) 335.] [1]

District Court, N. D. New York.

BANKRUPTCY — SECURITY FOR DEBT — PROOF FOR DEFICIENCY—VALUATION OF SECURITY.

1. A creditor of the bankrupts, holding security by way of mortgage upon real estate, obtained leave of the bankrupt court to foreclose his mortgage in a state court, sold the real estate under the decree of foreclosure, and proved his judgment for deficiency on the sale as a claim against the estate. On re-examination of the claim, *held*, that he could not prove for his deficiency; that if he desired to do so, he should have taken the necessary steps to obtain a valuation of his security in the manner prescribed by section 5075.

[Cited in Re Miller, Case No. 9,555; Bradley v. Adams Express Co., 3 Fed. 897; Re Letchworth, 18 Fed. 823.]

2. The ordinary order granting leave to foreclose a mortgage upon the bankrupt's property, cannot be construed as directing that the value of the creditor's security be ascertained by a sale under a decree of foreclosure.

[In bankruptcy. In the matter of Hugh T. Herrick and George Herrick.]

WALLACE, District Judge. A creditor of the bankrupts, holding security by way of mortgage on their real estate, applied to this court for leave to foreclose his mortgage in

[1] [Reprinted by permission.]

one of the state courts, and leave having been granted, commenced an action to foreclose, sold the real estate under the decree of foreclosure, and in that action obtained a judgment against the bankrupts for a deficiency arising upon the sale. He then proved the judgment as a claim against the estate. Upon application of the assignee in bankruptcy, this claim has been re-examined, and the question now is whether it shall be disallowed or held to be a valid claim against the estate.

Without adverting to several of the issues presented, I am of opinion that the creditor cannot prove for his deficiency, because he is precluded by that provision of the bankrupt act [of 1867 (14 Stat. 526)] which declares that where a creditor has a mortgage upon the property of the bankrupts, "he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct." By force of this provision it is in all cases incumbent upon a lien creditor who may desire, after resorting to his security, to prove for any deficiency, to take the necessary steps to obtain a valuation of his security in the manner prescribed by the section referred to. Unless he does this he elects to look to his security alone.

It cannot be maintained that this court, by granting leave to foreclose a mortgage in a state court, thereby directs a sale of the property for the purpose of a valuation under the section in question. Leave to sue is invoked by the creditor in order that the validity of his lien may be determined, or his security enforced by the judgment of a state court The order granting leave always implies, if it does not expressly provide, that the validity of the lien may be contested in the action by the assignee in bankruptcy, and therefore does not imply that the creditor has a valid and ascertained lien which he is to be permitted to enforce for the purpose of obtaining a valuation of his security. Applications for leave to foreclose mortgages are frequently made before an assignee in bankruptcy is appointed, and are granted in special cases where the estate cannot suffer, and the interests of the holder of the mortgage are pressing; but in no case can there be a valuation of a creditor's security for the purpose of proving the balance of the debt, until an assignee has been appointed and become a party to the proceeding. Doubtless, after an assignee has been appointed, this court could direct that the value of the creditor's security be ascertained by a sale under a decree of foreclosure; but the ordinary order granting leave to bring suit to foreclose cannot be so construed.

Aside from these general considerations, it is quite clear in the present case that it was not contemplated by the creditors, the assignee, or the court, that the action to foreclose was to be instituted for the purpose of a valuation of the security. Both upon the proofs and by the form of the order it is evident the object of the proceeding was to determine the validity of the mortgage, which was challenged by the assignee as preferential and void. The claim is disallowed and the proof of debt expunged.

HERRICK (THAYER v.). See Case No. 13,868.

HERRIET (BOWEN v.). See Case No. 1,722.

Case No. 6,422.

HERRING et al. v. GAGE et al.

[15 Blatchf. 124; 3 Ban. & A. 396.][1]

Circuit Court, N. D. New York. Aug. 10, 1878.[2]

PATENTS—INFRINGEMENT—AWARD OF DAMAGES.

1. The findings of the master, in ascertaining the profits made by the defendants, in infringing letters patent, sustained.

2. The case of Mowry v. Whitney, 14 Wall. [81 U. S.] 620, explained.

3. In the present case, it was *held*, that the proper inquiry was, not what saving the defendant had made by using the patented device, over the saving which he might have made if he had used any or all of various other devices, but what saving he had made directly by using the patented device.

[Cited in Garretson v. Clark, Case No. 5,250.]

4. Interest on the cost of a device, and the cost of power, are to be alowed as deductions from profits, only when it is shown they have been paid or incurred as debts.

5. A defendant cannot avail himself of the defence that he has not marked or labelled the infringing machines as patented, and especially so when no such defence is set up in the answer.

[Cited in Dunlap v. Schofield, 152 U. S. 246, 14 Sup. Ct. 578.]

6. In a suit against three defendants, it is proper to award against all three the profits made by them jointly, while partners, and against two of them the profits they made after their partnership with the third defendant was dissolved, and while they were using the patented invention in conjunction with a fourth person, not a defendant.

[This was a suit for infringement by James W. Herring and others against William G. Gage and others. An interlocutory decree was entered for the plaintiffs, and the cause referred to a master for an accounting. Case No. 6,424.]

Edwin S. Jenney and James A. Allen, for plaintiffs.

H. C. Howe, for defendants.

WALLACE, District Judge. This case comes here upon exceptions by both parties to the report of the master to whom it was

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[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 396; and here republished by permission.]

[2] [Reversed in 107 U. S. 640, 2 Sup. Ct. 819.]

referred, by interlocutory decree [Case No. 6,424], to take proofs and ascertain the profits received by the defendants from the use of the device described in the first claim of the letters patent [No. 4,712] as reissued to John Deuchfield, January 16th, 1872, being for an improved arrangement of means for cooling and drying meal. The master has found, that the defendants have used the device from January 16th, 1872, and, by the use of the device, have saved flour to the amount of one barrel to 600 made, and that, for the period between April 1st, 1872, and May 10th, 1876, the saving was, in all, 191 $^{11}/_{100}$ barrels, of the value of $1,441 84. He also finds, that, after May 10th, 1876, (at which time the defendants dissolved partnership,) two of the defendants, William G. Gage and Frederick A. Gage, continued to use the device until November 1st, 1876, and that these two defendants, in conjunction with one Henderson, continued to use it from November 1st, 1876, until October 3d, 1877. The flour saved by the use of the device after the defendants dissolved partnership, and up to October 3d, 1877, was 57 $^{7}/_{10}$ barrels, of the value of $376 97. The master had also found, that this saving accrued to the defendants over and beyond any saving which they could have obtained from any other successful device for cooling and drying meal, known and open to use by them. He has deducted the cost of introducing the device into the defendants' mill and the cost of keeping it in repair, and ascertained the profit actually made after such deduction. He has allowed the complainants, however, only the profits made by the defendants down to May 10th, 1876.

The first exception of the defendants raises the point, whether the master's report is sustained by the proofs, as to the time when the defendants commenced to use the Deuchfield device. The proofs show a conflict as to the fact whether the device was introduced into the Riverside Mills (the defendants' mills) prior to 1873-4, but the unequivocal statement of the defendant William G. Gage is sufficient to justify the conclusion of the master, and I am unable to say that it should not prevail over the testimony of his miller, and the other testimony that might justify a different finding. This exception is, therefore, overruled.

The next exceptions of the defendants allege that the master has erred in stating the account between the parties as to the number of barrels of flour manufactured by the defendants during the period in question, and as to the price received for flour manufactured. The defendants neglected to state an account of the number of barrels of flour manufactured, or of the price received by them, for the period between January 16th, 1872, and April 1st, 1872, and the master has failed to report upon the number of barrels manufactured during this period. The master had a right, in the absence of a statement by the defendants, to assume that they manufactured, during this period, at the same rate as during the rest of the year, and if, acting on that assumption, he had charged them with the proportion that period bears to the entire year, they would have been charged with a larger sum as profits than they are now charged with, assuming that the master has erred as claimed. It would not benefit the defendants if the report were sent back for revision, and the error pointed out by the exceptions is of inconsiderable moment. The master's error costs the defendants something less than $30, but, if he had charged them with the product between January 16th, 1872, and April 1st, 1872, it would have amounted to over three times that sum. The defendants also overlooked the fact that there was other evidence before the master of the product of the mill than that contained in the account rendered by the defendants. These exceptions will, therefore, be disregarded.

By further exceptions, the defendants insist that the master's findings, as to the actual savings realized by the defendants by the use of the device, is not sustained by the evidence. This finding is based, in part, upon the testimony of various experts, who were familiar with the practical working of the device in other mills, and who were permitted to state the quantity of flour lost when the device was not used, thus estimating the saving realized under their observations, and basing upon that their opinion of the saving ordinarily gained by the use of the device. The conditions under which the device was used differed in the different instances observed by the witnesses. It is contended that this testimony is not entitled to consideration. To this I cannot agree. Of course, the ultimate inquiry was only as to the saving made by the defendants. It was impracticable to ascertain this by direct evidence, because the defendants did not keep any account relative thereto. They and their witnesses gave their opinions, with the data upon which they were based. The complainants gave the best evidence which was attainable from the nature of the case. It was peculiarly the province of the master to sift out what was valuable, and reject what was not, and, by an analysis of the testimony, to ascertain what the saving would be when the device was used under conditions similar to those which obtained in the defendants' mill. I am not satisfied that he has not done this with discrimination, and am not convinced that the defendants have any ground of complaint.

The next exception of the defendants brings up what I deem the most important question in the case. A large amount of testimony was given tending to show that other devices were known, were open to use, and had been used by millers, which were an equivalent for the Deuchfield device, and by the use of which a saving would result equal to that

realized by the use of the complainants' device. The master has found that the saving made by the defendants was over and beyond that which they could have made by the use of any other device, and the defendants insist that this finding is not supported by the proofs. The answer to this, in my judgment, is, that the exception rests on a misconception of the rule of law by which the profits, in such a case, are to be ascertained. It is said, in Mowry v. Whitney, 14 Wall. [81 U. S.] 620, 651, that the question to be determined, in finding the profits made by an infringer, by the use of the patent infringed, is, "What advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result;" and this language, probably, has given rise to the theory by which both the complainants and the defendants have been governed in the production of their testimony, and which has also been adopted by the master. As a consequence, a vast amount of time has been devoted, by the complainants and the defendants, in producing testimony relative to the efficiency and value of the various devices which the defendants might have employed for the cooling and drying of meal, as a substitute for that of the complainants, and the comparative merits of each with the complainants' device, with a view to ascertain what additional saving was made by the use of the complainants' device, beyond that which might mave been made had the defendants used any or all of the various other devices.

In settling an account between a patentee and an infringer, the real inquiry is: What is the advantage which the infringer has derived from his use of the invention? If he has derived a profit attributable directly to the employment of the invention, that profit belongs to the patentee and is the measure of his recovery. Here, the defendants saved a considerable quantity of flour by the use of the complainants' property, which, until they used it, had been lost. Their gain is directly traceable to the use of the invention. How is it important to ascertain what they might have saved, if, instead of using the complainants' property, they had used some other device? How are they in a better position than they would be if there had been a different device which was patented, and they had acquired the right to use it from the patentee, but, instead of using it, saw fit to employ the complainants' device? Mowry v. Whitney [supra] was a case where the entire profit of the manufacture of an article made by the patented process was given upon an accounting, when that profit was largely due not to the advantage derived from the patented process but from that of other processes actually used by the manufacturer, and which he had the right to use; and what was said in that case, pertinent to such a state of facts, is not to be assumed as the enunciation of the rule where the profit has been made directly by the use of the patentee's device. Such a rule would impose an extraordinary burden upon a patentee, because it would require him, when seeking for redress, to explore the whole realm of practical and theoretical mechanism, to ascertain and demonstrate that what was realized by the wrongful appropriation of his invention could not have been made by the use of any other device or substitute which the infringer might have employed. The infringer is, at the election of the patentee, treated as a trustee, and, as such, required to account for the profits actually made by the use of the patentee's property. It would be a novel defence to permit a trustee who has made a profit by the use of the money or property of his cestui que trust, to show that he would have made an equal profit if he had used the money or property of a third person, or if he had used his own money or property. It was quite unnecessary, in my judgment, to enter into any investigation of the savings which the defendants might have realized if they had used some other than the complainants' device, and the exception to the master's finding upon the question cannot avail the defendants.

Further exceptions of the defendants present the questions whether the master erred in not deducting the interest on the cost of the device from the aggregate of profits, and also in not deducting the value of the power employed in using the device. Undoubtedly, interest and cost of power enter into the account of profits to be ascertained from a given manufacture. Profit is the gain made upon any investment when both receipts and payments are taken into the account. Where interest has been paid upon the capital invested, or where it is to be paid upon borrowed capital, it should be allowed in estimating profits; but I am not aware of any rule which requires that it should be deducted where it has not been actually paid or incurred. The allowance for cost of power is to be determined by the same rule. If expense has been actually incurred for power, it should be deducted. But, if interest or expense for cost of power has not been incurred, there is no more reason why there should be a deduction therefor from the profits, than that there should be for the personal service of the infringer in conducting the business. It was not shown that any interest, or any sum for cost of power, had been paid, or any indebtedness incurred therefor. The master was correct in not making any such allowance.

It is insisted, in the argument for the defendants, that no damages are recoverable, because the device was not labelled or marked as patented, under section 4900 of the Revised Statutes. The statute has no application to a case like this, where the defendants were themselves the persons who made and used the device. If it had, the defendants cannot avail themselves of the defence, be-

cause they have not set it up in their answer. Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 788.

This disposes, in substance, of all the exceptions of the defendants. In conclusion, it is proper to say, that the proofs show a case where it is peculiarly proper that the court should repose upon the master's findings upon the facts. Such is the conflict between the witnesses upon nearly all of the issues entering into the question of the amount due the complainants, that while I should have been better satisfied if the profits had been estimated at fifty dollars per annum for each run of stones using the device, it would be quite unsafe to say that the master has not arrived at judicious and correct conclusions. The defendants' exceptions are overruled.

The complainants insist, by their exceptions, that they are entitled to recover not only the profits made by the defendants during the time all of them were using the device, but, also, as against the defendants William G. Gage and Frederick A. Gage, the further amount made while they were using the device jointly or in conjunction with Henderson. In this I think they are correct. The defendants are tort-feasors, and each is liable for the whole damages. The right of the party injured to look to either as well as to all of the defendants for the whole damage he has sustained, is not confined to a resort to a court of law, but is recognized and enforced when he resorts for his remedy to a court of equity. It is the peculiar province of equity, when it has acquired jurisdiction of the subject matter of a controversy, to award in the suit full and complete relief between all parties. The master has found the net profit arising from the use of the device by William G. Gage and Frederick A. Gage, down to the date of the order of reference, October 3d, 1877, to be $281 97, in addition to the profits which accrued to all the defendants jointly. This should have been allowed to the complainants, and is now allowed.

The decree will provide for a recovery for the complainants, as against all the defendants, of the sum of $1,161 84, and as against the defendants William G. Gage and Frederick A Gage, for the further sum of $281 97.

[NOTE. An appeal was then taken by the defendants to the supreme court, where the decree was reversed, and the bill dismissed, in an opinion by Mr. Justice Gray, who said that the new claim in the reissue was invalid because it was merely a combination of some of the elements of the original claim, and, as defendants only used the new claim, there could be no infringement. 107 U. S. 640, 2 Sup. Ct. 819. [For another case involving this patent, see Bignall v. Harvey, 4 Fed. 334.]

HERRING v. GAGE. See Case No. 6,424.

Case No. 6,423.

HERRING v. GAS CONSUMERS' ASS'N. [See 9 Fed. 556.]

Case No. 6,424.

HERRING et al. v. NELSON et al.

SAME v. GAGE et al.

[14 Blatchf. 293; 3 Ban. & A. 55; 12 O. G. 753; Merw. Pat. Inv. 459; 10 Chi. Leg. News, 260.] [1]

Circuit Court, N. D. New York. Sept. 10, 1877.

PATENTS—IMPROVEMENT IN COOLING AND DRYING MEAL—REISSUE—COMBINATION OF FEWER ELEMENTS — NOVELTY — REJECTED APPLICATION AS EVIDENCE OF USE.

1. The first claim of reissued letters patent granted to John Deuchfield, January 16th, 1872, for an "improvement in cooling and drying meal," and extended, April 17th, 1872, for seven years from April 20th, 1872, (the original patent having been granted to said Deuchfield April 20th, 1858), namely, "The arrangement and combination of the suction fan, G, and the spout, I, with the meal-chest, D, receiving the meal from the grinding stones, and provided with a conveyor shaft, F, and elevator F', substantially as and for the purpose set forth," is not subject to the objection that it is for a different invention from that for which the original patent was issued, although the original patent claimed only a combination which embraced the elements composing the combination claimed in said first claim with other elements.

[Cited in Kerosene Lamp Heater Co. v. Littell, Case No. 7,724; Christman v. Rumsey, Id. 2,704; Blackman v. Hibbler, Id. 1,471; Atwood v. Portland Co., 10 Fed. 287; Bignall v. Harvey, 4 Fed. 334; Wilson v. Coon, 6 Fed. 620; Smith v. Merriam, Id. 718; Dederick v. Cassell, 9 Fed. 308; Gage v. Herring, 107 U. S. 641, 2 Sup. Ct. 820.]

2. The combination of machinery for cooling meal, in the process of converting grain into flour, with machinery for preventing the waste of meal, constitutes a patentable combination, and not a mere aggregation.

[Cited in Johnson v. Flushing & N. R. Co., Case No. 7,384.]

3. A patent for a combination of old elements may be reissued for a combination of fewer elements than were contained in the combination originally claimed.

[Cited in Hoffman v. Young, 2 Fed. 77.]

4. The decision in Gill v. Wells, 22 Wall. [89 U. S.] 11, explained.

5. A patent, to be overthrown on the question of novelty, must be overthrown by clear and satisfactory proof.

[Cited in Kittle v. Hall, 29 Fed. 514.]

6. A rejected application for a patent is not evidence that the thing described was ever used, nor is such description a patent or a publication, within the statute.

[These were bills in equity by James W. Herring and others against Willis S. Nelson and others and against William G. Gage and others for infringement of a patent.]

George F. Comstock and James A. Allen, for plaintiffs.

Henry R. Selden, for defendants.

JOHNSON, Circuit Judge. The bills, in these causes, were exhibited by the plaintiffs, as assignees, for the county of Oswego, of

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 55; and here republished by permission. Merw. Pat. Inv. 459, contains only a partial report.]

certain reissued and extended letters patent, originally granted to John Deuchfield, April 20th, 1858, and numbered 19,984, for the term of fourteen years. The letters patent were reissued to Deuchfield, January 16th, 1872, and were extended, April 17th, 1872, for a further term of seven years from the time of the expiration of the original and reissued patent, April 20th, 1872. The defendants are charged with infringing the first claim of the reissued patent. In defence, it is insisted that the reissued letters patent are not for the same invention as the original patent, and that new matter has been introduced into the specification, contrary to the provisions of section 53 of the patent act of July 8, 1870 (16 Stat. 205). In the second place, it is claimed that the patentee was not the first inventor of what, if anything, was new in the invention claimed under the first claim of the reissued patent. This position is sought to be sustained by proof, 1st, that some one else made the invention, if any; 2d, by proof of several patents which are claimed to anticipate the Deuchfield patent; and, 3d, by proof of what is alleged to have been the prior use, in various instances, of that which is claimed as the invention of Deuchfield.

The reissued patent, number 4,712, dated January 16th, 1872, is for an alleged new and useful "improvement in cooling and drying meal," which Deuchfield claimed to have invented. The amended specification annexed thereto states that Deuchfield has "invented a new and improved arrangement of means for cooling and drying meal," and declares the invention to consist in "the peculiar arrangement of a suction fan, conveyor or conveyors, and elevators," as thereinafter described, "whereby the meal, during its passage from the grinding stones to the bolts, is thoroughly dried and cooled within a limited space, the whole forming a simple and economical device." The specification is accompanied by lettered drawings, which are referred to in the description: "A represents mill-stones, and A' are the curbs. The stones are arranged in the ordinary way. B represents the bed on which the stones are placed; C represents the spouts which convey the meal from the stones; and D is a chest which is placed horizontally on the flooring, E, and with which the blower ends of the spouts, C, communicate, as shown at a in both figures. Within the chest, D, a longitudinal shaft, F, is placed, said shaft having a spiral flanch, b, on it, as shown clearly in Fig. 1. The chest, D, is equal in length to the bed, B, so that all the spouts, C, of the several stones, A, may communicate with it. Within the chest, D, there is also placed a zig-zag partition, E, provided with openings, c, having slides, d; and with one end of the chest, D, elevators, F', communicate, said elevators discharging their contents at e, as shown in Fig. 2. G is a fan, which is placed within a suitable box, H. The box, H, communicates with a spout, I, the lower end of which communicates with one end of the chest, D, as shown at f. The upper end of the spout, I, communicates with one end of a chest, J, as shown at g. The chest, J, contains a longitudinal shaft, K, having a screw or spiral flanch, h, on it, as plainly shown in Fig. 1, and, within the chest, J, a series of vertical plates, i, is placed and arranged, as clearly shown in Fig. 1, to form a zig-zag passage, as indicated by arrows, 1. The end of the chest opposite to that where the spout, I, communicates, is provided with an opening, j. Both shafts, F, K, are rotated by

[Drawings of Reissue Patent No. 4,712, published from the Records of the United States Patent Office.]

Fig. 1.

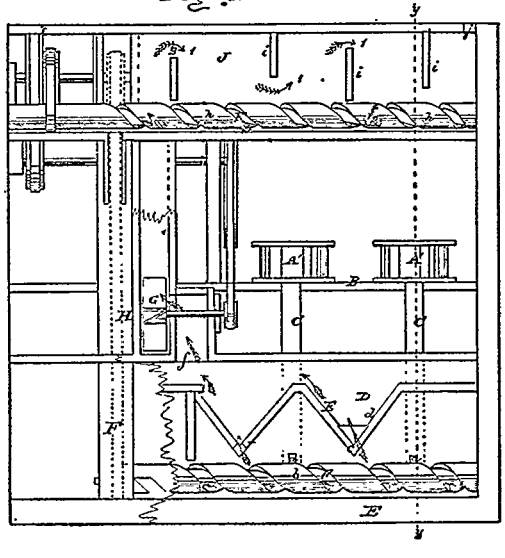
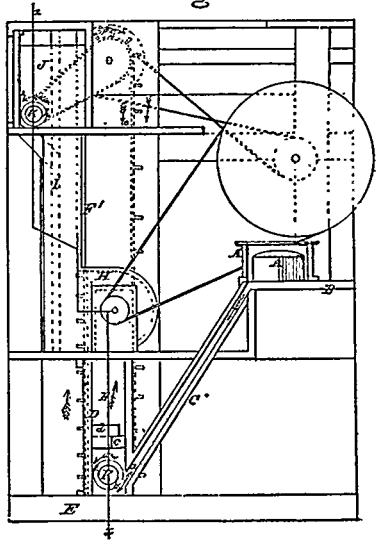


Fig. 2.



any proper means, in the direction indicated by the arrows, 2." The operation is next described, as follows: "The meal passes from the stones, A, down the spouts, C, and into the lower part of the chest, D, and is conveyed by the spirally flanched shaft, F, into the elevator, F', the shaft, F, which is a conveyor, moving the meal in the direction indicated by the arrows, 3. The meal is carried up by the elevators and discharged, at e, directly into the bolts or into troughs, and may be conveyed by hopper-boys, or any suitable conveying device, into the bolts. While the meal is thus passed through the stones, A, spouts, C, and the chest, D, a suction blast is produced by the fan, G, said blast absorbing the moisture or vapor which the meal contains, and which is heated or warmed by the friction of the stones, A. The meal, therefore, is dried and cooled, and, in consequence of the time consumed during its passage through the spouts, C, and chest, D, will be perfectly acted upon by the blast, so that all free moisture will be absorbed. A portion of the finer and lighter particles of flour will follow the blast, and will be ejected up through the spout, I, and through the serpentine or winding-passage formed by the parts, i, and will settle in the outer end of the chest, J, and be conveyed by the conveyor or flanched shaft, K, to a spout, j, through which it falls into the elevators, F', and unites with the meal which is received by the elevators direct from the chest, D." The specification proceeds: "This compound arrangement for operating on the meal while passing through the chest, D, and on the escaped flour in the chest, J, returning the latter to the elevators, while it is extremely well adapted for large flouring mills running at high speeds and with a strong suction blast, may not be either necessary or even practicable in all cases. When the grinding friction evolves only a moderate degree of heat, the chest, J, and its apparatus, may be dispensed with, for, the blast being moderated to correspond, so small a quantity of the fine flour will be drawn through the spout, I, that such flour may be ejected on the mill floor, and may be disposed of in any convenient way, so as to enter the bolts. I do not claim forcing a current of air between a pair of mill stones, while the same is in operation, for the purpose of keeping the stones in a cool state, and preventing the heating of the grain, for, such means, although not very efficient, have been previously used; but I am not aware that parts arranged as herein shown, so as to allow the meal to be subjected to the blast during its entire, or nearly entire, passage from the stones to the bolts, and insure the perfect drying and cooling of the meal, have been previously used. I claim, therefore, as new, and desire to secure by letters patent, 1. The arrangement and combination of the suction fan, G, and spout, I, with the meal chest, D, receiving the meal from the grinding stones, and provided with a conveyor shaft, F, and elevator, F', substantially as and for the purpose set forth; 2. The arrangement and combination of the chests, D, J, shafts, F, K, elevators, F', fan, G, and spout, I, substantially as and for the purpose herein shown and described."

The specification annexed to the patent as originally issued April 20th, 1858, differed in some respects from that attached to the reissued patent. In the original, Deuchfield declares himself to have invented a new and improved arrangement of means for cooling and drying meal *during its passage from the grinding stones to the bolts*, the underlined words being omitted in the reissue. In the original it is declared that the invention consists in the peculiar arrangement of a suction fan, conveyors and elevators. The reissue, by the insertion of the word "conveyor," in the singular, is made to read "conveyor or conveyors," and thus the way is prepared for the omission of one feature of the combination originally claimed. This severance of the combination is further prepared by the paragraph of the reissued specification, commencing with the words, "This compound arrangement," and ending with the words "enter the bolts." The proposed severance is consummated by the insertion of the first claim, under which, as framed, are claimed only "the arrangement and combination of the suction fan, G, and spout, I, with the meal chest, D, receiving the meal from the grinding stones, and provided with a conveyor shaft, F, and elevator, F', substantially as and for the purpose set forth." The other and original claim, now the second, embraces the arrangement and combination of both chests, D and J, both (conveyor) shafts, F and K, and the elevators, fan and spout connected therewith, substantially as and for the purposes therein shown and described. Under the patent as originally issued, it is, therefore, quite plain, that no infringement could be made out without showing a use of the complete combination, with all its elements, for that was the thing patented. No device was claimed as the invention of the patentee, which entered into the combination. The invention claimed consisted only in the combination, and, in this sense, at least, it is true, that, in such a case, the combination disappears when any element is omitted, as was said by Mr. Justice Nelson in Vance v. Campbell, 1 Black [66 U. S.] 427, and as since has been frequently repeated.

Under the first claim of the reissued patent, if it be valid, an infringement may be made out by showing a use of the combination specified in that claim, which omits a number of elements combined in the second or original claim. Under the first claim, therefore, the operation of the reissued patent is greatly enlarged beyond that of the original patent. It, according to its terms, entitles the patentee to exclude everybody

from using the combined elements of that claim; while the original claim would be effectual only to exclude the use by others of the elements of the first claim when combined with the other elements of the original claim. The learned counsel for the plaintiffs is, therefore, in error when he contends that the change produced by the introduction of the first claim of the reissued patent is a narrowing of the claims of the patentee, by abandoning to the public the use of a part of that which, under the original claim, was secured to the patentee. Such is not the operation or effect of that which has been done by the alteration of the specification. Under the original claim, two things were necessary to an infringement, each of which was expressed in the single original claim. Under the reissue and its first claim, one only of those two things being done works an infringement. So that the enlargement is of the right of the patentee; the narrowing is of the right of the public.

It is further claimed, on the part of the plaintiffs, that the claim under the original specification was not of a true combination, producing a result from the co-action of the elements, but that the results were the consequence of the successive and independent action of the parts, each producing its own result. In a certain sense, this would seem to be true; because, the cooling of the meal may be conceived of as one independent result, and the saving and restoring to the common mass that part of the meal which, in the cooling process, has been mechanically separated from the rest, may, also, be conceived of as another independent result. But, this, in my opinion is an over-refinement, not required by the principles of the patent law. When regarded as part of a practical improved arrangement of means for converting grain into flour, both results, the cooling and the saving, contribute to the one common result—cooling without waste, and thus getting the largest practicable amount of merchantable flour. It cannot be doubted, that, if the whole process of reducing grain to flour were new, the complete machinery employed, even including the combined Deuchfield device, could be included and maintained in a single patent, or in a single combination. This view is, as I understand it, supported by the decision of Mr. Justice Curtis, in Forbush v. Cook [Case No. 4,931], cited in Curt. Pat. § 111, note 2. The learned judge says: "To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made." In the original arguments on the part of the plaintiffs, the combination was sought to be sustained as a patentable combination; but, in the further argument, the attempt is made to treat this arrangement of means claimed in the original patent, and in the second claim of the reissued patent, as not patentable, upon the ground that it constitutes only an aggregation of several results, within the doctrine of Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353, 368, and Reckendorfer v. Faber, 92 U. S. 347; but, what has been already said on that topic seems to me to be sufficient to show, that the combination for which the original patent was granted was not liable to the objection, that the results of the combination were an aggregate of separate results, and not the joint product of the several elements of the combination. The case is one not of juxtaposition merely, but of combination, in the sense of the law.

The next question to be considered is that which arises upon the consideration of the two patents, with their specifications and drawings—whether the reissued patent is for the same invention as that for which the original was issued, and thus within the authority of the commissioner of patents, under section 53 of the patent act of 1870. That the original patent was inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming, as his own invention or discovery, more than he had a right to claim as new, and that the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, has been conclusively established by the action of the commissioner, to whom alone the decision of these questions belonged. Seymour v. Osborne, 11 Wall. [78 U. S.] 516, 543–545. But, this decision leaves undetermined the question whether "there is such a repugnancy between the old and the new patent, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced in the original patent." I purposely omit the additional word used in the decision cited, which says, "embraced and secured in the original patent," because, one of the very plain grounds of reissue specified in the statute is, that the original patent fails to secure the invention, by reason of the imperfection of the claim or description of the invention. Curt. Pat. § 282b, note 1, and cases there cited. Moreover, the statute, in the section cited, allows the new patent to be issued with corrected specifications, and, in case of a machine patent, reference to be had, for this purpose, to the drawings and model, the only prohibition, in that behalf, being, that they may only be amended by each other. There is, also, a general prohibition, that no new matter shall be embraced in the specification. A further provision is made, that, where there is neither model nor drawing, amendments may be made upon proof satisfactory to the

commissioner that such new matter or amendment was a part of the original invention. It results, from these provisions, taken together, that what is found in the specification drawing or model of the original patent may be embraced in the reissued patent (Seymour v. Osborne, 11 Wall. [78 U. S.] 516); and that, in redescribing his invention, the patentee is not rigidly confined to what was described before, but may include in the new description whatever else was suggested or substantially indicated in the old, provided it was embraced in the invention as actually made and perfected. Differences in the description and claims of the old and the new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable. Parham v. American Buttonhole Co. [Case No. 10,713]; Battin v. Taggert, 17 How. [58 U. S.] 74. In the case of Stevens v. Pritchard [Case No. 13,407], Mr. Justice Clifford has stated the doctrine with great clearness and precision, so as to afford a plain guide to the application of the law as to reissues. The learned justice says: "Reissued patents are presumed to be for the same invention as the original, unless the contrary appears. Matters of fact are not open, under such an issue, in a suit for infringement. Instead of that, the conclusion in such case must always be in favor of the validity of the reissued patent, unless it appears, upon a comparison of the two instruments, that the reissue, as matter of legal construction, is not for the same invention as the original. Surrenders are allowed, in order that what was imperfect before may be made perfect, and in order that what was before ambiguous may be made clear and certain; and, for that purpose, the patentee may add whatever was substantially suggested or indicated in the original specifications, drawings, or patent office model. New features may not be introduced, for the reason that every interpolation of the kind is forbidden by the act of congress. Errors and defects may, however, be corrected, under the conditions specified; and the prohibition, that new features shall not be introduced, must not be understood as taking away the right to include in the reissue whatever was substantially suggested or indicated in the surrendered specifications, drawings, or patent office model."

In the case now before the court, the drawings attached to the reissued patent are the same as were annexed to the original. The mechanical structure, so far as the machine comes under the first claim of the reissue, is exactly the same as was described in the original specification, up to that point. Nor is anything added to the description of the further mechanical structure of the machine, as originally described. Looking at the mode of operation of the machine as set forth in the original specification, the reissued patent makes no alteration in it, so far as the machine falls under the first claim of the reissue. The whole controversy upon the question turns upon this. The mechanical arrangements are all unchanged; the mode of operation of the several parts is correctly described; the results of the action of the whole are correctly stated; and it is obvious, that, while the combined action of all the parts produces the complete result, yet the mere cooling and drying of the meal is the result of that part of the machinery which is now covered by the first claim of the reissued patent. All that has been added is the new claim, which embodies in words that which the specifications and drawings could not fail to disclose to any intelligent examination. The verbal addition to the specification, of the paragraph which declares that the collection of the separated fine part of the meal and its return to the general mass may or may not be made, as circumstances make desirable, is not, in my opinion, new matter, within the prohibition of the statute. If, to the original specification, only a new claim had been added, substantially like that which forms the first claim of the reissued patent, the legal effect of the original patent would have been the same as that now asserted for the reissued patent. The remarks with which Mr. Justice Clifford commences his opinion, in the case, already cited, of Stevens v. Pritchard, I think, substantially sustain this view. The learned justice says: "Cases arise where a patentee, having invented a new and useful combination, consisting of several elements which, in combination, compose an organized machine, also claims to have invented new and useful inventions, consisting of fewer numbers of the same elements, and, in such cases, the law is well settled, that, if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations, provided he complies with the requirements of the patent act, and files in the patent office a written description of each of the alleged new and useful combinations, and of the manner of making, constructing and using the several inventions. He may, if he sees fit, give the descriptions of the several combinations in one specification, and, in that event, he can secure the full benefit of the exclusive right to each of the several inventions, by separate claims, referring to the specification for the description of the invention, without the necessity of filing separate applications for each of the inventions. Separate descriptions of the respective inventions in one application are as good as if made in several applications; but the claims must be separate, and it would follow, that, if the patentee, by inadvertence, accident or mistake, should fail to claim any one of the described combinations, he might surrender

the original patent and have a reissue, not only for the combinations claimed in the original specification, but for any which were so omitted in the claims of the original patent." For this proposition is cited as authority the case of Gill v. Wells, 22 Wall. [89 U. S.] 24. It is mainly upon what is said in that case that the defendants rely to sustain their proposition that the reissued patent is void, as not for the same invention as the original patent. The position is this, that, where a patent is for a combination of old elements producing a new and useful result, the invention consists only in the combination, and, therefore, when one element is relinquished, the combination being gone, the invention is gone likewise. This proposition is, in a certain sense, true and accurate, in reference to a patentee of such a combination bringing an action for an infringement. There is no infringement when all the elements are not employed, leaving out of view the consideration of equivalents, which, for the present purpose, is not material. Numerous cases sustain this view, and the law is unquestioned. Vance v. Campbell, 1 Black [66 U. S.] 427; Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Gould v. Rees, 15 Wall. [82 U. S.] 187; and many other cases. But, upon the doctrine of these cases in respect to actions for infringements, it is sought to establish a distinction between patents for combinations of old elements and all other patents, in regard to reissues, and to deny the power to reissue such a patent for a combination of any fewer elements than were contained in the original combination. Now, the patent act makes no such distinction. Its terms are general and relate alike to all patents. The position is set up and rests upon this argument: The reissue must be for the same invention; this consists in the combination, which disappears when one element is omitted. But, this argument, true or unsound, does not apply to a case in which, among the old elements, some are single and some are sub-combinations, entering into the general and larger combination. This doctrine was necessarily affirmed, because acted upon in judgment, in the Corn-Planter Patent, 23 Wall. [90 U. S.] 181. To the opinion of the majority of the supreme court in that case was opposed the able statement of the learned judge who delivered the opinion of the court in Gill v. Wells, 22 Wall. [89 U. S.] 1, of the grounds on which he had, in that case, maintained the view that is now sought to be applied to and to control the decision of the present case. But the majority of the court did not apply those views to the decision of the Corn-Planter Case [supra], but held that the reissues were for things contained within the machines and apparatus described in the original patents, and were, therefore, not subject to the objection of diversity of invention.

In Gill v. Wells, above cited, the reissues omitted one well described ingredient of the patented combination, and substituted in its place several other devices, not equivalent for the omitted element, nor claimed to be such, and the court held that this was inadmissible, and that the reissues were not for the original invention.

The case of Vance v. Campbell, before cited, does not, as a judgment, settle any doctrine material to the question of reissues. There was no reissue in the case, and the decision granting a new trial was put upon the ground that the plaintiff had been improperly excluded as a witness.

In Russell v. Dodge, 93 U. S. 460, the only point decided was, that the alleged invention or inventions contained in the original and reissued patents lacked novelty, and were, therefore, not patentable.

After a careful examination of all the cases which have been cited, I am of opinion, that, upon a comparison of the original and reissued patents, it cannot be held, as matter of legal construction, that the reissued patent is for an invention not contained in the original patent, and that the reissued patent is, therefore, not void upon that ground. The decision of the patent office in granting the reissue covers the grounds of fact upon which the action of the commissioner could, in the proceedings before him, have been contested.

The reissued patent being valid upon its face, the presumption is, that the patentee was the first inventor of that which the patent purports to secure. Seymour v. Osborne, 11 Wall. [78 U. S.] 516; Tucker v. Tucker Manuf'g Co. [Case No. 14,227],—Clifford, J. And this is not a mere formal presumption, but, if to be overthrown by parol testimony, must be overthrown upon clear and satisfactory proof. A case of doubt upon the evidence is not enough, for that leaves the presumption operative. Brady v. Atlantic Works [Id. 1,794].

The prior patents adduced by the defendants to show an anticipation of the plaintiffs' invention do not appear to me, in their principles and modes of operation, to approach near enough to the plaintiffs' invention to require particular comment. No one of them shows a current of air created by a suction fan, and drawn through the opening of the mill stones, down the meal spouts, and into and along the enlarged meal box shown in the drawings, and the conveyor shaft, and accompanying the meal in its progress to the elevators, and, by its operation, taking away the heat and moisture of the meal, which is the substance of the plaintiffs' invention.

The rejected application of Mann for a patent is not to be considered as a bar to the patent represented by the plaintiffs. Corn-Planter Patent, 23 Wall. [90 U. S.] 181. Assuming its similarity to the Deuchfield device, the rejected application does not make out that the thing described was ever used; nor is such a description a patent or publication, within the statute.

The defence of want of novelty, by reason

of the alleged prior invention by one Stryker, does not appear to me to have any serious basis. The story which he tells of Deuchfield's application to him, at a grocery store, on a Sunday evening, February 1st, 1857, to contrive some way of keeping the mill (the Uhlhorn) dry, that, after a brief conversation, Deuchfield employed him to come on the next day, to begin the work, and that, on the Monday morning, he went to the mill and made the drawing which he produces, dated and signed by him on that day, as he testifies, and then proceeded with the work, having, as his guide, this working drawing, which represents the mill as having five run of stones, while, upon the overwhelming proof, it never had but four, makes a story incredible enough, upon the face of it, to be disbelieved. But, it is shown to be necessarily untrue, by the evidence of several persons with whom Deuchfield had previously conversed respecting a plan which he had devised for drying the meal and thus freeing the mill from the injurious effect of moisture, and, also, by his consultation with the owners of the mill, and the final consent on their part that he might proceed to put in the contrivance which he had devised, as he proceeded to do on the 2d of February, 1857, employing Stryker for the purpose. It is true, that Deuchfield was not called as a witness, but the proof shows that he was a man broken in health and aged at the time of the examination, and, as there was other independent proof upon the point, satisfactory in character, the omission is not material. It only calls for close scrutiny of the question.

The other questions of anticipation rest upon oral proof, either of the time when certain contrivances were introduced into particular mills, or of the substantial identity of such devices with that covered by Deuchfield's invention.

I am satisfied, upon the most careful examination which I am capable of, that, in each case, the weight of the oral evidence is with the patentee, and that, without the presumption arising from the patent, I should be constrained to hold, upon these questions, with the plaintiffs. But, I can with difficulty understand how it can be supposed, that, in any of the cases of alleged anticipation, the proof for the defence can be taken to go beyond a case of doubt; and, in such a case, the presumption arising from the patent must stand. To discuss these several questions in detail can be of no public service, and I have not the time to devote to it.

The infringements by the defendants are clearly made out by the testimony on the part of the defendants, as well as by that of Bignall on the part of the plaintiffs. In each case, the first claim of the reissued patent is infringed by devices, in all material respects, like those contained in the reissue, and embracing all the elements of that combination. That the defendants have added something to the devices combined by the patentee does not enable them to use his combination without being answerable.

A decree in favor of the plaintiffs must be made in the usual form, restraining further infringement, establishing the reissue, and directing a reference to a master to take an account and ascertain the profits made by the defendants, and the damages suffered by the plaintiff, by reason of such infringements. Either party has leave to apply for further directions, and, upon the coming in and confirmation of the master's report, for a final decree.

[See Case No. 6,422, and note.

[For another case involving this patent, see Bignall v. Harvey, 4 Fed. 334.]

Case No. 6,425.

In re HERRMAN et al.

[4 Ben. 126;[1] 3 N. B. R. 649 (Quarto, 161).]

District Court, S. D. New York. April, 1870.

PROOF OF DEBT—POSTPONED CLAIM.

A proof of a claim, which has been postponed by the register until after the election of an assignee, is then to be treated as if it had not been tendered before the election of the assignee.

In this case [in the matter of Adolph B. Herrman and Herman Herrman], the register, at the first meeting of creditors, postponed certain claims till after the election of the assignee. After the election the proofs were again presented. The question arose how such proofs should be treated, and the register certified it to the court.

[By I. T. WILLIAMS, Register: I, the undersigned, one of the registers of this honorable court, do respectfully certify and report that, at the first meeting of creditors, I postponed the claims of Isidor Rosenthal and others until the assignee should be elected. After the election of assignee, the said Rosenthal, by his counsel, Mr. Mackie, again presents his proofs. The question is, what is then the proper practice? Mr. Seixas, who objected to the proving of the claims before the election of the assignee, suggests that the proofs must now be received by the register as if now for the first time offered and thereupon, in the usual course, handed over to the assignee to share the same future as all other proofs, unless the assignee or some creditors should petition the court to strike out such proof, or reject the claims. If such application be so made, the court will refer it to the register to take proof, and on the coming on of the proof will decide upon the validity of the claims. But if no such action is taken on the part of the assignee or creditors, the party will be entitled to share in the dividend. Mr. Mackie, on the other hand, suggests the apprehension that the claim having been so far the subject

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

of adjudication, that it is postponed under a quasi direction to the assignee to investigate the same, may require affirmative action on his part, to place the claim upon the footing of claims not so objected to and postponed. It would seem that under section 22 [of the act of 1867 (14 Stat. 527)], the burden of proof in opposition to a claim, proved in the usual form, is with the party, assignee or creditor, objecting to it. Yet, when a claim is postponed from the expressed opinion of the register that it ought to be investigated by the assignee, I am not sure that this does not change the burden of proof, and make it the duty of the creditor whose claim is so postponed to take proof before the register, on notice to the assignee and objecting creditors, making a prima facie case at least, of the justness of his claim; thus holding the affirmative in case the assignee desires to proceed and give evidence in opposition to it. If, upon the testimony so taken, there be an opposing interest, the register must certify to the court for decision. If not, he may deem the proof satisfactory, if indeed it be satisfactory, and order distribution accordingly.] [2]

BLATCHFORD, District Judge. The proof of claim, when now tendered, is to be treated, in all respects, as if it had not been tendered before the election of assignee and postponed.

[See Case No. 6,426.]

Case No. 6,426.

In re HERRMAN et al.

[3 N. B. R. 618 (Quarto, 153).] [1]

District Court, S. D. New York. March 18, 1870.

BANKRUPTCY—PROOF OF DEBT—CHOICE OF ASSIGNEE—POWER OF REGISTER.

Where counsel, representing certain creditors, objected to the votes of other creditors being received for choice of assignee, on the ground that one had accepted a preference, and the claims of others had been purchased with the bankrupt's money, opposing counsel offered contrary proof which the register declined to hear, an injunction order having been produced by first counsel. *Held*, that the register was right. The register has power to postpone proof of a claim until an assignee is chosen, if a case is made out for such postponement within rule 6 of this court; but he has no power to institute or set on foot the inquiry provided for by the last clause of section 22 of the act [of 1867 (14 Stat. 527)].

[Cited in Re Bininger, Case No. 1,421.]

[In bankruptcy. In the matter of Adolph B. Herrman and Herman Herrman.]

By I. T. WILLIAMS, Register.

I, the undersigned, one of the registers of this honorable court, do respectfully certify that, upon the first meeting of creditors, I proceeded to take the votes of all the creditors, reserving, by consent of the meeting, all objections until the close of the voting, and also the right to strike out the votes of those whose proofs should be postponed. The vote stood twelve votes, representing seventy-three thousand two hundred and five dollars and nine cents, for William H. Rooney, and seventeen votes, representing fourteen thousand two hundred and twenty-five dollars and sixty-three cents, for David W. Evans. Mr. Seixas, of counsel for certain creditors, then proceeded, pursuant to the understanding aforesaid, to object to the vote of Solomon Reich, and read an affidavit tending to show that said Reich had accepted a preference contrary to the act. After hearing Mr. Mackie, of counsel for certain other creditors, in opposition thereto, I came to the conclusion that there was reasonable doubt of the right of said Reich to prove his claim, and was of the opinion that such right ought to be investigated by the assignee, and pursuant to the understanding aforesaid, struck out said vote. Mr. Seixas then proceeded to object to the vote of Isidore Rosenthal, Simon Fox, Rawitzer Brothers, Adolph Rawitzer, and Edward Nathan, and read several affidavits, letters, papers, and documents, to show that the claims of the said creditors had been purchased with money belonging to the bankrupts, and in collusion with them, in fraud of the bankrupt act. Pending the examination of the case, the hour of adjournment having arrived, the meeting was adjourned to Wednesday, the 9th instant. At the appointed time the meeting proceeded, when Mr. Seixas produced a certified copy of an order, and an injunction founded thereon; whereupon Mr. Mackie stated that he had affidavits of the several creditors whose votes were objected to by Mr. Seixas, and others which he had intended to read in opposition to the objection to the proving of their claims. He also produced Edward Nathan, one of said creditors, and offered him for oral examination. I declined to hear them or permit them to be read or given, holding that the question was disposed of by the order and injunction above referred to. Mr. Mackie then proceeded (pursuant to the understanding under which the vote was taken) to object to the votes of Jacob Foss, Alexander Ross, Felix McCabe, Owen Ward, Ingersoll & Dougherty, William Kelly, the Cleveland Paper Company, Murphy & Son, M. Urspring, John W. Winegar, John Beaman & Co., and Jessup & Moore, stating the grounds on which such objections were founded, and offering proof to support the same. I declined to hear said objections, or the proof supporting them, holding that the court had, in the making of the order and granting the injunction aforesaid, indicated a different practice—to wit: the practice of presenting such objections by petition to the court, and obtaining an order and injunction restraining such creditors from voting. Where-

[2] [From 3 N. B. R. 649 (Quarto, 161).]

[1] [Reprinted by permission.]

upon, after striking out the votes of the creditors named in said injunction order, the said Evans was found to have been elected, and I so declared, to all of which Mr. Mackie excepted, and desired the same to be certified to the court for decision. In submitting the views of the register pursuant to the rules of this court, it is submitted that the view taken in the Case of Noble [Case No. 10,282] should undergo some modification. The questions presented by objections of this character go, in effect, only to the right of voting upon the election of an assignee before the register. Such objections must be disposed of on the spot, otherwise they are utterly idle. The register should listen to them, and if a prima facie case is made out, he should postpone the proof of the claim till the assignee is chosen. If the court should be of this opinion, this case must, of course, be remitted to the register, with directions to hold another election. I beg to say, further, that I was not aware, at the time of the meeting, of the decision in the Northern district in Re Pearson [Id. 10,878]. Adopting the practice there suggested, it would clearly be the duty of the register to first call the names of the creditors entitled to vote, and dispose of any objection to his voting before receiving his vote. Such a course will, in future, be adopted by me, unless the judge of this district should indicate a different practice. Dated this 16th day of March, 1870.

BLATCHFORD, District Judge. The order made by me on the 8th instant was made because it was stated to me by the attorney who applied for it, that the register doubted his power to make it. The case of In re Noble [Case No. 10,282] was called to the attention of the attorney by me, with the statement that my understanding of it was that the register in that case being the same register as in this, expressly stated in his certificate that he had power to inquire into the right of creditors to vote, for the purpose of postponing the proof of claims until an assignee should be chosen, pursuant to section 23. I also called the attention of the attorney that, by rule 6 of this court, it is expressly provided that if the register entertains doubt of the validity of any claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. But the attorney stated that the register, notwithstanding that rule, doubted his power to do what I state above I understand him, in his certificate in the Case of Noble, to say he has power to do. I understand the Case of Noble to mean that the register has power to postpone proof of a claim until an assignee is chosen, if a case is made out for such postponement within rule 6 of this court; but that, beyond that, the register has no power to institute or set on foot the inquiry provided for by the last clause of section 22 of the act. I did not intend, by granting the order made in this case, to institute any new practice.

Let an order be entered in this case for a new election of assignee, and setting aside the former election. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

[Subsequently, the court made an order concerning certain proofs of claim presented after said election. Case No. 6,425.]

Case No. 6,427.

HERRON v. The PEGGY.

[Bee, 57.] [1]

District Court, D. South Carolina. Oct. 21, 1794.

SEAMEN—WAGES—ENTRY IN LOG-BOOK—EVIDENCE.

The entry in the log-book according to the act of congress was defective, as to the point of this man's leaving the ship. But a partial forfeiture of wages was decreed, from other evidence.

[Cited in The Martha, Case No. 9,144; Knagg v. Goldsmith, Id. 7,872.]

It appears from the articles and evidence produced in this case, that the actor [William Herron], on the 9th October, 1793, shipped in this port, as cook of this schooner, at ten dollars per month. That he performed the voyage out and home, and discharged his duty well. That, on the day after the vessel returned here, he went ashore; and though he came back within the twenty-four hours of each day, yet he never did any work on board afterwards. On the 2d October he quitted the vessel finally; and went to sea on another voyage, leaving a letter of attorney to receive his wages. It appears that after he first left the schooner, the captain hired another cook in his room, who continued on board at a dollar per day, notwithstanding this man's regular appearance on board daily. It is contended on the part of the owners that this leaving of the vessel without permission amounts to a forfeiture of all this man's wages; and the 5th clause of the act of congress [of 1790 (1 Stat. 133)] "for the government and regulation of merchant seamen" has been relied upon to this effect. The articles also were produced to this point. I am to decide whether a total or partial forfeiture of wages has been incurred. It is part of the law of all the maritime powers that if a seaman be absent from his ship forty-eight hours, without leave, he forfeits his wages. Congress has adopted this regulation; and the only new matter contained in our law upon this point is relative to the sort of evidence by which such misbehaviour shall be proved. In order to fix the forfeiture, it was formerly necessary to make a protest before some notary or other officer, and that upon

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

oath. The act of congress declares, that in such cases the officer having charge of the log-book, shall make an entry therein of the name of the offending seaman; and, if he return within forty-eight hours, he shall only forfeit three days' wages, for each day of absence. But if he absent himself for more than forty-eight hours, he shall forfeit the whole. The mate, or officer having the log-book, is, by this act, vested with very extensive powers. He is not sworn to the faithful discharge of this duty, and, if a bad man, may materially injure every incautious mariner; and such is their general character. The act is highly penal in other respects, particularly as it authorizes commitment to jail for leaving the vessel without permission. I think, therefore, it should be construed strictly: it is favourable, indeed, to owners and shipping, but highly rigid as respects the seamen.

I will now recur to the evidence in this cause. We find by the log-book that this schooner arrived at our wharves on Sunday the 21st September at two o'clock in the afternoon. An entry is made that the cook went ashore that day without leave of any person on board. No other charge appears against him, nor any thing else respecting him; no mention is made of his ever returning on board. Yet the mate in his examination declared that he came on board the next day, and staid an hour and a half; that he was there in liquor; that he continued to come on board daily, and staid always about the same space of time. Not only is the log-book silent as to this, but we find almost daily mention that "all hands were on board lading salt." Nothing conclusive therefore, appears in the log-book. If at the end of forty-eight hours from the time he first absented himself it had been entered that he had not returned, a forfeiture must have followed. As it is, we should rather infer that he was included in the expression "All hands on board." We must, therefore, have recourse to other evidence.

The mate proves that another cook was hired in the actor's place, but does not know by whom. The captain is gone to sea, and we lose the benefit of his testimony.

Mr. Wyatt's evidence must be conclusive as far as it goes. He says that a few days after the vessel arrived, he was on board, and the captain asked him if he had seen the cook. He answered, that the cook was on shore with a sore leg. The captain desired him to advise the cook to return on board, and save the money he had earned, as he was then paying a dollar a day to a substitute. He added some further advice as to this man and a large family who would suffer by his neglect of duty, as well as waste of money on shore. From this it would seem that neither the captain nor the actor entertained a thought of a total forfeiture at this time. The 7th section of the act allows the master to have his seamen sent to jail for an offence of this sort; but he preferred hiring one in his room, out of regard both to him and his family. Wyatt says the man acquiesced in the captain's hiring a person in his room; here, then, is a tacit agreement between them, under the impression of which the man seems to have gone to sea, leaving a power to receive his wages, subject to this deduction. Neither vessel, owner, nor captain was injured by the arrangement, and I see no equitable cause why he should forfeit what he had so well earned for twelve months preceding. As to the remedy under the act, it was waived by the defective entry in the log-book. Nevertheless, I think the conduct of this man blamable, and that he ought to be mulcted agreeably to one part of the clause above cited. He was absent from the vessel fifteen days previous to the 7th October, when the vessel was discharged; he must therefore lose forty-five days wages, that is, a month and a half at ten dollars..... 15
Hire of a substitute for fifteen days, at one dollar per day..... 15

Dollars 30

Let that sum, then, be deducted from what is due to him; and as the act declares that where one person is hired in the room of another, damages shall be recovered with costs, I decree further that the actor pay the costs of this suit.

Case No. 6,428.

HERRON v. RUNKLE.

[1 Am. Law Rev. 217.]

Circuit Court, W. D. Tennessee. April 11, 1866.

FREEDMEN'S BUREAU—INJUNCTION AGAINST TRESPASS.

[A court of equity cannot enjoin the commission of a trespass on the part of an officer of the Freedmen's Bureau, in the levying of an execution upon personal property.]

This was a bill praying for injunction to restrain the defendant, who was superintendent of the Freedmen's Bureau, from enforcing, against the personal estate of the plaintiff's testator, a judgment rendered by the defendant against plaintiff's testator, a white citizen, in favor of a freedman.

TRIGG, District Judge, held that the act of March 3, 1865, § 1 [13 Stat. 507], gave the Freedmen's Bureau no jurisdiction to determine such suits, and that the enforcement of the judgment would be a trespass, but that the court could not enjoin against the commission of such trespass, and that the parties must be left to their remedies at law.

Case No. 6,429.

HERSEY v. The NORTH AMERICA.

[6 Hunt, Mer. Mag. (1842) 174.]

District Court, D. Massachusetts.

COLLISION—LOOKOUT—DARKNESS.

[On a libel of a steamer for collision with libellant's sloop on the high seas, four persons on the steamer testified that they were keeping a sharp lookout, and, because of the excessive darkness, did not see the sloop until too late to avoid the collision. *Held*, on conflicting evidence as to the extent of the darkness, that the steamer should not be held in fault.]

[This was a libel in rem by Albert Hersey, owner of the sloop Quincy, against the steamer North America, for collision.]

SPRAGUE, District Judge. The collision took place on the night of the 21st of August, about 9 o'clock, near Half-Way Rock, off Cape Ann, between the steamer North America, bound from Boston to St. Johns, and the sloop Quincy, of Hingham, bound from Rockport (near Gloucester) to Boston. The libellants charge that the respondents were in fault and guilty of gross carelessness, while the respondents state that they did not see the sloop, by reason of the darkness, until within a minute and a half before they struck. The steamer, having her steam up, is to be taken to be a vessel sailing with a fair wind, and it is also to be taken that the sloop was not in fact seen in season to avoid her.

The first question is, was there a good lookout kept up on board the steamer? The evidence on this point comes from the captain, mate, and pilot of the steamer. The pilot states that he and the mate were stationed on the upper deck for the express purpose of keeping a good lookout, which they did. The pilot first saw the Quincy, and sprang into the wheel-house to assist the helmsman to avoid her. The mate's testimony concurs with that of the pilot. Two of the men also say that they were keeping a lookout on the lower deck of the steamer, but did not see the sloop until after they heard the pilot cry out. Here are four witnesses to the point that a good lookout was kept up on board the steamer, and they are uncontradicted. This point is thus far established. But it is urged by the libellants that the mere fact of the collision, under the circumstances, proves that a proper lookout was not kept up on board the steamer, as the night was a clear, starlit night, and the sloop could have been seen half a mile off. Was this the case? On this point the testimony was exceedingly contradictory. The captain of a vessel which sailed from Rockport about an hour before the Quincy testifies that the night was clear, and not thick or close, and those on board the Quincy state the same; while all on board the steamer concur in testifying the contrary. How can this evidence be reconciled? Two of those on board the sloop state that there was a heavy cloud along the horizon from southwest to northeast. The two vessels were sailing in opposite directions,—one rather towards the cloud, the other away from it,—and this may account for the difference of opinion as to the night. Be this as it may, it does not appear, on the whole, that the collision was the result of negligence, but of pure accident, and the libel must be dismissed. But, as the libellants do not seem to have been in fault in bringing it, let it be dismissed without costs.

Case No. 6,430.

In re HERSHMAN.

[7 N. B. R. 604.] [1]

District Court, E. D. Pennsylvania. 1873.

BANKRUPTCY—DISCHARGE—ASSENT OF CREDITORS—AMENDMENTS TO ACT OF 1867.

1. The amendments of 22d of July, 1868 [15 Stat. 227], and 14th of July, 1870 [16 Stat. 276], to the bankrupt act [of 1867 (14 Stat. 517)], extend the time as to the operation of the provisions of the second clause of the thirty-third section as if the original act had in this respect been passed January 1st, 1869.

2. Where a majority in number and value of those creditors of a bankrupt, whose debts were contracted after January 1st, 1869, assent in writing to his discharge, he is entitled to a discharge from all provable debts, whether contracted before or after that day.

[Cited in Re Pierson, Case No. 11,154.]

By JOSEPH MASON, Register:

The bankrupt [J. W. Hershman] has applied for his discharge and passed his final examination which is herewith forwarded. His petition was filed March 11th, 1870. Twelve of the creditors of said bankrupt have proved claims amounting together to the sum of four thousand six hundred and thirty-five dollars and twenty cents; eight of said claims, and portion of another, amounting together to the sum of one thousand one hundred and eighty-eight dollars and twenty-six cents, appear to have been contracted subsequently to the 1st day of January, 1869. Three of said claims and portion of another, amounting together to the sum of three thousand four hundred and forty-seven dollars and forty-four cents, appear to have been contracted prior to the 1st of January, 1869; but of these three, two, each for one thousand six hundred and fifty-six dollars and twenty-four cents, are for the same debt, one of them to the bankrupt's former copartner on account of the non-payment of the other—a debt of the firm's copartnership. This would reduce the total actual indebtedness proved, to the sum of two thousand nine hundred and seventy-eight dollars and ninety-six cents. The assets have not been equal to fifty per centum of the claims proved. The bankrupt has obtained the assent (in writing) to his discharge, of eight of said claimants, the claims of six and portion of another amounting to

[1] [Reprinted by permission.]

six hundred and fifty-one dollars and seventy-four cents, having been contracted subsequently to January 1st, 1869, and that of one and balance of the remaining one, amounting to one hundred and thirty-four dollars and forty-six cents, having been contracted prior to January 1st, 1869. The bankrupt has, therefore, obtained the written assent of the majority in number of all his creditors, but not of the majority in value. He has obtained the assent of both the majority in number and value of those whose claims have been proved, and which were contracted subsequently to January 1st, 1869. I should have supposed that the latter would have been sufficient for the purpose of his discharge, were it not for the decision of the district court of the United States for the district of Kentucky in Re Shower [Case No. 12,816], which holds that the "assent" of creditors for this purpose "must be equal to fifty per centum of all the claims proved, on which the bankrupt is liable as principal, including as well those contracted prior to January, 1869, as those contracted afterwards." The second clause of the thirty-third section of the bankrupt act, as amended by the act of 27th of July, 1868, is as follows: "In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for his discharge." The amendment of July 14th, 1870, is as follows: "The provisions of the second clause of the thirty-third section of said act, as amended by the first section of the act in amendment thereof, approved July 27th, 1868, shall not apply to those debts, from which the bankrupt seeks a discharge, which were contracted prior to the 1st day of January, 1869."

In the decision referred to, this clause is construed, together with its amendment, as follows: "In all proceedings in bankruptcy commenced after the 1st of January, 1869, no discharge shall be granted to a debtor from debts contracted on or after the 1st of January, 1869, whose assets shall not equal fifty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor and who have proved their claims, be filed in the case." I had supposed that the amendment of July 14th, 1870, should be construed so as to render inapplicable all of the provisions of the second clause of the thirty-third section, as amended by the act of July 27th, 1868, to debts contracted prior to January 1st, 1869, that is, not only those in the first portion of said clause, as above set forth in the construction adopted in Re Shower [supra], but all throughout the whole clause, and I should have read it with the last amendment interpolated as follows: In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor (from debts contracted after the 1st day of January, 1869,) whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of the majority in number and value of his creditors, (whose claims were contracted after the 1st of January, 1869,) to whom he shall have become liable, &c. The construction in Re Shower would allow the assent of creditors whose debts are discharged, whether their assent be obtained or not, to control the discharge as to those creditors whose debts would not be discharged without the requisite assent. I should have supposed that this result would have been considered a fatal objection to such a construction. It is to be noticed that in the other construction which I have suggested I have not interpolated after the words "fifty per centum of the claims," the qualification, "contracted after the 1st of January, 1869," as might seem to be necessary in order consistently to fulfill the requirement that this qualification should extend throughout the entire clause; but upon reflection it will readily be seen that where the assets are equal to fifty per centum of all claims proved, they must also—or a proportional part thereof, be equal to fifty per centum of any particular class of claims, for the whole must include its parts, and, therefore, any such interpolation (without more) in this connection would, in fact, be erroneous. I had supposed that the object of the amendment of July 14th, 1870, was to give applicants for the benefit of the bankrupt act as to debts contracted prior to January 1st, 1869, the same privilege as to discharge as they would have had had their application been made prior to said time, and to place them as to debts contracted after said time, in regard to the requirement of their assets being equal to fifty per centum of their indebtedness, in the same position they would be, had they no other creditors than those whose claims were contracted after said time. In other words, in order to effectually exclude the provisions of the second clause of the thirty-third section, as amended by the act of July 27th, 1868, from application to debts contracted prior to January 1st, 1869, they must be confined in their operation wholly to debts contracted subsequently thereto. I, therefore, certify the conformity of the bankrupt, subject to the opinion of the court, upon the question whether he has obtained the requisite assent of creditors.

J. Davis Duffield, for defendant.

CADWALADER, District Judge. A majority in number and value of those creditors of the bankrupt, whose debts were contracted after the 1st of January, 1869, having, in writing, assented to his discharge, he will be discharged from all provable debts, whether contracted before or after that date. The second clause of the thirty-third section of the original bankrupt act of 1867, applied only to subsequent bankruptcies. The reason was, that the sole purpose of the enactment was to prevent future overtrading. The amendatory enactments of the 22d of July, 1868, and 14th of July, 1870, extend the time as if the original enactment had, in this respect, been passed on 1st of January, 1869; but the policy of the original act and of the late enactments is the same. Their import is thus explained sufficiently.

HERTY (BAKER v.). See Case No. 771.

HERTY (BOYER v.). See Case No. 1,753.

Case No. 6,431.

HERTY'S CASE.

[Cited in Ex parte Burr, Case No. 2,186. Nowhere reported; opinion not now accessible.]

Case No. 6,432.

HERTZ et al. v. MAXWELL.

[3 Blatchf. 137.] [1]

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

CUSTOMS DUTIES—VALUATION OF APPRAISERS—PROTEST.

1. Where a protest against the imposition of duties after appraisal, protested "against the payment of 15 per cent. advance, and the penalty therefore accruing on velvets contained in the entries, because we are fully satisfied that they are fully invoiced by the manufacturers:" *Held*, that the price fixed by the appraisers was conclusive as to the dutiable value of the goods (Act Aug. 30, 1842; 5 Stat. 564, § 17), and that no evidence could be given against it.

[See Bailey v. Goodrich, Case No. 735.]

2. Requisites of a protest against the imposition of duties, stated.

This was an action [by Theodore Hertz and others] to recover back an excess of duties, and a penalty of 20 per cent., exacted by the defendant [Hugh Maxwell], as collector of the port of New York, on several importations of Westphalia velvets, in the year 1850. Protests were filed on various grounds, but, upon the argument of the cause, all the protests were abandoned except those "against the payment of 15 per cent. advance, and the penalty therefore accruing on velvets contained in the entries, because we are fully satisfied that they are fully invoiced by the manufacturers."

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

BETTS, District Judge. The case before the court is complicated by the accumulation of documents attached to it, and by testimony taken abroad on commission; and it appears to the court that facts are disclosed which, had they been made grounds of protest, might have entitled the plaintiffs to judgment—such as, that the plaintiffs were manufacturers of the goods, and did not procure them by purchase; and that the invoice was not raised on entry by the importer; and that the collector had not, under either the act of August 30, 1842 (5 Stat. 548), or the act of July 30, 1846 (9 Stat. 42), any authority to impose a penalty of 20 per cent., in addition to the duty on the appraised valuation of the goods.

Upon the specific point presented by the protest, we are of opinion that the price fixed by the appraisers is conclusive as to the dutiable value of the goods (section 17 of the act of August 30, 1842; 5 Stat. 564), and that the plaintiffs have no right to give evidence against it. If such right could be exercised, the exception taken to the protest, that it does not point out the particulars in which there was an overvaluation, comes within the principles repeatedly ruled on that head at the present and previous terms of this court. Judgment for defendant.

HERTZ (UNITED STATES v.). See Case No. 15,357.

Case No. 6,433.

In re HERTZOG.

[18 N. B. R. 526.] [1]

District Court, S. D. New York. Dec. 7, 1878.

BANKRUPTCY—PROOF OF DEBT—STATUTE OF LIMITATIONS.

A debt against which the statute of limitations has run, but which is included in the debtor's schedules, is provable in bankruptcy.

[In bankruptcy. In the matter of Solomon Hertzog.]

J. H. Goodman, for opposing creditors.

G. Patzel, contra.

CHOATE, District Judge. This is a motion to expunge the proof of a debt against which the statute of limitations has run, but which was included in the debtor's schedules. The question whether such a debt is provable or not was determined in the affirmative by Judge Blatchford upon very careful consideration in the case of In re Ray [Case No. 11,589]. It is insisted by the learned coun-

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sel for opposing creditors that this case has been overruled by the case of In re Cornwall [Id. 3,250]. While the latter decision of the circuit court expresses opinions on some points differing from those expressed by Judge Blatchford in the former case, touching some of the grounds or reasons given for his decision, yet it does not in terms overrule In re Ray [supra], nor was the case one involving the principal point on which the decision of Judge Blatchford rests, which was that by the statute of limitations of New York the remedy merely is affected, while the debt is not extinguished or absolutely barred. The case of In re Cornwall [supra] arose under the statute of limitations of Connecticut, by which, as interpreted by the highest court of that state, a debt is absolutely barred. Decisions in other districts, mostly under statutes held to be of the same effect as that of Connecticut, are also referred to. But for the same reason, even if it was proper for this court to follow them upon a doubtful question already litigated and determined in this court, they are not necessarily in conflict with In re Ray.

In the Northern district of New York Judge Hall came to the same conclusion with Judge Blatchford. In re Perry [Case No. 10,998]. For these reasons, I decline to re-examine the question. It is undoubtedly an important one, but seems not to be an open question in this court.

Case No. 6,434.

HERVEY et al. v. ILLINOIS MIDLAND RY. CO.

[7 Biss. 103;[1] 8 Chi. Leg. News, 274.]

Circuit Court, S. D. Illinois. March 11, 1876.

REMOVAL OF CAUSE FROM STATE COURT—FOREIGN CITIZENSHIP—NOMINAL PARTIES.

1. A part of a controversy only cannot be removed, but the case must be so removed that it can be wholly determined.

2. Foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit, as the suits contemplated by the act of March 3, 1875 [18 Stat. 470], are those between citizens of one of the states of the Union on one side, and foreign states, citizens or subjects on the other.

3. Where parties are merely nominal and have no actual interest then their citizenship will not affect the question of removal.

In equity.

Bishop & McKinlay, for plaintiffs.
Robert G. Ingersoll, for defendants.

Before DRUMMOND, Circuit Judge, and TREAT, District Judge.

DRUMMOND, Circuit Judge. An original bill was filed in the Edgar county circuit court, on the 11th of September, 1875, by one Henry Hervey, who claimed to be owner of the majority of the stock of various railroad companies, the Paris & Decatur Railway Company, the Peoria, Atlanta & Decatur Railway Company, and the Paris & Terre Haute Railway Company, all of which had been merged in the Illinois Midland Railway Company, and which was made a defendant. The only plaintiffs in the original bill were Hervey, and some judgment creditors of the Peoria & Decatur Railway Company.

The original bill alleged that there were very large claims in judgment and otherwise against these various companies, and that executions had been issued; and that owing to the purchase by the Peoria, Atlanta & Decatur Railway Company, of the other roads, it could not be ascertained how the judgments could be collected or appropriated, and therefore asked for the appointment of a receiver.

The claims outstanding—what are called the floating debts of the company—were said to be something over three hundred thousand dollars. A receiver was appointed. An amended bill was then filed which set out in more detail the various facts stated in the original bill and also included numerous plaintiffs besides those in the original bill.

These various parties were stockholders of the road, and also judgment and other creditors, and it was stated in the amended bill that if the property was placed in the hands of a receiver, and thus a foreclosure prevented by the sale under execution of the property, the company might be placed upon a stable footing, and that something might be realized for the stockholders and the creditors.

The receiver took possession; various applications were made by him to the court; money was paid under the direction of the court, and contracts also entered into with approbation of the court, by which the receiver became liable to pay certain moneys from time to time, and to issue certificates, (a very objectionable thing which, however, the courts have to some extent countenanced of late, while the property is in possession of the receiver; but it is only to be permitted, I think, under extraordinary circumstances) so that the Edgar circuit court had retained possession of this property for a very considerable time. The only defendant to the original and amended bill, was the Illinois Midland Railway Company.

This was substantially the condition when in February, two creditors, Albert and Morris Grant, citizens of Great Britain, and representing themselves to be bondholders of all these various companies merged into the Illinois Midland Railway Company, came into court and asked to be made parties defendant, and also for leave to file a cross-bill. At the same time Secor, representing himself to be trustee of the mortgage executed by the Peoria, Atlanta & Decatur Railway Company, asked to be made a party. An order was accordingly made by the court. The order

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

seems to have anticipated the actual application, the order being on the 7th of February, and the application not being in fact made in the clerk's office until about the 15th of February. This, perhaps, is not material. They were made parties, on leave given by the court. They then filed answers to the original and amended bills, in which Secor set up that he was mortgagee and trustee of the Peoria, Atlanta & Decatur road; that he represented thirteen hundred thousand dollars for which the mortgage was given; that the plaintiffs were seeking to make the property, which he states was covered by the mortgage, available to them to pay the claims which they had against these companies, and alleging an independent fact, that the Midland Railway Company, and all these companies, were insolvent; that they had not property enough to pay the various mortgage debts against them; and that the bonds secured by the mortgage were a prior lien over the claims represented by the various claimants in the original and amended bills.

These were also the substantial allegations of Albert and Morris Grant, with the exception that they represented in their answer that they were bondholders of these three companies. They allege also that there was a mortgage made by the Paris & Decatur road, of which they held bonds, and also by the Paris & Terre Haute road, of which they were the owners of the bonds, but who the mortgagees and trustees were they do not say. All that is stated is that there were mortgages or deeds of trust to secure bonds of which they were the holders.

Now this was the status of the case when, on the 16th of February these defendants, Albert and Morris Grant and Secor, filed a petition in the clerk's office of the circuit court of Edgar county, to have the cause removed to this court, for the reason that there was a controversy which could be wholly determined as between the trustee and these bondholders and the plaintiffs in the original and amended bills; and if that were so there would be no objection in one aspect of the case for the court to take jurisdiction, because the language of the law is, that when the controversy is wholly between citizens of different states, the court may have jurisdiction, although perhaps the implication is, there may be other controversies in the case between other parties.

It can hardly be said that is true in this case. For instance, in the original and amended bills, there is no allusion whatever to any of the bonds issued—to any paramount claim over that of the stockholders and the judgment and other creditors. But it is insisted that the property, if put in the hands of a receiver, and taken care of, and an arrangement made by which the floating debt can be paid off, can become valuable to the stockholders; and there is nothing in the original or the amended bill to indicate that the Midland Railway Company, which is a citizen of this state, has no interest in the property. And it is manifest that the case cannot be transferred without affecting the interest of the Midland Railway Company very seriously, and the only ground upon which it could be transferred by these bondholders and this trustee is that the Midland Railway Company is a mere nominal party.

If it is a real party, it being one of the defendants as well as the bondholders and the trustee, it is a controversy between that company as one of the defendants and the judgment and other creditors, the plaintiffs in the original and amended bills, and therefore it cannot be wholly determined as between these parties who seek for a removal.

But, independent of that, it appears that Albert and Morris Grant are citizens of Great Britain. They are not citizens of one of the states of this Union, as we think they must be within the meaning of the last clause of the second section of the act of the 3d of March, 1875, under which this case is sought to be removed.

"Between citizens of a state and foreign states, citizens or subjects" (18 Stat. 470), is one of the conditions under which the federal court has jurisdiction. Now "citizens of a state" there means citizens of one of the United States, and the suits contemplated are suits between citizens of one of the states of the Union on one side and foreign states or citizens or subjects on the other.

Then the next section proceeds to say (18 Stat. 471), "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states," (that means different states of this Union—not citizens of one of the states of this Union and foreign states, citizens or subjects: and the suits referred to are the suits which can be fully determined as between them,) "then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit."

Now, as I have said, we cannot determine the controversy, whatever it may be, between these parties seeking a removal, and the plaintiffs in the original and amended bills, without affecting the controversy which may exist between the Midland Railway Company and them, and therefore it is not wholly a controversy between the parties seeking such removal and the plaintiffs in the original and amended bills. Why there was this distinction made—why the language was dropped in the last clause of the section which is contained in another part—it is not for us to determine. It is sufficient that the phraseology is changed, and seems to be limited when less than the whole of the plaintiffs or defendants have the right to remove the suit so that they must be citizens of different states of the Union, and the controversy must be wholly between them.

In this case it is not so. There is a controversy between citizens of the same state, namely, some of the plaintiffs, citizens of

Illinois, and the Midland Railway Company, also a citizen of Illinois.

Again, it is stated in the application for removal, that some of the plaintiffs are foreigners. Waring & Company are bondholders, and are citizens of Great Britain and Ireland, and another party is a citizen of Canada. These are included among the plaintiffs in the amended bill.

Of course they are to be affected by the settlement of any controversy between the other plaintiffs and these defendants who seek a removal. For instance, if it is to be held that the trustee of the bondholders seeking the removal is to have a prior claim over the judgment creditors, then a foreigner is to be affected by that adjudication of the court, whatever it may be. So, in relation to the bondholders who are foreigners and plaintiffs, with the others.

It is not therefore in this aspect of the case a controversy wholly between citizens of different states, but it is a controversy between the citizens of a foreign country and citizens of one or more of the United States.

It has occurred to us as a question whether or not these difficulties may be removed, as in this very complicated case it has been suggested that it might perhaps be better for the interest of all parties that this court should take jurisdiction of the case. But of course we can only take it where the law enables us to do so. It is said that the Midland Railway Company, which is the only other defendant, has no interest in this controversy. If it be true, if it is actually insolvent, and all these various railroad companies of which it is the successor are also insolvent, and there is not more than enough, or not enough, to pay the bonded debt, then it may be that and the other companies are merely nominal parties. They may have no real interest in the controversy. So perhaps it might be if the stockholders were parties and the stock was of no value whatever.

The controversy then would be, whether the bondholders should have this property, or the judgment and other creditors represented in the original and amended bills. But we cannot assume now, in the present aspect of the case, as it appears upon the record, that this is so. It is alleged on one side, it is true, but it is in an answer which has not, as yet, judicially come to the knowledge of the court, and this allegation is entirely different from that in the bill.

We think that it must affirmatively appear that the court has jurisdiction. These answers were filed in vacation. The state court has never had its attention drawn to them—they never have come under its judicial cognizance in any way. It is to be observed that the Midland Railway Company has never answered, and the Paris & Decatur Railroad, the Paris & Terre Haute Railroad, the Peoria, Atlanta & Decatur Companies have never appeared directly in the case, nor have their trustees or mortgagees, except Mr. Secor.

The Midland Railway Company may admit it, or it may appear to the satisfaction of the court that it has only a nominal interest, and so of the other parties named. It may be remarked further there was no necessity for these bondholders, Albert and Morris Grant, to be made parties. The trustees could act for them, as there seems to be no antagonism or breach of duty on their part, especially under the allegation contained in Secor's answer, that he is requested by them to appear for the protection of the bondholders. He is so far actually interested, within the meaning of the last clause of the second section of the act of 1875, as to enable him to represent them, although he is a mere trustee, yet as trustee representing their interests, he can become a party to the suit.

So then, if it did appear, or shall be made to appear that these various railroad companies are only nominally interested, and are nominal parties to this controversy, if the trustees shall come in and desire to appear as defendants, for the purpose of directing and controlling the litigation, and if it shall prove that there is no other real controversy in the case, except between them as representing the bondholders and the judgment and other creditors of these various companies, and that they are citizens of different states—then we think that the court may take jurisdiction.

[Mr. Ingersoll—This case then remains as it is, as I understand it, as though no motion had been made. I will try to make it appear to this court by proper evidence on giving the other parties notice.

[The Court—We understand that the circuit court of Edgar county sits on Monday. I think you had better appear before that court and make your regular application, and then if what is proposed is true a proper case may be made.

[Mr. Ingersoll—It seemed sufficient to say in the answer and petition, that the road is utterly insolvent, and that there is not property enough to pay the bonds—and to make it appear that they are merely nominal parties.

[The Court—That may not be true.

[Mr. Ingersoll—I say I supposed that would be sufficient.

[The Court—I think the proper allegation would be to allege, that they were, from these circumstances, mere nominal parties. It does not seem that we had better make any order in the case.

[R. N. Bishop—It will be proper, then, for the circuit court of Edgar county to take notice and proceed with the case.

[Treat, District Judge—The case is not here.

[Mr. Bishop—I will state. I have been perfectly willing to adopt the suggestion of the

court, as to the removal of the cause here at the proper time, as soon as I have consulted my client, to strike out everybody that stands in the way.] [2]

[NOTE. Subsequently, April 6, 1878, the Union Trust Company filed a petition in the state court for the removal of the cause to the federal court, with the usual allegations to give jurisdiction. An order was accordingly made, a bond filed, and the federal court took jurisdiction without objection. At the expiration of 18 months the complainant made a motion to remand the case to the state court, upon the ground of irregularity in the bond, and for certain other reasons. The motion was denied. 3 Fed. 707. The causes were then referred to a special commissioner to take testimony and report his conclusions of law and fact. Exceptions were filed to this report, and, after argument by counsel, certain orders were made by the court. 28 Fed. 169.]

Case No. 6,435.

HERWIG v. OAKLEY.

[Taney, 389.] [1]

Circuit Court, D. Maryland. April Term, 1838.

BOTTOMRY BOND—FRAUDULENT ACQUITTANCE—WAIVER—PURCHASER—NOTICE.

1. Oakley advanced money, at New York, on bottomry, for the repairs of the schooner Isabella (afterwards Rosamond), of Port au Prince; the bond was dated 16 November, 1829, and payable sixty days after the arrival of the vessel at Port au Prince, where she arrived on the 12th of December, 1829; the title to her, at the time of the bottomry, was, according to her papers, vested in Dupesne, a merchant of Port au Prince, father-in-law of R. A. Windsor, the principal of the firm of Windsor & Co.; Oakley sent the bottomry-bond to Windsor & Co. for collection, supposing them to be the charterers; and they, on the 10th of January, 1830, endorsed on the bond the following acquittance: "We hereby acquit Messrs. L. Dupesne & Co., owners of the schooner Isabella, as well as the said schooner, collectively or individually, of all liability or responsibility that might arise from this bottomry-bond, which, being entrusted to us by Mr. Oakley, we now cancel and annul, acknowledging ourselves to be the sole debtors to Mr. Oakley of the amount of disbursements paid by him on the schooner in New York, the said amount being, according to agreement, entered to our own account:" prior to the execution of this acquittance, a letter dated 31 December, 1829, had been despatched by Windsor & Co., to Oakley, stating that they were the owners of the schooner, and that his advances on her account would be promptly remitted by them: Oakley, not knowing of the above acquittance, brought suit in the Haytien court, against Windsor & Co., and obtained judgment on the 14 September, 1830, on an account, in which the amount of the bottomry-bond was included. On the 30 December, 1830, Herwig (the claimant of the vessel) purchased her from Dupesne, who exhibited to him the bottomry-bond, with the acquittance of Windsor & Co. written upon it: at the time he made this purchase, Herwig was acquainted with the fact of the judgment recovered by Oakley against Windsor & Co., and that, notwithstanding this judgment, and the acquittance written on the bond, Oakley claimed his lien on the vessel under his bottomry-bond, as still subsisting. No evidence was offered by Herwig to prove that he paid full value for the schooner, and immediately after the purchase he changed her name to "Rosamond," and sent her to a port of the United States to which she had not been accustomed to trade: Windsor & Co. stopped payment in the month of September preceding the sale to Herwig. On a libel filed by Oakley, to enforce his bottomry-lien: *Held*, that the acquittance of Windsor & Co. was a fraud upon the libellant, and a mere nullity, and did not in any degree impair the security of the bottomry-bond.

2. The suit brought and judgment recovered by Oakley in Hayti, being in ignorance of the facts constituting the fraud, did not amount to a waiver of the bond. But it would have amounted to a waiver, if it had been done with a knowledge of all the facts.

3. Herwig could not hold the vessel discharged from the lien of the bond, as he was a purchaser with notice of Oakley's claim. His opinion as to the validity of that claim, did not alter his predicament; he had notice that Oakley made the claim, and having this notice, he bought at his peril, and the property in his hands was bound to the same extent and in the same manner as it was in the hands of the person from whom he purchased.

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

In admiralty.

Charles F. Mayer, for appellant.

J. Glenn, for appellee.

TANEY, Circuit Justice. This is a proceeding on the part of Charles Oakley, to charge the schooner Rosamond, formerly the Isabella [Ernest C. Herwig, claimant], with the amount due on a bottomry-bond, executed at New York, 16 November, 1829. The vessel belonged to Port au Prince, in Hayti, and was consigned, with her cargo, by R. A. Windsor & Co., merchants of that place, to Oakley, the libellant; after her arrival in the port of New York, she was found to require extensive repairs to make her seaworthy, and the master having no funds, and being unable to raise the money, Oakley made the necessary advances on bottomry, and took the bottomry-bond from the master to secure himself. At the time the money was advanced by Oakley, and the bond taken, he did not know who were the real owners of the vessel, and had no funds of Windsor & Co. in his hands. The bond is on the schooner Isabella (now called the Rosamond) for $1145 97, with seven per cent. interest, payable in sixty days after the arrival of the vessel at Port au Prince. She sailed from New York, a few days after the execution of the bottomry-bond, and appears, by a letter from Windsor & Co. to Oakley, to have arrived at Port au Prince before the 12th December, 1829.

The bond was sent by Oakley to Windsor & Co., for collection; and it appears by the testimony of Roome, the clerk of Oakley, that it was forwarded to them, under the impression that they were the charterers, and not the owners of the vessel. There were other accounts and dealings between the parties, and when Oakley, at the end of

[2] [From 8 Chi. Leg. News, 274.]

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

the year, transmitted his account to Windsor & Co., the amount of the bottomry-bond was charged against them, because the bond had been sent to them for collection.

The title to the vessel, at the time of the bottomry, was, according to the vessel's papers, in Dupesne, a resident merchant of Port au Prince; and Heyliza, the master, and R. A. Windsor, the principal of the firm of R. A. Windsor & Co., both swear that the vessel was the property of Dupesne. But the master does not appear to have had any means of knowledge on the subject, except what he derived from the schooner's papers; and the conduct of Windsor has been such, that the court must regard his testimony as entitled to but little consideration; for, in the letter of R. A. Windsor & Co. to Oakley, dated 12 December, 1829, in reply to Oakley's letter informing them of the bottomry, and that he did not know who owned the vessel, they state that the schooner belongs to them; and they repeat this statement in another letter to him, dated 31 December, 1829, and mention that they are about to send him an account of damages sustained on her voyage, by stress of weather, in order to obtain compensation from the underwriters.

Now, after such statements made to their commercial correspondent in New York, who, it appears from the papers in the case, was in advance for them on other accounts, Windsor comes before the court with an ill grace, when he appears here to prove that the schooner, at that time, belonged exclusively to Dupesne, and that his firm had no interest whatever in her. The testimony of such a witness cannot be respected, nor allowed to have any weight in the decision of this controversy.

Besides, his testimony is not only inconsistent with his letters, but it is inconsistent with other acts to which he was a party; his acquittance on the bottomry is made to "Messrs. L. Dupesne & Co., owners, collectively and individually;" but he states in his testimony, that Dupesne was her "lawful and only owner," and yet he gives no explanation of the reason for making the acquittance to "Messrs. L. Dupesne & Co., collectively and individually," instead of making it to Dupesne himself, "her lawful and only owner." The schooner was, certainly, documented in the name of Dupesne alone, and there is nothing in the evidence to show that this vessel was ever owned by the firm of "Messrs. L. Dupesne & Co.," except this acquittance; nor is it stated who composed the firm of Dupesne & Co.; neither does he inform us who composed the firm of R. A. Windsor & Co.; he states that he was the principal partner, and that he purchased the vessel in 1827.

Now, according to his own showing, he was, at that time, only seventeen years of age; for, in his deposition taken in 1833, he is stated to be at that time about twenty-three years of age. It cannot readily be imagined, that one so youthful could have been placed at the head of a firm carrying on such extensive business, unless his associate was some person who felt a peculiar interest in his welfare, and was willing to advance the interests of R. A. Windsor at some hazard to himself. Dupesne was his father-in-law; he may have been the partner in this firm, and taken the documentary evidence of ownership on account of the youth of his son-in-law; neither Windsor nor Dupesne states the time when the schooner was documented in the name of Dupesne; both of them carefully evade that point. Windsor says he purchased her in 1827, and that she then changed flag and name; but whether her new papers were in the name of Windsor & Co., or in the name of Dupesne, is not stated; he tells us that he sold her to Dupesne in 1829; this may be literally true, and yet the sale may have been made, after he was informed of the bottomry; for he received information of the bottomry-bond before 12 December, 1829, and the sale may have been afterwards and before the close of the year. Now, if there had been a real and bonâ fide sale of this vessel in 1829, before the bottomry, it cannot be doubted, that Windsor would have given the date, and would not have answered in this loose and equivocal manner, which leaves it doubtful whether the alleged sale was before or after the bottomry.

Dupesne seems to be equally unwilling with Windsor to give the date of his purchase; he is asked by the libellant, "At what time he purchased the schooner, and from whom?" And he answers "All the documents are in the possession of E. C. Herwig:" this is his whole answer. It is a manifest evasion of the question, and an attempt to put the case exclusively on the formal documents of the vessel; and is a refusal to give to the libellant the information he asked for.

Dupesne knew, from the very nature of the proceeding, that Oakley disputed the validity of the acquittance which he had received on the bottomry, and if his own conduct in that matter had been free from reproach, he would gladly have availed himself of the opportunity of explanation offered him by the libellant, and have given a frank and full account of his connection with Windsor & Co. and the schooner. There is no reason to suppose that the documents of the vessel, in relation to her ownership, were ever changed, after she was purchased by Windsor & Co. in 1827, until she was sold to Herwig in 1830; and from the manner in which Windsor and Dupesne testify, taken in connection with the other testimony in the case, their collusion and co-operation with each other in this business, are too evident to be mistaken. The acquaintance itself strongly implies that no money was paid by Dupesne to Windsor, in discharge of the bottomry. The acquittance is in the following words:

"We hereby acquit Messrs. L. Dupesne & Co., owners of the schooner Isabella, as well as the said schooner, collectively or individually, of all liability or responsibility that might arise from this bottomry-bond, which, being entrusted to us by Mr. Oakley, we now cancel and annul, acknowledging ourselves to be the sole debtors of Mr. Oakley, of the amount of disbursements paid by him on the schooner, in New York, the said amount being, according to agreement, entered to our own account. R. A. Windsor & Co. Port au Prince, 10th January, 1830."

The amount of this acquittance, according to its language, is nothing more than this —that, instead of collecting the money due on the bond, he cancels and annuls it, and avails himself of the confidence reposed in him by Oakley, to deprive him of the security he had obtained. And this instrument is secretly executed by a young man, who, at the time of its date, was only twenty years of age, to release property, which is claimed by his father-in-law, from a lien to which it was honestly and justly liable. It is impossible to acquit the father-in-law, under such circumstances, of having participated in the fraudulent intentions of the son-in-law. The court considers the acquittance as fraudulent and void; it is a mere nullity, and does not in any degree impair the security of the bottomry. It is worthy of remark that, at the moment this acquittance was executed, which treats Dupesne & Co. as the owners of the schooner, the letter of Windsor & Co. to Oakley, of 31 December, 1829, was actually on its passage to the United States, and in this letter they assure him, that Windsor & Co. were the owners of the schooner, and that his advances on her account will be promptly remitted by them.

It has been argued that, after this bond was taken, Oakley charged Windsor & Co. in account, with the amount of these advances, and afterwards included them in the account in which he brought suit against them and obtained judgment in the Haytien court; and that these acts are a waiver of the bottomry. It is true, that the advances for which the bottomry was taken were charged against Windsor & Co., by Oakley, in the account transmitted to them shortly after the bond was taken, and the same charge was continued in the account sent to Squire & Reynolds, upon which the suit was brought against Windsor & Co., and the judgment obtained against them; and if the libellant had been apprised of the acquittance, these proceedings would, undoubtedly, have sanctioned what was done, and would have discharged the schooner from the bottomry. But it is proved by the clerk of Oakley, that the item was introduced, in the first instance, in the account, because the bond had been sent to Windsor & Co. for collection, and not because it had been collected by them. Indeed, the account sent at the close of the year 1829, was prior to the date of the acquittance; and these advances were naturally and properly continued in the account of 7 August, 1830, afterwards transmitted to Reynolds & Squire, for the purpose of suit against Windsor & Co., because Oakley had been informed by them, before he sent this account, that they were the owners of the vessel.

He certainly did not mean to waive his lien and rely on the personal security of Windsor & Co., for, in the orders he sent, with the account, to Reynolds & Squire, he directed them to proceed against the vessel as well as against Windsor & Co., and they would have proceeded against her on the bond, if the laws of Hayti had permitted them to do so.

It remains to be examined, whether Herwig, the claimant, stands in a different position from Windsor & Co. and Dupesne. If Herwig had been a purchaser, without notice of the claim of Oakley, he would, without doubt, be entitled to hold the vessel discharged from the bottomry. The possession of the bottomry-bond by the party appearing on the face of the papers to be the owner, with the acquittance endorsed upon it, would have been sufficient to justify the purchase; the more especially, as Oakley had obtained a judgment in the court of Port au Prince against Windsor & Co. for the whole amount of these advances; and the loss occasioned by the breach of trust of Windsor & Co., who were the agents of Oakley, must have fallen upon him, and could not, upon any principle of justice, have been visited upon an innocent purchaser, without notice.

But Herwig was not a purchaser without notice. Reynolds states, in his testimony, that Herwig, previously to his purchasing the vessel, informed his (the witness's) firm, of his wish to do so, when they warned him against it, on account of Oakley's claim, but that Herwig informed him, that Dupesne had exhibited to him documents to prove that the claim no longer existed on the vessel. Now, the vessel was sold to Herwig on the 29th December, 1830, and this conversation took place when he was about to make the purchase; the acquittance bears date on the 10th January, 1830, and Oakley's judgment against Windsor & Co. was obtained on the 14th day of September in the same year; so that Herwig, when he was about to purchase, was warned that, notwithstanding this acquittance, and the judgment for these advances against Windsor & Co., the bottomry on the vessel was still claimed by Oakley as a subsisting lien upon her.

Herwig may possibly have considered this claim as unfounded, and that the possession of the bond by Dupesne, with the acquittance upon it, discharged the lien. But his opinion as to the validity of Oakley's claim, does not alter his predicament; he had notice that Oakley made the claim, and having this notice, he bought at his peril, and the

property in his hands is bound to the same extent, and in the same manner, as it was in the hands of the person from whom he purchased. This is the well-settled rule in courts of equity; it is founded in the principle of justice, and prevails also in courts of admiralty; and there is no department of business in which it should be more strictly enforced by courts of justice, than in commercial concerns, where, from the very nature of his pursuits, the merchant is compelled to confide in distant agents, who can easily give to fraudulent and colorable transactions, the form and semblance of real contracts.

Herwig, it seems, had seen the bottomry-bond, with the acquittance upon it, and knew that this acquittance was dated as far back as 10 January, 1830; yet, nearly a year aftwards, he is warned that Oakley still claims his bond as a lien upon the vessel. Surely this was enough to put him upon inquiry before he bought; it was enough to satisfy him that Oakley did not admit the validity of this acquittance, and if he chose, with that knowledge, to become the purchaser, he must abide the consequences, and must stand upon the title of the party of whom he purchased; and if that title was subject to this lien, the one he acquired is bound in like manner. It was his voluntary act to buy a title which he knew to be disputed; and if he loses his money, it is his own fault. The right acquired by Herwig, the claimant to the schooner, was therefore no better than that of Dupesne, and the vessel came to his hands still charged with the amount due on the bottomry-bond.

There are, moreover, strong circumstances to show that if Herwig did not collude with with Dupesne and Windsor & Co., he was yet sensible that he was purchasing a doubtful title. He avers, in his answer, that he paid the full value of the vessel, discharged from the bottomry, but he has offered no evidence to prove that the sum he paid was the full value; and immediately after his purchase, he changed the name of the schooner and sent her to a port of the United States to which she had not been accustomed to trade. These measures were well calculated to deceive Oakley, and to deprive him of the opportunity of enforcing his claim on the bottomry.

It is true, that the name of this schooner had been changed before, from that of the Robert Burns, to that of the Isabella, when she was bought by Windsor & Co., from her American owners. There was a reason for that alteration in the name; for the vessel, at that time, changed the American flag for the flag of Hayti; and the owner might very naturally suppose that the name of the Robert Burns was not very appropriate to a vessel sailing under the flag of Hayti, and that the name of the Isabella would be more suitable to her new national character. But no reason is assigned for the change of name made by Herwig; and as he had been warned that Oakley still claimed the bottomry on the vessel, this change of name and change of destination was so well calculated to mislead Oakley, and embarrass him in the pursuit of his remedy on the bond, that the court cannot regard it as an act of mere caprice or fancy; it has all the marks of contrivance and design. It does not even appear that Herwig, the claimant, was a merchant or ship-owner in any way engaged in trade before he became the purchaser of the Isabella. Windsor & Co. stopped payment in September, 1830; and the transfer is made to Herwig about two months afterwards, when it was no longer safe to send the schooner to the United States in the name of her former owners.

It has been strongly pressed upon the court, that the libellant has waived his remedy on the bottomry by his own neglect and delay. But the claimant, being a purchaser with notice, stands in the same predicament with Windsor & Co. and Dupesne, and the delay which has taken place has been occasioned by the respondent himself, or those under whose title he claims. The bond was executed at New York, 16 November, 1829, payable sixty days after her arrival at Hayti; she arrived there before the 12th December; it does not appear that she ever returned to any port of the United States, or was at any port where Oakley had an opportunity for enforcing the bond, until after she was transferred to the present claimant, on the 29th December, 1830; the libellant endeavored to enforce it at Port au Prince, where the vessel belonged, but the testimony of Reynolds shows that by the laws of that place it could not be done. After she was transferred to the present claimant, she came to Baltimore, for the first time, on the 28th February, 1831, but she came under a new name, and appeared to be owned by another person; she came again, on the 3d June, 1831, and before she left the port, on the 23d of that month, the process in this cause was issued against her. In all this the court see no want of reasonable diligence on the part of the libellant; on the contrary, he must have been vigilant and active in the pursuit of his remedy, or he could not have so soon discovered her under her new name, with her new owner, in her new place of trade, distant, as it was, from his own place of residence; and there is nothing in the evidence which can impute to him neglect or unnecessary delay, and nothing which ought to deprive him of the lien of his bottomry-bond, against a claimant who stands in the predicament of the present respondent. The decree of the district court must, therefore, be affirmed with costs.

HERZ (GARDNER v.). See Case No. 5,229.

HESS (UNITED STATES v.). See Case No. 15,358.

Case No. 6,436.

HESSIAN et al. v. The EDWARD HOWARD.

[Newb. 522.] [1]

District Court, E. D. Louisiana. June, 1855.

SALVAGE—PARTIES TO LIBEL—COSTS.

1. It is the duty of salvors in bringing suit for salvage, to make all the co-salvors parties, otherwise the court cannot do full justice to all concerned.

[Cited in McConnochie v. Kerr, 9 Fed. 60; A Lot of Whalebone, 51 Fed. 925.]

2. Where a few of the salvors present themselves in court, conceal from the court the names of others, who equally participated in the salvage services, the court would feel bound to dismiss their libel.

3. Where a fair and liberal allowance as salvage is tendered to the libelants or their proctors, the court will be bound to decree costs against the libelants, to be paid out of their distributive share.

[Cited in Lubker v. The N. H. Quimby, Case No. 8,586.]

[This was a libel by William Hessian and others against the steamboat Edward Howard, for salvage.]

Mr. Egan, for libelants.

Mr. Hunter, for respondent.

McCALEB, District Judge. The proceedings in this case are irregular. The libelants are seven of the crew of the steamboat Iroquois, which went to the aid of the Howard while she was on fire near President's Island, in the Mississippi river. They set forth their meritorious services in saving the burning boat and cargo; and if the allegations of their libel could be taken as true, they alone were engaged in the salvage service; they alone were instrumental in saving the boat and cargo from impending peril. The difficulty and confusion which a libel like this will necessarily create in cases of this nature, are apparent. It is impossible for the court to do justice to all parties concerned, when the few who present themselves, conceal from it the names of others, who equally participated in the salvage service, and are therefore equally entitled to share in the compensation which the law allows. It is the duty of salvors, in bringing suit for salvage compensation, to make all the co-salvors parties. This they are required to do at least in general terms, to enable the court in one final decree to do full justice to all concerned. Another and most important reason for the strict enforcement of this rule, is to be found in the necessity of avoiding a multiplicity of suits. I have no hesitation, therefore, in saying that if I were to confine myself to this case as it now stands before the court, I should feel bound to dismiss the libel. The proctors for the respondent, however, have brought to the knowledge of the court, the fact, that the insurance company to which the boat and cargo saved have been abandoned, have amicably agreed to pay to the salvors a fair and reasonable compensation for their services. An arrangement has already been effected with the master of the Iroquois, by which this compensation can be distributed among the officers and crew of that boat. Whatever may be done hereafter to meet the wishes and expectations of the other salvors, it is in evidence that a proposition was made to the proctor of the libelants in this case, to pay them what was deemed a fair and liberal proportion of the compensation thus awarded by the insurance company. The quantum of the whole compensation has been allowed upon the principles of the case of Montgomery v. The T. P. Leathers [Case No. 9,736], decided by this court. The facts and circumstances as detailed by the evidence in that case, would render the decree of the court, a fair criterion for its action in the one now under consideration. The two cases are strikingly similar, and certainly I have heard no evidence adduced on behalf of the present libelants, which would induce me, if all the salvors were now before the court, to award them a higher compensation than was allowed in the case of Montgomery v. The T. P. Leathers [supra]. The respondent has, through its proctors, offered to deposit in court for the benefit of the libelants, a fair proportion of the whole compensation allowed. It is for this court to say what that proportion should be. Without proceeding to make a distribution by shares, which cannot be properly effected in the absence of evidence showing the whole number of salvors and the various positions they occupied on board the Iroquois, I am satisfied that the amount which was tendered to the proctor of the libelants, would be a fair and liberal compensation for at least a portion of his clients: for according to the evidence, a distinction should be drawn between those who shipped at New Orleans and those who shipped at Memphis. The former were among the first who went to the assistance of the Howard, and the latter embarked in the salvage service after much had already been done for the rescue of the boat and cargo from impending peril. To the former I shall award the sum of $50 each, and to the latter $30 each; the costs to be borne by them all, according to the rate of compensation here allowed. It is with reluctance that I require of salvors the payment of costs; but as the case now stands before the court, no other judgment can be properly given. The court cannot be responsible for irregularities committed in the institution of suits of this nature, which, like suits in equity, should embrace all as parties, who are interested in the final decree.

The amount agreed upon as a salvage compensation between the master of the Iroquois and the underwriters, is $10,000. This has been paid over to R. Yeatman & Co., agents of the boat. If the amount be divided be-

[1] [Reported by John S. Newberry, Esq.]

tween the owners of the Iroquois and the salvors equally, according to the decree of this court in the case of the Leathers, there will remain $5,000 to be divided among the crew of the Iroquois. Three fourths of the whole property saved was secured, it is said, before the boat went to Memphis and discharged her upward cargo. She there took on board some additional hands, among whom were four of the present libelants. There were, it appears, about sixty people in all on board of the Iroquois, and of these forty-four or forty-five were firemen or deck hands. The libelants in this case were all firemen. The sum of $50 each awarded to the three who were shipped in New Orleans, and the $30 to each of those four who were shipped at Memphis (in all $270), will give the libelants, even after paying the costs, more than can be paid to the others of the crew according to the rule of apportionment already established. In cases like the present, a very large proportion of the salvage compensation must necessarily be awarded to the salving boat, inasmuch as it was mainly through the admirable equipments—the apparatus of such boats as the Robb and the Iroquois, that the exertions of the salvors were rendered effectual. The decree will be entered and the amount herein awarded will be paid over by the clerk out of the sum deposited in the registry of the court. No proctor's fees to be deducted from the amount so deposited.

Case No. 6,437.

In re HESTER.

[5 N. B. R. 285.][1]

District Court, North Carolina.[2] June, 1871.

BANKRUPTCY—DOWER — EXEMPTIONS UNDER ACTS OF NORTH CAROLINA.

1. The widow of a bankrupt, where petition in bankruptcy was filed after the act passed by the legislature of North Carolina, repealing the statutory provision and restoring the common law right of dower, the bankrupt dying after the issuing of the warrant in bankruptcy, is entitled to dower in the land owned by the bankrupt at the time of the filing of his petition.

[Cited in Re McKenna, 9 Fed. 34.]

2. The act referred to repealed the statutory provision in regard to dower, which in effect restored eo instanti the common law.

3. The legislature by that act attempted to create additional exemptions to those theretofore allowed by law; those exemptions are void as to creditors whose debts were contracted previous to the passage of the act.

4. The widow of a bankrupt is not entitled to the personal property exempted by the provisions of the fourteenth section of the act of eighteen hundred and sixty-seven, nor is the assignee in bankruptcy. No title to exempt property passes to the assignee by the assignment; it remains in the bankrupt; at his death it passes to his legal representatives.

In bankruptcy.

BROOKS, District Judge. There are two questions to be considered and determined, asked by the assignee in his petition in this case.

1. Is the widow entitled to dower in the land owned by the bankrupt at the commencement of proceedings in bankruptcy; the widow being the wife at the commencement of such proceedings, and the bankrupt dying after the issuance of the warrant in bankruptcy?

I have no doubt as to the proper answer to be given to this question. The legislature of North Carolina, by chapter 3, Acts 1868–69, repealed the existing statutory provisions in regard to dower, and eo instanti restored the common law right of dower. The legislature undertook to do much more than repeal the statutory provision for dower, for the act expressly restores the common law dower; in addition thereto they undertook to vest the wife of a living husband with dower in the land of her husband. If this was the intent of the legislature its effect would be to create an additional exemption of property of a debtor from liability to his creditors for debts existing at the time of the passage of the law, as against the claims of such creditors it would be void. For this reason I have heretofore decided in Kelly v. Strange [Case No. 7,676], that a wife is not entitled to dower in the lands of her living husband, in any case in which debts are due from the bankrupt which were contracted previous to the passage of the act referred to.

The question presented here is essentially different. After the petition was filed in this case, and the warrant issued, Hester, the petitioner, died, leaving a widow who claims dower in the lands owned by her husband at the time of his bankruptcy. The proceedings in bankruptcy were commenced subsequent to the passage of the act of the legislature above referred to. The widow of the bankrupt is undoubtedly entitled to dower in the land in question. To show this, it is only necessary to ask what interest or estate in the lands Hester could have conveyed after the restoration of the common law right of dower had been restored, and before his bankruptcy, without the proper relinquishment of his wife? He could only have conveyed the land subject to the contingent right of dower, which would never ripen into any positive right if the wife should die before her husband, but which would become an absolute positive right at the death of the husband—the wife surviving. This is all the estate the husband could have conveyed or which could have been sold by his executors or administrators, and it is clear that this is all the estate in the land that the assignee takes by virtue of the bankruptcy and the assignment of the register. The assignee can sell no more or higher estate than he receives, and the widow is entitled to all her rights in the land, though they are in the hands of the assignee, the same as she

[1] [Reprinted by permission.]

[2] [District not given.]

would be if they were in the hands of heirs at law, or purchasers. There has been no period of time under the written or common law, when a widow was not entitled to dower. The moment the statutory provision became inoperative by reason of its repeal, the common law was in full force, affording, by its munificent provisions, its protection to the "favorites of the law."

2. The second question submitted is as follows: Is the widow of the bankrupt entitled to the personal property set apart and exempted to the bankrupt under the provisions of the fourteenth section of the act?

I might sufficiently answer this question by saying that the assignees are not entitled to any of the property so exempted, and it is no concern of theirs who may have a right to the same. The law attaches no responsibility to them for property to which it gives them no title. The assignment of the judge or register passes no title or interest whatever in the exempted property to the assignee.

The fourteenth section of the bankrupt act, after providing for the assignment, proceeds as follows: "Provided, however, that there shall be exempted from the operation of the provision of this section, the necessary household and kitchen furniture, &c."—and after enumerating all the exemptions it proceeds—"provided, that the foregoing exemptions shall operate as a limitation upon the conveyance of the property of the bankrupt to the assignee." I cannot imagine how language could render it more certain that the assignee acquires no title to any of the exempted property. It is not difficult, however, to see that the title to such exempted property would vest in the executor or administrator of the bankrupt at his death, or on the qualification of either (unless the bankrupt should dispose of the same during his lifetime), to be by such representatives administered according to law. Let this be certified to T. B. Keogh, register in bankruptcy, to the end that he may certify the same to the assignees of the estate of John H. Hester, bankrupt.

Case No. 6,438.

HESTER v. BALDWIN.

[2 Woods, 433.] [1]

Circuit Court, N. D. Georgia. Sept. Term, 1875.

BANKRUPTCY — PARTNERSHIP DEBTS — PROOF — DISCHARGE.

1. Claims against a bankrupt can not, as a matter of course, be proven to bar his discharge on a date subsequent to the day fixed for the creditors to show cause against the discharge.

2. One of the three individuals composing a firm was adjudicated a bankrupt. One of the other members of the firm offered as proof of a claim in his favor against the bankrupt, evidence to show that the firm of which the bankrupt had been a member was indebted in certain specified amounts which still remained unpaid, insisting that such evidence established an indebtedness from the bankrupt to him to the amount of one third of said partnership debts. *Held*, that such proof was properly rejected as not tending to establish any claim against the bankrupt in favor of his copartner, unless accompanied by proof that the copartner setting up the claim had paid said partnership debts.

[In review of the action of the district court of the United States for the Northern district of Georgia.]

In bankruptcy.

B. H. Thrasher and A. M. Thrasher, for petitioner.

B. F. Abbott, contra.

WOODS, Circuit Judge. Shepherd, Baldwin & Co. was the name of a firm composed of J. M. Shepherd, James J. Baldwin and A. G. Hester. Baldwin filed his voluntary petition and was adjudicated a bankrupt. On the 4th of September, 1874, the creditors of Baldwin were required to show cause why he should not be discharged. A. G. Hester, one of the members of the firm of Shepherd, Baldwin & Co., offered to file a large claim on account of the copartnership debts of Shepherd, Baldwin & Co.; that is, he claimed that Baldwin was indebted to him, because he, Hester, was liable jointly with Shepherd and Baldwin for the partnership debts of Shepherd, Baldwin & Co. The register refused to file the claim. On a day subsequent to the 4th of November, that being the day on or before which the creditors were required to show cause, Hester offered to file two other claims of like character, which the register refused him permission to file, both on account of the character of the claims and because the claims could not be proven in order to bar a discharge after the day upon which creditors were required to show cause against the discharge.

The question submitted to this court is, whether the action of the register and the decision of the district court which approved it was right. In my judgment it was. There must be some liability on the part of the bankrupt to the creditor, before the latter can set up any claim. The fact that Shepherd, Baldwin & Co. were indebted did not make one of the partners the creditor of the others. The fact that one joint debtor may call upon his codebtor for contribution does not make the one the debtor of the other, in any manner or degree, until the one setting up the liability has paid the debt. Until a partner pays the debt of the partnership, he has no claim, contingent or otherwise, against his copartners. The proof of debt which Hester offered to file, merely set forth that the bankrupt, "at the time of filing his petition, was and still is indebted to the deponent (Hester) in the sum of $6,700 on the following claims, growing out of the copartnership of Shepherd, Baldwin & Co., J. M. Shepherd, James J. Baldwin and Albert E.

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

Hester composing the said firm: That James J. Baldwin is due deponent the one-third of each of the several sums due to divers persons by said firm, each copartner being equally interested and mutually bound for the payment of all the debts of said firm." Then follows a long list of the partnership debts, which had been paid neither by Hester nor any one else, but were still due and owing. The idea that the existence of these unpaid partnership debts made Hester the creditor of Baldwin is entirely untenable. Baldwin has the same ground to say that Hester is indebted to him for the one-third of the partnership debts as Hester has to set up a claim against Baldwin on account of the partnership debts. See Sigsby v. Willis [Case No. 12,849]. I think the register and the district court were both right in their conclusions. The petition of review must therefore be dismissed at petitioner's costs.

HETTICK (EVANS v.). See Case No. 4,562.

Case No. 6,439.

The HETWAN.

[Blatchf. Pr. Cas. 331.] [1]

District Court, S. D. New York. March 17, 1863.

PRIZE—VIOLATION OF BLOCKADE.

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

In admiralty.

BETTS, District Judge. In this, as in The Reindeer [Case No. 11,681], the cause comes before the court for adjudication solely upon the papers submitted on the part of the libellants. The libel avers the capture of the schooner and her cargo on the 21st of January last, at sea, off Charleston harbor, by a United States gunboat, as prize of war; that the vessel, being found unseaworthy, was appraised by a board of naval survey, and left at Port Royal, with the flag-officer at that port, for the use of the government; and that the lading on board of her was brought to this port, within the jurisdiction of this court. A warrant and a monition were here issued against the same, February 12, 1863, and were returned by the marshal, duly served, March 3 thereafter, and a default, for want of appearance and answer, was taken publicly in court. Thereupon, upon the papers found on the schooner, and the proofs in preparatorio laid before the court, judgment for condemnation was prayed by the libellants against the cargo, and the proceeds of the vessel in court. The master, captured with the vessel, testifies, that he is a native and a resident of one of the Confederate States, and owes allegiance to those states; that he took possession of the vessel seized, in Charleston, and was captured in attempting to come out of that port with her, in violation of the blockade; that the vessel and cargo were owned by persons residing in the Confederate States; that the voyage was intended to be from Charleston to Nassau, N. P.; that the schooner left Charleston under a military pass from the Confederate authorities; and that he knew of the war and the blockade, and was captured when heading out of Charleston harbor. The vessel had a permanent register, dated November 11, 1862, from the Confederate authority at Charleston, to J. E. Hertz, of that place, and an invoice, bill of lading, &c., assigning the cargo to Adderly & Co. From this statement of the evidence, it is palpable that the evasion of the blockade in this case was deliberately undertaken, and that the vessel and her cargo were the property of the enemy. I accordingly decree the condemnation and forfeiture of the schooner, and of all the lading on board of her.

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

HEUGH (HIGGS v.). See Case No. 6,472.

Case No. 6,440.

In re HEUSTED.

[5 Law Rep. 510.]

District Court, D. Connecticut. Feb., 1843.

BANKRUPTCY—DECREE—CONTEST—FRAUDULENT PREFERENCE—EXAMINATION.

1. In the case of a petition in bankruptcy, in invitum, the alleged bankrupt did not appear and contest the right of the petitioner to a decree; but certain of his creditors to whom he had made conveyances (alleged in the said petition to be fraudulent) appeared to contest the decree in their own behalf, denying that the petitioner had any debt, and praying that the alleged bankrupt might be subjected to an examination on that point. *Held*, that the creditors alleged to have been fraudulently preferred, had a right to appear and contest the facts asserted in the original petition. See Dutton v. Freeman [Case No. 4,210].

[Cited in Re Thomas, Case No. 13,891.]

2. The alleged bankrupt might properly be subjected to an examination in relation to his indebtedness to the petitioning creditor.

This was a petition by Griffin Green, praying that Eborn Heusted might be declared a bankrupt, alleging certain conveyances to have been made by him in fraud of the bankrupt act [of 1841 (5 Stat. 440)]. Heusted did not appear to controvert the allegations in the petition, but some of the creditors, who were alleged in the petition to have been preferred, appeared and contested the right of the petitioner to a decree. In their answer they denied the existence of any debt in the petitioner, on the ground of usury; and they prayed that the bankrupt might be examined as to this fact.

R. J. Ingersoll, for petitioning creditors.

Bissell & Hawley, contra.

JUDSON, District Judge, said it was very apparent from the seventh section of the act, that the right of appearance is not limited to those creditors who may have proved their debts; neither is the right confined to creditors whose names appear on the list annexed to the petition, but this right is expressly extended to "all persons interested." In the present case, the persons claiming to come in and contest the facts set up in the petition, are those who hold certain lands attempted to be secured to them by the alleged bankrupt, and these identical conveyances are set up in the petition as acts of bankruptcy, and utterly void, and a fraud upon the bankrupt act. These are the allegations of the petitioner, and the grantees under such deeds come here to deny these allegations, and maintain a valid title. The facts so stated in the petition, to wit, that these deeds were given with the intent to prefer the grantees over the general creditors, and in contemplation of bankruptcy are put in issue, and the legality or illegality of the deeds, depends upon the truth or falsehood of these allegations. If the deeds be fraudulent, in the sense which the act considers deeds of preference, then the title of those claiming under those deeds may be annulled by the decree, and the property may be claimed by the assignee of the bankrupt. In that event, the grantees lose the property attempted to be conveyed. This cannot be done unless a decree in bankruptcy is passed. These grantees have a direct interest involved in the proceeding, and may appear to show cause against a decree. Any cause which prevents a decree, goes to secure their title; any cause which makes for the decree, has a tendency to jeopardize their title. The right of appearance, then, is secured by the act to all persons interested. The persons appearing are such.

The second question is equally clear. Can the alleged bankrupt be subjected to an examination in relation to the consideration of the debt alleged to be due from him to the petitioning creditors? Recurrence must again be had to the act, in answering this question. A part of the second proviso to the fourth section, is found to be directly in point: "And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commissioners appointed by the court therefor, on oath, in all matters relating to such bankruptcy, and his acts and doings and his property and rights of property, which, in the judgment of such court are necessary and proper for the purposes of justice." The persons having a right to appear and contest the question of bankruptcy, now move for liberty to interrogate the bankrupt, in matters relating to the bankruptcy, and relating to his acts and doings; and relating to his property and rights of property. Those who make the motion, do not withhold the object they have in view, nor the subject matter of the inquiry. They claim the right of compelling the bankrupt to say whether more than the lawful rate of interest has been reserved and taken by the petitioner. This they seek to do, for the avowed purpose of invalidating the petitioner's debt, set up as the ground of his application. If objectionable, that objection rests on the proposition, that a party to a contract cannot impeach it by his own testimony. Whatever may be the common law on this subject, is not material, because the act of congress is framed, and wisely framed, broad enough to sanction the right of this examination. Heusted cannot be declared a bankrupt, on this petition, unless the petitioner has a valid debt of not less than $500; any fact within the knowledge of the bankrupt tending to invalidate this debt, relates to the bankruptcy in question. Suppose the debt of a petitioner is wholly without consideration—fictitious—may not a person in interest examine him on that point? Suppose the debt has been paid and extinguished, may the bankrupt not be interrogated? If a bankrupt have given a note without consideration, merely to enable a petitioner to proceed against him, or if he have paid a debt, still allowing the note to remain for the same purpose—these are "acts and doings," such as he may be compelled to answer on oath. The interrogatories may be filed, and the case will then be referred to a commissioner to take the answers.

HEWES (UNITED STATES v.). See Case No. 15,359.

Case No. 6,441.

HEWETT v. NORTON.

[1 Woods, 68;[1] 13 N. B. R. 276; 1 N. Y. Wkly. Dig. 535.]

Circuit Court, W. D. Louisiana. Nov. Term, 1870.

BANKRUPTCY — PRIOR SUIT IN STATE COURT — ABATEMENT—POWER OVER PROPERTY IN HANDS OF ASSIGNEE.

1. A suit commenced in a state court before bankruptcy, in which the title to the property surrendered by the bankrupt is in controversy, will not be abated by the bankrupt proceedings.

2. A state court cannot, by its process, take property surrendered by a bankrupt, from the possession of the assignee in bankruptcy.

[Cited in Hudson v. Schwab, Case No. 6,835; Adams v. Crittenden, 17 Fed. 45.]

This is a petition addressed to the supervisory jurisdiction of the circuit court, under section 2 of the bankrupt act [of 1867 (14 Stat. 517)], to review an order of the district court sitting in bankruptcy.

Edward Phillips, for petitioner.
R. H. Marr, for defendant.

WOODS, Circuit Judge. Zebulon York and Elias J. Hoover were, by the last will of

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

Jacob Hoover, dated Jan. 28, 1859, made his executors and universal legatees. Jacob Hoover died on the 27th day of August, 1859, in the parish of Concordia, in the state of Louisiana, and said York and Hoover by virtue of said will, took possession of his estate, both real and personal, claiming title thereto under the will. On the 13th of December, 1859, the heirs of Jacob Hoover, deceased, filed in the district court of Concordia parish, their petition against York and Hoover, alleging that said paper writing purporting to be the last will of Jacob Hoover, was not his last will, praying that the same and the probate thereof might be set aside and avoided, and for an account, and pending this suit, to wit, in March, 1869, York and Hoover filed their petition in bankruptcy, in the United States district court of Louisiana, were adjudged bankrupts and surrendered to E. E. Norton, their assignee, certain plantations and other property which they claimed under the will of Jacob Hoover. On or about the 13th of October, 1869, the petitioners in said action to set aside the will of Jacob Hoover filed an amended petition, in which they set out new grounds for avoiding the will of Jacob Hoover, and prayed that a writ of sequestration might issue to the coroner of Concordia parish, directing him to take possession of said property so surrendered by York and Hoover to Norton, their assignee. The district court of Concordia parish, on a hearing of this amended petition at chambers, on the 5th of November, 1869, ordered the writ of sequestration to issue as prayed for. On the 13th of June, 1870, Norton, as assignee of York and Hoover, applied by petition to the U. S. district court, for an order enjoining and restraining the petitioners in the suit pending in the district court of Concordia parish, from any further proceedings therein. Such an order was made by the U. S. district court, sitting in bankruptcy, and it is to review and reverse such order that this petition is addressed to the circuit court.

The case presents two questions:

1. Whether the suit in the Concordia district court to try the title to the property surrendered by York and Hoover, by an attack on the will of Jacob Hoover, ought to be allowed to proceed; and 2. Whether that court ought to be allowed, by a writ of sequestration pending the trial of the title to the property, to take the property out of the possession of the assignee in bankruptcy.

Of these in their order. I think the first question is settled by the 25th and 14th sections of the bankrupt act. The 25th section provides, that whenever it shall appear to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of an assignee is in dispute, the court may order it to be sold under the direction of the assignee, who shall hold the funds received in the place of the estate disposed of. And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court, but this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders a sale. It seems clear from these provisions that it is not the purpose of the bankrupt act to abate suits commenced before bankruptcy, in which the title to the property surrendered by the bankrupt is in litigation. This view is strengthened by the provisions of the 14th section, to the effect that the assignee may prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy in which the bankrupt is a party in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt. The provisions of this section include suits and actions pending in the state courts and are addressed to the courts in which such suits or actions are pending, quite as much as to the federal courts. The state courts having jurisdiction of the parties and subject matter, must determine the questions as they arise, according to law, subject to the final judgment of the proper appellate tribunal. In re Clark [Case No. 2,798]; Samson v. Burton [Id. 12,285].

I am unable to arrive at the conclusion, as I must do if I affirm the order of the district court, that upon the filing of a petition in bankruptcy, all suits pending in the state courts in which the bankrupt is a party abate, and that new actions must be brought in the bankrupt court, either by or against the assignee. I am of opinion, therefore, that the injunction allowed by the district court, so far as it operated to restrain the parties from proceedings in this suit in the district court of Concordia parish, to try the title to the property surrendered by York and Hoover, was improvidently granted.

Upon the second question raised by the petition of review, I am quite as clear that the action of the district court in restraining the parties from proceeding to take the property out of the possession of the assignee in bankruptcy, by a writ of sequestration issued from the state courts, was right and ought to be affirmed. When York and Hoover filed their petition in bankruptcy, they had the apparent legal title to the property in controversy, and were in possession. They surrendered the title to the property and the possession to their assignee. As soon as a petition in bankruptcy is filed, the property of the insolvent is thereby brought eo instanti into the bankrupt court and placed in its custody, and no other court and no person acting under any process from any other court can, without the permission of the bankrupt court, interfere with it, and to so interfere is a contempt of the bankrupt court. See Bump, Bankr. (Ed. 1871) p. 245, and numerous cases there cited. In order to recover property from the possession of the assignee

in any court, it must be by proper action commenced before the bankrupt court orders a sale of the property. Bankr. Act, § 25. The proceeding to sequester the property surrendered by York and Hoover, was not commenced until the 13th day of October, 1869, long after the bankrupt court had ordered a sale, and the property had been put up to sale and bid off. Even if such proceedings could be permitted to a state court, they came too late.

In accordance with these views, it is decreed that so much of the decree of the district court as authorizes the injunction to restrain the petitioners from proceeding in the action in the state court be set aside, and so much as authorizes an injunction restraining the petitioners from proceeding under the writ of sequestration be affirmed. And it is ordered that the injunction be modified accordingly.

[See Cases Nos. 18,138 and 18,139.]

HEWETT v. SILVERMAN. See Case No. 16,288.

HEWETT (TOMLINSON v.). See Case No. 14,087.

HEWEY (BURNHAM v.). See Case No. 2,175.

Case No. 6,442.

Ex parte HEWITT et al.

[3 Am. Law Rev. 382.]

District Court, S. D. Mississippi. 1869.

RECONSTRUCTION ACTS—TRIALS BY MILITARY COMMISSION—EXCESSIVE PUNISHMENTS—HABEAS CORPUS.

[1. It was not the purpose of the reconstruction acts to create any new laws for the punishment of crime, but only to secure the enforcement of the existing laws of the state by means of a military commission when, in the opinion of the commanding officer, an impartial trial could not be had in the local courts; and hence, while the course of procedure would necessarily be different from that pursued in the state courts, the party charged could only be required to answer for the violation of some known law in force in the state, and the only punishment which could be inflicted was that which the law had annexed to the offence.]

[2. It is within the power of the district courts to release on habeas corpus a prisoner sentenced by a military commission, under the reconstruction acts, to a longer term of imprisonment than that provided by the law of the state in which the crime was committed; and in such case it is the duty of the court to grant the discharge, and it has no power to remand the prisoner, with directions to execute such punishment as the law has prescribed.]

[This was a writ of habeas corpus to obtain the release of Hewitt and McIlwaine from imprisonment under sentence of a military commission.]

HILL, District Judge. From the allegations made in the petition in this cause, and the return made thereto by John R. Hynes, superintendent of the penitentiary of the state of Mississippi, to whom the writ was directed, the following facts appear out of which the questions now submitted for the determination of the court arise. The petitioners were arrested and put upon their trial before a military commission appointed for the trial of offenders by Major General A. C. Gillem, commanding this district. The specifications and charge upon which they were put upon their trial are substantially as follows: "That said petitioners, with others, citizens of Natchez, in the state of Mississippi, in the county of Adams, in said state, on or about the 19th day of July, 1868, did unlawfully, maliciously, and feloniously conspire and combine together to kill and murder one George Stewart, a teacher of a school for colored children, and, in pursuance of said agreement and conspiracy, did proceed to the house of said Stewart, and by false pretenses induced him to leave his house, and did then and there order him to reveal the password of a secret association called the 'Loyal League,' and, upon said Stewart's refusing to do so, did pour about one gallon of coal oil or turpentine on his head and body, and did order him to kneel down and say his prayers, that he had but a few minutes to live; that said Stewart escaped from them, when they fired at him with a pistol, with intent then and there to kill and murder said Stewart." That, after the testimony on said trial had been heard by said commission, the commission found from the proof that said acts were committed, but were not committed with the intent to kill and murder said Stewart, but with intent to outrage and injure him, and for this offence the petitioners were sentenced to hard labor in the penitentiary of this state for the term of one year, which sentence was approved by the commanding general, and in pursuance to which they have been placed in said penitentiary, in the custody of the superintendent, John R. Hynes. To be discharged from such custody and punishment is the purpose of this application. The petitioners by their counsel concede the jurisdiction and power of the commanding general, when in his opinion a fair and impartial trial of offenders cannot be had, and the offenders punished by the local courts, to cause them to be arrested, tried, and if found guilty, punished by a military tribunal; but insist that they must be judged by the laws in force in the state, and can only be subject to the punishment prescribed by those laws, although the mode of trial may not be required to conform to the forms prescribed by the state laws, and insist that the punishment inflicted in this case is unknown to any law of the state for the offence of which they were found guilty, and is not authorized by the act of congress, empowering the military commander to protect the citizens in their persons and property, and to secure the citizens in their persons and property, for which purpose he is directed and authorized to

cause offenders to be arrested and punished, and further insist that this court has the power and should discharge the petitioners.

The counsel for the respondent, not conceding that the sentence is illegal, insists that, if it were so, this court having no appellate jurisdiction to review and reverse the action of the military tribunal, has no jurisdiction to discharge the petitioners. Two questions are thus presented: 1st, Is the sentence thus pronounced, and which is being executed, authorized by the act of congress conferring this quasi civil jurisdiction upon the military commander? And, 2d, If such power was not conferred, and the sentence authorized, has this court the power to relieve the petitioners from such unauthorized punishment? I am satisfied from a careful examination of the act of congress that the only purpose was to secure all classes of citizens in their rights of persons and property under the laws of the state, whether created by statute or arising out of the common law, and to this end to secure a certainty of punishment on those who might violate the laws; that it was not intended to create any new law for the punishment of crime, but to secure the enforcement of those then existing, and for this purpose their execution was authorized to be committed to the local courts then and now existing, and which were declared to be provisional only, unless that when, in the opinion of the commander, a fair and impartial trial could not be had, and the punishment of the guilty secured in such courts, he might, and it would be his duty to order military commissions or tribunals to convene and try the offenders, and, if found guilty, cause them to be punished; and whilst the mode of proceeding might and necessarily would vary from those pursued in the courts of the state, that the party charged should only be required to answer a violation of some known law in force in the state, and that only such punishment should be inflicted as was annexed to the law for its violation. The act itself, to secure this end, provides that no cruel or unusual punishment shall be inflicted. Congress in this was governed by that which experience has long demonstrated that certainty in punishment, more than severity, prevents crime. This brings us to the consideration of the question as to what the crime or offence is of which the petitioners have been found guilty, and what is the punishment annexed by law therefor.

The petitioners' counsel insist that it is only a conspiracy to commit a crime; that they have been acquitted of any crime or offence the punishment of which is confinement in the penitentiary. That the conspiracy of which they were found guilty is not embraced in the one charged, and therefore no punishment could have been inflicted. This position has been pressed by the learned counsel with great earnestness and ingenuity, but has failed to produce on my mind a conviction of its correctness. The charge and specifications are to be considered in place of an indictment, and constitute but parts of the same indictment, and, when viewed in that light, charge that these petitioners with others did unlawfully assemble, combine, and agree to kill and murder said Stewart, and, in pursuance of that unlawful agreement, did feloniously and maliciously assault said Stewart with intent then and there to kill him. This charge, if true, would constitute a felony under the provisions of article 18, § 8, c. 14, of the Code of 1857, then in force in this state, and the punishment of which is, by the same act, fixed at confinement at hard labor in the penitentiary for a period not to exceed ten years. The commission, sitting in place of a jury, have acquitted the petitioners of the felonious intent to kill and murder, but have found them guilty of an assault with intent to outrage and injure. It is conceded by counsel that if the offence charged is a felonious assault, it contains the less offence of a misdemeanor, and that the party charged may be acquitted of the higher crime and yet found guilty and punished for the smaller offence. But if the offence charged were only the unlawful assembly and conspiracy to commit an offence, and had stopped there, I cannot conceive that a different result could be arrived at other than that the conspiracy to kill and murder contains within it the less aggravated offence to outrage and injure, for he who would kill and murder me would certainly outrage and injure me; the one would certainly be contained within the other,—both purposes being a misdemeanor at the common law, the offence is an agreement and conspiracy to do an unlawful act, no matter what may be the purpose, making it only the more or less aggravated. The offence, whether a conspiracy, an unlawful assembly, or an assault and battery, is a misdemeanor, and punishable by a fine not exceeding five hundred dollars, and confinement in the county jail not exceeding six months. I am satisfied that neither the military commission who imposed the penalty, or the commanding general who approved it, supposed they were exceeding their authority in so doing. I am equally satisfied that the punishment imposed was unauthorized by the act of congress, and that the petitioners' confinement in the penitentiary is an unlawful restraint upon their personal liberty.

The next question is, has this court the jurisdiction to order a release from that confinement? It is insisted by petitioners that it has, and by respondent that it has not. The power of this court, or its judges sitting at chambers, to grant the writ of habeas corpus, and through it to relieve from illegal restraint, is limited by the several acts of congress to specified cases, one of which is to relieve those improperly restrained by the officers of the federal government, claim-

ing to act in their official capacity. This is a necessary power to avoid conflict between the state and federal jurisdictions, and is the proper remedy in this case. I will add, that the principles now announced are not in conflict, but in strict accordance, with the rulings heretofore made by me on these questions.

At this point, I am met by a perplexing question: The parties have been found guilty of an aggravated misdemeanor, one for which they should, if guilty, receive exemplary punishment; and, from the finding, I cannot presume them innocent. Their connections and position in society, instead of mitigating, aggravate their offence; its tendency is to encourage the less intelligent, and those whom we might suppose to be more inconsiderate, to commit acts of outrage and wrong. The law now knows no man on account of his race, color, birth, place, or pursuit in life; it affords, and should afford, equal protection to all, and when properly administered will secure this end; if any offend the law they should be punished by the law, and in no other way. Those who undertake to inflict punishment or wrong upon others without the sanction of the law to-day, should remember that, by so doing, they may become the victims of the lawless to-morrow. Without malice or ill-will toward the petitioners, or toward any citizen of the state, but with a strong desire to see that security of person and property which every good citizen desires, I must be permitted to express regret that it is not within my power to remand the petitioners to the custody of the commanding general, and to declare him to cause that punishment to be inflicted which the law has annexed for the offence with which they stand convicted. When first considering this question, I thought this could be done, believing at that time that the military commander could fix the punishment after conviction, as the judge may do after the verdict of the jury. This I inferred from the provision in the act of congress requiring him to punish, or cause to be punished, offenders; but from the statement of the judge advocate, who represents the respondent, and whose knowledge of military law cannot be questioned, I am satisfied that the military commission is required to fix the punishment; that this was so intended by congress, and that their powers in this case were exhausted, when their finding was approved by the commanding general. I am brought to the conclusion that the commanding general has no further power to punish upon the finding of the commission. I can, therefore, only say to the petitioners, that I hope they are convinced of the impropriety of the wrong they have committed; that they will return to their homes and enter upon the duties of life with a fixed and determined purpose not again to violate the laws of the country in which they live, or the right of any one, no matter what his condition or pursuits may be. I sincerely hope that no one will be encouraged to violate the law, with the hope of escaping punishment from the judgment I feel constrained to pronounce; which is, that the petitioners be discharged and go hence without day.

HEWITT (CLOUD v.). See Case No. 2,904.

HEWITT (HINES v.). See Case No. 6,520.

Case No. 6,443.

HEWITT v. NEW YORK & O. M. R. CO. et al.

STEVENS et al. v. SAME.

[12 Blatchf. 452.] [1]

Circuit Court, S. D. New York. March 6, 1875.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—VIOLATION—CHARTER—EXEMPTION FROM TAXATION.

1. The cases decided by the supreme court of the United States on the question as to when a state legislature, having granted, by a statute, immunity from taxation, can annul such grant, by repealing the statute, examined and applied.

[Cited in Pennsylvania R. Co. v. Bowers, 124 Pa. St. 192, 16 Atl. 836.]

2. The legislature of New York, by an act passed April 5, 1866 (Laws 1866, c. 398), provided, that the property of the New York and Oswego Midland Railroad Company, a corporation formed under the general railroad law of New York, should be exempt from taxation until a certain event should happen, but for a term of not exceeding ten years. On the 29th of April, 1874, and, as was alleged, before such event had happened, the legislature passed an act (Laws 1874, c. 296) subjecting the property of the corporation to taxation for the future: *Held*, that the other provisions found in the act of 1866 constituted amendments of the charter of the corporation.

3. The provisions of that act, taken together, including the provision for exemption from taxation, constituted a contract, and one and the same contract.

4. The provision for exemption from taxation could not, as against the corporation and its stockholders, be abrogated by the state, without impairing the obligation of the contract, unless the right so to do was reserved by the state, as a part of the same contract.

5. By reservations in the constitution and statutes of the state, the legislature had the right to amend the charter of the corporation, by repealing such exemption from taxation.

[Cited in Ex parte Chamberlain, 55 Fed. 706.]

[These were bills by Abram S. Hewitt, trustee, against the New York and Oswego Midland Railroad Company and others, and by John G. Stevens and others, trustees, against the same defendants.]

Ashbel Green, for receivers.

John C. Churchill, for tax collector.

BLATCHFORD, District Judge. The New York and Oswego Midland Railroad Company, having been incorporated under the general

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

railroad law of the state of New York, a special act of the legislature of that state was passed on the 5th of April, 1866 (Laws 1866, c. 398), entitled, "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," which provides, that commissioners may be appointed for any town or city in certain specified counties, who may borrow, on the faith or credit of such town or city, certain sums of money, on interest, and execute bonds therefor, the bonds to be disposed of, and the money to be raised by any loan or sale of the bonds to be invested in the stock of the said corporation, and to be applied in the construction of the railroad, and in its buildings and appurtenances, and for no other purpose whatever, "the public necessity and utility whereof," says the 3d section of the act, "is hereby declared, and in the construction thereof the said towns and cities are immediately interested." The act further provides, that the commissioners may, for that purpose, in the corporate name of the town or city, subscribe for and purchase the stock of the corporation to the amount designated in the act; that, by virtue of said subscription and purchase, and upon receiving certificates therefor, the town or city shall acquire "all the rights and privileges as other stockholders" of the corporation; that the dividends from the stock so subscribed for or purchased by the town or city shall be applied to pay the interest on the bonds, and that any further amount necessary to pay the principal or interest accruing on the bonds, shall be assessed and levied and collected on the real and personal estate of the town or city as other taxes, and be applied to pay such principal or interest; that the railroad corporation shall have power to receive gifts or grants of land, money or other property, to aid in the construction of the road, and to take by gift or grant, from any person, corporation or town, rights of way; that the proper authority of any town may grant to the corporation the right to use or run upon the roadbed of any public highway in the town; and that the corporation may build two specified branch railroads. In order to the borrowing of any money, or the issuing of any bonds by any town or city, the act makes it a condition precedent, "that the consent shall first be obtained, in writing, of a majority of the tax-payers of such town or city, owning or representing, (as agent, president or otherwise, including owners of non-resident lands), more than one-half of the taxable property of said town or city, assessed and appearing upon the assessment roll of the year eighteen hundred and sixty-five," except that, in the city of Oswego, two-thirds of the voters present and voting at any special or general election therein must signify their assent thereto, and provision is made for a special election in that city. The provisions thus cited are found in the first 15 sections of the act. The 16th section is in these words: "And it is hereby further provided, that the real and personal property of said corporation shall be exempt from taxation for state, county, town or municipal purposes, until a single track of said road shall be completed and in operation, but the time of such exemption shall not exceed the term of ten years, nor shall this section apply to any road now wholly or partly constructed which may be consolidated with this road." The act then goes on to provide, that the inhabitants and tax-payers of the towns and cities which shall issue the bonds shall have the exclusive right to take and purchase the same for thirty days after they are ready for sale, and shall have the preference over non-residents; and that the corporation may merge its capital stock, franchises and property with those of the Oswego and Syracuse Railroad Company, and of any other railroad corporation organized and operated under the laws of New York, whenever two or more railroads of the corporations so to be consolidated form a continuous line of railroad with each other between the two termini of the New York and Oswego Midland Railroad, or form a portion of a continuous line between said termini. The act then prescribes the method in which such consolidation may be made. It then provides, that no part of the moneys arising from the bonds issued by any town or city shall be expended in any other county than that in which such town or city is situated, until at least $10,000 per mile, on an average, shall have been expended on the grading and construction of each mile of the road lying within such county, but enacts that such provision shall not apply to any county through which the road does not run. The act further provides, that the corporation may acquire the title to such lands and real estate as shall be needed for the purposes of its incorporation, under the provisions of chapter 140 of the Laws of 1850 (which is the general railroad law under which it was incorporated), and the acts amendatory thereof and supplementary thereto, whenever $1,000 per mile of its capital stock shall be, in good faith, subscribed and paid in. Under the general law of 1850, as amended by chapter 53 of the laws of 1853, a railroad corporation could not take proceedings to acquire the title to lands until $10,000 for every mile of its road had been, in good faith, subscribed to its capital stock, and 10 per cent. thereof had been paid in. There is not, in the act of 1866, any reservation of a right to alter, amend or repeal it.

Article 8, § 1, of the constitution of New York, of 1846, is in these words: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be at-

tained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." The 1st section of the general railroad act of 1850 (chapter 140) provides, that the corporations formed under it "shall possess the powers and privileges granted to corporations, and be subject to the provisions contained, in title three of chapter eighteen of the first part of the Revised Statutes, except the provisions contained in the seventh section of the said title." The provision of section 8 in said title 3 (1 Rev. St. 600) is as follows: "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." The 48th section of the general railroad act of 1850 provides, that "the legislature may, at any time, annul or dissolve any incorporation formed under this act."

On the 29th of April, 1874, an act was passed by the legislature of New York (Laws 1874, c. 296), entitled, "An act to subject the real and personal property of the New York and Oswego Midland Railroad Company to taxation, and to appropriate the amount of the county taxes thereon to certain towns, to be applied towards the payment of the interest or principal on certain town bonds." The 1st section of this act is in these words: "All laws and parts of laws, in so far as they exempt the property, real or personal, of the New York and Oswego Midland Railroad corporation from taxation, are hereby repealed, and the real and personal property of the said corporation is hereby made subject to state, county, town and municipal taxation." The 2d section provides, that "all moneys to be collected upon the real and personal property of the said corporation, and upon said real property now or hereafter used or held, or which may hereafter be used or held, by any receiver or successor of said corporation, for county taxes, in any of the towns or municipalities by which bonds have been issued in aid of the construction of the New York and Oswego Midland Railroad, are hereby appropriated to said towns and municipalities respectively, and shall be paid over to the commissioners of such towns or municipalities appointed pursuant to" the said act of April 5th, 1866, "and the said moneys shall be by said commissioners expended for, and applied to, the payment of the interest on said bonds, or to the principal thereof." The 3d section provides for the payment of such county taxes, when collected "from the said corporation, or the real and personal property thereof," to the said commissioners. It must be inferred, from this legislation, that bonds had been issued by towns, and that the legislature deemed it proper to subject to future taxation the property of the corporation which it had before relieved from taxation, and to appropriate the future county taxes on such property, in each town which had issued such bonds, to the payment of the interest and principal of the bonds issued by such town.

Prior to the passage of the act of 1874, and on the 18th of November, 1873, Abram S. Hewitt and John G. Stevens were appointed, by an order made by this court, in these suits, which are suits to foreclose mortgages on the property of said corporation, receivers of such property, with authority to operate the railroad of said corporation and railroads held by it under lease. The receivers now present to this court a petition, setting forth that said corporation has been assessed on the tax rolls of the city of Oswego, in this state, on property which belonged to said corporation before such receivers were appointed; that a warrant has been issued to the collector of the city of Oswego, to collect a tax of $3,453 27 thereon; that such tax has not been paid; that such collector has levied on some passenger coaches in the possession of the receivers, worth $16,000, and which belonged to said corporation before the receivers were appointed, to meet the tax, and has advertised them for sale; and that such property was levied upon as the property of said corporation, and was placed in the hands of said receivers under said order of this court. The petition then sets forth the passage and contents of the said act of 1866 and of the said act of 1867, and alleges, that the corporation was organized to construct, maintain and operate a railroad from Oswego to the state line of New Jersey, and thence to a point on the Hudson river opposite the city of New York; and that a single track of said railroad has not been completed as provided in the act of 1866. The petition prays for an injunction perpetually restraining the said collector from levying upon or selling any of the property placed in the hands of the receivers by this court, and for a temporary injunction until a decision upon the petition, restraining the said collector from further proceeding under such levy. Such temporary injunction was granted.

On the hearing on the petition, it is contended, for the receivers, that the act of 1874 is unconstitutional and void, as being an act impairing the obligation of a contract made by the enactment of the act of 1866, and, therefore, repugnant to section 10 of article 1 of the constitution of the United States, which provides, that no state shall pass any law impairing the obligation of contracts. It is urged, that it is settled, by a series of decisions made by the supreme court of the United States, that a state can waive its right to tax property, for any length of time it may designate; that such waiver, when contained in any act of a state legislature, whether an act under which a corporation comes into existence, or an act of a different character, is a contract between the state and the party in whose favor the waiver is made; that any subsequent legislation repealing or annulling such

waiver contravenes the said provision of the constitution; that benefit to the public is a sufficient consideration to support such a contract; and that the existence of the consideration, having been determined by the legislature, will not be inquired into by a court. It is further contended, for the receivers, that, as the act of 1866, which grants the exemption in this case, does not reserve to the legislature any right to amend or repeal it, and as the provision of section 1 of article 8 of the constitution of New York is only to the effect that general laws and special acts passed pursuant to that section, to form or create corporations, may be altered or repealed, and as section 8 of title 3 of the Revised Statutes only provides that the charter of a corporation may be altered or repealed, and as the act of 1866 is not a charter, or an act creating or forming the corporation, or an amendment of any charter, or of any act creating or forming the corporation, therefore, there is not, in the constitution of New York, or in any statute in force when the act of 1866 was passed, or in that act itself, any reservation of any right to repeal or annul the contract created by the enactment of the 16th section of that act.

For the tax collector, it is contended, that the legislature could lawfully repeal the 16th section of the act of 1866. It is conceded, by his counsel, that, if the exemption contained in that section had formed a part of the general railroad law under which the corporation was formed, or of any special act of incorporation, there would have been a contract between the state and the corporation, which could not have been repealed, unless the right of repeal had been reserved in the constitution, or in some prior statute, or in the general law or special act; but, he maintains, that the exemption in the act of 1866 was a gratuitous, executory promise on the part of the state, contained in an act which imposed no obligation on the corporation, and did not vest or secure any rights of property, and did not have the elements of a contract; and that, if the act of 1866 was a part of the charter of the corporation, the provisions cited from the constitution and statutes of New York constituted a reservation of the right to amend the charter, and, therefore, to repeal the exemption.

The first case, involving the question of the effect of an act of a state legislature repealing a provision in a prior act, as impairing the obligation of a contract, that was decided by the supreme court of the United States, was that of New Jersey v. Wilson, 7 Cranch [11 U. S.] 164, in 1812. Prior to 1758, the Delaware Indians had claims to certain lands in New Jersey. It became an object for the government of New Jersey to extinguish those claims. In 1758, a convention was agreed upon between the Indians and that government, whereby the government was to purchase a tract of land for the residence of the Indians, in consideration of their releasing their claim to certain specified lands. To carry this convention into effect, an act was passed, in 1758, by the legislature of New Jersey, authorizing the purchase of lands for the Indians, restraining them from selling or leasing the same, and enacting, "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax." In virtue of this act, the convention was carried into execution, lands were purchased and conveyed to trustees for the use of the Indians, and they released their claim to the lands specified in the convention. In 1801, the legislature of New Jersey passed an act authorizing the sale of the lands so purchased. That act made no reference to the privilege of exemption from taxation, conferred by the act of 1758. The lands were sold. In 1804, the legislature of New Jersey passed an act repealing the exemption provision in the act of 1758. The lands were then assessed for taxes, and the purchasers took the ground that the repealing act impaired the obligation of a contract and was void. The state courts of New Jersey affirmed the validity of the repealing act, but the judgment was reversed by the supreme court of the United States. That court held, that the provision of the constitution extended to contracts to which a state was a party, as well as to contracts between individuals. Upon the question whether, in the case before it, a contract existed, and whether such contract was violated by the repealing act, it held, that every requisite to the formation of a contract was found in the proceedings of 1758 between the government of New Jersey and the Indians; that, in consideration that the Indians would extinguish their claims to certain specified lands, the government agreed to purchase another tract of land for them and exempt it from taxation; that, in consideration of this arrangement, of which the act exempting such land from taxation was a part, the Indians ceded their claims to the other lands; that this was a contract; that the privilege of exemption from taxation was annexed, by the act, to the land, and not to the persons of the Indians, it being for the advantage of the Indians that it should be annexed to the land, because, in the event of a sale, when alone the question would be material, the value of the land would be enhanced by the privilege; that the state of New Jersey had not, as it might have done, insisted on a surrender of such privilege, as a condition of allowing a sale of the land, but had assented to such sale, with all the privileges attached to the land, and the purchasers had succeeded, with the assent of the state, to all the rights of the Indians, and stood, with respect to the land, in their place, claiming the benefit of the contract; and that the contract was impaired by the repealing act annulling the privilege. Three points are decided by the case of New Jersey v. Wilson [supra]—(1) that a state may

contract to exempt property from future taxation, in such manner as to make such contract irrevocable without the consent of the person claiming the exemption; (2) that, to make such contract thus irrevocable, it must have the elements of a contract; (3) that one of such elements is, a consideration for the agreement on the part of the state.

The decision in Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518, in 1819, established the principle, that a charter granted by the British crown to the trustees of a college, was a contract, within the meaning of the clause of the constitution which declares that no state shall pass any law impairing the obligation of contracts, and that a law of a state, altering the charter, without the consent of the corporation, in a material respect, was an act impairing the obligation of the contract and void. The alteration of the charter in that case was, the transfer of the governing power of the corporation from trustees appointed according to the will of the founder, expressed in the charter, to the executive of the state. The court held, that the charter was a contract, incorporating the trustees of the college, with the usual corporate powers, authorizing them to fill their own vacancies, and to administer the property of the corporation; that the objects for which the corporation was created were beneficial to the country; that this benefit constituted the consideration of the grant; that the donors of money to the college, in return for giving the money, stipulated for the consideration that the moneys should be perpetually applied to the object set forth, in the mode prescribed by themselves; that there were three parties to the contract, the donors, the trustees, and the crown; and that the contract was one for the security and disposition of property, and was made on a valuable consideration, and was one on the faith of which property had been conveyed to the corporation.

In Providence Bank v. Billings, 4 Pet. [29 U. S.] 514, in 1830, it was held, that where a charter of a bank gave it no express exemption from taxation, a general law of the state, taxing it in common with other banks, did not impair the obligation of any contract contained in its charter. The court, while holding that a contract entered into between a state and an individual is as fully protected by section 10 of article 1 of the constitution as a contract between two individuals, and that a charter incorporating a bank is a contract, upheld the validity of the law taxing the bank.

In Charles River Bridge v. Warren Bridge, 11 Pet. [36 U. S.] 420, in 1837, it was held, that a state law may be retrospective and divest vested rights, and yet not violate the constitution of the United States; that, where the charter of a bridge corporation did not contain any express contract that the state would not authorize another bridge to be built to the injury of the corporation, such contract would not be implied; and that a law empowering another corporation to erect and maintain a free bridge, so near to the first as practically to deprive the first corporation of all tolls, was not a law impairing the obligation of any contract.

In Gordon v. Appeal Tax Court, 3 How. [44 U. S.] 133, in 1844, it was held, that where the legislature of a state, by statute, accepted from banking corporations a bonus, as a consideration for granting the corporate franchise, and therein pledged the faith of the state "not to impose any further tax or burden upon them, during the continuance of their charters under this act," a tax upon the stockholders by reason of their stock was a violation of the contract, and the tax was illegal.

In State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369, in 1853, it was held, that the legislature of a state, if not restrained by its constitution, may make a valid and binding contract with a corporation, in its charter, that no more than a specified amount of taxes shall be levied on its property during a term of years, and that a succeeding legislature has not power to pass a law impairing the obligation of such contract. In that case, the act of incorporation provided that a specified sum of money, if paid by the corporation, should be in lieu of all taxes to which the corporation would otherwise be subject. The court say: "Every valuable privilege given by the charter, and which conduced to an acceptance of it, and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action." It was held, that the state had, in the act of incorporation, proffered certain privileges, which had been accepted by the stockholders, such as the franchise, the rate of interest to be charged, the duration of the charter, the liabilities of the corporation, the rate of taxation, and other privileges, and that, in consideration thereof, funds had been invested in the bank; that this constituted a contract between the state and the corporation —a contract founded on considerations of policy required by the general interests of the community; and that the state could not annul such contract. It was further said by the court, in that case, that, where a consideration appears to have existed for the agreement on the part of the state, the court will not inquire into its sufficiency, but will regard the agreement as a contract, which a subsequent legislature cannot impair; that a state, in granting privileges to a corporation, with a view of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of

which it is the exclusive judge; that a contract for a specific tax, and for exemption from other taxes, is binding, and is an exercise of the sovereignty of the state; and that, if such contract is impaired by an act of the state, such act is void. The conclusion of the court was, that, as regarded the rights of the corporation under the charter, the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay a sum specified in the charter, in lieu of all taxes, constituted a contract binding on the state and on the corporation, and that a subsequent statute, assessing a higher tax on the corporation than was stipulated in the charter, impaired the obligation of the contract, and was prohibited by the constitution of the United States, and was, as regarded the tax thus imposed, void.

These views were affirmed by the same court, in 1855, in Dodge v. Woolsey, 18 How. [59 U. S.] 331.

In 1860, the case of Christ Church v. County of Philadelphia, 24 How. [65 U. S.] 300, was decided. The legislature of Pennsylvania, in 1833, passed an act, which recited, "that Christ Church Hospital, in the city of Philadelphia, had, for many years, afforded an asylum to many poor and distressed widows, who would probably else have become a public charge, and, it being represented that, in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," and then enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." In 1851, the legislature passed an act providing, "that all property, real and personal, belonging to any association or incorporation, which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation, in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." The supreme court of Pennsylvania decided that the exemption conferred by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of the real property of the hospital, under the act of 1851, was not void, as tending to impair any contract contained in the act of 1833. The case was taken, by writ of error, to the supreme court of the United States, and it was there contended, that the exemption conceded by the act of 1833 was perpetual, and that that act was itself, in effect, a contract. But the court held, that the concession of the legislature was spontaneous; that no service or duty or other remunerative condition was imposed on the corporation; that the privilege conferred existed bene placitum, and might be revoked at the pleasure of the sovereign; and that there was no contract.

In Jefferson Branch Bank v. Skelly, 1 Black, [66 U. S.] 436, in 1861, the supreme court affirmed the principle laid down in the cases before referred to, that a state legislature, unless prohibited in terms by a state constitution, may contract, by legislation, to release the exercise of taxing a particular thing, corporation, or other person; and that, where such a contract is made, by the passage of an act of the legislature, an act passed by a subsequent legislature, repealing the former act and imposing the tax, is a violation of the contract, and repugnant to the constitution of the United States.

In The Binghamton Bridge, 3 Wall. [70 U. S.] 51, in 1865, the court held, that the legislature of New York had, by an act incorporating a bridge company, contracted with it, that if it would build and maintain a safe and suitable bridge across a specified river, at a specified place, for the accommodation of the public, it should have, in consideration therefor, a perpetual charter, and the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on such river, either above or below such bridge; and that an act of a subsequent legislature, chartering another corporation, with power to construct a bridge for general road travel over the same river, and within the prohibited distance, was in violation of the contract made by the first act, and void.

In Home of the Friendless v. Rouse, 8 Wall. [75 U. S.] 430, in 1869, the state of Missouri had, in 1853, incorporated an institution by a special act, which stated, in its preamble, that it was passed for the purpose of encouraging the establishment of a charitable institution, to afford relief to destitute and suffering females, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose, and enacted, that all property of the corporation "shall be exempt from taxation," and that an already existing provision of statute, declaring that every charter of incorporation should be subject to alteration, suspension, or repeal, at the discretion of the legislature, should not apply to such corporation. The corporation was organized and had acquired a considerable amount of real estate. Under the authority of a constitution adopted by Missouri, in 1865, the legislature imposed a tax on the real property of the corporation. The state court upheld the validity of the tax, and the supreme court, on a writ of error, held, that the exemption from taxation was held out by the legislature as an inducement to the making of donations of money and land to the corporation; that the charter

was a contract between the state and the corporators, that the property given for the charitable uses specified in it, should, so long as it was applied to such uses, be exempted from taxation; that there is no necessity for looking for the consideration of a legislative contract, outside of the objects for which the corporation was created; that such objects were deemed by the legislature to be beneficial to the community, and such benefit constituted the consideration for the contract, and no other was required to support it; that a state may, by contract, based on a consideration, exempt the property of an individual or a corporation from taxation, either for a specified period or permanently; that the exemption is presumed to be on sufficient consideration, and binds the state, if the charter containing it is accepted; that the state of Missouri did make a contract, on sufficient consideration, with the corporation, to exempt its property from taxation; and that the attempt to compel it to pay taxes was an indirect mode of impairing the obligation of the contract.

In Washington University v. Rouse, 8 Wall. [75 U. S.] 439, in 1869, the same views were held in regard to a university for learning.

In Wilmington Railroad v. Reid, 13 Wall. [80 U. S.] 264, in 1871, the legislature of North Carolina had, in 1853, chartered a railroad corporation. One section of the act of incorporation provided, that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." While this act was in force, the franchise, and the rolling stock, and certain real estate of the corporation, were assessed, under a subsequent law, for taxation, by the state and a county in it. The state court held, that the subsequent law did not impair the obligation of a contract, and that the tax was valid. The supreme court held, that the legislature had, in the charter, told the corporation, that, if it would complete its road, its property and the shares of its stockholders should be forever exempt from taxation; that all the real and personal estate required by it for the successful prosecution of its business was exempted from taxation; that the franchise of the corporation was part of its property; and that the subsequent act of the legislature impaired the obligation of the contract made in the charter, and was void.

In Tomlinson v. Jessup, 15 Wall. [82 U. S.] 454, in 1872, the state of South Carolina had, in 1851, incorporated a company, for 50 years, to build a railroad. At the time the charter was passed, there was in force a statute of the state, passed in 1841, declaring that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal, by legislative authority, unless the act granting the charter, or the renewal, amendment or modification, should, in express terms, except it from the operation of that law. In 1855, an act was passed, "to amend the charter" of the corporation, "and for other purposes," which provided, that its stock, and the real estate it then owned or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from all taxation during the continuance of its charter. This act did not except itself or the original charter from the operation of the act of 1841. Under acts passed in 1868, and subsequently, whereby the property of corporations was made liable to taxation, proceedings were taken to assess and tax the property of this corporation. The supreme court held, that the provisions of the law of 1841 constituted the condition upon which the charter granted in 1851 was held, and upon which every amendment or modification of it was made; that the power reserved to the state by the law of 1841 authorized any change in the contract, as it originally existed, or as subsequently modified, or its entire revocation; that the stockholders took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time, in the discretion of the legislature; that the right of a legislature to surrender its power of taxation, so as to bind its successors or the state, is upheld, when and because the exemption is made on considerations moving to the state, which give to the transaction the character of a contract, which is thus brought within the protection of the federal constitution; that, in the case of a corporation, if the exemption is made in the original act of incorporation, it is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter, and, if it is made by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation; that, by the reservation of power in the act of 1841, immunity from taxation, as a part of the contract with the state, was subject to be revoked equally with any other provision of the charter, whenever the legislature might think it expedient to make the revocation; and that the reservation affected the entire relation between the state and the corporation, and placed under legislative control all rights, privileges and immunities derived by its charter directly from the state.

In Miller v. State, 15 Wall. [82 U. S.] 478, in 1872, the court construed the provisions before cited from the constitution of New York, of 1846 (article 8, § 1), and from the 1st and 48th sections of the general railroad law of New York, of 1850 (chapter 140), and from section 8 of title 3 of chapter 18 of the first part of the Revised Statutes of New York (1 Rev. St. 600), in regard to the right

of the legislature to alter or amend the charter of a corporation. A railroad corporation had been formed under the general railroad law of 1850, with thirteen directors and a capital stock of $800,000. The legislature, by an act passed in 1851, authorized the city of Rochester to subscribe for three-eighths of the stock, or $300,000, and provided, that, if the subscription were accepted, the city should appoint one director for every $75,000 subscribed by it, that is, four directors of the thirteen. This left nine directors to be appointed by the stockholders of the remaining $500,000 of stock. The city subscribed and paid its $300,000. The other stockholders paid only $255,200 of their subscriptions. In 1867, the legislature passed an act which gave to the city the power to appoint one director for every $42,855.57 owned by it, thus substantially apportioning the number of directors according to the stock actually paid for. This gave to the city seven directors of the thirteen, and to the other stockholders six. The question arose, whether there was a contract made by the state in respect to the number of directors, and whether the act of 1867 violated that contract. It was contended, that the act of 1867 was void, as being repugnant to the act of incorporation. The court held, that there was, in the constitution and prior statutes, a reservation of a right to alter the act of incorporation, under which the act of 1867, if an alteration of the charter, was valid: that the right to elect nine of the thirteen directors was not a vested right, and the act of 1867 did not impair any vested right, because the concession made in the special act of 1857 was subject to the reserved power to alter or repeal the charter, and left the legislature the power to change the apportionment of directors; and that the act of 1867 was valid.

In Holyoke Co. v. Lyman, 15 Wall. [82 U. S.] 500, in 1872, the same views were applied as in the case last cited. The General Laws of Massachusetts provided, that every act of incorporation passed after 1831 should "at all times be subject to amendment, alteration or repeal at the pleasure of the legislature." A corporation was chartered in 1848, to construct a dam across a river, to make a water-power. The act of incorporation required it to pay damages to the owners of fishing rights above. It constructed its dam without a fishway, and paid such damages. The act did not expressly exempt it from maintaining the dam without a fishway. Afterwards, the legislature passed an act requiring a corporation which was its successor in the ownership of the franchise, to construct a fishway in the dam. It was contended, that the last act impaired the obligation of the contract contained in the charter, and was void. But the court held, that the charter was subject to the implied condition, that a suitable fishway should be constructed in the dam, and that, as it contained no stipulation exempting the corporation from such implied condition, it was subject to the power of amendment reserved by the general statute, and no contract was impaired nor any vested right infringed, and neither the object of the charter, nor any rights vested under it, were defeated or substantially impaired, and the act requiring the fishway to be constructed in the dam was valid.

In Humphrey v. Pegues, 16 Wall. [83 U. S.] 244, in 1872, the legislature of South Carolina had, in 1849, incorporated railroad company number one, granting to it the privileges granted by the charter of a prior company. These privileges did not include any exemption of its property from taxation. In 1851, the legislature incorporated railroad company number two, by an act which contained no exemption of its property from taxation. In 1855, it passed an act "to amend the charter" of company number two, "and for other purposes," which provided, that the stock of company number two and its real estate, then owned or to be acquired, connected with or subservient to its works, should be exempted from all taxation during the continuance of its charter, which would expire in 1901. In 1863, the legislature amended the act incorporating company number one, by declaring that all the privileges granted "by the charter" of company number two were thereby granted to company number one. The road of company number one had not then been built. It was afterwards built. Thereafter, officers acting under the authority of the legislature imposed taxes on the stock and property of company number one. The question arose, whether the act of 1855 formed part of the charter of company number two, when, in 1863, the privileges granted to that company were conferred on company number one, or whether such privileges were limited to those granted to company number two by the original act of 1851. It was contended, for the state, that, as the act of 1855 was an act to "amend the charter" of company number two, it followed, that the act of 1851 was "the charter" of company number two, and that, when the act of 1863 gave to company number one all the privileges granted by "the charter" of company number two, it gave only those granted by the act of 1851, and did not give the exemption from taxation contained in the act of 1855. The court held, that the charter of company number two, as it existed in 1863, was based upon the two acts of 1851 and 1855; that, after the passage of the act of 1855, company number two stood, in law, as if it had been originally chartered with the privileges conferred upon it by the act of 1855; that all those privileges were conferred upon company number one by the act of 1863; that it appeared that, prior to 1863, no sufficient inducements had been found to procure the building of the road of that company, and the exemption from taxation conferred by the act of 1863 was of great value, and the road was after-

wards built; and that there was, in that instance, the consideration that at any time exists for the granting, by the legislature, of the privilege of exemption from taxation, to aid the acceptance of the same and the building of the road. The court further say: "Another question is raised, to wit, that a legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said, that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this court. It has been held, that the legislature has the power to bind the state, in relinquishing its power to tax a corporation. It has been held, that such a provision, in the charter of an incorporation, constitutes a contract, which the state may not subsequently impair." Some of the cases above quoted are then cited, and the court say, that these doctrines "must be considered as settled in this court."

The most recent case on the subject, decided by the supreme court of the United States, to which my attention has been called, is that of Pacific R. Co. v. Maguire, 20 Wall. [87 U. S.] 36. The Pacific Railroad Company was incorporated by the state of Missouri, by special act, in 1849. Authority was therein given to the counties through which it should pass, to subscribe for the stock. By an act passed in 1851, provision was made for loaning the bonds of the state to the corporation. By an act passed in 1852, certain public lands were vested in the corporation, and it was authorized to build a southwestern branch road, and provision was made for the issuing of more bonds of the state, to be used in aid of the work, and that the road should be completed and put in operation within five years from the passage of that act. The act then provided (section 12) that the road and the southwestern branch road should be exempt from taxation respectively, until the same should be completed, opened and in operation, and should declare a dividend, and that then the property of the road, at its cash value, should be subject to taxation at the rate assessed by the state on other property of like value, with the proviso, that, if the corporation should fail, for the period of two years after the said roads respectively should be completed and put into operation, to declare a dividend, then it should no longer be exempt from the payment of said tax. This act and its grants were accepted in the manner thereby prescribed. The road was completed and put in operation on the 1st of April, 1866, but, before any dividend had been declared or paid, and before the two years had elapsed, a tax was levied on the property of the corporation, under a "railroad ordinance," adopted on the 4th of July, 1865, as a part of the constitution of Missouri. This ordinance provided, that there should be levied and collected from this road, and from two other specified roads, an annual tax of 10 per centum of all their gross receipts for the transportation of freight and passengers, (not including amounts received from, and taxes paid to, the United States,) from the 1st of October, 1866, to the 1st of October, 1868, and 15 per centum thereafter, which tax should be assessed and collected as other taxes, and be appropriated to paying the principal and interest of the bonds of the state and the bonds guaranteed by the state, issued to the three companies, provided, that the tax should be collected from each company only for the payment of the principal and interest on the bonds for the payment of which such company should be liable. The penalty imposed for the non-payment of the tax was the sale of the property and franchises of the company. The tax assessed was 10 per cent. on the gross earnings of the company for the year commencing October 1st, 1866, and was assessed in the same manner as other state taxes. The state court held that the tax was lawful. This decision was reversed by the supreme court, which held, that the 12th section of the act of 1852 created a contract between the state and the company, by which the road was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion; and that the ordinance of 1865, imposing a tax of 10 per cent. upon the gross earnings, before the road was completed and in operation and had declared a dividend, was a violation of the contract, and the levy for its enforcement was illegal. The court affirmed the doctrine, that, when a contract of exemption from taxation is established, it is binding upon the state, and the action of the state in passing a law violating the terms of the contract will not be sustained. It also holds, that, in the case before it, there was such a contract; that the corporation was unable to raise funds for completing its road; that, to induce it to go on with its work, and to induce individuals and counties to subscribe for stock in what the legislature evidently deemed an enterprise of public benefit, loans of the credit of the state were made from time to time; that, to make the franchise still more valuable to the corporation, and to the end that individuals and counties should be induced to subscribe to the stock, the legislature added an exemption from taxation until the road should be completed and in operation and should have declared a dividend; that the money value of this exemption was shown to have been large, by the amount of the tax in question; and that the transaction amounted to a contract between the state and the

corporation, that there should be no taxation of the company until the occurrence of the stipulated events.

In the case now before the court, it is manifest, from the terms of the act of 1866, that the work of the construction of the road of the New York and Oswego Midland Corporation required facilitation, and that such facilitation, by authorizing towns and cities which would be benefited by its construction to subscribe for its stock, and expend their money in constructing the road, was deemed necessary by the legislature. The title of the act is, "An act to facilitate the construction" of the road "and to authorize towns to subscribe to the capital stock thereof." A prominent facilitation to the construction of the road, given in the act, is the provision for investing the money of the towns and cities in the stock of the company, and for expending such money in building the road, coupled with the exemption of the property of the company from taxation. The bonds to be issued might, by the terms of the act, amount, in a town, to 30 per cent. of the assessed valuation of its property, for the year 1865, and, in a city, to 15 per cent. The money raised by the sale of the bonds was directed to be invested in the stock of the corporation, and to be used by it in constructing the road and its buildings and appurtenances, and for no other purpose, and the act declared "the public necessity and utility" of the road, and also declared, that the towns and cities authorized to issue such bonds were "immediately interested" in the construction of the road. The towns and cities thus becoming stockholders were to acquire, as such, thereby, the same rights and privileges as other stockholders. The dividends on the stock were to be applied to pay the principal and interest of the bonds, and the deficiency was to be raised by taxation on the real and personal estate of the town or city. The act also provides, that the corporation may take from towns gifts or grants of rights of way, and of rights to use or run on the road-beds of public highways. It also empowers the corporation to build two branch railroads, one to Newburgh and one to Ellenville, and declares, that the proceedings theretofore taken in organizing the corporation, and in filing its articles of association, shall be deemed legal and valid, as well for the purposes of its organization as for constructing such branch roads, and enacts, that, in constructing said branch roads, it shall have all the powers, and be subject to the liabilities, provided in the general railroad law. The act also confers upon the corporation the faculty of consolidating itself with other corporations, so as to form a continuous line of road between its two termini, and to create a new consolidated corporation, with certain rights, franchises and property. There is, also, the provision, before referred to, giving the corporation the power to acquire title to land by compulsory proceedings under the general railroad law, on having $1,000 per mile of stock subscribed and paid in, instead of its being restricted from doing so unless $10,000 per mile should be subscribed and $1,000 thereof be paid in. Interwoven with these provisions is the one for exemption from taxation, contained in section 16 of the act. This exemption was a valuable privilege. It was given in an act which authorized towns and cities to issue bonds, and subscribe for stock in the road, and thus facilitate its construction. But for this provision, the towns and cities would have had no power to issue the bonds or take the stock. By the general railroad law, and, therefore, by the charter of this corporation under it, towns and cities could not be holders of stock in it. By the act of 1866, they could become such stockholders, provided the expressed assent of tax-payers in towns and cities other than the city of Oswego, and the suffrage of electors in that city, were first given in favor of the measure. As an inducement to giving such assent and such votes, the exemption from taxation was granted. The subscription for stock is directed to be made in the corporate name of the town or city. The commissioners whom the act authorizes to be appointed are empowered by it to act for and represent the town or city, as a stockholder, at all meetings of stockholders. These functions conferred by the act of 1866 upon towns and cities, as stockholders in this particular corporation, and upon their agents, are amendments of the charter of this particular corporation. So, also, the power, given to it by that act to build the two branch railroads, and the extension, by that act, of the scope and operation of its articles of association, so as to cover the construction of such branch roads, and the powers given to it, by that act, to consolidate with certain other specified railroad corporations, and to acquire the title to real estate, by compulsory proceedings, on more favorable terms than under the general law, are amendments of the charter of the corporation. The corporation must be regarded as having accepted these amendatory provisions, in conjunction with the provision for exemption from taxation. All, taken together, constituted a contract, and one and the same contract. All were provisions essentially connected with the franchise of the corporation. The contract was founded on considerations of policy, stated in the act, and of which the legislature had the sole right to judge. The act declares, that the construction of the road is a matter of public necessity and utility, that the towns and cities specified are immediately interested in its construction, and that the measures provided, and which are in amendment of the charter, for enabling such towns and cities to issue bonds and take stock in the corporation, are measures in facilitation of the construction of the road. The exemption from taxation given by the act amending

the charter is supported upon the consideration of the greater efficiency with which the corporation will be enabled to discharge the duties originally assumed by its corporators to the public, not only in view of its status without having for its stockholders any towns or cities, but, also, in view of the fact that, because of the exemption from taxation, towns and cities will issue bonds and become stockholders, and thus the corporation will have greater efficiency and greater facility to carry out the purposes of its creation. The charter of the corporation stood, after the passage of the act of 1866, as if the corporation had been originally chartered with all the additional faculties conferred by the act of 1866. The present case resembles very much, in its main features, that of Pacific R. Co. v. Maguire, above cited. There, the original charter gave authority to counties to subscribe for the stock. A subsequent act provided for loaning the bonds of the state to the corporation, and vested public lands in the corporation, and authorized it to build a branch road. This latter act exempted the road from taxation for a limited period. The exemption was held to be a stipulation in a contract, whereby, in order to induce subscriptions to stock in what was regarded as an enterprise of public benefit, the state loaned its credit to the corporation and granted to it an exemption from taxation for a limited time. There can be no doubt, I think, that, in the present case, the stipulation for exemption from taxation was a stipulation contained in an act amending the charter of the corporation, and was a stipulation forming part of a contract between the state and the corporation, and was one which, as against the corporation and its stockholders, could not be abrogated by the state, without impairing the obligation of the contract, unless the right so to do was reserved by the state, as a part of the same contract.

The act of 1874, repealing all laws exempting the property of the corporation from taxation, has no retrospective operation. It does not purport, or have the effect, to subject the property of the corporation to taxation for any period anterior to the passage of the act of 1874. On the contrary, the 1st section of that act, after the repealing clause, goes on to say: "and the real and personal property of the said corporation is hereby made subject to state, county, town and municipal taxation," that is, to future taxation, for and in respect of future time, not to future taxation for past time, or to past taxation for past time. So far as the act of 1874, either by repealing a prior exemption from taxation, or by affirmative provision subjecting property to taxation, undertakes to subject the property of this corporation to taxation, it subjects it to no greater or other future burdens than like property in a like situation. It is a mere exercise of the general taxing power of the state. It does not destroy any vested right, or deprive the corporation or its stockholders of any property or right of property vested in them, or divert their property to any purpose inconsistent with the purpose of the charter. It leaves the exemption enacted by the act of 1866 in force for the period between the passage of that act and the passage of the act of 1874. No complaint can be made that the act of 1874 does not exercise fairly the power of taxation, nor that the provision for employing the moneys collected for county taxes in a town or city which has issued bonds in aid of the construction of the road, to pay the interest and principal of such bonds, is not a proper and competent disposition of such moneys. In view of the decisions above referred to, the reservation in the constitution of the state, and in the general railroad law, and in the Revised Statutes, gave to the legislature the right to amend the charter of this corporation, by repealing the exemption from taxation, and enacting the provisions for taxation which are found in the act of 1874. The provisions of law in force when this corporation was organized, authorizing the legislature to amend or alter the charter of any corporation thereafter to be created, constituted a condition upon which this corporation was formed, and upon which it held its franchise, and upon which every amendment of its charter was made. The power reserved to the state authorized the change made by the act of 1874 in the contract for exemption from taxation. The individuals who, and the towns and cities which, became stockholders while the 16th section of the act of 1866 was in force, took their interests with knowledge of the existence of such power, and of the possibility of its exercise at any time, in the discretion of the legislature. Immunity from taxation, as a part of the contract, was subject to be revoked by the state, at any time, in the discretion of the legislature, because the reservation placed under legislative control all immunities derived from the state by the charter, or by any amendment thereto.

It was stated, on the argument, that, if the act of 1874 were held to be valid, questions remained to be discussed as to the mode in which the tax in question was assessed, as having been assessed against the corporation and its property, and not against the receivers, and other questions in regard to the levy of the tax. I will hear the parties in regard to those questions, if desired.

[NOTE. Subsequently, upon foreclosure proceedings being brought against certain property owned by the New York and Oswego Midland Railroad Company, receivers were appointed. These receivers applied for injunctions to restrain the tax collectors of certain towns from proceeding to interfere with said property by selling it under warrants to satisfy certain state taxes. The applications were denied. Case No. 13,405. In Case No. 13,406, the court made an order of distribution of the proceeds of the mortgaged railroad and its property.]

HEWITT (STANLEY v.). See Case No. 13,285.

HEWLETT v. The ANTONETTA. See Case No. 491.

HEWSON (GREGORY v.). See Case No. 5,801.

HEWSON (UNITED STATES v.). See Case No. 15,360.

Case No. 6,444.

In re HEYDETTE.

[8 N. B. R. 332.] [1]

District Court, E. D. Michigan. May 26, 1873.

BANKRUPTCY—ANSWER—FORM OF.

1. Neither the bankrupt law [of 1867 (14 Stat. 517)] nor form 61 require that the answer to a creditor's petition, to entitle the debtor to demand and have a hearing by the court or a trial by jury, should be verified or even in writing. It is sufficient if he appears before the court and allege that the facts set forth are not true.

2. The better practice, however, is to put the whole answer in writing, and allege in express terms that the facts set forth in the petition are not true, and then conclude with a demand for a hearing by the court or a trial by jury. It should be signed by the respondent in person or by attorney.

Motion for adjudication of bankruptcy on creditor's petition for insufficiency of debtor's answer. On the return day of the order to show cause, March 24th, 1873, the debtor [Frank Heydette] appeared by attorney, and presented and filed the following paper, entitled in this matter: "To the Clerk of Said District: Please enter a denial of bankruptcy for said Heydette, and a demand for a trial by jury in said cause. (Signed) Ward & Palmer, Solicitors for Defendant."

On the filing of this paper, no objection being made, and the attention of the court not being particularly called to it at the time, the usual record was made and attested by the clerk, as is prescribed by form No. 61, and the usual order for a trial by jury was made as prescribed by form No. 62. The matter was then adjourned from time to time, by consent, to the 19th day of May, 1873, when this motion was made, and the same was then argued and submitted.

LONGYEAR, District Judge. As the motion was argued and submitted, the court is asked to treat the paper which was filed on behalf of the debtor, and the record and order based thereon as a nullity, and to adjudge the debtor a bankrupt under section 42, as on default. The motion should have been to strike the paper from the files, and to vacate the record and order, and, that being granted, an adjudication of bankruptcy would necessarily follow, unless otherwise ordered. As this motion is made, however, with a view to having the practice established in regard to putting in answer and demand for jury in such cases, I shall treat the motion as if it were to strike from the files, etc., as above suggested.

The question is, then, what constitutes a sufficient answer to a creditor's petition, to entitle the debtor to demand and have a hearing or trial? Must such answer be specific as to each allegation in the petition, or is a general denial of the truth of the matters set forth in the petition sufficient? Must the answer be verified, or may it be put in without oath? These questions must be answered in the light of the act itself, of the general orders, and of the forms prescribed thereunder, and such judicial decisions thereon as have been made, independently of local rules upon the subject, there being no such rules in this district.

Decisions based upon such local rules can afford us but little aid, and can have but little weight as authority upon the general question. Such is especially the case in the district of Oregon and in the Northern district of New York. The language of section 41, upon which the questions above stated mainly depend for their solution, is as follows: "That on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor," etc. It is contended that the word "allegations" here is used in its ordinary sense, and means the same as "pleadings," and that so far as it relates to the debtor it can mean nothing more or less than an answer to the petition. Conceding this (although in view of the subsequent language of the section it admits of much doubt whether the word "allegations," as here used, has not a broader meaning) it does not necessarily follow that such answer must be specific, or that the requirement is not complied with by a general denial of the facts set forth in the petition, where such denial is all the defence relies on.

The "forms in bankruptcy," prescribed as they are by general order 32, are expressly authorized by the act (section 10), and hence constitute a part of the act, and are of equal authority with it, the same as if they had been incorporated in it. The form prescribed, No. 61, for a record entry of what is done under the clause of section 41 above quoted, is as follows: "And now on this return day (or adjourned day) for the hearing of said petition, the said —— appears and denies that he has committed the act of bankruptcy set forth in said petition, and avers that he should not be declared bankrupt for any cause in said petition alleged, and this he prays may be inquired of by the court (or he demands the same may be inquired of by a jury)." The subsequent part of section 41, to which allusion has been made, has a direct bearing here. It is as follows: "And if, upon such hearing or trial, the debtor

[1] [Reprinted by permission.]

proves to the satisfaction of the court or of the jury as the case may be, that the facts set forth in the petition are not true, * * * * the proceedings shall be dismissed and the respondent shall recover costs."

Now it will be observed that the recital contemplated by form 61 is not merely that the respondent appeared and put in an answer, nor in general terms that the court heard his allegations, but, on the contrary, it is a recital of just what answer he put in and what his allegations were; and, I think, it is equivalent to an explicit recognition that the answer or allegations there recited—that is, a simple denial—is sufficient to entitle the respondent to make the proof required of him by the clause of section 41 just quoted. Nor does the act require or the form seem to contemplate that the answer need be verified, or even in writing. On the contrary, taking section 41 and form 61 together, and it seems to have been contemplated by congress and by the justices of the supreme court that, on the return day of the order to show cause, or on an adjourned day, the respondent should, if he desires to controvert the petition, appear before the court and allege that the facts set forth in the petition are not true, and demand a hearing by the court, or a trial by a jury, and that the court should cause a record of such allegation and demand to be made. No portion of these proceedings previous to the making of the record by the clerk is required to be in writing except the demand for a trial by jury, neither is it essential, in the nature of things, that they should be. The record, according to form 61, is the evidence of what occurred, and it must be impeached before it can be averred that a respondent has not made the requisite allegations to entitle him to controvert the facts set forth in the petition. It is, however, the better practice, and it is recommended, to put the whole in writing. It should be addressed to the court, and allege in express terms that the facts set forth in the petition are not true, and conclude with a demand for a hearing by the court, or a trial by a jury, and should be signed by the respondent, in person, or by attorney.

The foregoing remarks apply, of course, only in cases where the respondent, as in the present case, intends simply to controvert the facts set forth in the petition. This decision, therefore, has no application to cases in which the respondent's answer consists in a confession of the truth of the facts set forth in the petition and an avoidance of their legal effect by allegations of new matters. As to such cases, the act and the general orders are silent, and without expressing an opinion (for such is not the present case,) I shall content myself with the recommendation that in all such cases the answer should not only be in writing, but should be as full, specific and certain as an answer to a bill in equity. Phelps v. Clasen [Case No. 11,074] and In re Dunham [Id. 4,143] are decisions sustaining the views expressed in this opinion. The cases holding the contrary view will be found in the most part to be based upon some special local rule. The paper filed by respondent's attorneys, although informal and not properly addressed, clearly indicates that he intended to take issue upon the facts set forth in the petition, and to demand a jury trial, and it was not objected to at the time. Respondent will, under the circumstances, be allowed to put in a new answer and demand of trial in conformity with this opinion, provided he does so instanter, and goes to trial at the first opportunity, at the option of the petitioner. Otherwise the motion must be granted.

Case No. 6,445.

HEYDOCK et al. v. STANHOPE et al.

[1 Curt. 471.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1853.

FRAUDULENT CONVEYANCE—INSOLVENCY—CONSTRUCTION OF STATUTE.

1. In construing the statute of Rhode Island to prevent fraudulent conveyances, this court follows the construction settled by the highest court of that state.

2. By the law of Rhode Island, an assignment of all the property of an insolvent debtor, for the benefit of all his creditors, stipulating for a release, and that the dividends of creditors refusing to become parties shall be paid to the assignor, is not fraudulent and void on its face.

This was a bill in equity, filed by the complainants [Henry W. Heydock and others], merchants, in the city of New York, against John T. Stanhope, William H. Cranston, Jacob Weaver, and Sarah H. Weaver, citizens of Rhode Island. The bill alleges that, at the June term, 1848, of this court, the complainants recovered a judgment at law against John T. Stanhope, whereon execution issued, and was levied on certain merchandise found in the shop of the defendant, Stanhope; and that the defendant, William H. Cranston, caused the same to be replevied out of the hands of the marshal, by a writ of replevin issuing out of and returned into the supreme court of Rhode Island, claiming the said merchandise as his own property; that the action of replevin was duly entered, but has not been tried, having been continued from term to term. The bill further alleges, that, on the fifth day of June, 1848, Stanhope made an assignment of all his property to Mr. Cranston, in trust for the creditors of Stanhope, and annexed a copy of the deed of assignment, and charges that it was fraudulent as against creditors, and void. The particular grounds upon which the charge of fraud is rested, are

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

noticed in the opinion of the court. The bill also alleges, that at or about the same time when the assignment was made, and in part execution of the same design, to defeat the plaintiff's execution, Stanhope conveyed some land to Jacob Weaver; and it further charges that Sarah Weaver, who is named in the schedule of preferred creditors annexed to the assignment, was not a bonâ fide creditor, her claim being fictitious, and inserted by a fraudulent concert between herself and Stanhope, to aid him in withdrawing a part of his property from his just creditors. The defendants having answered, the cause was set down, and heard on bill and answers.

Potter & Turner, for complainants.
Mr. Ames, for respondents.

CURTIS, Circuit Justice. The complainants, who are judgment creditors, ask the aid of the court to remove an obstacle to the levy of their execution on personal property, alleged to belong to the judgment debtor, upon which they assert they have acquired a lien. Their general ground is, that the debtor, just before their execution was sued out, and with an intent to prevent its levy, made a fraudulent conveyance of all his property to Mr. Cranston. Of course, it is incumbent on them to show that the conveyance, which is admitted to have been made, was fraudulent and void, as they allege. And inasmuch as the cause has been set down by the complainants, and heard upon bill and answer, all pertinent facts, stated in the answers, must be taken to be true, and the court must find the fraud upon, or as a legal conclusion from, those facts.

It is necessary, therefore, to examine the grounds upon which the bill rests the charge of fraud, and see how far they are confessed or denied by the answers. These grounds are, that the debtor made the assignment with an intent to delay and defeat the levy of the complainant's execution; that the assignor and assignee both had that end in view, when the assignment was made; that it was not intended to be a real transfer of property, for the benefit of bonâ fide creditors, but only a colorable arrangement, placing the nominal title in Mr. Cranston, but really leaving the whole control of the property, and its substantial ownership, in the debtor. And as evidence of this, the bill charges that the debtor was not in fact insolvent, and so not in a condition to make an assignment of all his property for the benefit of his creditors; that in point of fact, he continued, after the assignment was made, to have the custody and possession of the merchandise, and to sell the same as before; that the assignee exercised no supervision over him; that the schedules of property annexed to the assignment had no values or estimates of value, and were so left to prevent creditors from obtaining information; that a fictitious debt to Mrs. Weaver, the mother-in-law of the assignor, was placed on the schedule of preferred creditors; and that about the same time when the assignment was made, the assignor made a fraudulent conveyance of some real estate to another defendant, Jacob Weaver.

Before examining the answers, to see how these charges are met, it is material to notice, that whatever may have been the actual intentions of the parties, no conveyance can be impeached as fraudulent as against creditors, unless it is capable, in point of law, of executing, or aiding in the execution of some illegal purpose. It is upon this principle, that an exercise of the common-law right of preferring one creditor to another, is sustained. If one creditor has recovered a judgment, and is about to levy an execution to satisfy it, and the debor, being insolvent, conveys his property to another creditor, whom he chooses to pay in preference to the other, though his design is to delay and defeat the latter, yet his conveyance executes only a legal intent to pay a just debt, and so is valid. And therefore, if it were admitted in this case, that the purpose of the assignor was to delay and defeat the complainant's execution, if he has only exercised a legal right to appropriate his property to pay certain favored creditors in full, and to distribute the surplus ratably among all his creditors, his intent does not avoid the deed, which is not capable of executing or aiding in the execution of any thing but a legal intent. Whether, under the law of Rhode Island, it would avoid an assignment, otherwise valid, to a trustee, for the benefit of creditors, if it were proved that the assignor and assignee, when it was made, intended not to execute it, but to use it, only to enable the debtor to continue to enjoy the property assigned, I do not find it necessary in this case to decide. In Massachusetts, it has been held that it would. Johnson v. Whitwell, 7 Pick. 71. It is a question not free from difficulty in Rhode Island, because the statute law of the state enables any creditor interested in the assignment to come into the supreme court and compel the assignee to give an inventory of the property, and secure the execution of the trusts, by a bond with sureties, and the assignee is liable to be removed for neglect or misfeasance. Substantially the same ends are attainable by the aid of a court of equity, under its jurisdiction over trusts. Inasmuch, therefore, as the deed which conveys the property does not, at the same time, actually create the trusts in favor of creditors, which form a full and legal consideration for the conveyance, and which the assignee is compellable to execute, it is certainly difficult to maintain that his intention not to execute them vitiates the deed. It would seem that the deed was incapable, in point of law, of aiding in the execution of an intent to hold the property for the debtor, and so was valid, even if that intent existed. But, as I have said, I do not find it necessary to decide this question, because both the assignor

and assignee, in their answers, not only declare in general that the assignment was made in good faith, for the benefit of creditors, but they deny every fact alleged in the bill as evidence that the assignment was colorable. In respect to the possession and control of the property, the assignee says that by the assignment it was made his duty to judge whether it was most for the benefit of the cestuis que trust to sell the property at public or private sale; that he believed the latter to be best, and that from the knowledge of the business and customers, possessed by the assignor, he considered it expedient to employ him as his clerk, to make sales of the merchandise, under his supervision and control; that the property was in his possession, in a store hired by him, and not, at any time after the assignment, in the possession of the assignor; that he believes the assignor was insolvent, and the debt to Mrs. Weaver real and justly due, and he knows nothing of the conveyance to Jacob Weaver; that immediately after the assignment was made, he gave public notice thereof to all creditors of the assignor; and, so far as he has been able, has in good faith executed the trusts which it declares. Stanhope's answer contains the same facts concerning the custody and possession of the property, and declares that he was insolvent; that the debt to Mrs. Weaver was justly due for so much money lent to him by her, and denies that the conveyance of the real estate to Jacob Weaver was without consideration, though it admits that the consideration was a note payable to his wife, to whom the estate in the land descended. Mrs. Weaver's answer avers, that the debt to her, mentioned in the schedule, was justly due, for that amount of money lent, and states from what source she obtained the money. Jacob Weaver answers, that he was led to purchase the undivided interest which his sister, Mrs. Stanhope, had in this land, because it was the residence of his mother, who, he was afraid, might be disturbed, if Stanhope were to sell it to another, as he feared he might do, knowing him to be embarrassed by debts, and in want of money; that he paid the full value for the estate of his sister by a note, payable to her; and that he made the purchase in good faith. It is not necessary for me to investigate particularly the question of the validity of this sale of the real estate, because it is only as evidence of the fraudulent purpose of Stanhope, in making the assignment, that this transaction is introduced into the bill, no relief being prayed, and no case for relief stated, as respects this land, on which the complainants have acquired no lien at law, or made any attempt to levy their execution. And as the answers, both of the assignor and assignee, deny the fraud charged in the bill, and every specific fact therein charged, from which fraud is inferrible; and as these denials must be taken to true, it would be of no importance, if I were satisfied that other property was conveyed by the debtor, about the same time, to defeat his creditors.

It remains only to consider an objection to the assignment, which appears upon its face. The assignment contains these clauses: "He shall pay to my creditors of the first class, enumerated in Schedule A, which said schedule is hereby referred to and made a part of this assignment, the full amount of their respective debts, in the order in which they are named, the amounts now due each of them, and which are stated as correctly as the same can now be ascertained; should the balance of said proceeds be insufficient to pay the remainder of my creditors, as enumerated in Schedule B, which said schedule is hereby referred to and made a part of this assignment, then he shall make an equal distribution of said balance among all said creditors of the second class, as enumerated in said Schedule B, according to their respective claims, provided said creditors shall discharge said Stanhope from all liability for the balance due from him to each, after the payment as aforesaid of each creditor's share of the estate and effects hereby assigned. If any creditor shall refuse to discharge said Stanhope as aforesaid, then, and in every such case, the share of such person or persons so refusing shall be paid by said assignee to said Stanhope." Whatever might have been the view taken by this court, of an assignment containing such clauses, I do not feel at liberty to treat the title, acquired by the assignee, as fraudulent and void under the statute law of Rhode Island, if the highest court of that state, construing the statute of Rhode Island, have deliberately and finally adjudged it to be valid. In Brashear v. West, 7 Pet. [32 U. S.] 615, the supreme court, considering the effect of a clause in an assignment requiring a release, and reserving the surplus to the debtor say: "The property is not entirely locked up; a court of equity may reach it; and whatever may be the intrinsic weight of the objection, it seems not to have prevailed in Pennsylvania; and the construction which the courts of that state may have put on the Pennsylvania statute of frauds, must be received in the courts of the United States." I understand it to have been settled in Rhode Island, under the statute of frauds of that state, that clauses, like those now in question, do not per se render void an assignment of all the property of a debtor, for the benefit of his creditors. The chief justice of the supreme court of Rhode Island has, upon my application to him, placed in my hands a copy of an opinion of that court, in the case of Dockray v. Dockray [2 R. I. 547], by which it appears that the construction put on the statute of Rhode Island, that these clauses do not vitiate an assignment, is settled, and under it a great number of titles to real as well as personal estate have been made during a considerable period of time. In the language of the supreme court, this construction must be received by me; and in conformity therewith, I declare these

clauses do not of themselves vitiate the deed under the statute of Rhode Island. The result is, that the bill must be dismissed, with costs.

Case No. 6,445a.

HEYE v. LIEMAN.

[8 Betts, D. C. MS. 69.]

District Court, S. D. New York. Nov. 23, 1846.

PLEADING—MISTAKE—REPLEADER—PUIS DARREIN CONTINUANCE.

[Where, through the misapprehension or inadvertence of defendant's attorney, a mistake is made in a plea of puis darrein continuance, and not discovered until the trial, defendant will be allowed a repleader, but on condition of paying all costs, he having ample means to ascertain the proper evidence in defense.]

[This was an action at law by Herman Heye against George H. Lieman for a balance of account.]

BETTS, District Judge. A verdict was taken in this case at the last September term, in favor of the plaintiff, for $53.85, as the balance of accounts, subject to the opinions of the court on a case to be made, and subject to an application by the defendant for a repleader. The defendant does not now offer to argue the case, conceding that, upon the issues tried, the verdict cannot be impeached; but he moves, on affidavits and the state of pleadings, for leave to withdraw a plea of puis darrein continuance, interposed by him in November, 1845, and for a repleader. The ground of the application for a repleader is that the defendant's attorney misapprehended the purport of a receipt or acknowledgment given him by the plaintiff, written in the German language. He pleaded a full account and satisfaction of the debt, after suit brought, by the delivery of certain bills of exchange to the plaintiff, referred to in that receipt. He now alleges it was discovered on the trial that the said acknowledgment did not amount to a present accord and satisfaction, but admitted the deposit of the bills of exchange with the plaintiff to be in satisfaction of the debt when paid. The motion is therefore to change the form of the pleading so as to present the defence in this new aspect.

The plaintiff relies upon various English authorities as settling the doctrine that a repleader cannot be allowed after plea puis darrein continuance. Brown, Abr. "Repleader," B. N. P. 309; Cro. Eliz. 49; 1 Chit. Pl. 638; Bac. Abr. "Repleader," M, 2. And it will not be granted unless the first issue is immaterial (2 Saund. 319, note 6; 1 Ld. Raym. 167; Willes, 532), or in favor of a party making the first default (1 Ld. Raym. 170). The practice of the United States courts under the powers incident to them and the spirit of the 32d section of the judiciary act of 1789 [1 Stat. 91] has been of a more liberal character in respect to amendments than is the usage of the English common law courts, or courts pursuing closely their system of practice. Smith v. Jackson [Case No. 13,065]. The exercise of the power, when not restrained by positive rules, is regarded as resting wholly in the discretion of the courts. [Mandeville v. Wilson] 5 Cranch [9 U. S.] 15; [U. S. v. Buford] 3 Pet. [28 U. S.] 12; [Jackson v. Ashton] 10 Pet. [35 U. S.] 480; Calloway v. Dobson [Case No. 2,325]; Smith v. Jackson [supra]. Courts will not scrutinize the necessity or utility of a proposed amendment, farther than to see that it is not frivolous. 4 Cowen, 555. In view of the ordinary practice of the United States courts on this subject, I think the defendant ought not to be excluded from the privilege of an amendment. If the misapprehension or inadvertency of his attorney might have been corrected with due diligence before trial, that circumstance should not operate as an absolute interdiction of relief to the party himself. He must, however, expect, when he asks favors under circumstances like the present, and where his own proceedings have imposed great delay and cost on the opposite party, to find the terms on which relief will be granted more rigorous than in ordinary applications. After his plea of puis darrein continuance, and the return of the commission sent abroad under it, several terms elapsed before the actual trial, so that not only the plaintiff was further delayed in his proceeding, but the defendant had the most ample means of ascertaining precisely what evidence he could give in support of his plea. The defendant is allowed to amend his plea puis darrein continuance, on the payment to the plaintiff of all the costs which have accrued since that plea was interposed, and on such payment of costs the verdict will be set aside, and a new trial awarded. If the costs are not paid within twenty days after notice of this order, let final judgment be entered on the case for the plaintiff, with costs to be taxed.

Case No. 6,446.

HEYER et al. v. WILSON.

[2 Cranch, C. C. 369.] [1]

Circuit Court, District of Columbia. April Term, 1823.

MARSHAL—NEGLIGENCE — CAPIAS AD RESPONDENDUM—AMERCEMENT.

1. If the marshal upon a capias ad respondendum be amerced debt and costs nisi, the defendant may, on or before the next term, give bail and exonerate the marshal.

2. If the bill of exchange, which was the original cause of action be lost, it is sufficient (in order to amerce the marshal in the whole amount of debt and costs, for not bringing in the defendant arrested upon a capias ad respondendum,) to tender to the marshal an as-

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

signment of the right of action upon the bill, and, that assignment may be made by the attorney and agent of the plaintiff.

[This was a suit by Heyer and Bremner against David Wilson.] The late marshal (Boyd) had been amerced damages and costs, for not bringing in the defendant whom he had arrested upon a capias ad respondendum. Notice having been served upon R. Wallach, the administrator of the late marshal, to show cause why the judgment should not be final,

Mr. Wallach showed for cause that no tender had been made of the original cause of action, (an accepted bill of exchange.)

Mr. Dunlop, for plaintiffs, produced the affidavit of Mr. Brent, the clerk of this court, showing that the original bill whicIf had been filed in the suit against one Hyatt, had been sought for, but could not be found, and an assignment of the right of action signed by Mr. Key and Mr. Dunlop, attorneys and agents of the plaintiffs. Whereupon the court, at the last term, ordered the judgment to be entered against the administrator of the late marshal for the full amount of debt and costs, "nisi," the second day of the (then) next term (that is, the present term), according to the Maryland act of 1794, c. 54, § 2, for not bringing in the body of the defendant according to the tenor of the marshal's return.

Upon the second day of the present term, Mr. Swann, for defendant, offered bail for the defendant, Wilson.

Mr. Dunlop, for plaintiffs, objected that it was now too late.

But THE COURT (nem. con.) permitted the bail to be given, and ordered the judgment to be rescinded.

Case No. 6,447.

In re HEYS.

[1 Ben. 333;[1] 1 N. B. R. 21; Bankr. Reg. (Supp.) 5; 6 Int. Rev. Rec. 52; 36 How. Pr. 249.]

District Court, S. D. New York. Aug., 1867.

BANKRUPTCY PRACTICE—TIME OF NOTICE OF FIRST MEETING.

Where all the creditors of a bankrupt resided in Germany, and the register fixed the first meeting of creditors at sixty days from the date of the warrant: *Held*, that, under the eleventh section of the bankruptcy act [of 1867 (14 Stat. 521)], the fixing of the time for the first meeting is a matter of discretion with the register; that ninety days' time is to be allowed in cases where the creditors live so far away as to make such an interval a reasonable time. There is nothing to show that the register did not exercise his discretion wisely in this case.

In this case, all the creditors of the petitioner [Julius Heys], some eight or ten in number, were foreigners residing in Germany. On the return day named in the order of reference, the petitioner requested the register to fix a day twenty days from such return day, as the day for the first meeting of creditors. The register decided that sixty days' time from the date of the warrant, when issued, was the shortest time that could reasonably be named in the warrant for the first meeting of creditors, and that notices should be sent by mail to the creditors by the messenger, properly directed, and with the foreign postage prepaid. The petitioner contended that the clause in the eleventh section of the bankruptcy act, concerning service of notice on creditors by mail or personally, refers only to creditors residing within the United States, and that creditors residing out of the United States are, under that section, to be notified constructively, by the publication of notice in the newspapers specified in the warrant. On the application of the petitioner, the register certified the proceedings to the judge, for his decision thereon.

BLATCHFORD, District Judge. The register was correct in his decision. The eleventh section of the act requires that the warrant shall authorize the messenger to publish notices in such newspapers as the warrant specifies, and to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor. The same section then goes on to specify what particulars the notice so to be served shall state. One of those particulars is, that a meeting of the creditors of the debtor will be held "at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same." This allowance of as much time as ninety days, in connection with the absolute requirement that notice shall be served, by mail or personally, on all creditors, shows clearly that it was the intention of congress, that as much as ninety days' time between the issuing of the warrant and the first meeting of creditors shall be allowed in cases where the creditors reside so far away as to make such an interval a reasonable one. The fixing of the time is a matter of discretion, which it was the province of the register to exercise in this case, and there is nothing to show that he did not exercise it wisely in fixing sixty days' time.

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

Case No. 6,448.

In re HEZEKIAH.

[2 Dill. 551; 11 N. B. R. 573; 22 Pittsb. Leg. J. 164.] [1]

Circuit Court, E. D. Arkansas. 1873.

BANKRUPT ACT—EXEMPTED PROPERTY—CONSTITUTION OF ARKANSAS AS TO EXEMPTIONS, CONSTRUED.

1. The exemption of personal property of the value of $2,000 from judicial sale, by the constitution of Arkansas of 1868 (article 12, § 1) is self-executing, and its provisions are exclusive, and not cumulative.

[Cited in Re Handlin, Case No. 6,018.]

2. This provision of the constitution, construed, in connection with section 14 of the bankrupt act and its amendments (17 Stat. 334; Id. 577), and it was *held* that the bankrupt was limited to an exemption of property whose value in the aggregate did not exceed $2,000.

This is a petition, under the second section of the bankrupt act, to review and reverse an order of the district court, "that the bankrupt shall select as exempt such property as he may choose, not to exceed in the aggregate the sum of $2,000, out of any personal property belonging to his estate." The bankrupt excepted to so much of the order as limited his claim to exempted property to the sum of $2,000. The claim of the bankrupt, filed in the district court, was as follows:—

Under section 14 of the bankrupt act he claimed household furniture, &c. to the amount of	$ 287
Under the state law, he claimed "tools belonging to his trade" of tinner	100
Wearing apparel	50
Horse and wagon	125
Hardware and tinner's stock, to be selected out of stock in trade	1,875
Total claimed as exempted	$2,437

A statute in force at the time of the adoption of the present constitution of Arkansas reads as follows: "The following property, when owned by a married man, with a family, shall be exempted from execution: First, one horse, mule, or yoke of oxen, one cow and calf, one plow, one axe, one hoe, and one set of plow gears, if the person against whom any execution may be issued is a farmer; second, the spinning-wheels and cards, one loom and apparatus necessary for manufacturing cloth in a private family; third, all the spun yarn, thread, and cloth, manufactured for family use; fourth, any quantity of hemp, flax, cotton, and wool, not exceeding twenty-five pounds; fifth, all wearing apparel of the family, two beds, with the usual bedding and such other household and kitchen furniture as may be necessary for the family, agreeably to an inventory thereof, to be returned on oath, with the execution, by the officers whose duty it may be to levy the same; sixth, the necessary tools and implements of trade of any mechanic, while carrying on his trade; seventh, all arms and military equipments required by law to be kept; eighth, all such provisions as may be on hand for family use." Gould, Dig. c. 68, § 23. The constitution afterwards adopted, in 1868, provided that "the personal property of any resident of this state to the value of $2,000, to be selected by such resident, shall be exempted from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution." Const. Ark. art. 12, § 1. The same constitution also provides that "all laws of this state not in conflict with this constitution, shall remain in full force until otherwise provided by the general assembly, or until they expire by their own limitation." Id. art. 15, § 16. One question is, is the former law repealed by the provision of the constitution? Another question arises under section 14 of the bankrupt act and the amendments thereto. This section exempts "the necessary household and kitchen furniture," &c. not to exceed in value $500, wearing apparel, uniform, &c. property exempt by the laws of the United States from seizure under execution. And then follows this clause: "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." Afterwards congress amended this by striking out "1864," and inserting "1871" in lieu thereof. Act June 8, 1872 (17 Stat. 334). Some controversy having arisen as to whether this provision applied to debts contracted prior to the time of the passage of the amendment, congress, on the 3d day of March, 1873, passed a declaratory act, as follows: "That it was the true intent and meaning of an act approved June 8, 1872, entitled 'An act,' &c. that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall be, the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against him, by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws notwithstanding." 17 Stat. 577.

Rose & Green, for bankrupt.

Benjamin & Barnes, for assignee.

DILLON, Circuit Judge. 1. I am of opinion that the exemption provided by the constitution (article 12, § 1) executes itself, and that such exemption is exclusive, and not

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 22 Pittsb. Leg. J. 164, contains only a partial report.]

cumulative. The enlarged, and, as compared with the then existing statute provision, generous exemption given by the constitution in favor of any resident, without regard to his trade or condition or relations in life, with the privilege to him to select the property he desired to retain, seems to me to evince an intention to supersede the more narrow provisions which the statute had strictly limited, if not reluctantly given.

2. As all the property is personal, my opinion is, that the bankrupt is not entitled to claim, under the constitution of the state (article 12, § 1), $2,000 in addition to his household and kitchen furniture, &c. Household and kitchen furniture, &c. may be claimed as exempt under the bankrupt act (section 14), and this act then provides that there shall be exempt such other property not included in the foregoing exceptions, as is exempt by the laws of the state in which the bankrupt is domiciled. There cannot be a double exemption of the same property; and, as the $2,000 embraces all the property which is exempt by the state constitution, including household and kitchen furniture, wearing apparel, &c., the value of the latter, if selected by the bankrupt, ought, under the spirit if not the letter of section 14, to be deducted from the $2,000, and he be allowed to select other property, so as, in the aggregate, to amount to that sum. I reach this conclusion upon the language of section 14 and the amendment of June 8, 1872 (17 Stat. 334), without resting upon the act of March 3, 1873 (Id. 577), as having any controlling effect in this respect. Affirmed.

Case No. 6,449.

The HEZEKIAH BALDWIN.

[8 Ben. 556.] [1]

District Court, E. D. New York. Nov., 1876.

MARITIME LIEN—LIEN BY STATE LAW—WHAT IS A VESSEL.

1. A floating elevator used in the harbor of New York was libelled to recover a bill for repairs, and it was set up in defence, 1st, that she was not a vessel and therefore no maritime lien could attach; and 2nd, that the law of the state of New York respecting liens upon vessels does not create a lien that can be enforced in the admiralty court: *Held*, that the construction libelled being a canal-boat upon which had been built an elevating apparatus for hoisting grain, although not enrolled or licensed, without motive power of its own or capacity for cargo, except the permanent cargo of its elevator, was, nevertheless, a vessel and a subject of maritime lien.

[Cited in The Wilmington, 48 Fed. 567; The Alabama, 19 Fed. 547, 22 Fed. 451; The Ella B., 24 Fed. 508; Ruddiman v. A Scow Platform, 38 Fed. 158; Aitheson v. The Endless Chain Dredge, 40 Fed. 254; Seabrook v. Raft of Railroad Cross-Ties, Id. 597; The City of Pittsburgh, 45 Fed. 702; The Public Bath No. 13, 61 Fed. 693.]

2. The second defence was not tenable since the decision of the circuit court for the Second circuit in the case of The Ella M. Stevens [The John Farron, Case No. 7,341]. The libellant was therefore entitled to recover his claim.

In admiralty.

W. W. Goodrich, for libellant.

C. Van Santvoord, for claimant.

BENEDICT, District Judge. This is a proceeding in rem taken by a material man to enforce a lien for repairs upon the floating elevator Hezekiah Baldwin. The defence is two-fold.

One defence consists of the proposition that the Hezekiah Baldwin has no means of propulsion and is without capacity for use in navigation, is not enrolled or licensed under any navigation laws of the United States, was never used in any navigation, and therefore is not a ship or vessel, within the maritime law or any law of the state of New York conferring a lien for repairs.

The proofs in support of this defence show that the Hezekiah Baldwin consists of a hull, constructed to float in water and be navigated therein. She was in fact a canal-boat formerly used to navigate canals and thereafter devoted to her present use. Upon this hull has been erected and attached thereto an elevating apparatus, constructed for the purpose of transporting grain from one vessel to another. Within the hull is placed machinery which operates the elevator. She has no place used or proper to be used for the transportation of cargo, or passengers, nor has she any motive power of her own. The object of placing the elevating apparatus upon a hull in this manner is to enable it to be moved about the harbor to the various places where it may be required for the purpose of transferring grain from one vessel to another.

Such a construction I conceive to be a ship or vessel within the meaning of the maritime law as well as of the statute of this state. Canal-boats and scows are vessels, and this is simply a boat with an elevator upon it. The construction of the elevator upon the hull has not effected any substantial change in the character or use to which the hull is put. It is still the hull of a vessel, enabled by means of its mode of construction to float in the water, and thus transport the elevating apparatus. By reason of its mode of use it is made subject to the same vicissitudes and perils of the seas, to which all vessels are exposed. She may have collisions, she may require salvage services, and the same necessity for using her credit in order that she may obtain instant repairs—indispensable, it may be, to save her from going to the bottom—exists in her case as in the case of any vessel. It is true she has no motive power within herself, but she navigates by the aid of power applied from without as really as does any canal-boat or barge. She does not transport passengers nor cargo, as an occupation, but she transports an elevator. The eleva-

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

tor is her cargo, placed upon her for the sole purpose of enabling it to be thus transported. Indeed she may without much stretch be said to transport grain—clearly she protects and supports grain afloat on navigable water. These are the characteristics of a vessel. The floating palaces of the North river and of the Sound may be said to be hotels placed on a hull, and under some circumstances these steamers are used, stationary, for hotel purposes at a particular place, but it was never supposed that they are not vessels. In Franklin v. Pendleton,[2] a theatre was erected upon a hull, to be then used for theatrical exhibitions, and the whole was held to be a vessel.[3]

The ground of defence that this is not a ship or vessel cannot therefore be maintained.

The other ground of defence rests upon the proposition that the law of the state of New York respecting liens upon vessels has no effect to create a lien that can be enforced in this court. This question has received the consideration of the circuit court in the late case of The Ella M. Stevens [The John Farron, Case No. 7,341],—Nov. 11, 1876,—and it is there held that the law of the state of New York is valid to create a lien for repairs and supplies upon a domestic vessel, which lien may be enforced in a court of admiralty. The second ground of defence is therefore untenable, and there must be a decree for the libellant, with an order of reference to ascertain the amount.

H. H. SCRANTON, The (CHURCH v.). See Case No. 2,710a.

HIATT (BROWN v.). See Case No. 2,011.

Case No. 6,449a.

HIATT v. MUTUAL LIFE INS. CO.

[2 Dill. 572, note.] [1]

Circuit Court, D. Iowa. May Term, 1873.

LIFE INSURANCE—SUICIDE—INSANITY—BURDEN OF PROOF—CHALLENGE TO JUROR.

[This was an action at law by Hiatt, administrator, etc., against the Mutual Life Insurance Company of New York.] The defense was suicide, to which the plaintiff replied, insanity.

I. N. Kidder and Gatch & Wright, for plaintiff.

Holmes & Reynolds and Polk, Hubbell & Goode, for defendant.

THE COURT ruled:

1. That it was good cause of challenge to a juror that he considered the fact of suicide as conclusive evidence of insanity.

2. That the burden of proof to establish the insanity was upon the plaintiff. See Swick v. Home Ins. Co. [Case No. 13,692], and cases cited.

3. As to the kind and degree of insanity necessary to be shown to entitle the plaintiff to recover where the assured took his own life, the court followed Terry v. Insurance Co. [Id. 13,839], affirmed in 15 Wall. [82 U. S.] 580.

There was a verdict and judgment for the defendant.

[Cited in Houston & T. C. Ry. Co. v. Terrell (Tex. Sup.) 7 S. W. 672, to the point as stated above in paragraph 1.]

[In 2 Dill. 572, this case is published as a note to Wilkinson v. Union Mut. Life Ins. Co., Case No. 17,676.]

Case No. 6,450.

The HIAWATHA.[1]

The CRENSHAW.

Circuit Court, S. D. New York. Nov. 20, 1861.[2]

PRIZE—BLOCKADE—RESIDENCE OF OWNER OF VESSEL.

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

[Libels were filed against the bark Hiawatha and the schooner Crenshaw for violations of the blockade. The district court entered decrees of condemnation against both vessels and their cargoes (Case No. 6,451), and the claimants of both vessels appeal.]

These cases are two of the prize cases, which, with several others, involving a large amount of property, including vessels and cargo, have been argued on appeal, and submitted to the court. NELSON, Circuit Justice, has affirmed the decrees in these two cases, with a view to facilitate a hearing before the supreme court, at Washington, without delivering any opinion, or expressing any. The two cases involve the two important and novel questions common to most of the cases pending on appeal before him, viz. the effect of the blockade, and whether the fact of the residence of an owner in the disturbed or insurrectionary district furnishes evidence that the property captured on the high seas is enemies' property, previous to the act of congress of July 13, 1861 [12 Stat. 255].

The remaining cases will be held by the judge until these two are disposed of by the supreme court. From the novelty of the question, and the very large amount of property involved, and in the hands of the marshal and the custody of the court, it was understood that the cases would go to the supreme court, whichever way they were decided in the circuit, and, as it is the practice

2 See Pendleton v. Franklin, 7 N. Y. 508.

3 But see The Hendrick Hudson [Case No. 6,355].

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

1 [Not previously reported.]

2 [Affirming Case No. 6,451. Decree of circuit court affirmed by supreme court in 2 Black (67 U. S.) 635.]

of the court to give preference to government cases, the principles of which are in daily application, the judge has deemed it advisable to adopt the course above mentioned.

[NOTE. From the decrees of condemnation in these cases the several claimants took an appeal to the supreme court. 2 Black (67 U. S.) 635. Mr. Justice Grier delivered an opinion affirming the decrees. Mr. Justice Nelson delivered a dissenting opinion, which was concurred in by Chief Justice Taney, Mr. Justice Catron, and Mr. Justice Clifford. The proposition of law as to the power of the president to institute a blockade of ports in possession of persons in armed rebellion against the government was discussed at some length. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of intention of one of the parties belligerent to use this mode of coercion against a port, city or territory in possession of the other. It is not necessary, to constitute a war, that the belligerent parties should be separate and independent states. War exists where one belligerent claims sovereign rights against the other. A civil war is never solemnly declared. It becomes such by its accidents,—the number, power, and organization of the persons who originate and carry it on. Its actual existence is a fact in domestic history which the court is bound to notice and to know. The president was bound to meet it in the shape it presented itself, without waiting for congress to baptize it with a name. He must determine what degree of force the crisis demands.

[The second question considered in the opinion was, what is included in the term "enemies' property"? It is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law. It does not depend upon the personal allegiance of the owner. It is the illegal traffic which stamps it as enemies' property.]

Case No. 6,451.

The HIAWATHA.

The CRENSHAW.

[Blatchf. Pr. Cas. 1;[1] 18 Leg. Int. 332.]

District Court, S. D. New York. Aug. 8, 29, 1861.[2]

PRIZE—BLOCKADE—VIOLATION OF—NOTICE OF.

1. The act of July 13, 1861 (12 Stat. 255), "further to provide for the collection of duties on imports and for other purposes," did not rescind the prior proceedings of the president in authorizing acts of war by the United States, or in establishing blockades of the enemy's ports, or make void captures previously made for violations of such blockades.

2. The act of August 6, 1861 (12 Stat. 319), "to confiscate property used for insurrectionary purposes," is not to be regarded as a legislative determination that a vessel belonging to a citizen of a state in insurrection was not, before the passage of that act, confiscable merely as the property of an insurrectionist or rebel, without an enactment of congress to that end.

3. The pleadings in prize cases should be simple, direct, and free from technicalities.

4. The district courts of the United States have exclusive jurisdiction in prize cases, without restriction to cases of seizures within their territorial dimensions or on the high seas.

5. The existing war between the United States and the rebels is a defensive war on the part of the former. No formal declaration of war by the president was necessary to render lawful the means adopted by him to repel the warlike measures of the enemy.

6. A blockade of the enemy's ports is as lawful a means of war, in civil warfare, as it is in a war between nations foreign to each other.

7. Under the law of nations, the rights incident to a war waged by a government to subdue an insurrection or revolt of its own subjects or citzens are the same, in regard to neutral powers, as if the hostilities were carried on between independent nations.

8. Under the proclamation of blockade, of April 19, 1861, it is not necessary to the lawfulness of the capture of the vessel seized for violating the blockade that a warning should have been previously indorsed on her register, where, at the time of capture, she had entered into or escaped from the blockaded port, or possessed knowledge or notice of the blockade.

9. Citizens of the United States levying war against the government of the United States are enemies, and their property captured at sea is subject to confiscation. Persons abiding within the authority of such enemies become enemies because of their residence, without regard to their private sentiments, or the locality of the place of their property.

10. A notice of a blockade, to the officials of a neutral government, is a sufficient notice of it to the subject of such government.

11. The act of egress is as culpable as the act of ingress, when done in fraud of a blockade.

12. On notice of a blockade, a neutral vessel has a right to withdraw from the blockaded port, with all the cargo honestly laden on board before the commencement of the blockade.

13. The acts of a master in breach of a blockade affect the cargo equally with the vessel, if the cargo is laden on board after the blockade has become effective as to the vessel.

14. A warning on the register of a vessel is not necessary to establish notice of a blockade, where actual notice of it to the master or owner is satisfactorily made out otherwise.

In admiralty.

BETTS, District Judge. The bark Hiawatha, the bark Pioneer, the schooner Crenshaw, the bark Winifred, the schooner Hannah M. Johnson, the bark General Green, the brig Hallie Jackson, the ship North Carolina, the schooner Forest King, and the schooner Lynchburg were all captured as prizes of war by various public armed vessels of the United States, and sent into this port in charge of prize crews, consigned to the district judge, to be proceeded against under such captures. They were accordingly committed by the judge to the possession of the prize commissioners of this district, when severally brought before him, and were afterwards libelled by the United States attorney, and were attached by the marshal on process issued on each several libel, and thereupon brought into court. Appearances were entered in court in each suit, and answers and claims were interposed by various claimants, conformably to the practice of the court, and the causes were then placed upon the docket for hearing, and promptly brought to trial in their order at a public sitting of the court.

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

[2] [Affirmed in Case No. 6,450, and by supreme court in 2 Black (67 U. S.) 635.]

A vital part of the defences in each of the several suits, interposed by the claimants, consisted of propositions of law and fact common to all the actions, although, beyond these general defences, there were presented points of claim and exception more or less special to each particular suit. To secure a satisfactory discussion of those points common to all the suits, and avoid the labor and procrastination arising from reiterating the debates on the same issues in each individual action, an understanding was adopted by the counsel conducting the causes, and approved by the court, that the arguments covering those common grounds of defence should be virtually limited to the issues made in three cases, the bark Hiawatha, the bark Pioneer, and the schooner Crenshaw, with the reservation of the right to parties in the other suits pending to be heard upon the facts and law peculiar to the suits in which they were specially concerned. [See Cases Nos. 6,450, 11,171a, 17,873, 6,029a, 5,312a, 5,961, 10,316a, 4,937, 8,637a.]

It was understood and agreed between counsel, that official documents, correspondence, proclamations and enactments in print, as published by authority of the United States and British governments, by the separate seceded states, and by the Confederate States, should be read and used as evidence without other proof, to wit: The proclamations of the president, of April 15, 19, and 27, and May 2, 1861; his message to congress, of July 5, 1861; the proclamation of Commodore Pendergrast, of April 30, 1861; the correspondence of the secretary of state with Lord Lyons, on the subject of the blockade of American ports, printed by parliament; the secession ordinances and resolutions of the states of Virginia, South Carolina, Louisiana, Florida, Texas, and Georgia; the act of the Confederate government, declaring a state of war with the United States to exist; and the proclamation of Jefferson Davis, president thereof, of April 17, 1861.

Those causes were discussed with distinguished ability and learning, orally and upon written and printed points and briefs, and nine days of the sitting of the court were devoted to hearing those particular actions. They were argued by the district attorney (Mr. E. Delafield Smith) and Mr. William M. Evarts, on the part of the libellants, and by Messrs. Charles Edwards, Benjamin D. Silliman, and Daniel Lord, on the part of the claimants. For six days ensuing, further arguments were addressed to the court on collateral and auxiliary points embraced within those three particular cases, together with occasional supplementary observations upon the main topics also; and very ample and exhausting discussions were added upon the facts and law involved in the other seven causes above named. All these considerations were comprehended in the body of ten suits pending before the court, and were regarded by counsel as essentially pertinent and important to the just appreciation and decision of the respective causes. Those discussions were maintained by the district attorney, by Mr. Woodford, assistant district attorney, and by Messrs. Evarts and Upton, for the libellants and captors, and by Messrs. Edwards, Lord, Wright, Merrihew, Woodman, Mason, Donohue, Burrill, and Whiting, for the respective defendants and claimants.

After the hearings in the above suits were terminated, Mr. Lord produced and read in court the act of congress entitled "An act further to provide for the collection of duties on imports and for other purposes," approved July 13, 1861, which was then found just published in the newspapers, and submitted to the court that the true import and effect of the act was to counteract and rescind all the proceedings of the president in authorizing acts of war on the part of the United States, or in establishing the blockades of ports, or the seizures or captures referred to in the pleadings and proceedings in those several suits, and that the statute amounted to conclusive proof that those acts of the president were without authority of law, and invalid. Whilst the decision in these several causes was in course of preparation, Mr. Silliman, with the consent of the district attorney, enclosed to me a copy of an act of congress entitled "An act to confiscate property used for insurrectionary purposes" [3] (cut from a newspaper), but the date of the approval of which, if ever made, is not stated (and I am inclined to the opinion that the bill was included, with other provisions, in an act of like title, passed at the close of the session, a copy of which has not yet been furnished me), as being a clear exposition of the law, and amounting to a legislative determination that the vessel now on trial was not confiscable merely as the property of insurrectionists or rebels, without an enactment of congress to that end. It is observable that no express declaration is used, in either of the above enactments, that it was the purpose of congress to give those acts a retrospective or retroactive effect, or to pronounce a legislative opinion upon the true purport and scope of municipal or public law in reference to those subjects, as it then existed. As the statutes were passed in the light of the antecedent acts of the president, and with full knowledge of the consideration upon which those acts were founded, and of the assertion by the executive of their imminent necessity and justness, as measures conducing to the support of the national defense and existence, and the enactments, in terms, no way disclaim or disapprove of the action of the executive in respect to those measures, the implication, in my judgment, would be that the intent of congress was to signify an implied sanction to the employment of the powers used by the president, rather than to disaffirm or rescind the policy or provisions of the measures

[3] [See 12 Stat. 319.]

adopted by him. It is the established rule of construction to interpret statutory law as taking effect from the time of its passage, and not as varying the law or its administration by retroactive operation. Matthew v. Zane, 7 Wheat. [20 U. S.] 211; 1 Kent, Comm. 455, notes. If a statute may avail retrospectively in any description of cases, it would seem that the purpose of the legislature to give it such effect should be manifest in the terms of the act, or be unmistakably deducible from the intent of the enactment and its policy. Id. 456, note b. But it does not seem to me it can rightfully be claimed that there is any legal incongruity with the propriety of previous administrative acts performed by the executive, of high moment and exigency, in his opinion, although congress may subsequently appoint a precise law for future occurrences of a like nature; nor that such enactment of a permanent law would draw after it a doubt of the validity of the executive acts previously performed under the pressure of a political and public necessity; nor that a law declaratory of the rightfulness or invalidity of those acts would control the interpretation in a court of justice of the authority previously used. Id. In my opinion, however, neither of the acts referred to is to be interpreted as countervailing or derogating from any powers exercised by the president before their passage, and which were within his official competency; nor were those acts passed by congress with intent to have such effect. The pleadings in all the cases seem to have been constructed on a common understanding, and they essentially put in contestation the main features of fact and law which afford grounds of prosecution and defence in a prize court upon the subjects now in litigation here.

The matters debated in exception and bar to all the suits may be classed under five general heads: 1. That this court, as a prize court, or otherwise, has no jurisdiction over the actions. 2. That the public disturbances now subsisting throughout the country, or between different portions of the United States, do not constitute a state of war, carrying with it the consequences or incidents of public war, under the public law or law of nations. 3. That no lawful blockade has been established by the government of the United States against any port within the United States; nor has a blockade been maintained conformably to the rules of the law of nations, or been violated against such rules, within the United States. 4. That no particular state, or number of particular states, or the citizens or inhabitants of particular states, can become or be treated as enemies of the United States, by government of the latter. 5. That the president of the United States has no power, without authorization by congress, to create or declare a state of war with any state or states of the United States, or to establish a blockade of any port or ports within such state or states.

It is not attempted, in this summary of the points raised in bar of the suits under prosecution, to reproduce the objections with the formalities under which they were presented. It is, however, intended that all grounds of defence embraced within all the causes of action alleged in the libels shall be distinctly met and disposed of by the judgment of the court.

Proceedings in prize courts are subject to different considerations from those in the instance courts of admiralty (The Athol, 1 W. Rob. Adm. 380), and may be framed with great simplicity and directness (2 Wheat. [15 U. S.] Append. 19). An averment that the capture was prize of war would, in ordinary instances, be sufficient fulness of pleading to call out the defences of claimants against the seizure. The Fortuna, 1 Dod. 81. A like freedom from technical formalities, or diffusiveness in pleadings in defence, is allowed and encouraged in prize proceedings. The libels now under consideration have adequate amplitude of averments to cause condemnation of the property seized, if it be not protected by the defences set up. The main stress in all the suits, therefore, lies in the defensive matters put forth against them.

The objection taken to the jurisdiction of this court rests on the limitation of jurisdiction over civil causes of admiralty and maritime jurisdiction to cases of seizures within its territorial dimensions, or on the high seas. 1 Stat. 76, § 9. The constitution of the United States confers upon the judiciary cognizance of all cases of admiralty and maritime jurisdiction. Const. art. 3, § 2. In 1794, the supreme court, after hearing a protracted argument, decided that the district courts possess, under this grant in the constitution, all the powers of a court of admiralty, whether considered as an admiralty court specially or a prize court. Glass v. The Betsey, 3 Dall. [3 U. S.] 16; Penhallow v. Doane's Administrators, Id. 97; Jennings v. Carson, 4 Cranch [8 U. S.] 2. Under the English jurisprudence, prize cases appertained to the jurisdiction of the admiralty court, as a part of that system,—Le Caux v. Eden, 2 Doug. 594, note—[Lindo v. Rodney, 2 Doug. 613, note],[4] although the authority of the admiralty judge to hear and determine prize causes depended entirely upon independent and separate commissions issued to the judge,—2 Chit. Gen. Prac. 538, c. 5, § 12. That doctrine in respect to the admiralty was also applied to our system by the supreme court, in the decision above cited, before congress had designated the tribunals which should specially take cognizance of the prize branch of admiralty jurisdiction. Since that time the appointment of that jurisdiction by congress is made exclusively to the district courts, without any restriction to territory or place. 2 Stat. 759, 761, §§ 4, 6. And more recently the doctrine is declared that the admiralty courts possess the instance and

[4] [From 18 Leg. Int. 332.]

prize jurisdiction. Jecker v. Montgomery, 13 How. [54 U. S.] 498. The practice only in the prize courts, after it takes cognizance of the case, is to be "as in civil cases in admiralty." Wheat. Mar. Capt. 273. The exception to the jurisdiction of the court is, accordingly, overruled.

The other general propositions brought under consideration in these proceedings respect essentially the acts of the president of the United States, and their nullity towards proving a state of public war to exist between the United States and the insurgent and rebel forces now carrying on hostilities against the United States and its government; and the other various branches under which the defences were discussed may well be comprehended in the general topic respecting his powers as chief magistrate, particularly as no point of moment is further contested in respect to the blockade, except in regard to the adequacy of notice, and that particular point in the defences may be deferred to the cases in which it specifically arises. It is insisted, on the part of the defences, that the president, under the constitution, had no power, upon the facts before the court, to institute, declare or recognize, by executive acts, a condition of war between the United States and the insurgents and their forces, which will carry with it, in behalf of the United States, the incidents of a public war in relation to their enemies in the contest, and also to neutral nations, as between them and this government. As consequent to that position, it is urged that the steps taken by the president to establish a blockade of ports in the possession of the insurgents are inoperative and void to that end, because the insurgents cannot be, within the meaning of the public law, enemies of the United States, but are only citizens of the same country, in a state of internal and domestic contention; and because the president had no authority, under the constitution and laws of the United States, to declare and impose a blockade of any port or place, and particularly not of one within the limits of the United States; and, further, that the preliminaries and conditions indispensable to a valid blockade, by the law of nations, have not been observed and fulfilled in any of the cases now on hearing.

It is first to be observed, in respect to the general bearing and features of these defences, which seem grounded on the assumption that the president initiated and inaugurated the war against the rebels or insurgent enemies, that no public or private document, or official act of the president, is given in proof, conducing to show that the existing state of hostilities was produced by any authority or act of the government of the United States. The war, so far as the government has been proved to be an actor in it, and so far as the evidence characterizes it, has been wholly defensive, and in protection of the property and existence of the government itself, and in no particular, up to the captures in question, did it partake of the character of an offensive and aggressive war, in its conduct on the part of the United States. The question pressed earnestly during the discussion, whether the president can, without the authority of congress, declare or initiate an offensive war, becomes, therefore, merely speculative, on the merits of this debate. The inquiry is, if he is, by the constitution and laws of the country, clothed with power to defend the nation against an aggressive war waged for its extermination by internal enemies; and, if so, what public condition in relation to the belligerents and neutral powers results from such warfare.

Much stress has been laid, in the progress of the argument, on the want of an open declaration of war by the president previous to his adopting and employing forcible means to repel or counteract warlike measures of an enemy persisting in hostile attacks on the government and its property. No one can claim, as a right, that a public declaration of war shall be promulgated, unless it be the nation by whose government it is made, and then it serves only as a notice to their own citizens and subjects. The declaration by manifestoes, heralds, or nuncios does not constitute war, and the omission of the declaration can in no way impair its justness or efficacy, especially in a case of defensive war. 1 Kent, Comm. 51, 54; Wheat. Mar. Capt. 13, 15; The Eliza Ann, 1 Dod. 247; Dup. War, cc. 1, 2. A civil war of alarming proportions was waged with extraornary forces and activity. To promote the public defence, and impair the resources of the enemy, the president proclaimed the blockade of the ports referred to in the pleadings and proofs before the court. If the competency of a foreign government to question, in a prize court, the power of a belligerent to institute a blockade, be conceded, or to do more than exact a strict observance of public law in maintaining and enforcing such blockade by the belligerent who imposes it, I am not convinced by the proofs or arguments adduced in opposition, in the cases on trial, that the lawfulness or efficiency of the blockades established has been impeached. I hold that, in time of civil war and of insurrection and rebellion, the nation assailed and attacked by hostile and rebel forces may as rightfully resist war levied against itself, by closing, embargoing, or blockading ports held by its enemies, as a means of war calculated to weaken and defeat hostile operations to its detriment, as it may accomplish the end by direct force and superior power; and that no sound distinction exists, whether such defensive proceedings are employed in civil, internal, or domestic warfare, or in war between nations foreign to each other. Under the law of nations, the rights, incident to a war waged by a government to subdue an insurrection or revolt of its own sub-

jects or citizens, are the same, in regard to neutral powers, as if the hostilities were carried on between independent nations, and apply equally in captures of property for municipal offences or as prize of war. Rose v. Himely, 4 Cranch [8 U. S.] 241; Id., in circuit court [Case No. 12,046]; Hudson v. Guestier, 4 Cranch [8 U. S.] 293; The Santissima Trinidad, 7 Wheat. [20 U. S.] 306.

Commercial ports may, in time of war, through neutral trade, become efficacious allies to a belligerent power having the control or use of them. So far as that aid avails the enemy, it is warlike in its nature, and may be repelled by war means. Blockade is the measure recognized by the law of nations as the appropriate remedy, and that is, in character and operation, peaceful as to neutrals, and only warlike in respect to the enemy against whom it is imposed. The president, as commander-in-chief of the army and navy, is the functionary, under our government, who has, as incident to his office, the power and right to exercise the resisting and repelling means of legitimate warfare whenever the exigencies of the case require them. And it is not to be overlooked that, in selecting the method of restraining the commerce of neutrals with a besieged or beleaguered port, the milder means of blockade is more favorable to them than a peremptory exclusion of their trade by closing the port absolutely. It certainly can be of no consequence whether the ports blockaded belonged technically or in reality to the United States, or were the property of individuals innocent of any warlike purposes against the United States, or of aiding its enemies. It is sufficient if the evidence shows the ports to be under the power and use of enemies of the United States. This use may be an usurped one, and in wrong of the actual proprietary authority of the places. The right of the United States to prevent such use being turned to their prejudice rests not at all upon the character of the true ownership and rightful authority over the places, but on that of their employment by the occupants. Whilst so held by an enemy, they become foreign territory. U. S. v. Rice, 4 Wheat. [17 U. S.] 246. This consideration meets, also, another ground of defence earnestly urged on the part of the claimants, that these various ports which are subjected to blockade are portions of states of the Union, and, as such, a portion of the Union itself, and cannot, therefore, be made, territorially, objects of hostile control, but only of municipal regulation and government; nor that, more eminently, can they become, as countries or people, enemies of the government of which they are constituent parts, because in that relation they also hold an independent sovereignty as states, which cannot be infringed or molested by authority of the United States acting directly upon that independency.

The Union is not composed of subtleties and abstractions. It was formed with the purpose to render it practical and efficacious. The old confederation was abrogated, and a new form of government was created in substitution of it, with a view to free it from the infirmity and vice of leaving its existence in dependence upon the absolute will of the separate sovereignties from which it was composed. It is not to be supposed that the people would perpetuate that prominent infirmity of the old confederation which embarrassed and enfeebled every action of the Revolution, by the interposition of state distrusts and inactions in opposition to the common weal. The manifest purpose of the people, acting through their national representatives in convention, was to constitute and perpetuate a government of national powers, subsisting within itself, and it is not to be implied that there would be retained, in such reconstruction, the very evil of separate sovereignties in the several states, which had prevented and defeated all practical utility in the system then existing, and which, accordingly, was to be abrogated by the constitution. The notion of a government constructed of numerous parts, each part separate and sovereign in itself, and also sovereign against the whole, was never adopted or declared by the founders of the constitution, and probably was not contemplated or comprehended at that day. The officers of the United States government act within particular states to enforce or defend the laws of the United States, the same as if no state demarcation existed. The whole extent of the country is one nation and one government. In respect to the United States and its constitutional laws, there are no state lines, and state sovereignty is a nonentity. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 400. The denominations of states existing for local and domestic purposes are made use of and applied by the insurgents, in the present war, in designation of combinations of persons, disruptured, so far as they had material or political power so to become, from their citizenship of and subjection to the government of the United States, in disavowal and defiance of allegiance thereto, and who, so far as their own purposes and acts can fix their political status, make themselves as alien and foreign from the United States government as if they assumed the name of citizens and subjects of any state of Mexico or of South America. They thus make themselves avowed enemies, and wage war against the United States, to accomplish its dismemberment and destruction. It can be of no consequence under what name or appellation those enemies unite and act—whether as states, Secessionists, Southerners, or slaveholders. They are, in every just contemplation of our system of government, insurgents and rebels against a common government, waging war for its overthrow. The organism of states, which furnishes a form of government for peaceful and domestic purposes, is thus sought to be perverted by

the insurgents into alien sovereignties, which may exercise, under the familiar name of states, independent and coequal capacities with the national government. Such names or pretensions can have no effect to change the intrinsic nature of things, and transform the residents of particular states into anything else than citizens and subjects of the United States, and, as such, subordinate to its constitution and law. Luther v. Borden, 7 How. [48 U. S.] 1. But, by the instrumentality of these pretences, and other means employed, the insurrection has become developed into a hostile power of great magnitude and force, disavowing all unity with, or subordination to, the mother country, and taking to itself the attributes of a distinct nationality. It thus discards all common obligations under the federal government, and, by force of arms, wages war to establish one overpowering that of the parent nation. The insurrectionists become enemies of the United States government by open hostilities waged against it, without losing their subjection to it individually as citizens. Government represses their rebellion and treason legitimately by force of arms and war, because the magnitude and force of the revolt is beyond the control of the law and the civil magistracy. To that end all the constitutional powers of the president, in his capacity of commander-in-chief of the army and navy, may be rightfully called into exercise. The insurgents confront the government in masses of armed men holding fortified posts or ports of trade and general commerce, and they thus become belligerents and enemies of the nation, against whom all the means of war allowed by the law of nations may be rightfully employed, as was held by the supreme court in the case of the St. Domingo insurgents. Rose v. Himely, 4 Cranch [8 U. S.] 241. For the reasons hereafter suggested, I forbear adding further support to this view, by citation of authorities, than a reference to a very few fundamental points, taken generally from decisions in our own courts.

In my judgment, every branch of the general defences set up against these suits is inadequate and insufficient, in law and fact, to bar the prosecutions pending. I consider that the outbreak in particular states, as also in the Confederate States, was an open and flagrant civil war, waged against the United States by the insurgents in the several disaffected states referred to in the pleadings and proofs in these several causes, at the time the several proclamations, also referred to and named, were issued and made by the president (Wheat. Int. Law, pp. 57–60; Id. p. 343, § 7; Vatt. Law Nat. bk. 3, c. 18, § 292); that such insurrection was maintained by warlike means and forces too powerful to be overcome or restrained by the civil authority of the government; that it was a state of war, and the government could rightfully resort to the rights and usages of war to maintain itself and defeat the opposition (Luther v. Borden, 7 How. [48 U. S.] 45); that it became lawful and necessary to resist and repel hostilities so levied against the United States and its laws, by aid of the army and navy of the United States; that the president possessed full competency, under the constitution of the United States and the existing laws of congress, to call into service and employ the land and naval forces of the United States in the manner they were used by him, for the purpose of maintaining the peace and integrity of the Union, and putting down hostilities waged against it; and that the president had, rightly, power to establish blockades of ports held by those enemies, and to enforce such blockades pursuant to the law of nations (Kent, Comm. 144).

It is strenuously insisted that, under the proclamation of the president, a vessel is not subject to capture for violation of a blockade unless there has been a previous warning indorsed on her register by a commander of a blockading vessel at the port whose blockade she attempts to violate, and she shall afterwards attempt to enter or leave the same blockaded port. In my opinion, the provision in the president's proclamation of April 19, 1861, referred to on the argument, is not to be construed as a condition absolute, governing all instances of an effort by neutrals to break a blockade, but imports that the vessel so to be warned must have been arrested in innocently attempting to do the forbidden act, and will not apply in cases where a vessel has, at the time of capture, perfected the prohibited attempt by effecting an entrance into or escape from a blockaded port, undetected until the unlawful purpose has been accomplished. The universality and justness of the rule of the law of nations, that the breach of a blockade, with knowledge or notice of its existence, subjects the property so employed to confiscation, is stated by Lord Stowell, and commended with great force and emphasis, in the case of The Columbia (an American vessel) 1 C. Rob. Adm. 154. He says that, "Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge." Kent, Comm. 144; Hal. Int. Law, c. 20, §§ 16–24; 2 Wildm. Int. Law, c. 4. The common rule of the law of nations will, accordingly, be deemed to prevail, when not expressly abrogated by treaty or edict of the power seeking to enforce it.

Citizens of the United States levying war against the United States are enemies of the government, notwithstanding their residence within the Union; and the property possessed and held by them thus becomes property

of the enemy of the government, subject to confiscation when arrested at sea; and persons continuing within the authority and dominion of such enemies are clothed with the character and responsibilities of enemies, because of their residence, without regard to their private sentiments, or the territorial locality of the place of their hostility. 1 Kent, Comm. 74, 76; The Chester v. The Experiment, 2 Dall. [2 U. S.] 41; Jecker v. Montgomery, 18 How. [59 U. S.] 112.

Contemporaneously with the institution of these suits, a trial was had, and a condemnation made in the admiralty court, sitting within the District of Columbia, of the British schooner Tropic Wind, captured as prize of war, for violating a blockade of the ports of Virginia, proclaimed by the president, and on that hearing judgment was rendered by the court, confiscating the vessel and cargo for that cause. [Case No. 14,187.] On the 23d of July last, in a suit pending in the district court for the Eastern district of Pennsylvania against the ship General Parkhill [Id. 10,755a], seized as prize for a breach of the blockade of the port of Charleston, and also as being the property of residents of Charleston, enemies of the United States, the ship and cargo were, for the latter cause, condemned and confiscated by the court.

In one or the other of those two actions the general defences relied upon before this court, in the classes of suits now on hearing, were, in effect, set up by the claimants, and were there considered and decided. Those courts exercise co-ordinate authority with this court over the subject-matter of the respective suits, and the causes decided are subject to review by a like course of procedure, and before the same ultimate tribunals. It would accordingly comport with the stability and influence of judicial proceedings, in case the decisions already made on these main points are not palpably erroneous in point of law or fact, to avoid a conflict of adjudication between courts of co-ordinate jurisdiction, on propositions of law or fact substantially the same, and whilst all the adjudications are open to review in the same tribunal, where a decision may be speedy and must be final. I did not have the advantage of reading an official report of the decisions in the case tried at Washington, on the hearing of these causes. I have since obtained a newspaper copy of it, which, I presume, is substantially correct. The learned judge of the Eastern district of Pennsylvania has favored me with a copy of his opinion rendered since these causes were argued in this court.

The preceding statements evince that the three courts coincide essentially in their determination of all the points made by the respective parties which are of common import and bearing. Those learned courts, in the decisions rendered on the main questions raised there, and coinciding with those passed upon in this court, supported and vindicated the conclusions adopted by them, with an amplitude of research and argument I could not hope to strengthen, and which I can perceive no occasion to reiterate or attempt to re-enforce. I have perused those manifestations of judicial diligence and learning with great gratification and instruction, and hope the varied learning displayed in those judgments may be invoked to the support of the conclusions I have adopted in the cases before me, with no less efficacy than if they had been recapitulated specifically in the body of this decision. I have, for that reason, studiously omitted to cite the numerous quotations made on the argument of these cases by the respective counsel, or collected by my own reading, and, in preference to that course, leave the points on which the three courts concur in their opinions to the very adequate and satisfac tory support of the authorities of the books, so abundantly produced in the judgment of the other courts.

After this preliminary survey of the principles supposed to lie at the foundation of all these suits, and to bar their prosecution in favor of the libellants, it may be necessary to look into the specific proofs to ascertain whether the property seized is condemnable, because of its being shown to be prize of war, under the evidence and law governing these prosecutions. Taking up the cases in the order in which they were brought to hearing in court, it appears that the bark Hiawatha, was captured on or about the 20th of May last, by the United States flagship, in Hampton Roads, as prize of war, for an alleged violation of the blockade of the port of Richmond, Virginia, and, on the 27th day of May, 1861, was duly libelled in this court for condemnation as prize, and that various parties appeared and filed in court claims, answers, and exceptions to the libel, on the 18th of June thereafter. The pleadings interposed by the respective parties were, in substance, as follows: The libel; the claim and answer of the British consul, in behalf of the owners of the vessel and a portion of the cargo; the answer and the claim of Robert Colgate & Co., agents of Frederick Parbury & Co., English merchants, for other portions of the cargo; also, the claim and answer of Dubois & Vandervoort, agents of British and foreign owners of part of the cargo; also, the claim and answer of J. A. & T. A. Patterson, agents of British owners of other portions of the cargo; also, the claim and answer of Miller, Mossman & Potts, British owners of the vessel; and, also, the claim and answer of Schuyler & Livingston, agents of O'Brien & O'Connor, British subjects, and part owners of other portions of the cargo; all containing substantially the same matters of defence as the one filed by the British consul, above alluded to. All the foregoing claims and answers deny, in substance, the legality of the blockade of the port of Richmond, knowledge by the claimants of its

violation, and the authority of the master of the vessel to prejudice the rights of the claimants by any unlawful act on his part.

The facts appearing from the documentary proofs and the answers to the preparatory interrogatories established the following case: The Hiawatha sailed from England, despatched and laden by British owners, for City Point, in the port of Richmond, Virginia, with a cargo of salt, and to bring back a cargo of cotton and tobacco from that port, on freight. She was regularly documented as a British vessel, and was commanded and manned by British subjects. She entered the port at Richmond, and arrived at City Point, in that port, on the James river, about sixty miles below the city of Richmond, on the 29th of April. The proclamation of the president, of April 27, announced that an efficient blockade of the ports of Virginia and North Carolina would be established; and the proclamation of Commodore Pendergrast, of April 30, in command of the Virginia station, gave notice that he had a sufficient naval force there for the purpose of carrying out that proclamation. The documentary proof put in evidence by both parties, in connection with that already referred to, will bring into distinct view the facts in relation to the blockade of the state of Virginia, now under particular consideration. The letter of Lord Lyons to Lord John Russell, dated Washington, May 2, 1861, with its enclosures; that of Lord Lyons to Lord John Russell, dated May 4, 1861; and that of Lord Lyons to Lord John Russell, dated May 11, 1861, with its twenty enclosures,—will explain the posture in which the case of the Hiawatha stood at the time of her egress from the blockaded port of Richmond or City Point. The fifth count of the libel alleges that at the time of her seizure the Hiawatha was attempting to leave the port of Richmond, and to violate, and was violating, the blockade of such port; and the proclamation by which it was established, having notice of such blockade. The vessel had passed from that port to the port of Hampton at the time of capture. 1 Stat. 634, § 11. The owners of the bark plead to the libel at large various allegations, some excusatory of the conduct of the vessel in that port, some legal and others diplomatic in character; and, in regard to this particular charge, they deny that the port was under a legal blockade at the time of the seizure of the vessel, and also deny that she violated or was attempting to violate a blockade at the time, or that other evidence of blockade is admissible than a notice indorsed on the register. Numerous other parties, representing the cargo and other interests connected with the voyage, appear as claimants in the cause, and, in substance, take issue upon the charge of a breach of the blockade, as alleged, and also upon the validity of the blockade. The master of the bark, and J. Potts, a part owner, each in his answer to the preparatory interrogatories, denies personal knowledge or notice of the blockade prior to the capture, or that the owners of the vessel had notice thereof; but the master, in his private journal, kept and found on board the bark, under dates of the 14th, 15th, and 16th of May, notes his presence in Richmond and Petersburg on those days, and that he passed a night or more at a public hotel in one of those cities. Letters from persons concerned in freighting and despatching the vessel at City Point, found on board of her, speak of the blockade as severe, and known at the port where she was laden and made sail. The certificate of George Moore, British consul for the state of Virginia, appended to the ship's register, manifest, and bills of lading, bearing date the 15th of May, 1861, is clear evidence that the master of this vessel, and others interested in British trade, had notice of the blockade of the ports of Virginia as early as the 11th of May, and that it would be enforced. The consul supposed fifteen days would be allowed for the despatch of vessels, and that this time would begin from the second of May; but he does not assert any authority for naming that as the true day when the period of limitation was to commence. The evidence shows ample notice of the period of delay, to put all interested on inquiry, and they must be held to assume the risk of making a correct computation of the time. It must be presumed, from the knowledge of the blockade by the British minister, Lord Lyons, and by Consul Moore, resident at Richmond, acquired prior to the 4th of May, that the master of the vessel, and all the shippers of cargo at that place, had received direct notice of the blockade, through their agency, as well as from general notoriety, on or before the 11th of May, and that the master commenced lading his ship on that day, in consequence of such knowledge, with a hope to leave the port within the fifteen days limited.

The inquiry is not pursued further into the details of the proofs on this head, because, from the indubitable rule of law prevailing in the English prize courts, a notice of blockade to the officials of a neutral government is sufficient to the subjects of the neutral nation. Lord Stowell says: "A neutral master can never be heard to aver, against a notification of blockade," to his own government, "that he is ignorant of it." The Neptunus, 2 C. Rob. Adm. 113. Again he says that a public declaration is not necessary to constitute notice of it, and that, if the individual concerned is personally informed of the fact, the purpose of notice is still better obtained than by a public declaration. The Mercurius, 1 C. Rob. Adm. 83. And such is the American rule. 1 Kent, Comm. 147; Wheat. Mar. Capt. 193–199. In this instance every particular necessary to constitute a specific notification of the blockade to the ship, excepting serving it personally on her master or owners, concurred to fix the presumption that full

knowledge of the fact was possessed by her master and one of her owners before acts were entered upon by her in violation of it. The resident minister of the neutral government had official notice; the consul of the nation residing at the blockaded port apprised Lord Lyons on the 5th of May that he had cautioned persons in Richmond, there representing the owners of the ship, against her having the right of egress at that time, except in ballast, but they would not consent to her so going; and, on that evidence, it aggravates the force of the presumption against the integrity of the master and part owner there present for them to deny any notice of the blockade. The warning, if indorsed on the register, would only be evidence in protection if the vessel should again be arrested for the attempt made prior to the date of the warning, and would be evidence for her conviction should the effort be renewed afterwards. There is no ground, in national law or the reason of the thing, for claiming that a neutral vessel may commit the warlike act of violating wilfully a legal blockade if not found carrying on her register a written warning against so doing. The act of egress is as culpable as the act of ingress, when done in fraud of the blockade. The Frederick Molke, 1 C. Rob. Adm. 86; The Vrouw Judith, Id. 151; The Neptunus, Id. 171. Chancellor Kent approves the doctrine of Sir William Scott in these cases, and confirms the reason of it, because, he says, the object of the blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. 1 Kent, Comm. 46. On notice that the port of Richmond was under blockade, the Hiawatha, being a neutral vessel, had a right to withdraw, with all the cargo then honestly laden on board, but she could not have a right to add to her cargo after notification or knowledge of the blockade. The British authorities are strict to this point, and the American decisions accord with them, that the privilege of the neutral vessel to leave a port blockaded after her entry is limited to the vessel itself, and her cargo bona fide purchased and laden on board before the commencement of the blockade. Id.; The Comet, Edw. Adm. 32; Olivera v. Union Ins. Co., 3 Wheat. [16 U. S.] 194. The acts of the master of the vessel in breach of the blockade will affect the cargo equally with the vessel, if the cargo is laden on board after the blockade has become effective as to the vessel. Sir William Scott, in The Vrouw Judith, 1 C. Rob. Adm. 151; The Frederick Molke, Id. 88; and The Betsey, Id. 94,—declared the rule to be that a neutral cannot export cargo from a blockaded port, taken on board after knowledge of the blockade. The breach of blockade by the ship will equally affect the cargo on board, unless there be clear proof of the innocency of the cargo, and that it was neutral property at the time the blockade was established. The evidence of that fact is not satisfactory in this case, as to any portion of the cargo, and a strong suspicion rests upon some part of it, that it is enemy property. The whole cargo (cotton and tobacco) being the product of the enemy's country, the evidence should have been made free of doubt by the claimant, that it was shipped before notice of the blockade, or further proof should have been prayed for and introduced to that point. The want of such proof would seem to have prevented the discharge of the vessel by the government, at the instance of the British minister, after her arrest. But, further, in my opinion, the manner of the employment of the ship on this voyage renders the master the agent of the cargo, also, on the shipment on the home voyage. No cargo was laden on the vessel here until the afternoon of the 11th of May, subsequent to the effort of Lord Lyons to obtain from Mr. Seward a relaxation of the limitation of the time of departure with respect to the Hiawatha. That was a point within the scope of diplomatic arrangement, but the accommodation sought for this vessel, both as to her lading and time of departure, in the letter of Lord Lyons to Mr. Seward, of the 9th of May, and the reply thereto, make no mention of the privilege granted her by this government to ship cargo after she received notice of the blockade, and the privilege solicited does not seem to have been accorded by Mr. Seward; and, accordingly, the vessel, if she had taken her departure within the period of fifteen days from the establishment of the blockade, would not have been entitled to export the cargo taken on board after knowledge of the blockade (The Exchange, Edw. Adm. 43; Wheat. Element, 548; U. S. v. Guillem, 11 How. [52 U. S.] 62), without clear proof that the act was honest and fair as to the belligerent rights of the captors. Upon the proofs the vessel herself did not commence her outward voyage until the 16th of May, if unloosing her fasts in port be deemed the commencement of the voyage, and she is, accordingly, outside of the fifteen days' term of indulgence. When captured, she had left the port of Richmond and violated the blockade there existing. Her relief is to be pursued, as it was commenced, through equitable considerations addressed to the government, and not upon a legal defence against the suit in the prize court. I accordingly pronounce for the condemnation of the vessel and cargo, because of a violation of the blockade in question.

A point was made and fully discussed, in the course of the trial, as to portions of the cargo being enemy property at the time of seizure. No judgment is given upon that branch of the case. Although it is proper to observe that evidence arises out of the correspondence of laders of portions of the cargo, and other papers connected with the proposed voyage, found on the vessel, as, also, out of circumstances connected with the transaction, which tends to countenance the surmise that measures governing the preparation and ship-

ment were on foot, with intent to cover and protect a portion of the enemy's interests in the goods laden on board, yet these proofs but imperfectly make out probable cause, or just ground of suspicion, that the fact was so. It is considered more advisable to dispose, on this hearing, of the broader and more important issues springing out of the blockade declared, and the liabilities and rights of neutrals under those questions. Should the judgment of this court be affirmed by the higher tribunals, there will be no occasion to litigate the subject further; and, should this decree be reversed, the cause will undoubtedly be sent down from the courts of appeal, with instructions which may probably bring out more distinctly than the present shape of the pleadings and proofs seem to have done, the immunities and rights of the neutral owner or carrier in respect to the goods of an enemy laden on neutral bottoms and for neutral ports, together with the corresponding privileges and responsibilities of captors. I consider that the proofs in the case afford a violent presumption that both the master and the part owner of the vessel, sailing with her, had direct and positive notice of the blockade before they commenced taking cargo aboard, and that they afterwards proceeded to lade and despatch the vessel, with intent to evade its operation. I do not regard a warning in writing, indorsed on the register of the vessel, to be necessary to establish notice of the blockade, when actual notice to the master or owner is satisfactorily made out otherwise. The Columbia, 1 C. Rob. Adm. 156. Besides, this vessel was already out of the blockaded port, on her voyage to her port of destination, and turning her away, as it is argued should have been done, with such indorsement, would only be to authorize her to complete the purpose for which she violated the blockade. Sentence of condemnation of the vessel and cargo for a violation of the blockade will be entered.[5]

After the consideration of some intermediary points, arising in the case of the ship North Carolina, the suit against the schooner Crenshaw was the next one brought to hearing. The shape of the proceedings in this cause coincided essentially with that employed in the other suits heard concurrently with it, and the preliminary documentary proofs were the same.

BETTS, District Judge. The libel, in this instance, charges that the schooner Crenshaw, and the cargo laden on board her, were, on the 17th of May, 1861, seized in Hampton Roads by the United States ship Minnesota, under the command of Flag Officer S. H. Stringham, acting under the proclamation and instructions of the president, and that, at the time of the seizure, the schooner was attempting to leave the port of Richmond, then being under blockade, and to violate such blockade, and thus became, with her cargo, subject to confiscation. The libel also charges that the vessel and cargo were, at the time, owned by residents of the state of Virginia, and enemies of the United States, and thus became lawful prize.

Answers and claims were filed on the part of Charles H. Pierson, of New York, master of the vessel, as agent and carrier, on behalf of the owners of the vessel and cargo, of Richmond, Virginia; of Richard Irvin, Alexander Proudfit, James S. Wetmore, and Alexander P. Irvin, on behalf of themselves, and James A. Scott and Maxwell T. Clarke, all citizens of the United States, and the two last named residents of Richmond, Virginia, to thirty tierces of tobacco strips, part of the cargo; and of Laurie, Son & Co., of Scotland, British subjects, to ninety-one hogsheads and thirty-nine half-hogsheads of tobacco, part of said cargo; and of Henry Ludlum, a citizen and resident of Newport, Rhode Island, and G. F. Watson, now in Virginia, both doing business lately at Richmond, in said state, under the style of Ludlum & Watson, and the said Ludlum also doing business in the city of New York, with Gustav Heineken, under the style of Ludlum & Heineken, and the partners composing the firm of Charles Lear & Son, of Liverpool, England, through the said Ludlum & Heineken, intervening, as their agents, claiming ten hogsheads of tobacco strips, part of said cargo of said schooner; and also of John Caskie and James H. Caskie, owners of one hundred and eight hogsheads and forty-seven half-hogsheads of tobacco, part of the cargo of said vessel. These claimants do not aver that they are not citizens and residents of Richmond, in the state of Virginia, nor do they aver that they are the subjects of any neutral government.

This cause is one of the three upon which the merits of the defences to the captures of the ten vessels as prize, all on trial together, were investigated and debated upon points embracing all the grounds upon which the seizures are maintained by the government, and resisted on the part of the claimants. No party intervenes directly as owner of the vessel, to defend her against the arrest. Her master interposes a claim to her, as agent and carrier of the vessel and cargo. This is not a very apt description of the master's relationship to a vessel, and has no apparent pertinency or application to the cargo, as all parts of that are specifically claimed by its respective proprietors. The answers to the preparatory interrogatories and the ship's papers found on board show conclusively that the vessel was owned and controlled by residents in Richmond, Virginia; and one branch of the defence interposed to the prosecution is, that they, being also citizens of the United States, cannot, because of that residence, be

[5] The decree in this case was affirmed by the circuit court, on appeal, November 20, 1861. [Case No. 6,450.] The decree of the circuit court was affirmed, on appeal, by the supreme court. 2 Black [67 U. S.] 635, 678.

enemies of the United States. The vessel was registered in the names of the respective owners, as residents of Richmond, the 17th of April, 1861, and a clearance was given at the same place by the Confederated States, May 14, 1861. That topic was considered by the court and disposed of in the decision previously rendered on the general subject of the immunities so set up, and which applies fully to the condition of this vessel, and to so much of her cargo as is proved to belong to the enemies of the United States of that class and description. All of the cargo, not being enemy's property, which was not shipped with intent to evade the blockade then established at the port of Richmond, or was not placed under the charge of the master in such manner as to render him in law the agent of its owner, in attempting to evade the blockade, is entitled to be freed from the arrest and restored to the honest owners, neutrals, or residents within loyal states of the Union. The evidence furnished from the interrogatories in preparatorio, the test oaths and the shipping papers, is relied upon as proving that the cargo was honestly the property of neutrals or loyal citizens of the United States, resident out of any state in insurrection and rebellion, and in a state of war against the government.

Considering the proofs in the order in which the claims have been interposed, the first one is the claim to thirty tierces of tobacco strips, by Irvin & Co., in their own behalf and that of Scott & Clarke. The allegations of the libel are, that the cargo of the vessel is subject to condemnation as prize of war, both because it belonged to enemies of the United States, and because of its exportation in violation of the blockade subsisting against the port at the time of its departure, of which the claimants had notice and knowledge. The claim filed by the claimants alleges that all the claimants are citizens of the United States, and that Scott & Clarke are residing in Richmond, Virginia, and asserts that the other claimants are residents in New York. No proofs were given of these facts, but they were acquiesced in as true by counsel on both sides. It was not denied that the claimants had a partnership interest in the cargo purchased and shipped on their account, but it was insisted that they were no more than payers of the consideration or purchase price, and that there was no partition of the same, the whole property belonging to the claimants, and that the Richmond parties or co-proprietors obtained no property until after adjustment of the transaction, and that accordingly there was nothing seizable in the case at the time of arrest. The interests of the claimants described in the claim, became common and perfected from the incipiency to the termination of the adventure. Scott & Clarke, residents in Virginia, were the purchasers of the property, and the shippers of it from the place of purchase to agents in England. The other members of the concern, residents in New York, were to collect and realize the products of the consignment, and, after the charges of the transaction were adjusted, the net proceeds were to be shared between the two branches of the association,—one in Richmond and the other in New York. There was no contingency or reservation which prevented the contract from being a completed one of purchase and sale, except a possible right of stoppage in transitu, in case the consideration money should be unpaid.

It is to be implied from the statement in the answer or claim that the property passed directly, on its sale by the vendors in Richmond, to the claimants, the actual vendees; and more particularly so, as, by the bill of lading, it was consigned to their common agents in England, to be sold for their mutual advantage. This would constitute a joint ownership of the tobacco in all the claimants. There would thus clearly be a right of property in Scott & Clarke in their share of this shipment at the time of its capture, the value or amount in money only remaining to be ascertained by actual sale in market abroad. This was then a joint property in the copartners, their shares in which were not exempt from condemnation, because of its partnership character. The Franklin, 6 C. Rob. Adm. 127. The court would admit further proof in behalf of the other parties, copartners, to discriminate their shares of the joint partnership, and allow them to seek its restoration on that ground, were they neutral copartners and entitled to hold commercial intercourse with the enemy's port for the purpose of acquiring property, anew by such dealings, or to withdraw property of their own, then being in power of the hostile country. But citizens and subjects of the capturing nation are interdicted all trade, or dealing with the enemy or at his ports for any purpose or object in time of war. Wheat. Mar. Capt. c. 7. The tobacco purchased by the claimants and claimed in this case was bought by the claimants from the enemy after the commencement of the war. It was produced from the soil of the place of exportation. That impressed most distinctly upon the property a hostile character independent of the place of residence of its vendor or purchasers. 1 Kent, Comm. 73; Wheat. Mar. Capt. c. 7. Not only is property taken trading with the enemy liable to forfeiture, but it is subject to forfeiture as prize of war. Id. 219. Moreover, the seizure of this property was on the sea, after it had left its port of departure in an enemy's bottom. There is not, therefore, upon the facts of this case, any legal vindication of a right to this property established on the part of any of the claimants before the court, nor, on the rule adjudged to govern this case—that a lawful war of defence was subsisting at the time of capture on the part of the United States against the insurgents or citizens of

Virginia—have the claimants, or either of them, a capacity to controvert the rightful seizure and condemnation of this property. If Samuel Irvin and Peter Forbes, of Liverpool, England, composing there the firm of Samuel Irvin & Co., have any other or further interest in this transaction, pleaded in the defence of this suit, than that of brokers or agents between or in behalf of the parties before named, resident in Richmond and New York, who procured this property in Richmond to be consigned to Liverpool under the arrangements set forth, those Liverpool parties have not intervened in this suit and brought their rights and equities before the court. They are neutrals, and, if litigant parties in the cause, would have a right to raise the question of the validity of the blockade alleged in the libel, and demand the judgment of the court upon that point. That matters in respect to others of the claimants were so blended with the particular issues in this action, that the court was necessarily compelled to hear and investigate the subject; but the direct right between the libellants and these individual claimants does not, upon the issues, demand or authorize the court to adjudge the validity or invalidity of the blockade declared against the ports of Virginia. Upon the issue it is found by the court that the thirty hogsheads of tobacco strips, charged in the libel to be forfeited, as prize of war, and claimed in this suit by the claimants, were, at the time of seizure, wholly the property of the enemy, and lawful prize of war, and a decree of condemnation and sale is to be rendered against the same. The case, however, having been fully discussed on both issues, the magnitude of the questions and property involved in this suit renders it expedient to so dispose of both branches of the controversy that the parties concerned may have the opportunity, in a court of appeal, for a revision of the judgment of this court. I add to the determination above announced the further decision, that, in my opinion, if either of these parties claimants shall be afterwards adjudged competent to litigate the lawfulness and sufficiency of the blockade and the question of its violation, there is adequate evidence of its intentional violation by the claimants after notice of its establishment.

In addition to the documentary proofs previously adverted to, the domicile of these claimants, and their personal relations to the voyage and cargo, supply circumstances amounting to presumptions of high force, that they knew that the port was in a state of blockade immediately on the proclamation of the fact by Commodore Pendergrast on the 30th of April last. The vessel sailed from New York for Richmond April 19, passed Old Point Comfort the next day, and entered James river the 21st, and arrived in Richmond the 23d of April, as appears by the log of the vessel. On the 27th of April she finished unlading her cargo, and then, as appears by the log, lay idle in port, employed only on small and occasional jobs, in cleaning, painting, or putting the vessel in order, until May 13, when the entry in the log is in these terms: "At 12 m. orders came down to load for Liverpool, England. At 1 p. m. commenced loading with a cargo of tobacco, working until 10 p. m." On May 14 the entry is: "All hands employed at loading; continued work until 1:30 a. m. next morning, as we had no time to spare, (—— ——) which took effect on all vessels clearing after the 15th of May." On the 15th the vessel "finished loading at 10 a. m., and hauled down through the locks, and at 7 p. m. started down the river." Even if this leaving the locks to proceed down the river were to be regarded as an egress from the port, it was not within fifteen days from the 30th of April. It is obvious that implicit confidence cannot be reposed in this period being the real time of getting the vessel under way, from the paper representation of the commencement of the voyage, as the manifest and clearance were passed at the Confederate custom-house on the 14th of May, before the cargo was taken in, according to the log, and because the log further shows that the vessel had to anchor at Day's Point the night of the 16th and be searched by public officers, before she was allowed to depart from the port. Manifestly the answers of the master and the mate to the preparatory interrogatories are reserved and disingenuous as to the fact of notice or knowledge with them of the existence of the blockade before the vessel commenced taking in cargo on the 14th of May. The master answers positively that he did not know or have notice that the port was in a state of war, or was blockaded by the United States. He did not know that the state of Virginia was in rebellion. The mate answers that he knew Virginia had seceded, but did not know, from any legal or official notice, that there was a blockade. He knew it virtually, but not officially or legally. The entry extracted from the log of the 14th of May—imperfect, it is to be presumed, accidentally—still leaves the sense plain enough, that the extraordinary alacrity and exertion of the ship's company to complete loading the vessel on that day, was to avoid the blockade which would take effect after that time.

It appears, by the documents in proof, that Lord Lyons, at Washington, and the British consul Moore, at Richmond, as early as the 2nd and 4th of May, were apprised, from newspapers and other sources of intelligence open to the public, and the fact was freely made known to mercantile men in Richmond, that the ports of Virginia were under blockade. It was a fact of such direct interest and importance to the navigation and trading business of Richmond, that it would be promulgated and known as generally and equally well as the other striking events occurring

simultaneously, of the surrender or capture of Gosport navy yard, and the destruction of the United States shipping and naval stores at that port; the first transaction being on the 20th of April, the day this vessel was passing the site of the navy yard into James river, and the other on the 30th, whilst she lay at her wharf at Richmond, in that river. The startling character of these events, the universal arousing of public attention to each, the moving anxieties which would naturally beset owners, masters of freighters of this vessel, and the immediate vicinity of those persons to the hazard in which she might probably involved, would naturally cause them to become possessed of the earliest knowledge of the condition of public affairs between the United States and Virginia, and particularly of those affecting the condition and safety of this vessel and her purposed voyage. Secession, rebellion, war, and its concomitants, of the capture and destruction of a great seaport and naval depot directly contiguous to Richmond, and at the outlet of the river on which the place is situated, and immediately following those exciting occurrences, the proclamation of a blockade, and the assembling of ships-of-war to enforce it against that individual port, would inevitably affix such a publicity and notoriety to the events, that none of them, in human probability could fail to be known to residents in those localities, or persons having individual or business communications with them. They would bear with them, and spread far and wide around them, the strongest and most impressive notoriety. Notoriety greatly less in degree than that which surrounded the laying of this blockade is always regarded, in prize courts, as evidence entirely sufficient to fasten on parties notice of the existence of a blockade which they are found violating. Wheat. Mar. Capt. 193, 195. I can entertain no doubt, upon the proof produced to this point, that the master of the vessel and the claimants had notice of the blockade of this port at the time, and that the blockade was effective in law; nor is there any doubt, in my mind, that the master of the vessel and the claimants, Scott & Clarke, intentionally violated the blockade. The two latter must also be regarded as sufficiently authorized, from their connexion with their copartners the other claimants, to bind their interest in the cargo also. Beyond that presumption, and the constructive acquiescence by all these claimants in the breaking of the blockade, I think the evidence raises the further presumption of the actual knowledge and assent of the New York partners to the act of the master. The vessel having left the port of Richmond more than fifteen days after the blockade was imposed, and after notice to her of its existence, and the cargo having been laden on board after the blockade, and notice of the claimants thereof, I pronounce the vessel and this portion of the cargo forfeited.

Laurie, Son & Co. intervene in the above suit against the schooner Crenshaw, and claim ninety-one hogsheads and thirty-nine half-hogsheads of tobacco, seized as part of her cargo under the allegations in the above libel. The general defences before alluded to are again interposed, and the defence special to this claim is, that the claimants are neutrals, resident in Leith, Scotland, and that they had no notice of the blockade, and never authorized the master to evade it, and had no knowledge of his intention to do so. The ownership by the claimants of the property claimed, and the fact that they are British subjects, resident in Scotland, is verified by oath, duly made before the British consul at Richmond, on the bill of lading in the cause. The goods were shipped at Richmond by the consignors as belonging to the consignees, the claimants. They are proved to be neutrals. The vessel is an American bottom, and no privity is shown between the consignors of this shipment and the master, or that the master acted as agent of the consignees, or was authorized by them to sail in violation of the blockade. The claimants being domiciled in Great Britain, and having no personal or direct notice, and there not being such lapse of time after the declaration of the blockade as that an actual or constructive notice could be implied against them, there is not, in the judgment of the court, an adequate ground laid for the condemnation of this portion of the cargo. The act of the master in violating the blockade is not to be presumed to have been promoted or acquiesced in by the claimants upon these bald facts. Their goods were freighted on board a general ship at a period so immediately after the blockade was imposed, as to preclude all presumption that the claimants in Scotland could have notice of it. It is, therefore, ordered, that the ninety-one hogsheads and thirty-nine half-hogsheads of tobacco seized in this suit be restored to the claimants. No costs are to be allowed against the captors. The vessel and other portions of the cargo having been condemned for a breach of the blockade, and no fact being before the captors to show a distinction existing between the liabilities to seizure of different parts of the ship's lading, the costs for the arrest of the claimants' interest, in common with the residue of the cargo, are, accordingly, not awarded against the captors.

Ludlum & Watson, lately doing business as a mercantile firm in Richmond, Virginia, under that name, and Ludlum & Heineken, doing business in New York under that firm name, intervene and claim in this suit ten tierces of tobacco strips, forming a part of the cargo of the schooner Crenshaw, seized and prosecuted in this suit, the said Ludlum being a citizen and resident of Newport, Rhode Island, and the said G. F. Watson residing in Virginia, and the firm, lately doing business in Richmond, in said state, under

the style of Ludlum & Watson, claim an interest in part of said ten tierces of tobacco; and the said Ludlum & Heineken also intervene as agents of Charles Lear & Son, of Liverpool, England, British subjects, as part owners of the said tobacco. The claim and answer aver that the tobacco was laden on board the schooner as the sole property of the claimants, and that it still remains their sole property. They deny that the vessel knew or had notice of the blockade alleged, or attempted to evade the same, or that the master of the vessel was their agent. They also make, in substance, the general objections to the libel interposed in the preceding suits. The answer admits that the firm of Ludlum & Watson was doing business in Richmond, and its statement that Watson, one of its members, resided in Virginia, must in that connexion be deemed an admission that he resided at the same place where the business of the firm was transacted. This particular is only of importance in connexion with the presumption, arising from his position, and his being owner and shipper of the goods, that he had knowledge and notice of the existence of the blockade before the goods were shipped, and intended they should be exported in evasion of the blockade. The proofs before referred to satisfactorily establish those facts on the part of the libellants, and not being repelled or explained on the part of the claimants, must prevail against them. Watson being an alien enemy, his interest in the cargo was confiscable for that cause, and that of his partner, Ludlum, was alike subject to condemnation because he acquired the property in an illegal traffic with the enemy. The master of the schooner was not, from his office, in judgment of law, agent of Lear & Son, so as to charge them with constructive notice of the blockade because of knowledge of it by the master. The same conclusion applies to the agency of Ludlum & Heineken, which is not shown to have had any connexion with lading the cargo in Richmond. That act, as appears by the bill of lading, was done by the house of Ludlum & Watson in that port, whilst on the evidence Ludlum's personal residence was in Rhode Island, and no evidence is given by the libellants raising a presumption either that he individually, or the copartnership of Ludlum & Heineken, had any concern with shipping the cargo at Richmond or dispatching it from that port to Lear & Son. In my opinion, accordingly, the claimants, Lear & Son, being neutrals, are entitled to the restoration of their share of the ten tierces of tobacco mentioned in this claim without costs against the captors. But inasmuch as the test affidavit or other evidence does not distinguish the amount of interest claimed in this property by the claimants Lear & Son, nor explain the reason why the whole property was shipped in the name of Ludlum & Watson, and consigned to their order in Liverpool, without any indorsement or recognition of the interest of Lear & Son therein, costs will be adjudged against the said Lear & Son upon their claim, unless further proof, be furnished on their part showing that the property mentioned in their claim was bona fide neutral and owned by them.

John Caskie and James H. Caskie are claimants of one hundred and eight hogsheads and forty-seven half-hogsheads of tobacco, part of the cargo of the Crenshaw, as owners, and allege that they are citizens of the United States, but do not state the places of their domicile or their legal residence. They take issues and exceptions to the libel in substance conforming to those put in by the claimants in the preceding causes, and admit that the vessel sailed from the port of Richmond on the 15th of May, and that she and her cargo were arrested in Hampton Roads on the 17th of May. The bill of lading found on board of the vessel shows that the cargo claimed was shipped by the claimants at Richmond on the 14th of May, 1861; and the implication, in the absence of all proofs or declarations to the contrary, must be that they were at the time domiciled and doing business at that place. This, as already ruled in antecedent cases, constituted the claimants, under the proofs brought into the suit on the part of the libellants, enemies of the United States, and, accordingly, the property is subject to condemnation as enemy's property. Their residence in the port, in the transaction of mercantile business there personally during the blockade, supplies, as has been before shown, satisfactory proof that they had constructive notice of the blockade, and were engaged in the attempt to evade the same by such shipment and dispatch of the cargo in question. Upon both grounds, therefore, I am of opinion that the cargo seized is confiscable, and a decree of condemnation against the same is ordered, with costs.

The decree in this case was affirmed by the circuit court, on appeal, November 20, 1861 [Case No. 6,450]. The decree of the circuit court was affirmed, on appeal, by the supreme court, 2 Black [67 U. S.] 635, 682, except as to the thirty tierces of tobacco strips claimed by Irvin & Co. [See Case No. 6,450, note.]

Case No. 6,452.

The HIAWATHA.

[Blatchf. Pr. Cas. 632.] [1]

Circuit Court, S. D. New York. May 5, 1862.

PRIZE PROPERTY—SALE OF, PENDENTE LITE.

1. In this case, after an affirmance by this court of the decree of the district court condemning the vessel and cargo, and the taking of an appeal to the supreme court by the claimants, this court, on the application of the prize commissioners, and on proof that the cargo, consisting of tobacco, was in a perishing condition, ordered it to be sold.

2. The provisions of the act of March 25, 1862 (12 Stat. 374), in regard to the sale of prize property, pendente lite, commented on.

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

3. That act applies to proceedings in this court as well as in the district court.

4. The practice under that act prescribed and regulated.

In admiralty.

NELSON, Circuit Justice. The vessel and cargo were condemned in the district court as prize, upon proceedings instituted by the United States. [Case No. 6,451.] An appeal was taken to this court from that decree, which was affirmed. [Id. 6,450.] Since then an appeal has been taken to the supreme court from the latter decree, and is now pending.[2] The cargo consists chiefly of tobacco, manufactured and unmanufactured, which was laden on board the vessel at City Point, Virginia, in May, 1861. The capture occurred in the same month in Hampton Roads, and the vessel and cargo were brought into this port. The vessel, with most of the cargo, is lying at the Atlantic dock, in Brooklyn. According to the report of the prize commissioners, under date of April 14, 1862, supported by proof, the cargo is in a perishing condition. They, therefore, asked for an order of sale for the benefit of all concerned. A sale was ordered accordingly, and some steps were taken under the order, with a view to an appraisal of the cargo, preliminary to the sale. The proceedings were afterwards stayed, for the purpose of enabling the proctor and advocate for the claimants to make some suggestions to the court in respect to the order of sale; and those suggestions have been submitted for its consideration. It is not denied that the cargo is in a perishing condition, or that the interference of the court is required, with a view to its preservation pending the litigation. The value of the property involved is large, and the claimants are numerous, as the documentary proofs are said to show some thirty-three different bills of lading. No application has been made by any of the claimants for any interference with the cargo by the court, with a view to its preservation. The application is exclusively on the part of the government, and by the prize commissioners, acting for the benefit of all persons or parties concerned. I am satisfied, upon the proofs before me, that some immediate steps should be taken to preserve the subject-matter in dispute from loss, and that it will be for the interest of all parties that the cargo be sold.

The recent act of congress, passed March 25, 1862 (12 Stat. 374), provides (section 1) that it shall be the duty of the prize commissioners, "from time to time, pending the adjudication, to examine into the condition of said property, and report to the court if the same or any part thereof be perishing or perishable, or deteriorating in value; and if the same be so found by the court, upon said report or other evidence, the court may, thereupon, order an interlocutory sale thereof by the United States marshal, and the deposit of the gross proceeds of such sale in the registry of the court to abide the further order of the court, whether a claim to said property has or has not been interposed." I am inclined to think that this provision applies as well to proceedings in this court as in the court below. I do not suppose that it was intended to interfere with any of the usual modes employed in this court or in the court below for the disposition or preservation of the fund or subject-matter of litigation pending the suit; but I think that the object was to provide for the case of a sale, which is one of the modes, when that one had been adopted by the court.

This power of the prize commissioners is, I believe, new, and it may be proper to submit some observations upon it. The power is, I think, joint, and requires the concurrence of both in the exercise of it. As matter of practice, it would be proper for them to give to the district attorney, as representing the government, and also to the proctor for the claimants, notice of the application to the court for the sale, so as to afford an opportunity to these parties to support or oppose the order of sale. Either of them may still make an application to the court in respect to the condition of the res, notwithstanding this power of the commissioners. This power was obviously conferred upon the commissioners as an additional security for the preservation of the property, and for abundant caution. The sale is, when ordered, to be made by the marshal; but, as matter of practice, should be made under the superintendence and direction of the commissioners. They represent all parties in interest, and it is their duty to see that the property is not sacrificed at the sale. The relation they hold to the property is not unlike that of a private party in sales of this description. The marshal is to receive the purchase moneys, make a proper return of the sales, and pay the moneys into the registry of the court. The act provides that the order of sale shall contain an order to pay the gross proceeds into the registry; and the second section enacts "that all reasonable and proper claims and charges for pilotage, towage, wharfage, storage, insurance, and other expenses incident to the bringing in and safe custody and sale of the property captured as prize shall be a charge upon the same, and, having been audited and allowed by the court, shall, in the event of a decree of condemnation or of restitution on payment of costs, be paid out of the proceeds of any sales of the property, final or interlocutory, in the custody of the court." The gross proceeds of the sale must be paid into the registry of the court, and, on the allowance of the charges, &c., by the court, they may be paid. It may be proper to say

[2] [See note at end of case.]

in advance, that where these charges are fixed by law they will be strictly regulated accordingly; and, where they are not fixed by law, the allowance will in no case exceed the usual accustomed charge in similar cases arising out of navigation and trade. I suppose that the charges for pilotage, towage, wharfage, storage, and all other incidental necessary expenses, are either fixed by law or by custom and usage, or have some definite limit or regulation by the course of trade and business. The marshal having the possession and custody of the vessel and cargo, subject to the direction and control of the court, he will be held responsible for its due care; for placing and securing the vessel at a proper dock; and, when the cargo is ordered to be discharged, for selecting a fit and suitable warehouse for its stowage and custody. Where an appraisal of the goods is ordered to be made by the commissioners before a sale, he will discharge the cargo under their superintendence, so as to enable them to take a list of it, with a view to the appraisal, and he will also be enabled to take a list for his own benefit, with a view to the sale. I think that, in discharging the cargo, the parcels of each bill of lading should be separated, and be appraised and sold separately, so that each claimant may be advised of his distinct interest involved in the litigation. I shall affirm the order of sale heretofore made; but the sale is to take place in the mode and manner more fully stated in this opinion. The stay of proceedings is discharged.

[The decree of the circuit court was affirmed by the supreme court on appeal. 2 Black (67 U. S.) 635. See note at end of Case No. 6,450.]

Case No. 6,453.

The HIAWATHA.

[5 Sawy. 160.] [1]

District Court, D. California. April 30, 1878.

MARITIME LIENS—PRIORITY—MATERIALS—MORTGAGE.

1. Priority of lien of domestic material-man over lien of mortgagee.

2. The lien under the state law of a material-man for repairs has priority over that of a mortgagee under a prior mortgage duly recorded.

[Cited in The E. A. Barnard, 2 Fed. 722; The Canada, 7 Fed. 735; The J. E. Rumbell, 148 U. S. 19, 13 Sup. Ct. 503.]

In admiralty.

J. T. Hoyt, for libellant.

M. Andros, M. J. Nolen, T. J. French, and C. T. Emmet, for various intervenors.

HOFFMAN, District Judge. That the lien under the state law of a material-man for repairs furnished to a vessel in her home port has priority over that of a mortgagee under a duly recorded prior mortgage, has been so often decided that I think it unnecessary to do more than to state the principle and cite the authorities which the industry of counsel has collected in his brief.

The principle is concisely stated by Mr. Justice Curtis, in the case of The Kearsarge [Case No. 7,762], as follows: "The mortgagees can have no claim to be preferred over the lien-holder, because of their priority in time; for their interest in the vessel is as much subject to the statute lien as the interest of any other party." This principle is recognized in the following cases: The W. T. Graves [Id. 17,758]; Scott v. Delahunt, 65 N. Y. 128; The Island City [Case No. 7,109]; Donnell v. The Starlight, 103 Mass. 227; Hull of a New Ship [Case No. 6,859]; The Raleigh [Id. 11,539]; Shodes v. The Collier, 2 Pittsb. R. 304; The St. Joseph [Case No. 12,229]; Kellogg v. Brennan, 14 Ohio, 72; Provost v. Wilcox, 17 Ohio, 359; Jones v. Keen, 115 Mass. 170.

In the case of The William T. Graves [Case No. 17,759], Mr. Justice Johnson, circuit judge, considers the effect of the provisions of section 1 of the act of congress of July 29, 1850 (9 Stat. 440), on the liens of mortgages.

That section provides that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of customs where such vessel is registered or enrolled; provided, that the lien by bottomry on any vessel created during her voyage by a loan of money or materials necessary to repair, or enable such vessel to prosecute her voyage, shall not lose its priority or be in any way affected by the provisions of this act." With reference to this proviso Mr. Justice Johnson observes:

"The obvious purpose of this proviso was to make it entirely clear that a bottomry bond did not come within the statute, requiring certain instruments to be recorded. It might otherwise have been contended that it was in some sense a hypothecation of the vessel, and, therefore, required to be recorded. It will be observed, that the proviso is confined to liens by bottomry. If this proviso be construed to mean that such a lien only, is out of the purview of the statute, and that all other liens are postponed to that of a mortgage, then the claims of salvors, and all those having other strictly maritime liens would be thus postponed to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle

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

upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of the maritime law on the subject of maritime liens. This statute, I conclude, therefore, has no relation to the question involved, and the lien of the libellant is left to stand upon the statute of New York, which the courts of the United States enforce in the courts of admiralty."

The case of The Lottawanna, 21 Wall. [88 U. S.] 558, though not directly in point, seems impliedly to recognize the general doctrine I have stated. In that case, the contest was between domestic material-men and mortgagees, who petitioned against remnants and surplus in the registry. Some of the supplies had been furnished prior to the execution of the mortgage, and some subsequently. But the court takes no notice of this circumstance. The claims are all treated as standing on the same footing with regard to mortgagees. They were rejected, because the liens for them had not been perfected as required by the state law. There is no intimation that if the fact had been otherwise, the claims of the material-men would not have been preferred to that of a mortgagee, whether prior or subsequent. Such seems to be the necessary result of the decision.

The court holds, that by the maritime law, as received in the United States, domestic material-men, (so-called,) have no lien on the vessel; but that the states may, by statute, create such liens. Their contracts, however, are maritime, and the liens given by state laws can be enforced in the admiralty courts of the United States. It is well known that mortgagees have no right to foreclose their mortgages in the admiralty. When, however, the court finds itself in possession of remnants and surplus, which it is required to distribute, the lien of the mortgagee, like that of an attaching creditor, will be recognized and enforced. In no other way does the court take jurisdiction of the claim. But this remnant and surplus can only result after all maritime and quasi maritime liens have been satisfied. In this last category, liens attached by state laws to the contracts admitted to be maritime of domestic material-men, must be placed.

It follows, therefore, that the mortgagee cannot now be heard in support of his claim until the domestic material-man is paid. An order will be entered directing the demands of the material and supply men to be paid out of the fund remaining undistributed in the registry of the court; the balance remaining, if any, to be applied to the satisfaction of the demand of the mortgagee.

HIBBARD (GAYTES v.). See Case No. 5,287.

HIBBLER (BLACKMAN v.). See Case No. 1,471.

Case No. 6,454.

The HIBERNIA and The RELIEF.

[5 Ben. 352.] [1]

District Court, S. D. New York. Oct., 1871.

COLLISION—TUG AND SCHOONER—HOLDING COURSE.

A ship, in tow of a tug, on a hawser, was going to sea from the port of New York. When below the Narrows, they met a schooner bound in, coming on a course which would have carried her to the west of them, the wind being from the north of west. When the vessels were near each other, the schooner luffed up into the wind, and, missing stays, fell stern foremost across the hawser, and was struck by the stem of the ship, which, as soon as the manoeuvre of the schooner was seen, had starboarded her helm, the tug having at the same time stopped: *Held*, that the schooner was solely responsible for the collision.

In admiralty.

Townsend Scudder, for libellants.
Welcome R. Beebe, for steamtug.
Robert D. Benedict, for ship.

BLATCHFORD, District Judge. On the 22d of May, 1866, at about 11 o'clock, a. m., while the ship Hibernia was being towed out to sea by the steamtug Relief, in the lower bay of the port of New York, not far below the Narrows, the ship came into collision with the schooner Jesse Jones, owned by the libellants, and bound into the port from sea. The stem of the ship struck the starboard side of the schooner about abreast of her main rigging, and the schooner sank almost immediately. The ship was being towed by a hawser from the stern of the steamtug.

The case made by the libel is, that the wind was about west by north; that the schooner was heading north by west, with her port tacks aboard, close hauled, and with her sheets flat down; that the steamtug and the ship had plenty of room to pass to the leeward of the schooner; that it was the duty of the steamtug and the ship to keep away from the schooner, by putting their helms to starboard; that, instead of keeping to the leeward, they came close down to the schooner, while the schooner was standing upon her course; that the mariners on the schooner, finding a collision inevitable, put her helm hard down, which brought her in stays; that the ship and the steamtug, failing to put their helms a-starboard, and failing to give the schooner sufficient sea room, came towards the schooner, and, while she was in stays, with her helm hard-a-starboard, the ship struck the schooner; and that the collision occurred through the fault of those in charge of the steamtug and of the ship.

The defence set up in the answers of the steamtug and the ship is, in substance, that the schooner was going up the bay on such a course, that, if she had kept it, she would have passed at a safe distance to the windward of the steamtug and the ship; that she,

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

in fact, passed the steamtug at a considerable distance to the windward, but then attempted to tack and missed stays, and got sternway on her, and was carried stern foremost across the bows of the ship, and between the ship and the steamtug; that, as soon as danger of collision was seen, the steamtug was stopped, and the helm of the ship was put hard-a-starboard, and her bows were thrown to port; that the schooner drifted stern foremost over the slackened hawser and against the bows of the ship; and that the collision was the fault of those navigating the schooner.

The case made by the libel and sought to be established by the evidence on the part of the libellants is, that the ship came on to the line of the schooner's course while the schooner was keeping such course, and failed to starboard, and ran into the schooner while the schooner was in stays, after she had luffed to avoid a collision, which she saw was inevitably to result from the approach of the course of the ship to the course of the schooner. But I am satisfied, on the whole evidence, that the case of the libellants is not made out; that there was abundance of room for the schooner to pass safely to the windward of the steamtug and of the ship, if the schooner had kept her course; that the steamtug and the ship gave the schooner a sufficiently wide berth to the leeward, and were on a course which would have carried them safely to the leeward of the schooner, if the latter had kept her course; that the schooner improperly and unnecessarily undertook to luff up into the wind, and so got sternway on her, which caused her to drift stern foremost to the leeward; that the steamtug, the moment any danger was perceived, stopped, while the ship at the same time starboarded; that the steamtug and the ship never changed their courses so as to come more on the course of the schooner; that the collision was not at all the fault either of the steamtug or of the ship; and that it was wholly the fault of the schooner. The libel must, therefore, be dismissed, with costs.

Case No. 6,455.

The HIBERNIA.

[1 Spr. 78.][1]

District Court, D. Massachusetts. April, 1844.

SEAMEN—UNSEAWORTHINESS OF VESSEL—DEMAND OF SURVEY—WRONGFUL DISCHARGE—SHARE IN PROFITS—ADMIRALTY PROCESS—EXECUTION.

1. Where the crew of a vessel, in a foreign port, have reasonable grounds to believe that she is unseaworthy, and demand a survey, the master has no right to compel them to go to sea without one. And if he attempt to do so, they may resist.

2. If, for such resistance, the master causes them to be imprisoned on shore, and there leaves them, it is a wrongful discharge. In such case, the crew of a whale ship were allowed their full lay, or share, of the voyage.

[Cited in The Grace Darling, Case No. 5,651.]

3. The owners cannot deduct from such share, or lay, the amount which the master may have charged for articles furnished, unless such charge is shown to be correct.

4. If the master wrongfully detain clothing of a seaman, the owners are not liable therefor, unless they have ratified the acts of the master, or, upon demand, have refused to deliver it.

5. In the execution of admiralty process, in rem, the officer should take and hold actual and manifest possession.

6. If he do not, he is not entitled to charge custody fees, although he may have rendered himself liable for the safe keeping of the vessel.

The libellants in this case were defendants in the case of U. S. v. Givings [Case No. 15,212]. Immediately after their acquittal, Davidson and twelve others of the seamen promoted a libel in rem, in a cause of subtraction of wages, against the Hibernia. The facts were the same as those already given in U. S. v. Givings, with the addition, that at the time of the difficulty at Port Louis, and the imprisonment of the libellants, each of them had an interest in the proceeds of the cargo, of from $150 to $300; and at that time, the ship was nearly full, and she took no oil afterwards. The libellants now claimed their full lay or shares of the proceeds of the voyage, as though they had returned in the ship. The owners sought to deduct about one-fifth of each man's share: that being the proportion of the time of the whole voyage, which they were not on board the vessel. There were also some further claims passed upon, which appear sufficiently in the opinion of the court.

SPRAGUE, District Judge. From the evidence, it is clear that there were reasonable grounds for believing that the Hibernia was unseaworthy. The crew, therefore, had a right to demand a survey, and the master had no right to compel them to go to sea without it; and if he attempted to do so, they had a right to resist such an attempt, in a proper manner. The crew had violated no duty and merited no punishment, and the master had no justification for causing them to be imprisoned. It is a strong case of wrongful discharge. It is urged that they left voluntarily, and against the will of the master, because they must have foreseen that such would be the necessary consequence of their refusal to heave up the anchor; that, in short, this refusal was an election on their part, not to come home in the ship. The court cannot agree to this proposition. On the contrary, their refusal being justifiable, it was not to be presumed that the master would persevere in his unjust requirements. And even if they had anticipated that the master would punish them for asserting their rights, that is by no means to be taken as an assent by them to such punishment. It fur-

[1] [Reported by F. E Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

ther appears, that the election to come directly home, was never offered them; as the master insisted on their returning to the cruising ground, until the vessel should be full, of which she then lacked several hundred barrels. Finally, there was no occasion for taking them from the ship, nor was there any ground for apprehending danger from them, if they returned on board. There is then no breach of contract on the part of the men; but the act of the master, in causing them to be taken from the ship, imprisoned, and left in the foreign port, was a gross violation of their rights. They were ready to perform their contract, and were prevented by the unjustifiable act of the master. They are entitled to their full lays. The owners charge the full amount of the master's bill for slops furnished the men, and decline to give the items, or any evidence of the same, on the ground, that as the master has a lien upon the proceeds of the voyage for his slops (Barney v. Coffin, 3 Pick. 115), the owners must retain the nominal amount of his bills. This is going further than the case in Pickering warrants; and would defeat, pro tanto, the remedy of seamen against both vessel and owners for wages. I think the owners can retain only what is found actually to be due the master, after examination and proof. When the libellants were taken ashore, the master retained their clothing, alleging that it was forfeited. They now claim the value of this clothing. There is no evidence of any demand upon the owners, and refusal on their part, to deliver up the clothing, since the ship returned. It is said that the master acted as their agent in retaining it, and that it is in their possession, without any disclaimer on their part, or offer to return it; but I think there must be some evidence that they have ratified, or assumed, the master's act, to entitle the seamen to recover the value, in money, in this action.

The accounts were referred to an assessor. A question having arisen in regard to the custody fees, it was reserved for future examination.

R. H. Dana, Jr., at a later day, presented the case to the court in behalf of all the parties. The evidence was by affidavits, and it appeared that the deputy marshal (Mr. Gordon), was directed by the warrant to take the vessel into his custody, and to give notice, by posting at the court-house in Boston, and by publication in the newspapers. The posting and publishing were duly made. It appeared that the officer reached New Bedford late in the evening, went on board the vessel alone, found no one there, and took formal possession. After this act, he did nothing more, and neither went on board again himself, nor appointed any person to take charge of the vessel. She lay at the owner's wharf, dismantled and under repairs, the carpenter and the managing owner being on board the greater part of every day, and the vessel lying, so that she could be seen from the windows of the owner's counting room. The owner, his clerk, and the master carpenter, testified that they had no suspicion that the vessel had been arrested, until the twelfth day, when they learned it accidentally, from a person who had seen it in the newspapers. The next day, the owner came to Boston, and gave bonds. There was some evidence tending to show that the officer sent a lad to the owner's counting room with a verbal message, that the vessel was arrested; but the message was not received by the owner, or his clerk. The officer charged $39, custody fees, for thirteen days, and relied upon the fact, that having made return that he had arrested the vessel, he thereby became responsible for the custody, to the court and the parties, and took the risk of having no keeper. His fees for the arrest, publication, travel, &c., were not disputed. The only question was as to the fees for custody.

R. H. Dana, Jr., for libellants.
T. G. Coffin, for respondent.

SPRAGUE, District Judge. In the execution of admiralty process in rem, the officer should take actual and manifest possession, and hold it in such manner, that inquirers and observers may learn, or see, that he has such possession.

It is not necessary to decide, in this case, whether after such an arrest and possession, the officer must have some person on board, or near the vessel, during the whole time for which he charges fees. It is sufficient to say, that no proper arrest and possession have been shown. The officer may so act, as to become responsible to both parties, for the safe-keeping of the vessel, and yet not entitle himself to fees. Where personal notice is not ordered, it is on the supposition that the arrest and custody will be sufficient notice. The custody fees must be disallowed.

See U. S. v. Givings [Case No. 15,212]; U. S. v. Ashton [Id. 14,470]; The William Harris [Id. 17,695]; The Moslem [Id. 9,875]; U. S. v. Nye [Id. 15,906]; U. S. v. Staly [Id. 16,374]; Dixon v. The Cyrus [Id. 3,930]; 5 Stat. 396 (1840, c. 48, §§ 12–14).

HICKENLOOPER (ERDHOUSE v.). See Case No. 4,509.

HICKEY (PUTNAM v.). See Case No. 11,480.

HICKLAND (NEW YORK v.). See Case No. 10,196.

Case No. 6,456.

In re HICKS et al.

[19 N. B. R. 299.]

District Court, S. D. New York. June 27, 1879.

BANKRUPTCY—DIVIDEND—PROOF OF DEBT.

1. If, before proof is made against the endorser, a dividend is received by or has become payable to the creditor on the note from the estate of the maker, he can prove only for the bal-

ance. Nothing, however, short of payment, or the present right to receive a dividend, will operate to reduce the creditor's right to prove against the endorser's estate.

[Distinguished in Re Hamilton, 1 Fed. 808.]

2. The claimant held certain notes endorsed by the bankrupts. The makers were adjudged bankrupt, and effected a composition with their creditors June 11, 1878, and gave notes for the composition payments, dated that day, and payable in three, six, and nine months. The claimant refused to receive the notes offered him until September 25, 1878, when, one note having matured, he accepted cash for that note and the other two notes. On September 9, 1878, he proved his claim for the whole amount of the original notes in this proceeding. On application to reduce proof, *held*, that the proof was correct; that the claimant, at the time of proof, had not received, nor become entitled to receive, anything in part payment of the debt from the maker's estate which he was required to credit on the notes.

In bankruptcy.

D. J. H. Wilcox, for creditor.

Jos. Dunne, for trustee.

CHOATE, District Judge. This is a motion to reduce a proof of debt. The creditors held notes made by the firm of Greenbaum & Haas, endorsed by the bankrupts. The makers of the notes were adjudged bankrupts in May, 1878, and in June, 1878, they effected a composition with their creditors, the composition payments to be in three, six, and nine months, and for which composition notes were given for those periods respectively, dated June 11, 1878. The creditor was offered the composition notes to which he was entitled, but refused to receive them until the 25th of September, 1878, when, one of them having matured, he accepted cash for that note and the other two notes. Meanwhile, on the 9th of September, the endorsers having been adjudicated bankrupts, the creditor proved against their estates for the whole amount of the original notes. The trustee of the bankrupts now claims that, instead of proving for the whole amount of the original notes, the holder is entitled to prove only for the balance after deducting the amount of the composition.

The general rule that the holder of negotiable paper is entitled to prove both against maker and endorser for the amount of the notes, and receive dividends from both estates up to the full amount of the debt, is well established. In re Souther [Case No. 13,184]; In re Baxter [Id. 1,120]. If, however, before proof is made against the endorser, a dividend is received by or has become payable to the creditor on the note from the estate of the maker, he can prove only for the balance. If he has received payment of a dividend, the debt against the endorser is to that extent reduced. If a dividend has become payable, but he has neglected to collect or refused to receive it, although in some sense it may be true that the debt has not to that extent been in fact paid, yet he is compelled to credit the amount as if paid, because it is his own fault that he has not received it, and it is held by the assignee for him on demand, and it would be inequitable and unjust to permit him, by refusing or neglecting to take it, to obtain a larger share of the estate of the endorser than he would be entitled to if he had taken it. Nothing, however, short of payment or the present right to receive a dividend seems to operate to reduce the creditor's right to prove against the endorser's estate, and for the very obvious reason that nothing short of this reduces the debt of the endorser then owing to the holder. In the present case, at the time proof was made against the endorser no dividend had been paid or become payable to the creditor out of the estate of the maker. The first composition note was not yet due. The composition notes are but evidences of the agreement to pay the stipulated composition. By the very terms of the act, compositions must be paid "in money." If, before proof of debt against the endorser, one of them is paid, it would seem to operate as part payment of the debt as between the holder and the endorser; but until it is paid, or becomes due, the bankrupt at the time of its maturity being ready and able to pay it, it can at most be regarded, as between the holder and the endorser, merely as collateral security, given to the holder by the maker, which cannot affect his rights against the endorser. It is not true, as claimed by the trustee, that the mere giving of composition notes in itself operates as an extinguishment of the original debt, so that they are to be treated as a payment presently made as between the holder and the endorser.

I think in this case the creditor had not received nor become entitled to receive anything in part payment of the debt of the estate of the maker at the time of his proof against the estate of the endorsers, which he was required to credit on the notes. Motion denied.

[This case subsequently came before the court upon certain questions propounded by the register concerning the examination of the trustee by the creditors. 2 Fed. 851.]

Case No. 6,457.

In re HICKS.

[See 2 Fed. 851.]

HICKS (ANTONE v.). See Case No. 493.

HICKS (BUSSEY v.). See Case No. 2,230.

Case No. 6,458.

HICKS v. BUTRICK.

[3 Dill. 413.] [1]

Circuit Court, D. Kansas. 1875.

WYANDOT TREATY — LANDS PATENTED TO HEADS OF FAMILIES—NATURE OF TITLE GRANTED.

By terms of the treaty of January 31, 1855 (10 Stat. 1159), between the United States and

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

the Wyandot tribe of Indians, viewed in the light of the practical construction which it has received and of the patents to lands issued thereunder to the competent heads of families: *Held*, that such patents conveyed to the head of the family the land in fee and not in trust for the wife and other members of his family; approving Summers v. Spybuck, 1 Kan. 394.

[Cited in Elk v. Wilkins, 112 U. S. 100, 5 Sup. Ct. 44; Wau-pe-man-qua v. Aldrich, 28 Fed. 498.]

The Wyandot Indians, formerly numerous and powerful, while the French and English were contending for the domination of the continent, emigrated from their homes in Canada, crossed the Detroit river into Michigan, fought their way against all opposing forces along the southern shore of Lake Erie, and finally became permanently located under the protection of the United States in Northern Ohio. On January 21, 1785, the United States, by treaty of that date, conceded to the Delawares and Wyandots a large tract of territory, embracing millions of acres, in Northern Ohio. Of these lands, on the 17th of March, 1842, there remained to the Wyandots, in the county of Crawford, 109,144 acres, which, by treaty of that date, were ceded to the United States. In the mean time (near 60 years), the Wyandots made rapid progress in civilization, but had decreased in numbers and wealth. The title of the Wyandot Indians to the lands in question was derived as follows: By treaty of September 24, 1829 (7 Stat. 327), it is provided that the country selected in the fork of the Kansas and Missouri rivers (in which are the lands in question) "shall be conveyed and forever secured by the United States to the said Delaware Nation as their permanent residence." By article 2 of the compact between the Delaware and Wyandot Nations, December 14th, 1843, the Delawares did "cede, grant and quit claim to the Wyandot Nation thirty-six sections of land," in which thirty-six sections are the lands in controversy. This contract was confirmed by act of congress, approved July 25, 1848 (9 Stat. 336), with the proviso that the Wyandot Nation shall take no better right or interest in the lands than was then vested in the Delawares. The Wyandot Nation, by this act of congress, had secured to it the right to possess, occupy and reside upon these thirty-six sections of land. Within seven years was concluded the treaty of January 31, 1855 (10 Stat. 1159), under which the present controversy arises, which requires a construction of some of its provisions. John Hicks was a member of the Wyandot tribe in January 31, 1855, and had a wife and five children, of whom the complainant [Matilda Hicks] is one, and who was then about eleven years of age. In the allotment of lands under the treaty of 1855 John Hicks and family were entitled to 257 acres, of which the complainant claims by the present bill to be entitled to an undivided one-seventh part. The case was submitted upon bill and answer.

It appears by the pleadings, that John Hicks, the competent head of a family, under the treaty between the United States and the Wyandot Nation, of the 31st of January, 1855, received, on the 1st day of June, 1859, a patent to 257 acres of lands assigned to him and for his family under said treaty, including the lands in suit, reciting that said land had been allotted to John Hicks, the head of the family, naming his wife and five children, and conveying the same "unto the said John Hicks, as the head of the family aforesaid, and to his heirs and assigns forever, as an absolute and unconditional grant, in fee simple, to have and to hold the said tract or parcel of land, with the appurtenances, unto the said John Hicks, as the head of the family aforesaid, and to his heirs and assigns forever." Through divers mesne conveyances, the defendant [Hiram Butrick] has acquired the title of John Hicks to the lands in question. The commissioner of Indian affairs had directed the commissioners under the treaty to assign the land to the heads of families, and all the lands of families with a competent head were conveyed to the heads in the same manner as those conveyed to John Hicks. The Wyandot Nation, knowing of such construction, never dissented therefrom. The supreme court of the state of Kansas, in the month of September, 1863, gave the same construction to the treaty (see 1 Kan. 394), and the defendant purchased on the 20th day of April, 1865, for a full consideration, paid without notice of any adverse claim, relying on such construction and believing he was getting a good title, made improvements, and has ever since resided thereon. On the 13th day of January, 1864, John Hicks and his wife conveyed said land thus assigned and patented to John Hicks as the head of a family to a person under whom the defendant claims. The theory of this bill is that John Hicks, by the patent, acquired the title to the land in trust as to one undivided seventh part for the complainant, one of his children, and that she is entitled to have this trust enforced against the grantee of her father. The prayer is that the complainant's right be declared and established, and that partition be made.

J. P. Usher and L. C. Slavens, for complainant.

Cobb & Shannon, for defendant.

DILLON, Circuit Judge. The patent issued by the United States recites the treaty of January 31, 1855, that John Hicks was a member of the competent class, that the 257 acres of land were allotted, under the treaty, "to John Hicks, the head of a family consisting of (here naming his wife and five children, of whom the complainant is one)," and concluding as follows: "Now, know ye:

That, the United States of America * * by these presents do give and grant the tracts of land above described unto the said John Hicks as the head of the family as aforesaid—to have and to hold the said tracts of land unto the said John Hicks, as the head of the family as aforesaid, and to his heirs and assigns forever."

In executing the treaty of 1855, the United States construed it as dividing the competent Indians into two classes, to-wit: 1st, individuals or persons without families. 2d, heads of families, the names of the members of each separate family being arranged together. The test of competency in the head of the family was, sufficient intelligence and prudence, on the part of the head, to control and manage the affairs and interest of the family. Article 3. By the treaty lands were to be assigned and distributed "among all the individuals and members of the Wyandot tribe, so that those (lands) assigned to or for each shall, as nearly as possible, be equal in quantity or value, irrespective of improvements thereon; and the division and assignment of lands shall be so made as to include the houses, and, as far as practicable, the other improvements of each person or family * * and include those for each separate family all together." The commissioners are required to make a plat and schedule "showing the lands assigned to each family or individual."

Taking all the provisions of the treaty together, it quite satisfactorily appears to my mind that it contemplates that the competent heads of families shall take the lands by patent directly from the United States, and that the commissioner of Indian affairs and the land department properly construed the treaty, in investing John Hicks as the head of the family with the legal title to the land. It can hardly be supposed that the father of the family in his life time had no more interest in the land and the improvements than his wife or any one of his children, however young; or, as applied to the present case, that John Hicks, the father, who made the improvements, had only an undivided one-seventh part of the property.

Considering the known authority and power of the head of the family according to the laws, usages and customs of the Nation, and the injustice of such a division, putting an infant child upon an equal footing with the father, I am of opinion that the theory upon which this bill is exhibited is unsound. Certain it is that the construction of the treaty was against the view maintained by the complainant; that this construction was acquiesced in both by the government and the Wyandot Nation; that in 1863 the precise question here made was decided by the supreme court of Kansas (Summers v. Spybuck, 1 Kan. 394), against the principle on which the bill in this case is founded, and that this view has since that time been accepted and acted upon by purchasers of these lands as sound and unquestioned law.

The practical construction of the treaty and the co-incident judicial construction of it by the supreme court of Kansas, find much support in Wilson v. Wall, 6 Wall. [73 U. S.] 83. And see 9 Stat. 203, as to payments to heads of Indian families. At all events my judgment is that the practical construction of the treaty, so long acquiesced in, and on the strength of which so much money has been invested in good faith, should not be overturned in favor of a new construction, which to say the least is attended with grave doubts and would result in unsettling so many titles. Bill dismissed.

See Gray v. Coffman [Case No. 5,714]; Mungosah v. Steinbrook [Id. 9,924.]

Case No. 6,459.

HICKS v. FISH.

[4 Mason, 310.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

PUBLIC HIGHWAY—LIMITS AND DIRECTION—SURVEY—PRESUMPTION FROM PRESCRIPTION.

1. Where a committee of proprietors were authorized to lay out a highway; and they laid it out by a proper description to a certain point, and directed that it should run from thence "as it may be found the most convenient way" to another point, the highway is not legally laid out beyond the first point, for want of certainty.

2. When a highway is laid out, it must have a certainty of limits and direction.

[Cited in Cleveland & T. R. Co. v. Prentice, 13 Ohio St. 378.]

3. But if a highway has been used in a particular direction for a long period, as from forty to sixty years, that affords a presumption that it was legally so laid out, although the evidence may now be lost.

[Cited in Greeley v. Quimby, 22 N. H. 338.]

Trespass quaere clausum fregit [by Weston Hicks against Richard Fish]. Plea, that the locus in quo was a highway in Tiverton. Replication, traversing the fact of its being a highway and issue thereon. At the trial it appeared in evidence, that the proprietors of Tiverton, on the 11th of April, 1781, ordered lots of land to be laid out into convenient ways, &c. In July, 1794, the proprietors appointed a committee to lay out ways, and make partition of lots, ways to be reserved. The committee so appointed afterwards laid out certain ways, and made partition of lots. In the record of the report of their doings, there was the following way described. "Beginning on said eight rod highway, on the south side of lot No. 28, which way is to go the same point of compass with the lots, until it comes even with the south end of the Great Pine Swamp, and from thence as it may be found the most convenient way to the highway at the north end of the pond, commonly called the Little Pond; and the afore-

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

said twenty-eight upland lot is to go equal in breadth, to extend eastward unto the aforesaid Little Pond." The locus in quo was between the Great Pine Swamp and Little Pond. It farther was in evidence, that for a great length of time, from 40 to 60 years, there had been an old travelled road, leading from the Swamp to Little Pond over the locus in quo, and though it being woodland, in some parts new paths were made at some points, yet the road in its old direction had always been used for that period.

Upon this evidence, Bridgham & Hazard, for defendant contended, that defendant was entitled to a verdict, first, because the report of the committee contained a sufficient laying out of the whole road to Little Pond; and secondly and mainly, that at all events the use of the road for from 40 to 60 years was decisive of its legal existence.

Peirce & Searle, for plaintiff, e contra.

STORY, Circuit Justice (summing up to the jury). The court are clear that the highway was not originally laid out by the committee beyond the Great Pine Swamp. Up to that place, it had sufficient certainty of description and location. Beyond that the road was to be in the most convenient way to the highway at the north end of Little Pond. Now a highway cannot be legally created by such a description as this. It must have some definite location and boundaries. It is not sufficient to say, that it shall be in the most convenient direction; that direction must be actually fixed, before it has an existence as a highway. But the evidence of so long a use of the way as a highway, proved by witnesses from forty to sixty years back, is very strong presumptive proof, that this convenient way was afterwards actually laid out and adopted by the proprietors, though the record cannot now be found. Such a long use is, unless rebutted by other evidence, conclusive evidence of a dedication of the way to the public. It appears to us, therefore, if the jury believe the evidence, it warrants a verdict for the defendant.

Verdict for the defendant.

Case No. 6,460.

HICKS v. FITZSIMMONS.

[1 Wash. C. C. 279.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

INSURANCE—PERILS INSURED AGAINST—EMBEZZLEMENT—COMPETENCY OF WITNESS.

1. Action to recover the amount of three bags of Spanish dollars, which had been taken from the vessel on the voyage, during which she was boarded by the crew of a privateer.—The plaintiff must prove the loss to have occurred, by some one of the perils insured against; but, a loss by embezzlement of the crew, is not included in the policy.

2. The nature of the interest, which excludes the examination of a person, as a witness; and, an examination of the law, in reference to the interest, which excludes a witness.

[See note at end of case.]

This was an action on the case against the defendant, president of the Delaware Insurance Company, on a policy, dated the 6th of December, 1803, on 5000 dollars, in specie, at and from New-York, to the city of Santo Domingo; with liberty to proceed to any other port, Cape François excepted, in the island, and back to New-York. The policy was in the usual form. The plaintiff was owner of the vessel and cargo; the captain was the consignee. The bill of lading was for 17 bags, containing in all 5000 silver dollars. To prove the loss, the plaintiff offered the captain as a witness. He was objected to by Mr. Condy, for the defendant; who stated, that the captain was interested to fix the loss on the underwriter, so as to avoid the personal responsibility, which the bill of lading attached to him. He cited Peake, Ev. 113; 4 Term R. 589; Ld. Raym. 1007; Abb. Shipp. (Am. Ed.) 105.

Mr. Hallowell relied on the case of Ruan v. Gardner [Case No. 12,100], in this court. The objection was overruled.[2]

The captain stated, that he, at the request of the plaintiff, put two of the bags, containing six hundred dollars, in his chest, in the cabin, and the other bags in the hold of the vessel, under the ballast; that he was brought to, near St. Domingo, by a French privateer, and ordered, with his papers, on board; that, whilst he was there, some of the privateersmen went on board his ship, returned two or three times in the boat, to the privateer, with articles from the vessel; after which, he was permitted to return to his vessel, and proceed on his voyage. On his return, he found the two bags of dollars taken from his chest. St. Domingo being blockaded, he went to Jamaica; staid two or three days; and, while there, on examination, he found one of the 15 bags in the hold gone. The evidence was of such a nature, as to leave great room to suspect, that the third bag was embezzled by the crew; but, nothing positive appeared to show whether it had been taken by the crew, or by the French.

WASHINGTON, Circuit Justice, charged the jury that it was necessary for the plaintiff to prove his loss to have arisen from some of the perils mentioned in the policy, and in the way stated in the declaration. That, as to the third bag of money, it was for the jury to say, by what means it was taken. If by the French, the plaintiff was

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

[2] [See note at end of case.]

entitled to recover the amount, as well as of the other two. But, if they thought it had been taken by the crew, the plaintiff could not recover for it in this action; since the loss, stated in the declaration, was attributed to French spoliation, and not to barratry.

The jury found the amount of the two bags only, with interest from the demand, or so many days after, as the policy mentions.

NOTE. The general rule is, that the objection to a witness, on the ground of interest, goes to his credit, and not to his competency, unless he be directly interested; that is, may be immediately benefited or injured, by the event of the suit; or, unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him, in another action, in which he may be a party. Any smaller degree of interest, as that he may possibly be liable to an action, in a certain event; or, that the verdict may influence the jury in his own case, being similar; does not affect his competency. The admission of a person, immediately interested in the event of the cause, nay, party to it, from necessity; as the person robbed, in an action against the hundred; the defendant's wife; oath made on an indictment for robbery, in an action against the husband for a malicious prosecution; are exceptions to the general rule. So, likewise, persons who become interested in the common course of business, and who alone can know the fact; as a servant, who, in the way of business, delivers out goods, though the evidence, whereby he charges the defendant, exonerates himself from his liability to his master. Peake, Ev. 93–101. So in the cases of Martin v. Horrell, 1 Strange, 647, and Salk. 280; depend on the same principle. If not in the usual course of business, he must be released. Cowp. 199. So the objection, on account of interest, may be taken out of the general rule, by a counter interest in him; as, where his interest, in the event of the cause supported by his evidence, is counteracted by an equal or greater interest, that it should be decided otherwise. Peake, Ev. 102. So, if the witness stands indifferent, in point of interest, between the parties; being liable to pay to one or the other; as, if in a suit between A and B, for the recovery of money, paid by A to C, for the use of B, C may be a witness, to prove he received it as agent for B. So the acceptor of a bill of exchange, in an action against the drawer, to prove that he had no effects. 7 Term R. 480, 481, note. Peake, Ev. 102. But, in an action against the master, for the negligence of the servant, the servant is not a witness for his master, unless he is released. For, though he is equally liable to the master, in case of a recovery against him, and to the injured person, if he fail; still, as the master in a former case, may, in the action against the servant, use the verdict to prove the quantum of the damages, though not the facts; this is an interest which renders him incompetent. 2 Ld. Raym. 1411. 4 Term R. 589. Green v. New River Co. [4 Term R. 589]. In an action on a policy on goods, the master and owner was held incompetent, to prove the ship seaworthy, without a release by plaintiff; because, though this verdict could not be read in evidence, in any action, by or against the owner; yet, the witness, by his testimony, seems to exonerate himself from the action of the owner of the goods, for the want of seaworthiness of the vessel. Peake, 84. So, if the loss stated, be barratry of the master, he cannot be a witness for the defendant, to prove the deviation made with consent of the owners, unless released by defendant; for, if plaintiff succeeds on the barratry of the master, he is answerable to the underwriter. 1 Esp. 339. For, if the underwriters suffer by the fault of the master, they may maintain an action ex delicto, against the person who subjected them to it.

The principle of these cases, seems to militate very strongly against the decision in Ruan v. Gardner [supra], and the present. In the case of actions against the master, for injury suffered by neglect of the servant, the incompetency of the servant to give evidence for the master, without a release, must proceed on the ground, that the success of the master, exonerates the servant from his action; and the verdict, besides, would be evidence of the quantum of injury the master had sustained. It is true, the servant is liable to the action of the same plaintiff; but, he has an interest to get rid of one action, particularly when the verdict may be read against him. This is not like the case of Ilderton v. Atkinson, 7 Term R. 480, or Evans v. Williams, Id. 481, note, or Staples v. Okines, 1 Esp. 332: because, in all those cases, the witness's liability to one of the parties, was not disputed; and, it was of no consequence to him, to which he paid, or which of the parties succeeded. In the cases of Rotheroe v. Elton, Peake, 117, and Bird v. Thompson, 1 Esp. 339, the liability of the master was disputed. His evidence was to exonerate himself from the charge of barratry, and having an incompetent vessel; and, consequently, from the claim of the owner of the goods in one case, if he should fail on account of the unworthiness of the vessel, and of the underwriter in the other, for the barratry, in case the underwriter should be made liable. So in the case in the text. The master was liable, by his bill of lading, to the owner of the 5000 dollars; but, exonerated himself entirely, by proving a loss by capture. It is true, he might be sued by the underwriter, if he was guilty of embezzlement; but not under equal circumstances with the other case; for, I presume, the underwriter would be bound to prove the barratry: whereas, the owner might rely on the bill of lading; and put it upon the master to prove his excuse. Besides, he would be also liable in the cases before mentioned. I doubt the solidity of the reason given by Judge Peters; because, if the plaintiff had misconceived his action by stating a loss by capture, I do not see that this would preclude him from suing the master, for a loss by a different cause.

HICKS (FLOOD v.). See Case No. 4,877.

Case No. 6,461.

HICKS v. MOLLER.

[4 Ban. & A. 434;[1] 16 O. G. 805.]

Circuit Court, D. Connecticut. Aug. 13, 1879.

PATENT—INFRINGEMENT—"BOTTLE-STOPPER."

Upon the construction given by the court to letters patent No. 48,300 granted to E. D. Moyer, on June 20th, 1865, for an improved bottle-stopper, the defendants *held* not to have infringed.

[Bill by William H. Hicks against Constant A. Möller for infringement of a patent.]

George Gifford and E. L. Sherman, for complainant.

A. v. Briesen and Thomas H. Dodge, for defendant.

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

SHIPMAN, District Judge. This is a bill in equity to restrain the alleged infringement of letters patent [No. 48,300] which were granted to E. D. Moyer on June 20th, 1865, for an improved bottle-stopper. The plaintiff is the owner of the patent.

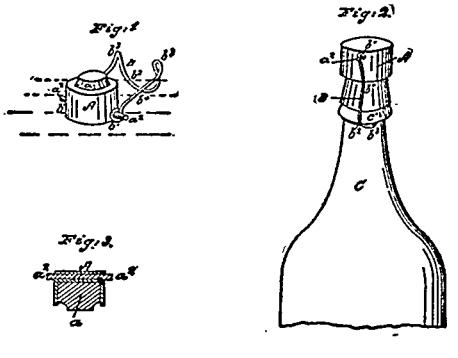
The object of the invention was to provide a durable and cheap substitute for the ordinary bark corks used for stopping beer and mineral-water bottles. The patentee says in his specification: "The nature of my invention consists in providing a hollow metallic cap, with an elastic water-proof filling, and attaching to its outer side a swinging frame of stiff wire so bent and fitted that when the elastic end of the cap is placed over the open mouth of the bottle and pressed firmly down thereon by hand, the lower end of the said swinging frame can be readily sprung under the lip of the bottle by one's finger, so that it will clasp it itself to the neck of the bottle, remain in that position without other fastening, and thus hold the cap firmly and tightly down on the mouth of the bottle against the pressure of the contained fermenting or expansive nature of beer, mineral water, or other similarly expansive beverage usually put up in bottles for sale, and also allow the quick removal of the said stopper when required, without breaking, deranging, or otherwise injuring any of its parts for subsequent use in like manner."

I deem it important to describe only the construction of the swinging frame. The manner of its construction will be better understood from the following description by the plaintiff's expert than from the language of the specification: "Through the upper portion of the metallic cap-piece, and upon a line which is the diameter of the cylinder, a hole is bored from one side to the other of the cap-piece, and a wire, marked a^2, is passed through the hole and made long enough to project on either side of the vertical outside walls of the cylinder, and in a horizontal direction when the cap is on the bottle, far enough to furnish bearings for a swinging frame to be pivoted to, and this wire, of course, stands vertically over the centre of the bottle mouth, and at right angles to the vertical axis of the cap-piece and rubber filling. The swinging frame, which is thus hinged to the ends of the projecting wire, a^2, is furnished with loops marked b^1, one on each side of the cap-piece, and the frame thus swings around the wire, a^2, as a centre, and around a line which is the diameter of the cap-piece. The swinging frame is made from one piece of wire, * * * and is called the swinging spring frame, B. It has two legs, b^4, which extend from the eyes b^1, nearly parallel to each other, to a circular bend marked b^2 in the drawing, making also another bend or loop where the said legs join the curve, b^2 * * *. The curve, b^2, is made somewhat smaller in diameter than the diameter of the bottle under the projection, c^1, and the curve extends more than a half-circle and less than two-thirds of a circle on the drawing when the whole apparatus is placed on a bottle. The curved portion upon both sides of the bottle just under the bends, b^3, hug the bottle and clasp it, and assist in keeping the frame in place. The operation of the apparatus is as follows: The rubber filling, a^1, is introduced into the bottle mouth, pressure is applied to the top of the cap-piece, and the rubber is condensed sufficiently between the cap-piece and the rim, c^1, to allow the swinging spring-frame to be thrown under the rim, c^1. When this has been done the spring-frame clasps the bottle, the rim, c^1; prevents the spring-frame from rising, and the cap is held down on the bottle mouth, and the bottle mouth is made tight against the escape of the contents of the bottle."

The claim of the patent is as follows: "The bottle-stopper, described and shown, the same consisting of the cap, A, the elastic water-proof filling, a^1, and the swinging spring frame, B, the whole being constructed, arranged, and combined together so as to operate, when applied to the mouth and neck of a bottle, substantially as described, for the purposes specified." The main question in the case is that of infringement. The defendant's bottle-stoppers are made under the reissued patent of Charles De Quillfeldt, assignor to Karl Hutter, dated June 5th, 1877.

The defendant's device consists of an elastic flexible disk stopper provided with a stem which is inserted in a flanged metallic thimble. The opening and closing mechanism consists of a V-shaped yoke, made of a stiff piece of wire, the central portion of which passes loosely through the stem of the stopper. The ends of this yoke are bent inwardly, and are pivotally connected with a lever, as hereinafter described. This lever is also V-shaped, and made of stiff wire, and "has its ends pivotally connected with a wire bound around the neck of the bottle and has each of its legs coiled, with slightly less than a single turn, for the purpose of forming two eyes for the reception of inwardly bent ends" of the yoke. When the bottle is to be closed, the stopper is placed by hand upon the

[Drawings of patent No. 48,300, published from the records of the United States patent office.]



mouth of the bottle, and the lever is swung downward and inward or upon the neck of the bottle.

The marked differences between the two devices are these: In the Moyer device, the cap is slightly secured to the mouth of the bottle by the spring-clasp of the lower part of the swinging frame under the lip of the bottle. In the De Quillfeldt device the stopper is pulled into the mouth of the bottle, and is retained there by the strong, rigid, constant pulling force of the lever. The Moyer stopper is kept in place by a spring-clasp. There is no springing action or clasp in the De Quillfeldt contrivance, but there is a steady and positive pull downward upon the yoke, by the lever, as it is turned and locked. There is no permanent connection in the Moyer device between the bottle and the stopper. The stopper is held upon the bottle only when the frame is sprung under the neck. In the De Quillfeldt device, the stopper is always connected with the bottle by the linked yoke and lever by means of three pivotal connections; the stopper is pivoted to the yoke, the yoke is pivoted to the lever, and the lever is pivoted to the neck-band which encircles the neck of the bottle. I am of opinion that the two devices are substantially different in construction and mode of operation. Let the bill be dismissed.

HICKS (NEW YORK DRY DOCK v.). See Case No. 10,204.

HICKS (POTTER v.). See Case No. 11,328.

HICKS (QUICKSILVER MINING CO. v.). See Case No. 11,508.

HICKS (RICHARDSON v.). See Case No. 11,783.

Case No. 6,462.

HICKS v. SHAVER.

[3 App. Com'r Pat. 439.]

Circuit Court, District of Columbia. March 12, 1861.

PATENTS—INTERFERENCE—DECISION—EFFECT OF.

[1. The failure of the patent office to declare an interference when a patentee is seeking a reissue, pending an application by another, is not a decision that the claims are for different inventions.]

[2. A perfected invention, if diligently pursued, will date back to the time of the first conception, as against a later conception of another, first perfected.]

[Appeal by James M. Hicks from a decision of the commissioner of patents in an interference case, in relation to curved back erasers and burnishers, awarding priority of invention to A. G. Shaver.]

DUNLOP, Chief Judge. On this appeal, two questions arise, and have been discussed: 1st, whether the inventions claimed, are the same; and 2nd, if they be the same, who was the first inventor? The claim of Shaver, in his original patent of March 8, 1859, was in these words: "The curved blade eraser, with the circular edge, pencil sharpener, &c." He did not claim the convex back; but in his specification or description, which precedes his claim, he uses these words: "The convex or bottom part of the blade is smoothed off, a little rounding, to be used as a polisher, or rubber down of the inequalities of the paper, after erasing, &c." In the reissued patent of August 30, 1859, his claim is: 1st. For the curved blade eraser, as above specified, forming on one side a convex surface, substantially as and for the purposes set forth. Hicks' claim in his application of July 19, 1860, is in these words: "The convex back eraser herein described, operating in the manner and substantially as set forth."

The claims of Shaver, in his reissue, and Hicks, in his application, appear to be identical, as to the convex back, and the counsel for Hicks admits them to be literally so, but insists, on various grounds, that there is a real and patentable difference. 1st. He alleges that the office has so decided, in not declaring an interference in August, 1859, when Shaver was seeking his reissue. Hicks then having substantially as now the same application then pending. There can be no doubt that Shaver, if the original inventor, was entitled to his reissue in August, 1859. He had a right to enlarge the original claim, because his original specification set forth the convexed back, and if he omitted it in his original, by inadvertence, and without fraud, the office, by the record, had the means, and were bound to correct the error by reissue. It is true the office might in August, 1859, on the reissue, have declared the interference with Hicks, and then tried the merits of priority with him. But Hicks is not injured in having the trial now, on the present application, more especially, if he is not the original first inventor, as between himself, and Shaver, and if Shaver, as is supposed and contended, is antedated by any other prior inventor, although Shaver's reissue patent cannot now be disturbed either by the office, or me, on appeal. The courts of justice are open to Mr. Hicks, or any other citizen, in a suit by Shaver, for infringement, to contest his title to his patent, and show it to be invalid. At all events, I see nothing in the action, or rather non-action, of the office in August, 1859, to estop them now, or to prevent their declaring the present interference.

It is next argued that the greater convexity of Hicks' eraser, distinguishes it, in a patentable sense, from Shaver's; that this greater convexity serves as a guide to the hand, in using it, and makes it operate as a plane, to plane off the surface of the paper, instead of scraping it. It seems to me these are very nice distinctions, too much so to be the foundation of a patent; the guidance of either Hicks' or Shaver's eraser, and the planing or scraping or cutting the paper, to which they

are applied, depends, after all, on the skill with which they are manipulated. One would seem as easily sharpened as the other, and as easily kept in order. The counsel of Hicks, in his argument, himself admits that "mere difference in the degree of convexity given to the back of the eraser would not be patentable, unless some new principle was brought into action, or some new and distinct result attained." I conclude, therefore, the inventions are substantially the same. This being so, who was the first inventor?

Hicks does not carry his invention back further than June 19 or 20, 1857. Theodore and Prince A. Snell certainly prove that Shaver had the "conception" of a convex back eraser as early as the spring of 1857, and ordered them to make such erasers for him, and W, X, and Y were made in April, 1857. These, it appears, were not made sufficiently convex, nor according to Shaver's directions. Miss Bull afterwards saw an eraser, in Shaver's possession, more convex in both directions, longitudinally and crosswise, than X or W, but like them in other respects. Now, if Shaver had the "conception" of the convex back eraser as early as April, 1857, and was using reasonable diligence to perfect it and reduce it to practice, even if he had failed to do so till Hicks, later, conceiving the same "idea," had first perfected the "idea" by a manufactured convex eraser, Shaver, in law, would still be the first inventor. His perfected eraser, if diligently pursued, would date back to the time of the first conception. On this subject I refer to my opinion in the case of Beverly Rubber Co. v. Wing [unreported], of August 30, 1860, and to the authorities cited, and to section fifteen of the patent act of July 4, 1836 [5 Stat. 123]. In point of fact, however, Shaver first perfected his invention by a completed convex eraser, as Miss Bull testifies, as early as June 5, 1857, two weeks earlier than Hicks on the 20th of the same month. On these grounds, and those so clearly set forth by the examiner and the commissioner, I overrule all the appellant's reasons of appeal, and affirm the judgment of the commissioner.

Case No. 6,463.

HIDDEN v. SLATER MUT. FIRE INS. CO.

[2 Cliff. 266.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1864.

FIRE INSURANCE — CHARACTER OF THE CONTRACT —INSURABLE INTEREST—LESSOR.

1. Policies of insurance against loss by fire are contracts of indemnity; and if the insured parts with his interest in the property before the loss, it invalidates the contract and releases the insurer.

2. Buildings held under a lease may be insured against loss by fire, but the policy, in such a case, becomes invalid, if the lessee, by mortgage and foreclosure, or otherwise, parts with his interest in the leasehold estate before the loss occurs.

3. The covenant in a lease of real property, to pay an amount in addition to a specified rent, equal to taxes and the cost of insurance for a certain sum, confers no authority upon the lessee to insure the buildings on the leased premises for the benefit of the lessor.

4. Such a covenant still leaves it optional with the lessor to insure or not as he may choose, and when and where he pleases; but if he neglects to insure, the lessee has nothing to pay on that account.

5. Viewed in any light, the case shows that the insured had parted with his interest before the loss, and therefore the plaintiff cannot maintain this action, as he cannot have any greater right than the insured.

Action of assumpsit on a policy of insurance. The case was submitted upon an agreed statement of facts. Suit was brought by the plaintiff [James C. Hidden], as executor and trustee under the will of William Hidden, deceased, to recover the amount of a certain policy of insurance which was issued by the corporation defendants to one Hervey M. Richards on the 30th of December, 1858, to continue for the term of one year, but it was agreed that the policy was renewed from time to time, and was in full force at the time of the fire. The plaintiff, as trustee and executor as aforesaid, on the 31st of December, 1853, leased to Hervey M. Richards, for the term of ten years, a certain parcel of land known as the "Union House Estate," containing about one and three quarters acres, with a dwelling-house and other buildings and improvements thereon, and reserving an annual rent of $400; the lessee paying in addition thereto "an amount of money equal to the aggregate sum of all national, state, town, district, road, school, or other taxes which may have been imposed upon said estate or upon its owners on account of ownership thereof, during the year preceding"; and also "an amount of money equal to the expense which may have been incurred in keeping said house insured against fire in the sum of $3,350, for the benefit of the lessor, subject to the provisions of the lease as hereinafter set forth." Payment of "the rent, taxes, and insurance" was to be made to the lessor at his residence at Attleboro', and in case of the destruction of the buildings by fire, the lessee, at his option, might surrender the lease, or might require the lessor to expend the proceeds arising from the policy of insurance, in erecting new buildings, or in case of partial loss, in the repairing of those injured. On the 27th of August, 1857, the lessee executed a mortgage of his leasehold interest to H. N. Dugget. The lessee's application for insurance was dated on the 16th of July, 1858, and the case showed that it was for a policy in the sum of $3,350. This was done without any notice to the defendants, of the prior mortgage. Pursuant to this application a policy

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

was issued on the 30th of December, 1858, to Hervey M. Richards, on his interest as lessee, in the sum of $3,000 on the frame hotel buildings known as the "Union House," and on the addition to the same, and $350 on the stable buildings attached to the addition. The memorandum in the policy of insurance was, "payable, in case of loss, to James C. Hidden, executor of the estate of the late William Hidden, and the lessor." The renewal certificate was duly issued on the 31st of December, 1859, but no notice was then given to the defendants of any change in the condition of the property. On the 17th of January, 1860, the renewal certificate was returned in a letter from the insured to the defendants, and they were informed that he had, some twelve months before, assigned his lease to H. N. Dugget. He also requested them, if the assignment would operate to invalidate the policy, to make out a new policy in Dugget's name. Instead of complying with the request, the defendants, on the 18th of January in the same year, through their secretary, returned the certificate, suggesting, however, that the better way would be that the insured should assign the policy to the lessee, and forward the same to the office of the company to be attested. No attention was paid to the suggestion, and nothing further was done upon the subject. The fire occurred on the 18th of May, 1860, and on the following day the insured sent a letter signed by H. N. Dugget, to the defendants, informing them that on the night previous the Union House property had been destroyed by fire, and was a total loss. On the 23d of May in the same year, the plaintiff presented the proof of loss to the defendants, but they objected to it, and subsequently a further statement was filed by the insured. About ten months before the fire, the insured went into insolvency under the laws of Massachusetts, where the insured property was situated, and Simeon Bowen and H. N. Dugget were appointed the assignees of his estate. The case further showed that H. N. Dugget, the mortgagee of the leasehold estate of the insured, ten months before the fire, in conformity with sections 6–8, c. 151, Rev. St. Mass., gave the notice therein required, of his intention to foreclose the mortgage for breach of the condition thereof. Accordingly the mortgagee took possession of the leasehold interest in the property, and thereafter the insured acted as his agent to collect rents, and that relation between them existed at the time of the fire.

A. Payne, F. F. Colwell, and J. P. Knowles, for complainant.

B. F. Thurston and J. M. Ripley, for respondents.

CLIFFORD, Circuit Justice. The insurance was in the name of Hervey M. Richards, lessee, and the terms of the policy show beyond controversy that it was an insurance upon his leasehold estate. The terms of the lease neither required nor authorized him to effect insurance in the name, or even for the benefit of his lessor. The covenant was to pay an amount of money equal to the expense which may have been incurred in keeping said house insured against fire, in the sum therein specified, during the year preceding, but if no amount was expended by his lessor for that purpose, within the preceding year, then he had nothing to pay on that account. The lessor reserved the right to effect the insurance, and of course had the right to select the company and make the contract. The lessee might insure his own leasehold interest, but he could not insure anything more, unless he had made improvements. Undoubtedly he had made improvements, but the case shows that those improvements were insured in another office, so that he had no interest that was the subject of insurance, except that which he derived under his lease, and having parted with that before the loss occurred, he cannot maintain his action. Authorities are not necessary at this day to show that a policy of insurance is a contract of indemnity, and that if the insured parts with his interest in the property before the loss, and no new contract is made, it avoids the policy. Hoxsie v. Providence Mut. Fire Ins. Co., 6 R. I. 517; Lynch v. Dalzell, 3 Brown, Parl. Cas. 497; Sadlers' Co. v. Badcock, 2 Atk. 554: Ang. Ins. § 55; Wilson v. Hill, 3 Metc. (Mass.) 66; Carpenter v. Providence Mut. Ins. Co., 16 Pet. [41 U. S.] 495.

Had the lessee covenanted to keep the premises insured during the term, and if the policy had been executed upon that subject-matter, it may be that the rule would be otherwise, but it is unnecessary to express any decided opinion upon that point, as no such question is presented by the facts in the case. According to the agreement of the parties, the verdict must be set aside, and judgment must be entered for the defendants.

Case No. 6,464.

HIDELL et al. v. GIRARD LIFE INSURANCE, ANNUITY & TRUST CO.

[26 Pittsb. Leg. J. 199; 36 Leg. Int. 67; 7 Reporter, 391;[1] 14 Phila. 401; 6 Wkly. Notes Cas. 435.]

Circuit Court, E. D. Pennsylvania. Feb. 7, 1879.

DEED OF SETTLEMENT — TRUST — POWER OF REVOCATION — EXECUTION OF.

1. A., a single woman, assigned her property in trust for herself for life, with remainders, reserving a power to revoke or declare new trusts. Subsequently, immediately prior to her marriage, she "renewed the trust for five years," and immediately afterwards formally revoked it. *Held*, that the renewal for five years was, as such, ineffective, as the trust

[1] [7 Reporter, 391, contains only a partial report.]

required no renewal to maintain it during the grantor's lifetime; but that it operated as a revocation at the end of that period.

2. *Held* further, that as the power had been thereby completely exercised, the subsequent revocation was void, as being unauthorized, and had no effect.

3. Quaere, whether the instrument executing a power of revocation can contain a valid power to revoke the execution itself.

Hearing on bill and answer.

The bill, filed by W. H. Hidell and Dora R. Hidell his wife, in right of said Dora, against the Girard Life Insurance, Annuity and Trust Company, alleged that Mrs. Hidell, prior to her marriage, on June 24, 1872, conveyed and assigned her property to the defendant in trust, to collect and pay over the rents, with other active duties, during her lifetime, with remainder to the uses to be declared in her will, and the usual remainders over; reserving in the said deed of trust a power "at any time after the first day of July, 1875, by any instrument in writing executed in the presence of two witnesses, to modify, change and alter said trusts, and to declare new and other trusts upon which said estate shall then be held, or, at her pleasure, entirely to revoke the same." On October 27th, 1876, prior to her marriage, she executed and delivered to the defendant the following instrument: "I hereby renew the trust created by the deed of June 24, 1872, recorded in Deed Book J. A. H. No. 269, page 441, for five years from this date. Witness my hand and seal this 27th day of October, 1876. Dora Robinson. Witnesses: Annie Smythe, L. C. Freeman." Subsequently to her marriage she, with her husband, executed and delivered a formal revocation of the trust deed of June 24th, 1872, but the defendant refused to reassign the property. The bill prayed for a declaration that the original deed of trust was revoked by the last-mentioned instrument, and that the defendant be ordered to reassign the property. The answer admitted the facts alleged, and set forth that on October 31, 1876, Mrs. Hidell, then a single woman, was married to the complainant, but averred that the legal effect of the instrument of the 27th of October, 1876, was to deprive the grantor of the power to revoke for five years from its date.

A. Sydney Biddle and C. D. Freeman, for complainants.

Mr. Ridgway, contra.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

McKENNAN, Circuit Judge. The deed of June 24, 1872, invested the defendant with the legal ownership of the property conveyed by it, during the life of Mrs. Hidell, the grantor, in trust that the defendant would receive and pay over to her the income of the trust fund, subject to her right, however, "at any time after the first day of July, 1875, by an instrument in writing, executed in the presence of two witnesses, to modify, change and alter said trusts, and to declare new and other trusts upon which said estate shall then be held, or, at her pleasure, entirely revoke the same," etc. The writing of October 27, 1876, was executed as required by the trust deed, and purports to "renew" the trusts thereby created for five years from that date. For this specific purpose it was plainly ineffective, because, by force of the deed creating it, the trust was of indefinite duration, and needed no renewal to continue it. But it is operative as a limitation of the duration of the trust to five years, and so came legitimately within the scope of the reserved power. It was an exercise of this power with that specific effect, and as that was, therefore, its apparent purpose, such must be taken to have been its real intent. Can Mrs. Hidell now revoke this trust, and demand a reconveyance of the trust estate? To this end she has invoked the intervention of this court. It has been already said, that the paper of October 27, 1876, is a proper exercise of the power reserved in the original deed. It is a modification of the trust, inasmuch as it changes the indefinite period of its continuance to five years. But it is more than this. It is an exercise of the power of revocation. By the clearest implication it establishes the trust for five years, limits its continuance to that period, and reserves no power to change or terminate it sooner. I think there can be no doubt that, by force of that paper, the trust will terminate at the expiration of that time. Hence it is a revocation of the trust to take effect at the end of five years, with a declaration that it shall continue during that period. And the designation of a day certain in the future, for the termination of the trust, is just as appropriate an exercise of the reserved power, as would be a revocation to become immediately operative, because an unlimited right to revoke necessarily includes a right to fix the time at which the act of revocation shall take effect. There is high authority for the argument that a single exercise of a power of appointment or revocation exhausts the power. But where a power of revocation is once fully exercised, what is there left in the possessor of it, upon which a subsequent and entirely inconsistent exercise of it can rest? Such is the virtual effect of Mrs. Hidell's execution of the writing of October 27, 1876, establishing the trust for five years from that date, and terminating it on the 27th of October, 1881, whereby it is revoked as of the latter date, without leaving any residue of the original power in her of intermediate revocation. The bill must, therefore, be dismissed with costs.

HIERN (BORDEN v.). See Case No. 1,655.

HIESKILL (SULLIVAN v.). See Case No. 13,594.

Case No. 6,465.

HIGBEE v. The NIPOTI ACCAME.

[36 Leg. Int. 294;[1] 14 Phila. 517.]

District Court, E. D. Pennsylvania. June 20, 1879.

COLLISION—SAILING VESSELS—DIRECTION OF WIND.

The bark Nipoti Accame sailing almost directly before the wind collided with the schooner Cordery, which was to leeward, within two points of "close hauled." The court *held* the case to fall within the last clause of the 17th sailing rule prescribed by section 4233, Rev. St., where the language employed is free from ambiguity: "If one of them has the wind aft, the vessel which is to windward shall keep out of the way of the one which is to leeward."

In admiralty.

Curtis Tilton and Henry Flanders, for libellant.

Morton P. Henry, for respondent.

BUTLER, District Judge. On the afternoon of March 3, 1878, the schooner Cordery, loaded with coal, left her anchorage in the Delaware breakwater, (where she had sought harbor a day or two before,) and started on her voyage to Providence, Rhode Island. Very soon the wind died out, and she was becalmed. To avoid drifting with the flood tide, then running up the bay, (near which she still was,) her head was kept to the current. With the ebb, which came at 8 o'clock, she drifted out, heading, as the captain says, east by south, and sometimes east by north; not having wind sufficient for steerage-way. Later in the night, probably between eleven and twelve o'clock, a breeze springing up, her sails were trimmed within a point or two of flat, and she was turned north-northeast. Continuing this course for half an hour or more, and reaching a point midway between the Delaware and New Jersey coasts, the bark Nipoti Accame was discovered, about two lengths off, bearing directly upon her. To avoid the danger of collision, then imminent, her wheel was ported, and the main sheet let run. The next moment, however, she was struck amidships on the port side, and an opening made four to five feet long, and five bends wide, extending to the water's edge. She was then immediately hauled "by the wind," heading north ½ east, in the hope of reaching Cape May beach. Efforts were made to relieve her by means of the pumps, and obstructions to the inward flow of the water; but they proved unavailing, and she sank, five miles off the coast. During the calm referred to, the bark Nipoti Accame had been anchored outside the Delaware Bay, near Cape May shoals, and had been underway, on a southeast by south course, not over ten to twenty minutes, when the collision occurred. In the moment of danger she starboarded her helm, hoping by this means to lessen the force of her blow.

Thus far the facts are not in controversy. To determine the fault which occasioned the accident, and the consequent responsibility for the loss which ensued, it is necessary to ascertain first, on which vessel the obligation rested to keep out of the other's way; and second, whether she had any proper excuse for the failure to discharge it. To accomplish the first, we must know, in addition to the facts stated, the direction of the wind at the time. The most serious contest in the case was over this important fact. The collision occurred between half past eleven and twelve o'clock, or near that time. Duke, who was on board the schooner, fixes it at twenty minutes to twelve, referring to circumstances which tend to corroborate his statement. Capt. Craviotto, of the bark, says, they got under way about half past eleven, and struck ten minutes later. The testimony of the crews of the two vessels, is in direct conflict respecting the wind, at this time. If there was no other in the case, the question would be difficult to solve; and, with the burden of proof resting on the libellant, the conclusion might be against him. While it is true that the witnesses from the schooner, speaking to this point, outnumber those from the bark; and that Fincatti, from the latter vessel, says the schooner "passed to windward," after the collision,—which cannot be true, if the wind was from the southwest, —and the master of the schooner says, "the wind was coming from the bay" at the time; still without more than the conflicting statements of the respective crews, the question would be involved in serious doubt. Fortunately for the case there is more—other important evidence, to be found in the testimony of disinterested witnesses, of a direct and positive character; as well as in the presumptions arising from established collateral facts bearing on the question.

The parties concur in the statement that the forepart of the night was calm, with occasional fitful puffs of wind, having no settled direction. At nine o'clock the signal service officer at Cape May registered it as south; and at eight minutes past eleven as southwest. This was probably half an hour before the collision. Unfortunately the parties have been unable to procure the subsequent observations or entries of this officer. From the information he has furnished it appears that the wind shifted westward with the slight increase which occurred in its velocity between nine o'clock and eight minutes past eleven. That the velocity continued to increase, and soon after the latter period, very rapidly—reaching twenty miles an hour by fifteen minutes to twelve—is shown by Sergeant Smith, and the record made by the anemometer at Cape May station. The journals at Cape Henlopen and

[1] [Reprinted from 36 Leg. Int. 294, by permission.]

Cape May Life Saving Stations state its direction at 12 o'clock as northwest. The journal of Cape Henlopen lighthouse shows a similar statement, and that of the breakwater lighthouse has it as north. While these entries are not so reliable as those made at the signal service stations, they are nevertheless (and especially by reason of their substantial agreement,) of great importance. Captain Clampit, a pilot, says that on this night he was in his boat between the breakwater and the Over Falls, at half past eleven; that from dark to that time the wind had been uncertain, and without strength; that a strong steady northwest breeze then set in, "coming up pretty fresh at once." Captain Townsend of the schooner Collins, says he was out twelve to fifteen miles east of Cape May, this night, and that when the wind arose it came from the northwest; and so continued throughout the night. While the statements of these two witnesses, Clampit and Townsend, may in some respects be inaccurate, the correctness of the material parts of their testimony, corroborated as it is, I cannot doubt. This direct evidence, furnished by the records of the lighthouses and life saving stations, and the testimony of Captains Clampit and Townsend, finds important corroboration in the presumptions arising from well established collateral facts in the case. During the calm the bark lay at anchor in about five fathoms of water—the tide running down. A large vessel and loaded, her head necessarily turned to the current—pointing northwest, or nearly so. In preparing to move from this position her foretop-sail was braced to starboard, her main top-sail to port, and her jibs were set. So we are informed by the captain. With her sails thus trimmed, as the captain and crew testify, she turned westward, and thus came about to the southeast. This fact forcibly indicates, if it does not prove, that the wind was not southwest. For with such a wind the vessel, so handled, was not likely to describe this movement, if indeed she could do so. She would probably, if not necessarily, have turned off eastward. Such would be the conclusion of a mind inexperienced in the navigation of ships. A reference to the answers of the assessors, accompanying this opinion, will show that these experienced and intelligent seamen express a similar judgment. Again, the schooner's proper course, with a southwest or western wind, was east northeast. With a northwest wind, such as the libellant's witnesses describe, it was northward, almost as nearly as practicable, to the New Jersey coast; which, when reached, would be followed eastward. In the unsteady wind at starting, she veered back and forth from east by south, to east northeast, endeavoring to pursue the latter direction. Soon after her sails were shifted, and her head turned north northeast. This change is not only consistent with the hypothesis that the wind shifted to the northwest, but cannot well be accounted for on any other. (Whether with such a wind her boom would shift, as was suggested, depends upon the extent to which they were over to port, and other circumstances tending to disturb or keep them in place.)

It would be unprofitable to pursue the subject further. Sufficient has been said, I hope, to justify the conclusion that the wind, at the time of collision, was northwest.

The course of the schooner, as before stated, was north northeast, and that of the bark southeast by south. Both, therefore, had "the wind free," the former by about two points, and the latter by about nine. The bark, however, had the "wind aft," and was, therefore, by the last clause of the 17th sailing rule—prescribed by section 4233 of the Revised Statutes—obliged to keep out of the schooner's way. I see no difficulty in construing the rule as respects the facts of this case, or indeed anything open to construction. The language employed is free from ambiguity—"if one of them has the wind aft, the vessel which is to windward shall keep out of the way of the one which is to leeward." Here the bark had the "wind aft," sailing almost directly before it, while the schooner was to leeward, within two points of "close hauled." The former could change her course with facility and without disadvantage, while the latter could not. By the spirit as well as by the terms of the rule, therefore, the obligation was on the bark to give way, and allow the other (as was her duty) to hold her course. As may be seen by reference to the answers of the assessors, this, too, is their understanding of the rule and the practice under it. Such being the obligation of the bark, has she any excuse for the failure to discharge it? The only one suggested is that the schooner was without proper lights. If this were true, it would be ample; she was not required to avoid a vessel which she could not see. But I do not think it is true. The burden of proof here is on the respondent, while, as I think, the clear weight of the evidence is against him. Witnesses on board the schooner testify to putting the lights up; others to seeing them up, and the lookout on board the bark to seeing one of them just before the collision. This latter witness did not see them earlier; and it is argued, therefore, that they were then first exhibited, or had gone out, or grown dim from want of care. This does not seem probable—much less probable, in view of all the testimony, than that the lookout was wanting in vigilance. In the labor and confusion of getting underway, it is not unlikely that he was interfered with, or his attention diverted, until the moment when he saw the light, then too late to avoid the catastrophe. The facts thus found dispose of the case. Whether the schooner maintained a vigilant outlook, and whether the bark had proper lights up—in view of the

direction of the wind, and the consequent relative obligations of the vessels—is unimportant. The schooner, by holding her course, with her lights up, discharged her whole duty, and the bark must answer for the consequences of failing to keep off. As is said by Mr. Justice Strong, in The Fannie, 11 Wall. [78 U. S.] 243, "It is not worth while to discuss the question whether the lookout on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper lookout did not contribute to the disaster. If the schooner held her course it was all the other vessel had a right to require, and whether she had a proper lookout or not, it was her duty to do precisely what she did." In view, however, of the possibility of further proceedings, I deem it proper to say that a careful examination of the evidence has satisfied me that the schooner maintained a sufficient lookout.

NOTE. Since the foregoing was written my attention has been called to the case of The Spring, 1 L. R. Adm. & Ecc. 99, in which the English sailing rule 12 (prescribed by St. 25 & 26 Vict.), in terms identical with our rule 17, as respects the parts there and here involved, was applied. The wind was S. S. E. The Spring was moving W. by S., and the Constantine N. N. E. Notwithstanding that the Spring was on the port tack, and the Constantine had not the wind directly "aft," (much less so than had the Nipoti Accame,) the court held her to be within the rule, and therefore responsible for failure to keep out of the Constantine's way. It is important to observe that in this case the Constantine had the wind almost, if not quite, on her starboard quarter.

Case No. 6,466.

HIGBIE v. HOPKINS.

[1 Wash. C. C. 230.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

BILLS AND NOTES—LOAN OF NOTE—DILIGENCE IN COLLECTION—ANSWER TO BILL—PROOF.

1. If A loan the note of a third person to B, B must use due diligence to recover the amount due by it; and if the debt is lost, by the insolvency of the maker, and by B's want of diligence, B must pay the amount of the note to A.

2. If the answer to a bill, contain a denial of the allegations, the plaintiff must support the statements in the bill, by testimony, and corroborating circumstances.

[Cited in Carpenter v. Providence Wash. Ins. Co., 4 How. (45 U. S.) 218.]

[Cited in Cleveland, P. & A. R. Co. v. City of Erie, 27 Pa. St. 386.]

On the 21st August, the defendant gave a receipt to plaintiff, for James Watson's note to Love, for 1350 dollars, endorsed by Love to plaintiff, and for Joseph Watson's note for 1075 dollars; which the defendant promised to be accountable for to the plaintiff, when requested. The defendant filed a bill on the equity side of this court, against the plaintiff; in which he charged, that these notes were merely put into his possession for collection; and if they could not be so collected, he was to place them in the Bank of Alexandria; that he did place them there; and that the plaintiff received the small note; but that the bank delivered out the other to Joseph Watson. He also claimed a sum of 280 dollars for a negro, (Joe,) sold by plaintiff to him, to which he had no title; and that defendant, Hopkins, was obliged to pay a judgment against him, for his value, to the above amount. The answer contained a positive denial of all these allegations; and a replication having been put in, the present defendant took some depositions, to prove the insolvency of James Watson and his endorser, at the time their note became due; also, to support the allegation about the negro. It appeared, pretty clear, from the evidence, and from some letters, that the notes were loaned to Hopkins. That Joseph Watson, as the agent of Hopkins, put into the Bank of Alexandria, the note of James Watson, and withdrew it the day before it became due. That in ten days after it became due, Hopkins, supposing it had been paid, gave Higbie an order for the amount, but when he applied at the bank, he was informed that Joseph Watson had withdrawn it. On the 3d December, one month after the date of the order, Hopkins offered James Watson's note to Higbie, which he refused. Some evidence was taken, which left it a matter of doubt, whether Watson and his endorser were able to pay or not, when their note became due.

WASHINGTON, Circuit Justice, informed the jury, that as to the note, it was clearly a loan to Hopkins, and he was bound to use reasonable diligence to receive the money. If the amount of the note had been lost, by his failing to use such diligence, he was liable to the plaintiff. The jury were to weigh the evidence, as to the solvency of the drawer and endorser, when the note became due, and before it was offered to Higbie. When Higbie received information from the bank, that Joseph Watson had withdrawn the note, it does not appear that any application was then made for it. An offer to return it was made in a month after, and refused. As to the value of the negro, the allegation in the bill, that he was sold by Higbie to Hopkins, is denied. The answer, then, must be considered as true, unless contradicted by one witness, and circumstances to give it a preponderance.

Verdict for plaintiff.

HIGGENS (POSTLEY v.). See Case No. 11,304.

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

HIGGIN (BADISCHE ANILIN & SODA FABRIK v.). See Case No. 722.

Case No. 6,467.

In re HIGGINS.

[8 Ben. 100.] [1]

District Court, S. D. New York. May, 1875.

POWER OF ATTORNEY—NOTARY PUBLIC.

Under general order in bankruptcy No. 34, adopted April 12th, 1875, a notary public is not authorized to take the acknowledgment of a creditor to a power of attorney to vote for assignee.

In this case the register certified that, at a first meeting of creditors held for the choice of assignee, eleven proofs of debt were filed, representing $3,952.05; that seven of them, representing claims amounting to $2,642.18, voted for George W. Van Siclen as assignee, the powers of attorney, under which two of these were represented, having been acknowledged before a notary public; that the other four creditors, representing claims amounting to $1,309.87, voted for John H. Platt as assignee; that the bankrupt [J. Olmstead Higgins] and the minority creditors objected to the votes cast under the powers of attorney, on the ground that, under general order No. 34, adopted April 12th, 1875, a notary public was not a proper officer authorized to take such acknowledgments; and that he had sustained the objection, had held that no assignee was appointed, and had appointed Mr. Platt as assignee.

BLATCHFORD, District Judge. I think the register ruled correctly.

Case No. 6,468.

HIGGINS v. JENKS et al.

[3 Ware, 17; [2] 31 Hunt, Mer. Mag. 74.]

Circuit Court, D. Maine. Dec. 2, 1853.

SPECIFIC PERFORMANCE—INJUNCTION—RIGHTS OF CO-OWNERS OF VESSELS.

1. Bill in equity for the specific performance of a contract for the sale of three-eighths of a ship now being built, with the right of the purchaser to the command, and for an injunction on the owners of the five-eighths against selling the same except with notice of this contract, and subject to whatever right the plaintiff may have under it, and against appointing any other person as master.

2. If the contract gives him any right in the nature of a privilege and preference to the command of the ship—an obligation, charge, lien, or nexus which follows and adheres to the thing, and qualifies the right of ownership, he is entitled to protection by injunction against the transfer of the five-eighths of the vessel without notice of his contract and of whatever rights he has under it.

3. But whether a preliminary injunction should issue against the appointment of any other person to the command is a question not free from doubt. The grounds on which courts of equity take jurisdiction to decree a specific performance of contracts stated. The rights of co-owners as to possession discussed.

In equity.

Fessenden & Deblois, of Portland, and Mr. Merrill, of Bath, for plaintiff.

Willis & Fessenden and Mr. Shepley, for defendants.

WARE, District Judge. This is a bill in equity seeking a specific execution of a contract. On the 9th of August, the defendants being then engaged in building a ship of about 1100 tons burthen, the plaintiff entered into a written contract for the purchase of three-eighths of her, upon which he was to pay at the rate of fifty-five dollars a ton, two-thirds of the amount in cash, deducting therefrom the cost of the rigging, which he was to furnish, and the other third in his notes, indorsed by Brookman & Co., of New York, in four, nine, and twelve months; and it was further agreed that Higgins should superintend and direct the completion and the rigging of the ship, for which he was to receive no other compensation than payment of his board; and that when completed he should sail her as master and have for his compensation the best wages with primage, etc., allowed to masters commanding similar ships from the port of Bath. In conformity with the agreement, the plaintiff has superintended and directed the work on the ship from the time of the contract until about the time of filing the bill; has furnished the rigging as it has been wanted, and made all his cash payments as often as demanded, and is now ready on the completion of the ship to deliver the securities named in the agreement for the balance due. The plaintiff apprehending that the defendants intended to disable themselves from performing their part of the contract by a sale and transfer of the vessel, filed this bill praying for an injunction against a sale of the three-eighths bargained to him, and on their disavowing any such intention, amended his bill praying an injunction against the sale of the other five-eighths, except with notice of his contract and subject to whatever rights he has under it, with a further prayer for an injunction against appointing any other person as master, and for a specific execution of the contract. Since the filing of the bill, the defendants have transferred five-eighths of the ship to Messrs. John and George Patten, and by a further amendment they have been made parties defendant, and the same remedies by injunction and specific performance are asked against them. The original defendants have appeared and put in affidavits admitting the contract, and offering to convey the three-eighths, and giving as a reason for refusing to fulfil the contract by putting the plaintiff in as master, that they have, since the contract was made, heard many reports and stories in disparagement of the

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

[2] [Reported by George F. Emery, Esq.]

plaintiff's character as a ship-master, and against his truthfulness and integrity in his dealings as a man, from which they have become satisfied that he is not a fit person to have the command and management of such a ship, and that they should not consider their property in her to be safe in his hands. Mr. George Patten, one of the new defendants, has put in an affidavit admitting the purchase of five-eighths of the ship of Jenks & Harding, and stating that a parol agreement for the purchase was made on the fifth of the month, the day on which the bill was filed, but that the contract was not completed, and the transfer made by a bill of sale, until the eighth, three days after,—admitting that he knew that Higgins was the purchaser of three-eighths, and that he expected to go as master, but that he did not know the precise terms of the contract. As to the Messrs. Pattens, the purchasers, their purchase was made under such circumstances that they must be deemed and considered as having purchased with full notice of the contract with Higgins. They knew of his contract, and they knew of his expectation of going as master. The contract was in the hands of their venders, and they might have seen it by asking for it, as it was their duty to do. I consider them as standing on the same ground, and having the same rights as their venders, and no others. They took the five-eighths subject to all the right which Higgins had against Jenks & Harding.

The defense made by the affidavits of Jenks & Harding against a preliminary injunction till the hearing, and the same will be relied on at the final hearing against a decree for a specific execution, is in substance that of a surprise; that at the time of the contract they supposed Higgins to be a well qualified master, and a trustworthy man; that they are now undeceived, and from what they have since learned of his qualification as a ship-master, and of his character as a man, they verily believe that they cannot, with safety and prudence, confide to him the command of the ship, or entrust to him the management of their property. But it is not pretended that they were deceived by any artifice or management on the part of the plaintiff. The negotiation between the parties for the sale and purchase of this vessel, commenced sometime before the contract was consummated; the precise time does not appear, but I infer from the affidavits and the exhibits in the case in the early part—at least as early as the middle of July. It was completed on the 9th of August. Capt. Higgins is a native of this state, and was born and brought up in Orland, an adjoining town of Bucksport. Early in life he had been in the command of two small vessels in this state, engaged, I infer, in the coasting trade. Afterwards he went to New York, and was there employed as a ship-master. If he was a stranger to the defendants, it would seem that during the month in which the negotiations were pending, the defendant might, without difficulty, have made all the necessary inquiries, and obtained all the necessary information in relation to his qualifications and character, and it is hardly to be supposed that, as men of ordinary caution and prudence, they would have agreed to intrust to his management and control, so large and valuable a property as five-eighths of this ship, of the value of $37,000, according to the rate at which the sale was made to plaintiff, or that they would have been willing to have entered into that confidential relation of joint owner of the vessel, intrusting to him the command, unless they had been pretty well assured of his qualification as a seaman, and of his integrity as a man. With all this time and opportunity for informing themselves, it seems to me that their excuse of surprise for not fulfilling their engagement ought to be scrutinized pretty narrowly. It was nearly three months after the plaintiff had been engaged in executing his part of the contract, and about four from the commencement of the negotiation for the purchase, that he was informed that he would not have the command of the vessel, though I cannot but believe that it must have been well understood by the defendants that this was Capt. Higgins' principal object in the purchase; that it was not so much his object to make an investment in the vessel, as to provide himself with an honorable and lucrative employment.

If, however, it is made satisfactorily to appear that here has been a real surprise; if it be shown that for want of capacity and want of integrity, the plaintiff is unfit to be intrusted with the command of such a ship, and that the defendants cannot safely intrust their property in his hands, as this application for an injunction and specific performance is addressed to the discretion of the court, and is not a claim strictly ex debito justiciae, my opinion would be that he ought to be left to his remedy at law. Under this view of the subject it becomes necessary to examine the foundation of the defendants' excuse for not performing their engagement. They have produced a large number of affidavits in their justification, most of them from persons residing in Bath, Bucksport, Eastport, and Calais, in which places he seems formerly to have been best known, all speaking of him in terms strongly unfavorable; some who have had dealings with him charging him with dishonesty, others speaking only of his general reputation for want of integrity, and for want of veracity, and several of them adding that he commonly was known by the name of the lying Higgins. They uniformly speak of him as a man unfit to be intrusted with such a vessel. All this testimony is open to one general observation, that it relates to a period ten or twelve years ago, when he was employed in the command of small vessels in the coasting trade of this state, and while he was young, and soon after arriving at his majority. Some years ago, precisely when does not appear, but as I

collect it from the affidavits eight or nine years, the plaintiff left this part of the country and went to New York, and has since been employed as a ship-master from that port. The defendants have produced two affidavits from New York, one of Richard P. Buck, formerly of Bucksport, and now a commission merchant and ship-owner of New York, who states that he has been acquainted with Capt. Higgins for six years, that he has been consigned to him but never employed by him, that he thinks him unfit to have the command of a ship of 1000 tons, that he would not intrust him with the command of a ship, because he believed him to be incompetent, that he considers him untrustworthy and irresponsible, that he would not trust him for a hundred dollars, and he adds that he should not have given his affidavit if he had not been called upon by a subpoena. The other is of Benj. Carver, formerly a ship-master, and now a dealer in ship chandlery. He has known Higgins for three or four years, has but little acquaintance with him, but has formed an unfavorable opinion of his character, and would be unwilling to purchase into a ship of which he was part owner. This is all the evidence which the defendants have produced from New York, where the plaintiff has been employed for the last eight or nine years. That of Carver is a little, and but a little more than negative. That of Buck is explicit and full as to his opinion, and it may be remarked that he is the only one of the affiants, who has taken pains to inform us that he gives his affidavit from necessity, and in the same breath says that he would not trust the plaintiff for one hundred dollars. This appears to me to be pretty strong language for an unwilling witness towards a neighbor, who has shown himself able to fulfil a contract for more than $20,000. The defendants have also produced the affidavits of Mr. Curtis and of Mr. Dimmock, each president of an insurance company in Boston, who had insured vessels commanded by the plaintiff and had had losses. They both say that after examining the statements of the losses and the circumstances under which they happened, they were so dissatisfied that they should be unwilling to insure a vessel of which he had the command. If this evidence stood alone, and unexplained, and unqualified, it would appear to me to be entitled to very grave consideration. If the plaintiff has justly earned such a reputation that where his character is known, a vessel under his command could not be insured at all, or not at the usual rate, it would be a decisive objection to the application that he here makes, and I should feel bound to leave him to his remedy at law. But in this connection it is proper to consider the affidavit of Zebulon Cook, formerly of Boston and now of New York, an insurance broker of great experience, and entitled to full credit as a man of integrity and as an expert in the business. He was employed by the owners of one of the vessels insured in Boston, to prepare a statement of the loss, and he says that in making up the statement, his intercourse with Capt. Higgins was protracted for some weeks, and that in the information and explanation he gave, he showed so much frankness and fairness that he became favorably impressed towards him; and that he has heard nothing since to change that opinion. This was one of the cases from which the Boston insurers formed their unfavorable opinion, and perhaps it would not be unreasonable to allow one opinion to balance the other. To meet this testimony impeaching his character, the plaintiff has produced the affidavits of five gentlemen of New York and six from Boston belonging to reputable mercantile houses, who have been acquainted with him for the last seven or eight years, who have had transactions of business with him, all speaking in strong terms of his capacity and integrity, opinions which they have formed from their intercourse with him in business as well as from his general reputation. One of them, Mr. Deshon, of Boston, was acquainted with the affair of the Kanahwa, one of the insurance cases complained of by the Boston offices, and formed so favorable an opinion from his own observation and what he heard from others, that he was very desirous of selling him part of a ship as late as last August, and putting him into her as master.

On a fair consideration of the plaintiff's affidavits, I think that they more than balance and neutralize those of the defendants. These relate almost exclusively to a period ten or twelve years ago. The plaintiff was then a young man just past his majority. They undoubtedly leave on the mind an unfavorable impression of the plaintiff's character at that time. But whatever the truth may be, this has not prevented him from obtaining employment, and rising in his profession, and passing from the command of small coasting vessels to those of a larger class engaged in foreign trade; and for the last nine or ten years, while he has sailed from New York, notwithstanding the opinion of Mr. Buck, I feel bound to consider him as having maintained a fair reputation as a ship master, and as qualified and competent for any kind of business, he may be required to transact in that employment, and I must hold that the excuse which the defendants have offered for not performing their engagements be removed.

The question then fairly arises, and to my mind free and disembarrassed, whether the plaintiff, on the principles upon which courts of equity exercise this discretionary jurisdiction, is entitled to the relief, by way of injunction, for which he asks. As to the first prayer of the bill, that is an injunction against the transfer of the five-eighths of the vessel without notice of his contract, and whatever rights he has under it, I can see no objection to it. If the contract gives him

any right in the nature of a privilege and preference to the command of the ship, an obligation, charge, lien, or nexus which follows and adheres to the thing and qualifies the right of ownership, it is what he has bargained and paid for, and whatever it may amount to he is on every principle of justice entitled to. If it is a right of any value, he might lose it by a transfer to a bona fide purchaser without notice. But, if with notice, he would have the same right, whether it is to a specific performance or only to a compensation in damages against the assignees, or against the original owners. As to the second prayer for an injunction against the appointment of any other person to the command, there is certainly much more difficulty; nor do I pretend, after the best consideration I have been able to give to the subject, to hold an opinion free from doubt. It appears to me that this injunction ought not to be granted, unless on the ground that the contract is a proper one for a decree of specific performance, and this is only to be determined at the final hearing. I am aware that it is not unusual in cases admitting of doubt for the court to grant a preliminary injunction, to preserve all matters unchanged till the hearing, but it is usually in cases where things may remain in statu quo without sacrifice to either party. In this case the effect may be to keep the vessel unemployed at the wharf till the hearing, to the injury of all interests.

Without undertaking to anticipate what may be the opinion of the court on a final hearing, it may not be out of place here to remark that the grounds on which courts of equity take jurisdiction to decree a specific performance of contracts, are, that a court of law can give for the breach of a contract no other remedy than damages; that in the particular case damages are an imperfect and inadequate remedy; that it is against conscience to leave to a party his election, either to pay damages for a voluntary breach of his engagements, or faithfully to perform them, and that it is unequal and unjust to the complainant to leave him to recover, by a suit at law, such damages as a jury may think proper to give him, in a case where the damages are uncertain and conjectural, instead of having the full benefit for which he has bargained by a specific execution of his contract. 2 Story, Eq. §§ 717, 719. It cannot be denied that this reasoning of courts of equity applies in its full force to the present case. It is sufficiently apparent in this case that the principal object of the plaintiff in this purchase was not a mere investment of money. It was to provide for himself a safe, lucrative, and honorable employment in his profession. If he had purchased only as an investment, there would be no particular hardship in leaving him to an action of law for damages. A jury would have a clear and intelligible rule by which to ascertain the damage. But by what rule is a jury to calculate the damage to the plaintiff of the disappointment in being thrown out of employment, with all his available means locked up in this vessel. It is plain that the damage is altogether uncertain and conjectural.

The counsel for the defendants have urged several objections to the granting an injunction, in a line of argument tending to show that this is not a case for specific performance. By what process, it is asked, will the court enforce a specific performance, and if it is enforced of what avail will it be for the plaintiff? The force of this argument presses on the prayer for an injunction against appointing any other person as master. It is said, if the plaintiff is placed in the command, that the defendants, being the major owners, may immediately displace him and appoint a new master, and that a decree for a specific performance would be nugatory. What the plaintiff asks for, and what he has bargained and paid for, is that the ship shall be finished and made ready for sea with all convenient speed, and he placed in the command. He has performed, or tendered the performance of, all his part of the contract in its precise terms, and he claims a like performance on the part of the defendants. When the contract is carried into execution they may exercise all the rights the law allows them. Whether they, as major owners, can immediately remove him from the command will be the subject of after consideration. It is certain in ordinary cases the major owners have this right. They may displace a master without assigning any reason. But if the master is a part owner, a court of admiralty, by which this jurisdiction is exercised, according to Lord Stowell, requires some justifying cause to be shown by the major owners beyond their own pleasure before it will interfere to displace him. The New Draper, 4 C. Rob. Adm. 290. By the common law, as a tenant in common, he has equal right to the possession with any other owner, and the admiralty pays so much respect to his common-law right that it will not interfere to disturb his possession without some cause shown, and would, I think, be reluctant to do it without a sufficient cause when the master was in possession under such a contract as this. On the whole, I shall grant both parts of the injunction asked for. And I do it with less reluctance as the injunction is only until the further order of the court. If I am wrong, no irreparable injury will be done to the defendants, as they may at any time apply to the circuit judge to have the injunction removed.

This case did not proceed to a final hearing, it having been adjusted by the parties.

HIGGINS (SMITH v.). See Cases Nos. 13,057–13,060.

HIGGINS (SPARKMAN v.). See Cases Nos. 13,208 and 13,209.

Case No. 6,469.

HIGGINS v. UNITED STATES MAIL STEAMSHIP CO.

[3 Blatchf. 282.] [1]

Circuit Court, S. D. New York. May 30, 1855.

BILL OF LADING—DELIVERY OF CARGO—USAGE.

1. Where a bill of lading of a cargo of coal, from New York to Havana, made no mention of the number of days within which the coal should be discharged: *Held*, that evidence of an oral contract that the vessel was not to be detained more than twelve running days in discharging her cargo, was inadmissible.

[Cited in Dixon v. Columbus & I. R. Co., Case No. 3,929.]

2. The usage as to the delivery of cargoes of coal at Havana, must govern the delivery under such bill of lading.

[Cited in Kenyon v. Tucker, 17 R. I. 532, 23 Atl. 62.]

3. As the shipper of the coal had a particular wharf at Havana, where all his coal was landed, the vessel was bound to discharge it there, and to conform to the usage as to its delivery, and could complain of no delay in the delivery, except such as was in violation of such usage.

[Cited in Addicks v. Three Hundred and Fifty-Four Tons of Crude Kainit, 23 Fed. 730.]

4. The shipper was bound to afford accommodation for the delivery according to such usage, and such obligation was a maritime contract, a breach of which could be sued on in a court of admiralty.

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

This was a libel in personam, filed in the district court by the owner of the barque Kanawha, to recover damages for her unreasonable detention at Havana. After a decree in favor of the libellant [Aaron G. Higgins], the respondents appealed to this court.

Charles Donohue, for libellant.

Edward H. Owen, for respondents.

NELSON, Circuit Justice. The Kanawha was freighted by the respondents with coal from New York to Havana; and it is claimed that, according to the contract of affreightment, the vessel was to be detained not exceeding twelve running days in the discharge of her cargo, whereas she was, in fact, detained some twenty-seven days in addition.

The bill of lading, signed by the master of the Kanawha, the only written contract between the parties, makes no mention of the number of days within which the coal should be discharged. It is in the usual form, and stipulates that it is "to be delivered in like good order and condition at the aforesaid port of Havana, (dangers of the sea excepted), unto Messrs. Drake & Co., or to their assigns, he or they paying freight at one dollar per ton, with five per cent. primage, and average accustomed." The limitation as to the number of running days in the discharge of the coal is sought to be made out by oral evidence; and we have the testimony of the agent of the owner on one side, and of the shippers on the other, directly in conflict on the subject.

It is undoubtedly true, that this instrument is open to explanation, to a certain extent, as between the original parties, to correct mistakes or imposition upon the master. So far as it partakes of the nature of a receipt, it may properly be explained, and is not conclusive. But I have seen no case that has gone the length of varying a contract by parol, in respect to a matter such as that in question here. According to the construction of the bill of lading, excluding interpolations by oral evidence, the delivery of the coal would be governed by the custom and usage of the delivery of cargoes of that description at the port of Havana. The oral evidence, therefore, changes entirely the legal effect of the instrument. Even were I more doubtful than I am as to the application of the rule excluding parol evidence of the contract, the omission to insert it in the bill of lading would lead me to incline in favor of the testimony of the witness who denies that any such contract was made. Whether it was made or not depends upon the evidence of the two parties who entered into the contract of shipment. Their evidence, as I have said, is directly in conflict. I therefore lay out of the case the oral agreement set up by the libellant.

Then, as to the delivery of the coal. The respondents were in possession of a particular dock or wharf at Havana, where all the coal shipped for their line of steamers was landed; and I am inclined to think that the master of the Kanawha was right in supposing that he was bound to discharge his cargo at that place. Indeed, upon the evidence, it would seem to have been the only place where the cargo could be discharged at that port. Being obliged to discharge it there, he was also necessarily obliged to conform to the usage and practice that existed regulating the delivery; and which was, as but two vessels could discharge at a time, to wait for his turn. One vessel, over which he was entitled to preference, was permitted to discharge her cargo before him. She was engaged seven days in her delivery, and of this delay he had a right to complain. The court below found the delay to have been twenty-seven days; but this finding was based upon the oral contract, which I have disregarded.

An objection is taken to the jurisdiction of the court below, upon the ground that the breach of contract complained of is not the breach of a maritime contract. But this is a misapprehension. According to my interpretation of the contract of shipment, the respondents were bound to afford accommodation at their wharf to the Kanawha, for the delivery of the coal, according to the usage and custom of vessels engaged in its shipment. The contract is a maritime contract,

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

over which the court had jurisdiction, and for a breach of it the libel is brought. The refusal to permit the discharge of the cargo according to the usage of the place, was as much a breach of the contract as would have been a refusal to pay the freight, or to accept the cargo at all, where the bill of lading provided for acceptance.

I must, therefore, reverse the decree below, and, unless the parties agree upon the damages for the seven days' detention, a reference must be made to the clerk, to ascertain them, in conformity with this opinion, without costs on either side.

Case No. 6,470.

HIGGINS et al. v. WATSON et al.

[43 Hunt, Mer. Mag. 69.]

District Court, S. D. New York. 1860.

FREIGHT—LOSS OF CARGO—CHARTER-PARTY.

[1. The vessel owner is not liable for the loss by sea perils of goods laden on deck with the shipper's consent, in the absence of culpable neglect or misconduct in their destruction or jettison.]

[2. As between the charterer and the owner, the charter-party, and not the bills of lading, controlls the contract of shipment, and governs the rights of the parties, where their terms are conflicting.]

[This was a libel by N. Foster Higgins and others against Barron C. Watson and others for freight under a charter-party.]

The libellants were the owners of the schooner B. S. Johnson, which was chartered on August 6, 1858, to the respondents by her master, for a voyage from two ports in North Carolina to New York, the respondents engaging to provide the vessel with a full cargo of resin and spirits of turpentine in barrels under deck, and with a deck load of resin in barrels, and to pay the master or agent a certain freight for resin and spirits of turpentine under deck, and another rate of freight for resin on deck. The master signed two clean bills of lading for resin shipped on board, and one deliverable to the respondents or their assigns, and the other deliverable to a third party. The vessel arrived in New York, September 24, 1858, and delivered to the respondents 106 barrels of resin less than the number of barrels called for by the bills of lading, that number having been swept from the deck or jettisoned by reason of sea perils. The master duly assigned the charter-party to the libelants, who brought this action to recover the freight according to the charter, while the respondents claimed that as the bills of lading were clean bills, the libelants were responsible for the loss of the resin shipped on deck.

Before BETTS, District Judge.

HELD BY THE COURT: That the owner of a vessel is not liable for the loss by sea perils of goods laden on deck with the consent of the shipper, when no culpable neglect or misconduct is attributed to him in their destruction or jettison. [Lawrence v. Minturn] 17 How. [58 U. S.] 100. That the charter-party in this case, and not the bills of lading, forms the controlling contract of shipment, and governs the rights of the parties, which are not changed by specifying a different rate of freight in the bills of lading. That the objection that an action upon a charter-party is not within the jurisdiction of the court, cannot be maintained. Decree for libelants, with a reference to ascertain the amount of the charter-money due.

HIGGINS (WEBSTER LOOM CO. v.). See Cases Nos. 17,341 and 17,342.

HIGGINS, The RICHARD R. See Case No. 11,768.

Case No. 6,471.

HIGGINSON'S CASE.

[1 Cranch, C. C. 73.] [1]

Circuit Court, District of Columbia. March Term, 1802.

WITNESS—SURETY FOR APPEARANCE — COMPENSATION DURING IMPRISONMENT.

A witness, who for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment.

[Cited in Robinson v. Chambers, 94 Mich. 473, 54 N. W. 176.]

Eleanor Higginson had been ordered by a justice of the peace to recognize with surety in a small sum, to appear and testify as a witness against Daniel Hennissee, on a charge of felony; but being a stranger and unable to get surety, she had been committed to prison and detained until the trial.

Mr. Mason, for the United States, moved that she should be allowed payment for her attendance during the whole time she was so detained. The act of 1753, c. 13, only provides for the payment of the prison fees, and makes no allowance for the time of the witness.

THE COURT allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained, it being her misfortune and not her fault that she could not obtain security for her appearance.

HIGGINSON (CREMER v.). See Case No. 3,383.

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

Case No. 6,472.

HIGGS et ux. v. HEUGH.

[3 Cranch, C. C. 142.] [1]

Circuit Court, District of Columbia. May Term, 1827.

TRIAL—CONTINUANCE—ABSENCE OF WITNESS.

In an affidavit for continuance of a cause on account of the absence of a witness, it is not necessary to state the particular circumstances of diligence used by the party to obtain the testimony of such witness. They may be proved ore tenus.

Mr. Jones, for plaintiffs, moved for a continuance of the cause, on affidavit of the plaintiff, Higgs, which stated, "that a witness in behalf of the plaintiffs in said suit, to wit, Turbett R. Belton, whose testimony is material, competent, and proper in the said suit, is really wanting from West Florida, and that the plaintiffs have used their proper and reasonable endeavors, to procure the testimony of the said witness, and this deponent verily believes that the said cause cannot be tried with justice to the plaintiffs, without such testimony, and he has a reasonable expectation and belief, that the testimony of the said witness can be procured at the next regular session of this court." The affidavit then stated the particular facts which it was expected the witness would prove.

Mr. Key, for defendant, objected that it did not appear, by the affidavit, what particular endeavors the plaintiffs had made to obtain the testimony of the witness.

THE COURT (nem. con.) said, that the practice of the court has not been to require the particular circumstances of diligence to be stated in the affidavit, but to examine the party, or his counsel either upon oath or otherwise to the satisfaction of the court as to the particular endeavors to obtain the testimony; and, in the present case, being satisfied by Mr. Jones's verbal statement, that reasonable diligence had been used, they continued the cause.

HIGGS (HODGE v.). See Case No. 6,558.

Case No. 6,473.

In re HIGH et al.

[3 N. B. R. 191 (Quarto, 46); [2] 16 Pittsb. Leg. J. 193; 2 Am. Law T. 170; 2 Chi. Leg. News, 9; 1 Am. Law T. Rep. Bankr. 175.]

District Court, E. D. Michigan. Sept., 1869.

BANKRUPTCY—CHATTEL MORTGAGE—LIEN—PROOF OF DEBT—ABANDONMENT OF SECURITY.

1. Chattel mortgagee petitioned to have his mortgage declared a valid and subsisting lien on property of bankrupts, and that the assignee be ordered to surrender to him the mortgaged property. Assignee objected to the jurisdiction of the bankruptcy court until the mortgagee should prove his debt against the estate. *Held*, the court has concurrent jurisdiction with other tribunals to hear and determine the question of lien in the premises.

2. The mortgagee cannot prove his debt in bankruptcy unless he releases or surrenders the mortgaged property, or agrees with the assignee as to its value, so that he might prove for any excess of indebtedness over such value.

[Cited in Re Haskell, Case No. 6,191; Re Stansell, Id. 13,293.]

3. Before the choice of assignee, if such a mortgagee seeks to prove his debt, he must abandon his security; but, after appointment of assignee, he may prove for any balance of his debt, after deducting the value of the mortgaged property, as agreed upon with the assignee.

[In bankruptcy. In the matter of William C. High and William B. Hubbard.]

WITHEY, District Judge. Joseph Hubbard has filed his petition, asking that a chattel mortgage given by the bankrupts to petitioner to secure payment of the bankrupts' indebtedness to him, may be declared to be a valid and subsisting lien upon the property of bankrupts, and that the assignee in bankruptcy may be decreed to deliver the mortgaged property to petitioner, mortgagee. The assignee has answered the petition, proofs have been taken, and the cause is ready for hearing upon the petitions and proofs. But now comes the assignee and interposes an objection to the jurisdiction of the court in bankruptcy to hear the petition —because the petitioner has not proved his debt against the bankrupts' estate.

The exact question is, whether the mortgagee can obtain a standing before the court in the course of the litigation in the bankruptcy proceedings without first having proved his debt. Regarding the mortgage as bona fide, and a valid, subsisting lien upon the goods of the bankrupts, the goods being in possession of the assignee, if the mortgagee may not file his petition or bill to have the question of priorities and rights declared, then his remedy would be by action against the marshal, for taking the goods from his possession, or against the assignee for not surrendering on demand—in the appropriate form of remedy. But it is claimed by the assignee that a secured creditor may prove his debts, and then he will be in a position to apply to the court by petition, and have his rights declared.

Cases are cited to show that a secured creditor may prove his debt without surrendering the mortgaged property, and without a sale by the assignee of such property. It is contended that such has been and is the construction of sections 19, 20, and 22 of the bankrupt act [of 1867 (14 Stat. 525–527)], notwithstanding the prohibitory provisions. I think there is no real conflict between these sections, but I take an entirely different view

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

[2] [Reprinted from 3 N. B. R. 191 (Quarto, 46), by permission.]

of them from that claimed by counsel for the assignee. Section 19 enacts that "all debts due and payable from the bankrupt may be proved against the estate of the bankrupt," and clause 2, § 20, declares that "if the property is not sold, or released and delivered up (to the assignee), the creditor shall not be allowed to prove any part of his debt." Now, before referring to section 22, I propose to show that there is no conflict between sections 19 and 20. They will harmonize by giving to clause 2, § 20, the exact effect it would have if it had been added to clause 1, § 19, as a proviso. Then the substance of clause 1, § 19, and clause 2, § 20, would read as follows: "All debts due and payable by the bankrupt may be proved and allowed against the estate of the bankrupt;" provided, "when the creditor has a mortgage or pledge of real or personal estate of the bankrupt * * * for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such a manner as the court shall decide; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole claim. If the property is not sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This last clause must not be regarded as preventing the secured creditor from proving the balance of his debt after deducting the value of the mortgaged property, whenever that value has been agreed upon between the creditor and assignee. This reading of clause 1, § 19, and clause 2, § 20, in connection, gives harmony to the two provisions. Now, what view is to be taken of section 22, the language of which would seem to contemplate proof by a secured creditor of his debt, with a view of participating in the choice of assignee. Clause 2, § 22, is this: "To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath, * * * setting forth * * * whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever, other than that by him set forth." And he is also to state what certain things have not been done, "whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person, in the proceedings under this act, is, or shall be, in any way affected, influenced, or controlled."

It is obvious in my mind, that what is said in section 22, relating to a secured debt, is to be understood in view of the provisions of sections 19 and 20, to give the right to prove secured debts only when the secured creditor is in that position where by section 20 he may make such proof, not while he stands in an attitude of opposition to other creditors or to the estate of the bankrupt. If such creditor seeks to prove his debt before the choice of assignee, he must abandon his security. Whereas, if he seeks to prove his debt after the choice of assignee, he is to be permitted to do so when he has complied with the terms of section 20. As he has security, the policy of the act is to leave his rights to be settled after there is an assignee to contest his claims to the property and protect the estate. To hold otherwise would be to annul the positive language of section 20, declaring that, "if the property is not sold, or released, and delivered up, the creditor shall not be allowed to prove any part of his debt." Thus, to hold is not demanded by the various provisions of the act, and would be allowing the positive language of a statute to be repealed by a subsequent clause of the same act, and that by mere implication. The apparent want of harmony between those provisions is not of a character to require the courts to say there is any conflict, because in the views suggested they can be made to harmonize. Thus we see when the secured creditor may prove his debt in part, when the entire debt, and when he is prohibited from proving any part of his debt.

Now, the secured creditor who presents his petition to have his rights declared, in this case, occupies an attitude of opposition to the general creditors, and to the assignee, refusing as he does to release or surrender the mortgaged property, and no agreement having been arrived at between him and the assignee as to the value of the mortgaged property, so that if there be an excess of indebtedness over the value of property, he might prove for such excess. Standing thus he cannot prove his debt against the estate. Section 14 declares that a valid mortgage of property shall not be affected by the transfer of the bankrupt's estate to the assignee. What, then, is the interest of the assignee in the mortgaged property? A right of redemption, precisely what the right of the bankrupt was before the bankruptcy.

It will not be questioned, but an assignee in bankruptcy may by petition bring before the court any question involving rights between him as assignee, and other persons setting up an interest in the property of the defendants. This is a common practice, is summary, and on many accounts more desirable than the institution of a suit, which must be tried and determined according to the course and rules of the common law. I think section 1 gives the court in bankruptcy jurisdiction to hear and determine all ques-

tions of liens and priorities involving rights to the bankrupt's estate, and that jurisdiction may be invoked by a creditor claiming under a lien or mortgage as well as by the assignee. This jurisdiction is not exclusive, but concurrent with that of other tribunals. And generally when the proceeding is by a preferred creditor, notice on the assignee who represents the estate will be sufficient, without notice to the creditors, though exceptions might be allowed to this rule in some cases very properly. Supposing the petitioner to have a valid claim for the goods in question, he should be protected in his right. If the value is less than the debt secured, his possession and control should not be interfered with. But if the property exceeds in value the debt, the court may, on a proper showing, interfere to protect the surplus, so as to insure its coming to the general creditors—always seeing that the secured creditor is protected to the extent of his secured debt. I hold, that the objection made by the assignee is not well taken. The case will accordingly be for hearing on petition and proofs.

See In re Grinnell [Case No. 5,830], holding a secured creditor must prove his debt in bankruptcy before he can apply the security he holds to the payment of his claim.

Case No. 6,474.

The HIGHLANDER.

[See Case No. 12,604.]

Case No. 6,475.

The HIGHLANDER.

[4 Blatchf. 55.] [1]

Circuit Court, S. D. New York. May 5, 1857.

MARITIME LIEN UNDER STATE LAW—WAIVER—REPAIRS OF VESSEL.

1. Where the owner of a steamboat agreed to pay by instalments for a boiler to be built for the vessel, the last instalment to be paid by his giving a note at three months from the completion of the boiler, but he did not give the note: *Held* that, under the lien law of New York (2 Rev. St. 493, §§ 1, 2), the lien of the builder on the vessel for the amount of such last instalment was not displaced by the agreement as to the note.

[Cited in Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 721, 3 Sup. Ct. 606.]

[Cited in Dey v. Anderson, 39 N. J. Law, 203.]

2. On the failure of the owner to give the note, the credit ceased, and the demand became immediately due.

3. If the note had been given, the lien would have been waived.

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

This was a libel in rem, filed in the district court, against the steamboat Highlander, to recover a balance of $1400 and interest, due on a special contract for the building of a boiler for that vessel, and also $1488.95, for work done over and beyond the contract. The district court rendered a decree in favor of the libellants, on both claims [case unreported]; and the claimant appealed to this court. The claim for the $1488.95 was not seriously disputed. The claim for the balance due on the special contract was contested, on the ground that credit was given to Cornell, the owner, and not to the vessel. By the contract, which was made February 2d, 1855, Cornell agreed to pay for the boiler by paying $1000 on the 1st of March, $1000 by the 1st of April, $1000 when the boiler should be on board and complete, and the balance by a note, payable three months from the time of completion. Cornell neglected or refused to give the note, as agreed.

Erastus C. Benedict, for libellants.
Dennis McMahon, for claimant.

NELSON, Circuit Justice. There is no question that the balance of the contract price for the boiler is due and payable, but it is insisted that the builder had no lien on the vessel, as the credit was given to the owner. The Highlander is a domestic vessel, and the lien, therefore, depends upon the state law. That law, at the date of the contract, provided that the lien should cease twelve days after the vessel had left the port for some other one within the state. 2 Rev. St. p. 493, §§ 1, 2. By a subsequent law, passed March 25th, 1855, the time is extended to sixty days. Sess. Laws 1855, p. 174, §§ 1, 2. So far as the question here is concerned, the latter law is not important. The contract was made before its enactment, and, of course, with reference to the old law.

On the part of Cornell, it is insisted, that the agreement to take a note at three months, for the last instalment was inconsistent with the idea of a lien on the vessel, as the event, to wit, leaving her port, would, in all human probability, occur more than twelve days before the credit of three months would expire, and hence that no lien could have been in the contemplation of the parties as to that payment.

On the part of the libellants, it is claimed, that the whole of the contract price became due on the completion of the work, but the last instalment was to be paid by a note at three months; and that, as the note was not given or tendered, that instalment became immediately due. The question is a close one, and I have entertained some doubts about it. Judge Ingersoll, who decided the case below, came to the conclusion that the lien existed, and enforced it by his decree. The mere giving of credit does

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

not necessarily displace the lien. That has been held in several cases. The ground here is not that a credit was given, but that the credit was inconsistent with the idea of a lien, for the reason, that, unless the boat should remain at her port for the three months, the lien would be lost by the terms of the statute; and that this must have been within the contemplation of the parties. The case of Peyroux v. Howard, 7 Pet. [32 U. S.] 324, bears somewhat on this question. There, a contract giving an unconditional credit, extending beyond the time which the law fixed for the duration of the lien, was considered to be inconsistent with the idea of a lien, and to operate as a waiver of it. The difference between that case and the present one is, that the credit given here was not absolute, but conditional upon the owner's giving a note at three months. On his neglecting or refusing to give the note. the credit ceased; for, the demand then became immediately due and payable, according to well-settled law. Now, it may be going too far to say that the builder must have intended to waive the lien in the event of the refusal to give the note; for the case comes down to that. I agree that he would have waived it, if the agreement had been kept on the part of Cornell, and the note had been given. But there is certainly much justice in saying that, on his refusal to keep the agreement in respect to the last instalment, the builder also ought not to be bound by the agreement, but should be remitted to his rights independently of the contract. It may have been material to him, whether this balance should remain in account, or in a note upon which funds could be raised.

The state act is very strong and positive. It declares that such debt, (one like that of the libellants,) "shall be a lien upon such ship or vessel, &c., and shall be preferred to all other liens thereon except mariners' wages." There is no condition or qualification attached, as in the case of maritime liens, in the admiralty, except that the work must be done on the vessel or the supplies furnished to do it. The affirmative therefore, lies on the claimant to displace the lien. That, it is insisted, has been done, by showing a contract inconsistent with any such lien. This assumes, however, that the contract has been fulfilled, in which event the inference is clear. But, is the party equally subject to this inference when the contract has been broken? It seems to me not. As I read the contract, the builder agreed to give three months' credit, on the owner's giving him a note of that tenor; if not, then no credit was given. This is certainly the legal effect, in case of the refusal to give the note, and I do not see why it should not be considered as the meaning and intent of the parties. Upon the whole, I am inclined to agree with the court below, and to affirm the decree.

Case No. 6,476.

The HIGHLANDER.

[Spr. 510; 22 Law Rep. 473; 42 Hunt, Mer. Mag. 192.] [1]

District Court, D. Massachusetts. Dec., 1859.

SEAMEN'S WAGES—DIVERS AND WRECKERS.

1. A seaman's lien for wages is not defeated by a previous attachment of the vessel, at common law, in a state court, abandoned before the filing of the libel.

[Cited in Pendergast v. The General Custer, 10 Wall. (77 U. S.) 218; The Home, Case No. 6,657; The Pioneer, 21 Fed. 427; The Sarah E. Kennedy, 29 Fed. 266; The Cerro Gordo, 54 Fed. 392.]

2. The services of divers and wreckers on board of a sea-going vessel, are maritime, and they have a lien upon the vessel therefor.

[Cited in The Murphy Tugs, 28 Fed. 430.]

3. Where the defence against an asserted lien for a seaman's wages, is a renunciation thereof, at the time of shipping, the court will require proof that the agreement was fully understood by the seaman, and that there was an adequate compensation for the waiver.

[Cited in The International, 30 Fed. 377; The L. L. Lamb, 31 Fed. 34.]

Libel by five seamen for wages, claimed to have been earned on a wrecking voyage to the British provinces, in the summer of 1859. The shipping articles showed the wages to have been put down in decimals at twenty-five and eighteen cents per month. It was not denied, however, that the real contract was for eighteen and twenty-five dollars per month; and the libellants insisted that they saw only the figures 18 and 25 in the articles, when they signed, and supposed that they meant dollars and not cents. The defence offered was, that the vessel had been chartered for the voyage, to one Charles Sanborn, under a contract to victual and man her, at his own expense; that the libellants had been distinctly informed, when they shipped, that they were to look to the charterer only, for their pay; that the wages in the articles were nominal, and that this arrangement was assented to by the crew. Before the filing of this libel, the libellants had attached the vessel in an action at common law, which they afterwards abandoned.

H. Pelham Curtis, for libellants.

J. C. Dodge, for claimants.

SPRAGUE, District Judge. The objection of the claimants that an attachment of the vessel at common law, made and abandoned before the filing of a libel in this court, defeats the lien of seamen for wages, cannot be sustained. A common law lien depends on possession, and is lost when the creditor causes the res to be taken possession of by an officer, by writ of attachment. The property, in such case, is in the custody of the law, and out of the possession of the creditor,

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 42 Hunt, Mer. Mag. 192, contains only a partial report.]

and a common law lien is therefore lost. But a maritime lien does not depend on possession.

I hold, as I have held before in the case of The Paul Boggs [Case No. 10,846], decided some years since, that the lien is not defeated by a previous attachment in a state court. It has been also objected by the claimants, that the services for which two of these libellants were employed, viz., diving and wrecking, are not of a maritime character. I cannot adopt this view. Though principally hired for their skill as wreckers, they were also required to aid in the general management of the vessel, and I am of opinion that they, like the rest of the crew, are entitled to enforce their claims for wages by a libel against the schooner, in this court.

There is no controversy, that seamen, prima facie, have a right to look to the vessel for their wages. The entries of twenty-five cents and eighteen cents, in these articles, are admitted not to be the wages agreed upon, which were eighteen and twenty-five dollars; and the principal ground of defence is that the libellants, by their original contract, relinquished their lien, and agreed to look to the personal credit of Sanborn alone. [The question here is, whether the libellants are precluded from enforcing their lien on the vessel by a previous binding agreement to give up such lien.][2]

Agreements varying the rights given to seamen by the general maritime law, are always scrutinized with great care, by courts of admiralty. Seamen, as a class, are ignorant and credulous, and rely in great measure, in their contracts with their employers, on the general known rights of sailors, as expressed in the shipping articles, which are a printed document known to contain certain well-understood stipulations, and any variation from them is looked on with jealousy by the courts. New clauses impairing the rights of seamen, are generally held inoperative.

Whenever an unusual clause is introduced into the shipping articles, impairing the rights of seamen, or imposing any additional duties or obligations on them, two conditions are required: 1st. That the seaman had the agreement so explained to him that he fully understood its meaning, and. 2d. That a reasonable compensation was given him for the renunciation of the right, or for the new obligation assumed.

The agreement set up in defence, in this case, was not inserted in the articles, but rests only in parol. Certainly the requirements will be not less rigorous, in the case of a parol agreement, than when a written alteration of the articles is made. Was there, then, a sufficient explanation made to these libellants, of the extent of the waiver which they are alleged to have made? And was there an adequate consideration for this waiver?

[It is true that the charterer Sanborn is not legally interested in the result of this suit. In law, his interests are equally balanced; but he can scarcely be considered an unbiased witness. Regarding him as such, however, he has not stated that the waiver of their lien was a matter much or at all talked about with the crew before they shipped, or that he took pains to explain to them the extent of their renunciation. He states only in effect that he told each seaman before he shipped that he was to sign for 25 cents "to clear the vessel." Nor does it appear that he offered to pay them an adequate consideration for the waiver. He says only that he gave the crew two dollars more than the ordinary wages of the port at the time, $16 for a foremast hand. I cannot regard this testimony as sufficient in clearness and weight to warrant me in giving validity to an agreement like the present. It does not appear in the testimony for the defence that $18 was more than the ordinary wages of the port at the time. Except Sanborn himself, no witness was produced to testify that these wages were beyond the usual rates for maritime services, such as these libellants performed. Nor is it unreasonable to suppose, I think, even admitting that these wages were two dollars higher than the ordinary wages at the time, that the peculiar character of the voyage, the dangerous nature of the coast near which the vessel was to be employed, and the uncertainty in the duration of the expedition, were ample reasons for a small advance on the rates at which a crew for an ordinary voyage could have been obtained.

[On the question whether the seamen understood the nature of the alleged agreement, the testimony is conflicting. Butters, the shipping-master, a witness produced by the claimants, swears that the libellants were distinctly informed, at the time they shipped, of the nature of the agreement they are alleged to have made, and bases his testimony chiefly on a paper signed by two of them, and which has been produced and read. But this paper proves to be merely an agreement not to hold liable for their wages what might be recovered from the wreck. In it they have waived any lien on the salvage, so called, but not on the vessel; and I think it clear that the witness has confounded in his recollection the one with the other. The written paper to which he refers, and the contents of which he had forgotten, contains no stipulation to renounce any lien on the vessel. Moreover, if, as is insisted, these libellants waived their lien on the vessel, why was there no written agreement to this effect explained to and signed by the crew, when, in the case of two of them at least, their waiver of a lien on the salvage was so carefully reduced to writing?

[It has been testified that the crew were told in the cabin, they were signing "to clear the vessel." What did they understand by

[2] [From 22 Law Rep. 473.]

this? As they were aware that they had waived their lien on the salvage, I think it reasonable to infer that they applied the expression of clearing the vessel to this waiver, and that they probably understood nothing more by it than that they signed "to get a clearance for the vessel," with which expression they were no doubt familiar. With regard to the remainder of the evidence, we have Ross, a witness for the libellants, who expressly contradicts Sanborn in his testimony as to a conversation on the subject of the agreement with the crew. Sanborn is also contradicted in several essential points by all the libellants. Thus contradicted, and standing in a situation to be biased, and no evidence being before me that the alleged agreement was sufficiently explained to the crew, I cannot hold that these libellants consented understandingly when they shipped to waive their ordinary lien on the vessel for their wages.][3]

It has not been shown, either that the libellants knowingly agreed to relinquish their lien, or that they received any compensation for the alleged renunciation. Decree for libellants for the full amount of their claims and costs.

See, also, The Gazelle [Case No. 5,289].

HIGHLANDER, The (SECOR v.). See Case No. 12,604.

Case No. 6,477.

The HIGHLAND LIGHT.

[Chase, 150; 2 Am. Law T. Rep. U. S. Cts. 118; 16 Pittsb. Leg. J. 150; 2 Balt. Law Trans. 361; 3 Am. Law. Rev. 778.][1]

Circuit Court, D. Maryland. 1867.

ADMIRALTY JURISDICTION — NEGLIGENCE OF CO-EMPLOYEE—PROCEEDING IN PERSONAM.

1. The admiralty may be styled the humane providence which watches over the rights and interests of those "who go down to the sea in ships, and do their business on the great waters." Its jurisdiction for marine torts, may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the person injured.

[Cited in The Garland, 5 Fed. 926; The Max Morris, 28 Fed. 884; The Harrisburg, 119 U. S. 207, 7 Sup. Ct. 143.]

2. The widow and son of a hand killed on a steamboat by the negligence of the engineer, have suffered an injury for which they have a remedy against the owners of the vessel.

[See Armstrong v. Beadle, Case No. 541, and note.]

3. The act of congress makes the fact of the injurious escape of steam full prima facie proof of negligence to charge the defendant in all actions against proprietors of steamboats, for injuries occasioned by injurious escape of steam.

4. This case distinguished from that of The Sea Gull [Case No. 12,578]. There the injury was by the vessel herself to the wife of the libellant, who was an employee on another vessel. The remedy there *held* to have been either in rem or in personam. In this case the injury is to an employee of the owners on their own ship, the injury being caused by the negligence of a co-employee.

[Cited in The Charles Morgan, Case No. 2,618; The Towanda, Id. 14,109; Holmes v. Oregon & C. Ry. Co., 5 Fed. 80; The Sylvan Glen, 9 Fed. 336; The E. B. Ward, Jr., 17 Fed. 458; The Manhasset, 18 Fed. 925.]

5. This court would hesitate to apply to this case the common-law rule that one employee can not hold his employer responsible for injuries caused by the fault of his co-employee. The statute law of Maryland, however, furnishes a clear right and a plain remedy, and the right may be enforced in this court by admiralty processes.

6. It is not necessary to pursue a statutory remedy in order to enforce a statutory right.

7. The acts of congress confine the remedy in rem for injuries from injurious escape of steam to actions brought by passengers—and the remedy in personam against owners for such injuries done to others on board. It is obvious that congress intended by these laws, to provide for all cases of redress for injuries from these causes, and no action for such injuries can be maintained unless sanctioned by its legislation.

[Applied in The Clatsop Chief, 8 Fed. 166. Disapproved in Id. 767.]

8. No remedy in this case can be had in this court, except by an action in personam against the owners, and this libel was, therefore, properly dismissed by the court below.

Price was employed as a hand on the steamer Highland Light, a vessel sailing out of and registered in the port of Baltimore. While navigating waters within the jurisdiction of Maryland, her steam-chimney collapsed and caused the death of Price. Whereupon his widow and son filed their joint libel against the steamer in rem. There was some proof that the owners had exercised due diligence in supervising the steam machinery of the vessel when it was originally put in, but it was clear that the steam-chimney had been remarkably insufficient at the time of the accident.

Robt. J. Brent and Wm. M. Addison, for libellants.

Wallis & Thomas, for respondents.

CHASE, Circuit Justice. This is a libel for damages occasioned by steam escaping from a collapsed steam-chimney of the steamer Highland Light, and causing the death of William Price, the husband of one, and father of the other libellant.

The first question is as to jurisdiction.

In The Sea Gull [Case No. 12,578], we held that the admiralty jurisdiction extends to the redress of injuries to persons on one vessel caused by the negligence of those charged with the navigation of another. And it is abundantly settled (The New World, 16 How. [57 U. S.] 472) that it extends to suits against vessels and owners and masters for injuries to persons on board as passengers, whether carried for hire or gratuitously.

Indeed, the jurisdiction for marine torts in

[3] [From 22 Law Rep. 473.]

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 3 Am. Law Rev. 778, contains only a partial report.]

admiralty may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the persons injured. Chamberlain v. Chandler [Case No. 2,575].

The admiralty may be styled, not improperly, the humane providence which watches over the rights and interests of those "who go down to the sea in ships, and do their business on the great waters." I entertain no doubt, therefore, upon the general question of jurisdiction. Whether a case is made for its exercise is a different inquiry. And the question now to be considered is whether, in the case before us, damages can be awarded to the libellants, in this form of action in rem, for the injury occasioned to them by the death of their relative.

This question resolves itself into three other questions: 1. Was the injury caused by negligence? 2. Can the libellants have redress in admiralty for the particular injury alleged in the libel? 3. Can they have such redress in the form of action they have adopted? And to these questions I will now endeavor to give an answer.

1. Was the injury caused by negligence?

It was caused by the explosion of the steam-chimney.

The act of July 7, 1838, in its 13th section, provides that "in all suits or actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue or other injurious escape of steam, the fact of such bursting, collapse, or other injurious escape of steam, shall be taken as full prima facie evidence, sufficient to charge the defendant or those in his employment with negligence, until he can show that no negligence has been committed by him or those in his employment." 5 Stat. 305.

In this case, the fact of an injurious escape of steam is undisputed. The full prima facie proof of negligence is therefore made. Is the negligence, then, disproved? Have the respondents shown that no negligence has been committed by them or those in their employment?

It is unnecessary here to inquire into degrees of negligence. In the use for navigation of such a powerful and dangerous agent as steam, it was expressly declared by the supreme court, in Philadelphia R. Co. v. Derby, 14 How. [55 U. S.] 486, and repeated in the case of The New World already referred to, that "any negligence may well deserve the epithet of gross." To repel the inference of negligence in this case, then, there must be such clear proof of care and vigilance as will exclude any reasonable belief that there was any negligence whatever on the part of the owners, or any of their employees, which contributed to the explosion.

And I think that the evidence fairly matches this requirement in respect to the original sufficiency of the boilers and other steam apparatus of The Highland Light. But the evidence of the insufficiency, and the remarkable insufficiency of the steam chimney, at the time of the explosion, is equally clear; and it is by no means certain that a somewhat greater degree of care and vigilance on the part of the owners or their engineers, would not have prevented the catastrophe. Indeed, under all the circumstances detailed in the evidence, I am rather led to the conclusion that there was negligence for which the owners are responsible than that there was not. At any rate, under the statutes, in the absence of convincing evidence to the contrary, negligence in this case must be considered as proved.

2. Can the libellants have redress in admiralty for the particular injury alleged in the libel?

The libellants are the widow and son of the man whose injuries occasioned by the negligence thus proved, resulted in death. Their right to compensation is a natural right. And I perceive no more ground for denying redress in admiralty in this case than in The Sea Gull [supra], unless it be found in the circumstance that the man killed was a hand on the boat, and the negligence which caused the injury was that of the engineer, and not that of the owners. It was insisted in argument that this circumstance does distinguish the cases, and that an employee can not have redress against his employer for injuries caused by the negligence of a co-employee. And this is the general rule of the common law (Priestley v. Fowler, 3 Mees. & W. 1), though it is undoubtedly limited in its application by another rule, that "where a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman" (Paterson v. Wallace, 1 Macq. H. L. Cas. 751).

I should hesitate to hold, even in the absence of statutory provisions, that the first rule ought to be applied in the case now under consideration. In several of the cases cited for the respondents, exceptions or qualifications are made which may fairly be held to take this case out of its application. Farwell v. Boston & W. R. Co., 4 Metc. (Mass.) 49; O'Connell v. Baltimore & O. R. Co., 20 Md. 220.

But the positive law of statutes seems to me to furnish a sufficient rule for guidance in the case of relatives seeking redress for the death of a relative, whether the injury be caused by strangers, or persons who are, in some sense, co-employees.

The act of parliament, commonly known as Lord Campbell's act, introduced the first great change in the common-law rule that personal actions die with the person, by making wrong-doers responsible in damages for injuries resulting in death. 9 & 10 Vict. c. 93, § 1, A. D. 1846. This act recognizes the equitable right to redress for such in-

juries in its title, "An act for compensating the families of persons killed by accidents." Many of the United States have enacted similar statutes, and among these states Maryland has followed quite closely the act of parliament. The law of Maryland (1 Code, 449), like the act of parliament, establishes in one section the general right to redress, and in another provides the mode in which redress may be pursued.

The right is quite separate from the remedy. The rights, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory rights.

It is clear, therefore, that for an injury such as that proved in this case, the wife and son of the man killed may have redress in admiralty. And the act of 1838, in the section already quoted, seems to contemplate no distinction between actions for injuries to hands employed on board, and to injuries to other persons on board. It appears to regard the negligence of the person employed as the negligence of the owners, and infers the existence of it from the unheeded or too little heeded defects of the steam apparatus.

I incline, therefore, to the opinion that the libellants in this case are entitled to redress against the owners, though the engineer may have been immediately responsible by his own negligence for the injury. It is not necessary, however, in this case, to decide this particular point.

3. The remaining question is, "Are the libellants entitled to redress in the form of action which they have adopted?"

The statute of 1838 recognized, and provided a rule of evidence for actions against owners. It would seem that this statute must have been amended while under legislative consideration. The sixth section made owners and masters responsible for injuries to property of passengers by explosion of boilers, and derangement of engine or machinery, caused by failure to employ competent engineers. But this section seems to have been superseded by the broader provisions of the thirteenth, which, as has been already said, sanctioned actions for all injuries occasioned by bursting of boilers, collapse of flues, or other injurious escape of steam. But no action is sanctioned by this section except against owners, and by the 30th section of the act of 1852 (10 Stat. 69), the action in rem is limited to passengers. It is a fair, if not an inevitable inference, that it was the intention of congress to confine the remedy in rem to passengers, and to allow to others on board injured by the causes enumerated only the remedy in personam. And it is obvious that congress intended to provide for all cases of redress for injuries from these causes, and that no action for such injuries can be maintained unless sanctioned by its legislation.

While, therefore, I am unable to adopt the views of the counsel for the respondents, that parties in the predicament of the libellants have no remedy unless against the engineer of the steamer, I am constrained on the other hand to the conclusion, that no other remedy can be had except an action in personam against the owners. The decree of the district court dismissing the libel against the steamer, must be affirmed.

I venture to add, in the language of Lord Brougham, in Paterson v. Wallace [1 Macq. H. L. Cas. 748], a case in some of its features very similar to this, that "I can not but hope that the defendants will see the propriety of putting an end to the case, by making some voluntary and benevolent compensation to the unfortunate appellants."

HIGHLAND ST. RY. CO. (RAILWAY REGISTER MANUF'G CO. v.). See Case No. 11,535.

HIGHLEYMAN, The (UNITED STATES v.). See Case No. 15,361.

Case No. 6,478.

Ex parte HIGHT.

[See 2 Car. Law Repos. 47.]

Case No. 6,478a.

HIGHT et al. v. CONTINENTAL LIFE INS. CO.

[10 Ins. Law J. 223.]

Circuit Court, D. Indiana. 1881.

LIFE INSURANCE—PREMIUM—TENDER—PAID-UP POLICY.

Where, by the terms of the contract, a premium on a life policy is payable half in cash and half in note, a notification by the company, through its agent, that it would not accept a note, as it had done before, but that the full premium must be paid in cash, is a violation of the contract, which excuses from a formal tender of the premium thereafter, unless the insured had reason to believe, from its conduct, that the company would accept a tender in accordance with the terms of the contract. If, under such circumstances, the assured afterwards offered to accept a paid-up policy, and the company never accepted the offer, it is liable on the original policy.

[This was an action on an insurance policy by Hight and Handy, administrators, etc., for the estate of J. S. Smith Hunter, against the Continental Life Insurance Company.]

Finch & Finch, Hill, and Butler, for plaintiffs.

Buchanan & Manlove, for defendant.

GRESHAM, District Judge (charging jury). The contract sued on was entered into on the 2d day of December, A. D. 1870. The defendant insured the life of J. S. Smith Hunter for $10,000 in consideration of twenty annual premiums for $472.20 each. The first premium was paid at the time the contract was

entered into, and the remaining nineteen were to be paid annually thereafter on the 2d of December. By the terms of the contract, the assured had the right to pay the premiums, half in cash and half by note. The interest on these notes was to be paid annually in advance. It is admitted that the first premium was paid at the time the contract was entered into, and it is also admitted that the three successive premiums were paid as the policy required viz. $236.10 in cash, and a note for the same amount, and that the interest was paid upon all of these outstanding notes by the assured. On the 2d day of December, 1874, the fifth annual premium became due, and it is insisted by the defendant there can be no recourse on account of the non-payment of this premium. As stated, prior to this time, the annual premium had been paid, half in cash and half by the note of the assured. This was according to the terms of the contract. The assured, by the contract, had the right to pay the premiums half in cash and half in notes, and if at this time he was ready and willing to pay his premiums according to the terms of the policy, and the defendant, by its agent, informed him that he must pay the entire premium in cash, and that it would not accept his note, as it had done theretofore, and as it was bound to do by the terms of the contract for a part of the premium, the company then violates its contract, and this violation excused the assured from making any formal tender of the amount due from him in money and by his note. To keep his policy alive, the assured was bound to pay the defendant on the 2d day of December, 1874, the annual premium of $472.20, together with interest for one year, on his four outstanding notes for $236.10 each, and interest for one year in advance on that day on the note to be executed for half of the fifth annual premium. In other words, if the assured at this time desired to execute his note for half the annual premium, as he had a right to do, he was bound at that time to pay the company $236.10, half of the annual premium, and interest in advance for one year on that sum for the other half, and interest for one year on each of the other outstanding premium notes, less the dividend of $104.21 in the defendant's hands, due the assured. In this view, the amount due from the assured to the defendant in cash, when the fifth annual premium became due, less the dividend due the assured, was $202.74. And before the company could forfeit the policy for non-payment, it was bound to credit the amount due in cash from the assured with the dividend in his hands, due to the assured. Both the parties were bound by the contract just as they had executed it. The company could not, without the consent of the assured, change the terms of the contract; and, as already stated, the assured was excused from making any tender at all, if, in advance, the company had informed him that it would accept payment of the entire premium in cash only. If, however, you find that the company did not insist that the entire premium should be paid in cash, that it insisted on nothing outside of the terms of the contract, then the question arises: Did the assured, on the 2d day of December, 1874, pay his premium as required by the terms of the policy,—that is to say, did he make a legal tender? If you find that the company made no illegal demands upon the assured in advance, as already spoken of, then I have instructed you as to the amount that was due from the assured to the company in cash to avoid forfeiture. If the company insisted on the payment of the entire premium in cash on the 2d day of December, 1874, the assured was excused from making tender thereafter, unless he had reason to believe, from something in the conduct of the company, that it was willing that the premium should be paid according to the terms of the policy.

There is evidence before you tending to show that the assured was willing to accept from the company a paid-up policy for as many twentieths of the total amount as he had paid annual premiums. If, after the defendant had violated its contract, and insisted that the assured should pay his premium in cash only, the assured was willing and offerred to take a paid-up policy under the terms of the agreement, and the company never accepted this offer, and no agreement to that effect was ever executed between the assured and the company, then there is nothing in the conduct of the assured which should prevent him from recovering less than the full amount of the policy, subject to proper deductions which will be hereafter referred to.

The plaintiffs have abandoned and dismissed the second paragraph of their complaint.

If you find for the defendant, the form of your verdict will be: "We, the jury, find for the defendant." If you find for the plaintiffs, the form of your verdict will be: "We, the jury, find for the plaintiffs, and assess their damages at $———." If your finding is for the plaintiffs, you will deduct from the amount of the policy the outstanding premium notes and interest accrued thereon, and also the full premiums for 1874 and 1875, with interest thereon, and the amount due the plaintiffs, less these deductions, will draw interest after the expiration of ninety days from the time the company received proofs of death, which, it is admitted, was on the 25th of October, 1876.

The jury returned a verdict for plaintiffs for $9,587.04.

HIGHT (TRAVERS v.). See Case No. 14,151.

HIGHTOWER (BARNERT v.). See Case No. 1,009.

Case No. 6,478b.

HIGHTOWER v. HAWTHORN.

[Hempst. 42.] [1]

Superior Court, Territory of Arkansas. Oct., 1826.

PRACTICE AND PLEADING—APPEARANCE—JUDGMENT BY DEFAULT—TENDER OF PLEA.

1. A plea not calculated to surprise the plaintiff, should be received when tendered.

2. Every litigant has an unqualified right to appear by himself or counsel, and to deny this right is a gross wrong.

3. After judgment by default, counsel may appear and cross-examine witnesses, and introduce witnesses in mitigation of damages.

Error to Independence circuit court.

Before JOHNSON and TRIMBLE, JJ.

OPINION OF THE COURT. This was an action of trover and conversion brought by [Thomas N.] Hawthorn against [Joshua] Hightower, in the circuit court of Independence county, and came on to be tried at the July term of that court in 1826, before Justice Scott. By the record it appears that a jury was impanelled and sworn to try the issue between the parties, and afterwards the jury were discharged, no plea having been filed and no issue made up, and judgment by default was entered against the defendant, Hightower, and a writ of inquiry awarded to the next term of the court. By a bill of exceptions signed by William Quarles, Caleb S. Manly, John Ruddle, and A. S. Walker, by-standers, it appears that Hightower, by his counsel, offered to file the plea of the general issue, which plea the court rejected, alleging that Hightower had no right to appear by counsel in the case. By another bill of exceptions signed by William Quarles, Thomas Moore, and John Reed, it appears that the court decided that Richard Searcy, counsel of the defendant, Hightower, had no right to appear, and ordered that the bills of exception tendered to the court should not be filed, noticed, or received by the clerk, and refused to sign either of them. The first point made by the plaintiff in error is, whether the court below ought to have admitted the plea of the general issue. We are of that opinion. It was not calculated to take the plaintiff by surprise, and he having omitted to take judgment by default at the previous term, the cause would stand over, as on an appearance, to the succeeding term. At each continuance, all the rights of both plaintiff and defendant were also continued, and the parties stood in precisely the same attitude that they did at each preceding term.

As to the second point, made in consequence of the court denying to the defendant the right of the counsel to appear in the case. By an act of the legislature of 1807 (Geyer, Dig. 250), parties may appear in person or by attorney. With a knowledge of this statute and the well-known doctrine of the common law on this subject for centuries, we cannot conceive how a court could deny, not only the right of counsel, but the unqualified right of every litigant. To deny the party the right to appear by attorney, is at once shutting out from him that source of information and that exercise of his legal rights which would enable him to make a just and fair defence to the suit brought against him. Even after judgment by default, the counsel for the defendant may contest the right to a recovery of more than nominal damages; may cross-examine the plaintiff's witnesses; may introduce witnesses in mitigation of damages; may make any motion in the progress of the case, and in fact do every thing as in other cases, except he is not permitted to deny the plaintiff's cause of action, and his right to recover nominal damages. Reversed.

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

HIGUERA (UNITED STATES v.). See Cases Nos. 15,362 and 15,363.

Case No. 6,479.

HIKE v. PROVIDENCE, ETC., R. CO. et al.

[The case reported under above title in 6 O. G. 575, is the same as Case No. 11,163.]

Case No. 6,480.

The HILARITY.

[Blatchf. & H. 90.] [1]

District Court, S. D. New York. Nov. 30, 1829.

HYPOTHECATION OF VESSEL — MORTGAGE — ADMIRALTY JURISDICTION—SEAMEN'S WAGES.

1. A hypothecation of a vessel, in the form of a mortgage, as security for supplies furnished in a foreign port, may be enforced in rem in the admiralty. The lien created by such hypothecation is not lost by taking other security for the claim.

2. In regard to supplies furnished a domestic ship in her own port, courts of admiralty are governed by the law of the place, in determining whether a lien against the vessel exists for such supplies. For this purpose, ports in different states of the United States are foreign to each other.

3. A material man cannot maintain an action in personam in admiralty, where a note or other obligation has been taken for the demand.

4. Either the owner or the master of a ship may bind her by a direct hypothecation, for repairs or supplies made or furnished in a foreign port, although a note or other obligation is given for the demand.

5. A hypothecation in the form of a mortgage is not a bottomry bond, where the creditor neither assumes the risk of a voyage nor reserves marine interest.

6. Seamen's wages take precedence of a hypothecation for supplies.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

This was a libel in rem against the schooner Hilarity. A hypothecation of the vessel was made by her owner in the port of Baltimore, in the form of a mortgage, as security to a material man, for supplies furnished her. The owner resided in the state of Delaware. A promissory note, at four months, was also taken for the same demand. The vessel was now libelled on the mortgage as a bottomry bond. A claim was interposed by an older mortgagee, and also by the seamen for their wages; and pleas were put in to the jurisdiction of the court on two grounds: 1st. That the lien implied by law was destroyed by the party's taking other security for his claim, and that no direct lien could be created by mortgage, and be enforced in admiralty; 2d. That the remedy upon the securities must be sought in the ordinary courts of law alone.

Mr. Greenwood, for libellant.
Mr. Blunt, for claimants.

BETTS, District Judge. This case does not present the point whether material men have a lien, in the home port of the owner, against the vessel, without actual possession. It is now fully settled, that in respect to domestic ships in their own ports, the courts of admiralty must be governed by the law of the place. The General Smith, 4 Wheat. [17 U. S.] 438, 439; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; The Zodiac, 1 Hagg. Adm. 320, 325. In those states where the rules of the civil law obtain, the lien would exist; but where the common law prevails, there would be no lien. But the question in this case is, whether a hypothecation of a vessel, by way of mortgage, can be enforced in the courts of admiralty. Baltimore being a foreign port in relation to the state of Delaware, it is well-settled that the lien would have been perfect, and that it might have been enforced in any maritime court, if no assurance for payment had been taken by the material man. Abb. Shipp. 116, note. The late decisions of the supreme court, which are quoted to establish a contrary doctrine, were cases of inquiry into the owner's liability in personam to material men. It was decided, that courts of admiralty would not sustain a suit in personam, for materials furnished a vessel, where a note of hand or other obligation had been taken for the demand. This would be upon the principle that a specific contract had been accepted in lieu of the implied obligation of the owner. The liability of the vessel was not in question.

It has been decided in this court, on full argument, that the master may bind a vessel, by a direct hypothecation, for repairs in a foreign port, although he has also given the creditor a bill of exchange for the same demand. The William and Emmeline [Case No. 17,687]. The right of the master to hypothecate, results from the doctrine that he stands in the place of the owner. His powers, however, though never greater, are often less than those of the owner. Thus, the owner may pledge the vessel by bottomry for the purchase of cargo,—The Mary [Id. 9,187],—which the master cannot do. In the present case, the libel articles upon the instrument of hypothecation as a bottomry bond, although it lacks the form and the essential requisites of that security. The creditor neither assumes the risk of a voyage nor reserves marine interest. But no special form of transaction is necessary to make an operative hypothecation. Any method which shows the intention of the parties, describes the subject matter, and confers adequate powers upon the pledgee, will make an empawning of property, which will be treated by the courts as such, whether in the form of a mortgage or of a simple hypothecation. There is, therefore, no impediment to proceeding on this instrument as a mere hypothecation, although it might also have the effect of a mortgage. There is nothing in the objection that this security can be enforced only by an action at common law. It is not necessary now to consider whether, in every case of a mortgage of a vessel, or of her equipments, a court of admiralty will enforce the contract in rem; for the debt secured by the hypothecation in this case, having been contracted for supplies furnished a vessel in a foreign port, was indisputably within the jurisdiction of the court, and that jurisdiction was not lost because the parties reduced to writing an admission of the indebtedness. I think, therefore, that the giving of the promissory note creates no impediment to the creditor's pursuing his primary lien in a court of admiralty against the vessel.

The question as to the order of payment between the two mortgages, is reserved for further consideration, after the money is brought into court.

A decree of condemnation must be entered, and a reference be had to the clerk to state the amount of wages due to the seamen, and also the amount due on the respective mortgages. The wages will be first satisfied. Decree accordingly.

HILDRETH (HEATH v.). See Case No. 6,309.

HILDRUP (STINSON v.). See Case No. 13,459.

HILDT (DOUGHTY v.). See Case No. 4,027.

Case No. 6,481.

In re HILL.

[1 Ben. 321;[1] Bankr. Reg. Supp. 4; 1 N. B. R. 16; 6 Int. Rev. Rec. 51.]

District Court, S. D. New York. Aug., 1867.

PRACTICE IN BANKRUPTCY—APPEARANCE OF CREDITORS — VARIANCE IN NOTICE TO CREDITORS — MARSHAL'S RETURN—STATEMENT OF DEBTS AND OF PERSONAL PROPERTY—PROOF OF DEBT.

1. At the first meeting of a bankrupt's creditors, an attorney appeared for two creditors who had not proved their claims, and filed four objections to the proceedings, viz.: (1) That the name of the bankrupt, as stated in the notice served on them, was William B. Hill; (2) that the petition did not comply, as to the details required to be stated in it, with the eleventh section of the bankruptcy act [of 1867 ,(14 Stat. 521)]; (3) that the inventory did not state the items of the bankrupt's personal estate; and (4) that the bankrupt had omitted from his schedule property held by him, or others for his use. The bankrupt moved to strike out these objections, among other reasons, because (1) the creditors had not appeared in person, or by an attorney authorized to practice in the United States district or circuit courts; (2) the creditors had not proved their claims; (3) the proof of service of notice by the marshal was regular and conclusive; (4) the inventory of debts, and of personal property was sufficient, and the register's certificate that it was so was conclusive. The register did not pass on the questions, because he held that the fourth objection was an "opposition to the bankrupt's discharge," which necessitated a reference to the court. He certified them to the court, and adjourned the proceedings. *Held*, that the adjournment was regular.

2. The fourth objection was not an "opposition to the discharge." Until the bankrupt applies for his discharge, under section 29, no objection to any proceeding can be considered to be such an opposition.

3. The variance in the bankrupt's name in the notice served was not material.

4. The marshal's return as to such service is not conclusive.

[Cited in Re Pulver, Case No. 11,466.]

5. The statement, in the schedule, of the sum due any creditor, and of the date of the debt or judgment, was sufficient, and any insufficient statement might be made sufficient by amendment.

[Cited in Re Heller, Case No. 6,339; Re Blaisdell, Id. 1,488.]

6. Schedules giving an inventory of the bankrupt's personal estate, but failing to set forth the separate items, were defective, but might be amended.

7. The objection to the appearance of the creditors by attorney was not tenable.

8. No creditor has any right to be heard at the first meeting, either in person or by attorney, in opposition to any of the proceedings, till he has proved his debt.

9. The register's certificate, as to the correctness of the inventory of debts, is not conclusive.

10. A creditor who opposes a bankrupt's discharge on the ground of fraud or concealment, must be required to specify the particular matter of which he complains.

In this case, on the day appointed for the first meeting of creditors, two of the creditors of the bankrupt appeared, by Theodoric R. Westbrook, Esquire, as their attorney. They did not appear in person, nor were their debts proved, but Mr. Westbrook filed with the register preliminary objections to the proceedings on behalf of each of the two creditors for whom he appeared. The objections were: (1) That the notices to the creditors gave the name of the debtor as William B. Hill, instead of William D. Hill; (2) that the petition did not state the sum due to each creditor, nor the nature of each debt or demand, nor the true cause and consideration of the indebtedness in each case, and where the same arose, and did not comply, as to the details required to be stated in it, with the eleventh section of the bankruptcy act; (3) that the inventory of the estate did not show the items of the debtor's alleged personal estate, and the value at which it was estimated, so that it could be determined whether the property was or was not exempt by law, and that the inventory was insufficient and defective under the requirements of said eleventh section; (4) that the debtor had omitted from his schedule property, claims, demands, and rights of action, owned by him, or held by others for his use and benefit. The bankrupt, by a written paper filed with the register, moved to strike out such preliminary objections of the creditors, on the following grounds: (1) That the creditors had not appeared in person, nor by an attorney authorized to practice in the district or circuit courts of the United States, who was authorized to appear for them in this matter; that Mr. Westbrook's name, endorsed on the objections, was not written by him, nor had he appeared in court to sanction its use; and that he could not delegate to other counsel or attorneys the use of his name, unless he in fact acted as attorney in the case; (2) that the creditors had not proved their claims, and could raise no objections until they established the fact on their part that they had claims against the bankrupt's estate; (3) that the first objection on the part of the creditors was frivolous, because the proof of service of notice by the marshal appeared to be regular, and was conclusive, and was, in fact, uncontradicted; (4) that the second objection on the part of the creditors was frivolous, because the inventory was made for the information of the court and not of the creditors as to the amount and nature of each claim, and the certificate of the register as to its sufficiency was conclusive, and because the inventory was sufficient; (5) that the third objection on the part of the creditors was frivolous, because value is never certain, and can only be estimated, and the value of the debtor's personal estate was so stated; that a full schedule of household furniture was not required by the act; and that the examination of the bankrupt was not intended to be superseded by the inventory; (6) that the fourth objection on the part of the creditors was frivolous, because it was too indefinite, and that it ought to specify what par-

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

ticular omissions had been made from the schedule. The debtor also asked that the creditors be charged with the costs and expenses of the decision of the objections made by them. It was agreed that the questions thus raised should be submitted to the court, and the case was adjourned.

BLATCHFORD, District Judge. The register states, in his certificate, that he would have assumed to decide the several questions raised, except for the fourth objection raised by the creditors, which seemed to him to go to the merits of the whole proceeding, and to constitute such an "opposition to the discharge" of the bankrupt as necessitated a reference to the court, under the act and the general orders.

The fourth objection was, that the debtor had omitted from his schedule property, claims, demands and rights of action, owned by him, or held by others for his use and benefit. This objection can not be regarded as an opposition to the discharge of the bankrupt. Until the bankrupt applies, under section 29, for his discharge, no objection filed or raised to any proceeding can be considered as an "opposition to the discharge." Besides, under sections thirty and thirty-one, no creditor who has not proved his debt can oppose a discharge. In this case, the creditors have not proved their debts.

The register also states, in his certificate, that if the adjournment of the case by the register was irregular, he assumes that the court may vacate such adjournment under its general powers over the bankrupt, and require an appearance in court. The adjournment was regular.

The register also states in his certificate that if he had assumed to decide the first preliminary objection raised by the creditors, he would have held that the variance by the use of the name William B. Hill, instead of that of William D. Hill, in the notices, was not material, and would not be regarded in law or equity, unless the party had been misled; that it is evident that the creditors who appear and raise the objection were not misled; that all the papers in the case, and the notices published in the newspapers, gave the bankrupt's name correctly; and that only the notices served on the creditors who appeared gave the middle letter of the bankrupt's name as B., instead of D. The variance in this case was not material, and the first objection taken by the creditors was untenable.

The register states that he does not regard the return by the marshal, as to the service of notice on the creditors, as conclusive. Under sections 12 and 13 of the act, such return is not conclusive.

The register states, as to the second objection taken by the creditors, that he should have regarded the statement, in the schedule, of the amount due to each creditor, as sufficient, wherever the sum and the date of the debt or judgment was given; that, to ascertain the exact amount, at any stage of the proceedings, only required a computation of interest; that any other mode is impracticable, with the form of schedules adopted by the court; that the details of place and consideration seem to be sufficient; and that, if they are not, they may be made so by amendment. The views of the register, as to the second objection, are correct.

The register states, as to the third objection, that he is of opinion that the schedules are defective in giving an inventory of the bankrupt's alleged personal estate, because they do not set forth the separate items of household furniture and wearing apparel, but that the omission may be remedied by amendment, if necessary. The schedules are defective, if they do not set forth such separate items; but the omission may be remedied by amendment, under section 26 of the act, and rules 7, 14 and 33 of the general orders in bankruptcy.

The register states that the point made by the bankrupt against the appearance of the creditors named, did not seem tenable; that William Lawton, Esquire, first appeared for the creditors named, and that, the objection being taken that he was not admitted to practice in this court, he called in Mr. Westbrook, who represented the creditors named, for Mr. Lawton.

The register is correct in his view that this point is not tenable. Mr. Westbrook being an attorney or counsellor of the circuit or district court, has a right, under rule three of the general orders in bankruptcy, to appear for the creditors, and conduct the proceedings for them, and, if he so appears to conduct the proceedings, the register cannot, at the instance of the bankrupt, inquire into the authority given to him by the creditors. The certificate of the register that Mr. Westbrook was called in and represented the creditors, is understood to mean that he appeared and conducted the proceedings for the creditors.

As to the second point made by the bankrupt, namely, that the creditors had not proved their claims, and could raise no objections until they established the fact, on their part, that they had claims against the bankrupt's estate, the register states it to be his opinion, that persons named as creditors in the debtor's schedule, may appear and make any motion, and take any exception, without other proof of their debts than that contained in the bankrupt's papers.

In this the register is mistaken. Under section thirteen of the act, the two creditors in this case, not having proved their debts, would not, at the meeting at which the proceedings now certified took place, have been entitled to any voice or vote in the choice of an assignee. The meeting was, under section eleven of the act and the warrant, form number six, a meeting of the creditors "to prove their debts, and choose one or more assignees." No creditor has, at such meeting, any right to be heard, either in person or by

attorney, in opposition to any of the proceedings, until he has proved his debt. The fact that his debt is set forth in the schedules to the bankrupt's petition, gives him no such right to be heard.

As to the fourth point taken by the bankrupt, the register states that he does not regard his certificate as to the sufficiency of the inventory of the debtor's debts as conclusive. Such certificate is not so conclusive as to prevent an inquiry into the sufficiency of such inventory, when the question is raised at the proper time and in the proper manner, and on the suggestion of a proper party.

The register states that the fifth point taken by the bankrupt is argumentative. It is untenable, except in so far as it claims that a full schedule of household furniture is not required by the act, and in that respect the views of the court have been herein before stated.

As to the sixth point taken by the bankrupt, the register states that he thinks it well taken, and that the creditor who opposes a bankrupt's discharge on the ground of fraud or concealment, should be required to specify the particular matter of which he complains.

The objection made to the fourth objection taken by the creditors would, in any event, be of no avail, unless made definite by specifying the particular omissions relied on. The clerk will certify this decision to Register Gates.

[NOTE. A creditor subsequently filed specifications of his objections to the bankrupt's discharge, which, having been amended (Case No. 6,482), the court, upon the proofs, refused said discharge. Id. 6,483.]

Case No. 6,482.

In re HILL.

[2 Ben. 136;[1] 1 N. B. R. 275 (Quarto, 42); 15 Pittsb. Leg. J. 329.]

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

SPECIFICATIONS OF OBJECTION TO DISCHARGE — BURDEN OF PROOF.

1. Where specifications of objection to a bankrupt's discharge state that he has placed his property in the hands of his wife, and withheld his books, papers, and documents, they will be *held* too general, unless they are intended to apply to all his property and all his books, papers, and documents.

[Cited in Re Antisdel, Case No. 490.]

2. A general charge of fraud against the act is too vague.

[Cited in Re Condict, Case No. 3,094; Re Jacobs, Id. 7,160.]

3. After specifications of objection are filed, furtlfer proof may be taken, if desired, by a reference to the register.

4. The issues to be tried in such case are the allegations in the specifications; and, where the bankrupt has taken the oath, required by section 29 of the act [of 1867 (14 Stat. 531)], the burden of proof is on the creditor to show that the bankrupt has forfeited his title to a discharge.

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

In this case [in the matter of William D. Hill] a creditor filed specifications of his objections to the bankrupt's discharge, which, among other objections, stated: "That the said bankrupt, with intent to defraud his creditors, has fraudulently placed his property in the hands of his wife, with intent to prevent it from being reached by his creditors, and applied in satisfaction of their debts, and that his said wife so held his property at the time of filing the petition aforesaid. That he was withheld his books, papers, and documents relating to his business. That he has been guilty of fraud, contrary to the true intent and meaning of the bankruptcy act."

[Previously, certain preliminary objections to the first meeting of creditors were passed upon by the court. Case No. 6,481.]

BLATCHFORD, District Judge. In this case I have examined the written specifications filed on behalf of William S. Preston, a creditor, of the grounds of his opposition to the discharge of the bankrupt. All of them are in proper form to be triable, except those hereinafter mentioned. The one in regard to placing the bankrupt's property in the hands of his wife is too vague and general, unless it means that the bankrupt placed all his property in the hands of his wife. Otherwise, the specification should state what property. The specification in regard to the withholding of his books, papers, and documents is too vague and general, unless it is intended to cover all his books, papers, and documents. Otherwise, it should specify which of them. The general charge of fraud against the act is too vague. It should specify the particular fraud. As I understand the specifications, they state that the evidence already taken before the register shows that the bankrupt has placed his property in the hands of his wife, and has withheld his books, papers, and documents, and has been guilty generally of fraud against the act. I shall allow the creditor, if he desires, to amend, within ten days, his specifications, in the particulars so held not to be triable. If either party shall desire to take further testimony as to the matters embraced in the specifications, it must be referred, under section 38 of the act, to the register, to take such testimony and report it to the court; and, when his report comes in, either party can bring the case on for hearing on any Saturday, on four days' notice to the other party and to the clerk. The issues to be tried and decided will be the allegations in the specifications, and, as the bankrupt has taken and subscribed the oath, required by section 29 of the act, the burden will be upon the creditor to show that the bankrupt has forfeited his title to a discharge, by having done some one of the things specified in section 29 as grounds for withholding a discharge.

[Upon the evidence, the discharge of the bankrupt was refused. Case No. 6,483.]

Case No. 6,483.

In re HILL.

[2 Ben. 349;[1] 1 N. B. R. 431 (Quarto, 114); 1 Am. Law T. Rep. Bankr. 56.]

District Court, S. D. New York. April 9, 1868.

FRAUD—BANKRUPT DOING BUSINESS IN HIS WIFE'S NAME.

A bankrupt had married in 1860, his wife having then no property, and having inherited none subsequently, and received none except from her husband. In 1861, he failed in business, and from that time did business as agent, first for one M., and then for his wife, in whose name he transacted an extensive business: *Held* that, on the facts, a house and lot which stood in the name of the bankrupt's wife, was really his property; that he had been guilty of fraud in placing his property in his wife's hands, and had willfully sworn falsely in the bankruptcy proceedings; and that a discharge must be refused.

[Cited in Re Bainsford, Case No. 11,537; Re Antisdel, Id. 490.]

[In bankruptcy. In the matter of William D. Hill.]

[In Case No. 6,482 the court had given leave to the creditor to file amended specifications giving the grounds of his opposition to the discharge of the said bankrupt, and in Case No. 6,481 certain preliminary objections to the first meeting of creditors were passed upon.]

Cooke & Lounsbery, for bankrupt.
William Lawton, for creditor.

BLATCHFORD, District Judge. The discharge of the bankrupt is opposed by William S. Preston, a creditor. The specifications in opposition, filed by the creditor [Case No. 6,482], aver that "the evidence taken before the register shows, beyond all reasonable doubt, that the bankrupt has willfully omitted from his sworn and filed schedules and inventories, property which, in truth and fact, belonged to him at the time of making and filing his said schedule and inventories, to wit, a certain house and lot, situate in the village of Kingston, claimed to have been purchased by his wife of Jeremiah Russell, a certain promissory note, made by one McKinstry, for $1,000, one of Jeremiah Green, one of H. S. Van Etten, and other notes, in addition to bonds, mortgages, and other evidences of debt and property, which will more fully appear from the evidence taken; that the said bankrupt, with intent to defraud his creditors, has fraudulently placed his property in the hands of his wife, with intent to prevent it from being reached by his creditors, and applied in satisfaction of their debts, and that his wife so held his property at the time of filing the petition aforesaid; that the said bankrupt has withheld his books, papers, and documents, relating to his business; that he has omitted from his schedules all claims and demands which he has against his wife, for services rendered for her as her agent, if, in fact, he was such agent, and which, in equity, belong to the creditors, and are unpaid for."

The bankrupt and his wife, and other witnesses, have been examined. I have carefully gone over their testimony, and am entirely satisfied that the allegations of the specifications above referred to, are fully proved. The case is one of a deliberate attempt, by the bankrupt, to defraud his creditors, and yet procure a discharge from his debts. He has willfully sworn falsely in his affidavit annexed to his inventory of property, and, on his examination before the register, in the course of the proceedings in bankruptcy, in regard to material facts concerning the property owned by him at the time of filing his petition in bankruptcy, he has concealed his property by covering it up in the name of his wife, and has been guilty of fraud, contrary to the bankruptcy act [of 1867 (14 Stat. 517)], by not delivering to his assignee property which belonged to him at the time of presenting his petition and inventory, and which he was not permitted to retain under the provisions of the act, and has made a fraudulent gift or transfer of property to his wife, contrary to the provisions of the act. He has committed all these offences, which are made grounds, by section 29 of the act, for withholding his discharge, and then he has crowned the whole by taking and subscribing the oath required by section 29, to the effect that he has not done, suffered, or been privy to, any act, matter, or thing, specified in the act, as a ground for withholding his discharge.

In his inventory of his estate, annexed to his petition, he sets forth that he has no property except $200 worth of property, that is exempted by section 14 of the act; and his assignee makes a return of no assets. The evidence shows that the bankrupt claims to have done business for several years past as agent for other persons, and not on his own behalf, first, as agent for one McMullen, and afterward, and down to the time of filing his petition, as agent of, and in behalf of, his wife. The testimony, and particularly the examination of the bankrupt and of his wife, shows that these pretended agencies, and especially the one for his wife, were mere shams and covers for fraud. The prevarications of the bankrupt in his testimony, his reluctance to disclose the truth, his want of recollection as to matters which he could not well have forgotten, and his failure to give any satisfactory explanation of the terms of his agencies, and of the nature and amount of his compensation as agent, all tend to show, beyond question, that the whole arrangement was one devised and carried out to defraud his creditors, and that the bulk of the property which stood in the name of, and was in the possession of, his wife, at the time his petition was filed, was, in fact, his

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

own property. The attempt to show that his wife derived the property from any other source than from him, utterly failed. The debts set forth in his schedule were, all of them, contracted in 1861. He was married in 1860. His wife had then no property, except some household furniture, of the value of $225, which he purchased and gave to her before their marriage. She has inherited no property since, nor received any from any other person than her husband. In September, 1861, he failed, and made an assignment of all his property for the benefit of his creditors. Since that time he has carried on business as agent for McMullen and for his wife. His wife's furniture was sold in 1864 for $600. The attempt to show that Mrs. Hill had capital enough growing out of the investment of this $600, and the buying of notes on her behalf, prior to the 18th of April, 1867, and the transactions on her behalf with John Grant, in regard to mules, prior to that time, to establish the extensive business which, from and after that date, was done for her by her husband as her agent, is absurd. At that date a bank account was opened in her name with the Ulster County National Bank at Kingston,' and her husband's agency for McMullen ceased about the same time. It is quite clear that the capital was really the property of her husband, and was the fruit of the business he had been transacting since he failed in 1861, nominally as agent for McMullen, but really on his own behalf. Mrs. Hill, in her testimony, shows that she knew nothing about what her husband was doing in her name in the way of business, and that she had no connection with it except to sign notes and checks as he brought them to her, filled up and ready to be signed. From April, 1867, to January, 1868, the deposits in the name of Mrs. Hill, in the bank, amounted to nearly $25,000; and Hill testifies that a large amount of her transactions do not appear upon her bank book, that some of the notes he bought for her were discounted at other banks, and that he bought about $50,000 worth of notes, as her agent, and dealt largely in other things as her agent, buying and selling mostly for cash. The house named in the specifications was purchased from Jeremiah Russell for $5,750, in the fall of 1866. Of this amount, $1,750 was paid in cash, being raised on a note signed by Mrs. Hill, and she took a deed of the house, and gave back a mortgage on it for $4,000. But the evidence as to the transaction shows that the purchase was really by her husband, and that the note on which the money was raised to make the cash payment, was paid with his money, if it has been paid. The bankrupt has kept no account of his dealings for his wife, as her agent, and has never rendered to her any account, and she has never paid him, or agreed to pay him, any thing for his services. The case is a plain one for refusing a discharge.

Case No. 6,484.

In re HILL.

[7 Ben. 378;[1] 10 N. B. R. 133; 1 Am. Law T. Rep. (N. S.) 421; 20 Int. Rev. Rec. 81.]

District Court, S. D. New York. July, 1874.

PRACTICE—ADJUDICATION—ACT OF BANKRUPTCY.

1. A petition in involuntary bankruptcy was filed in January, 1874. A trial was had before the court, and, on the 18th of March, 1874, a memorandum signed with the initials of the judge, was made by him on the petition, directing that an order of adjudication be entered on the first of the two acts of bankruptcy alleged, which was that the debtor had stopped payment of his commercial paper, and did not resume payment of it within fourteen days. No order of adjudication was entered before the passage of the bankruptcy amendment act of June 22, 1874 [18 Stat. 178], when the creditor applied to have the order of adjudication entered nunc pro tunc as of March 18, 1874. *Held*, that the order could not be so entered.

2. To obtain the entry of the adjudication, the creditor must amend the petition, so as to make it conform to the act of June 22, 1874, both as to the number of creditors joining in it and the act of bankruptcy.

[In the matter of Joseph M. Hill, an alleged bankrupt.]

H. C. Lockwood, for petitioning creditor.
J. D. Reymert, for debtor.

BLATCHFORD, District Judge. The petition in this case, in involuntary bankruptcy, was filed on the 17th of January, 1874. The order to show cause was returnable on the 24th of January. On that day the debtor appeared and filed a denial in the usual form, and demanded a trial by the court, and an order was made referring it to a commissioner, to take the evidence. The commissioner's report of the evidence was filed on the 6th of March, the matter was brought to hearing before the court, and, on the 18th of March, a memorandum, signed by the initials of the judge, was made by him on the petition, directing that an order of adjudication be entered. No such order was entered prior to June 22, 1874, probably for the reason that the petitioning creditor did not desire or procure such order to be entered. I am now asked to sign such an order nunc pro tunc, as of the 18th of March. I do not see how this can be done. The test must be whether a formal order of adjudication has been entered. Until the entry of such formal order, a discontinuance has always been allowed by this court to be entered, if desired by the petitioning creditor. A direction that such order be entered, the order not having been prepared in form, is no more than the decision of the judge. It is not a judgment, or an entry on the files of the court that the court adjudges thus and so. The form of an adjudication of bankruptcy on a creditor's petition is prescribed by form No. 58. Nothing else is an adjudication or an adjudg-

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

ing, and, therefore, the debtor in the present case remained, on the 22d of June, 1874, to "be adjudged a bankrupt" under the provisions of the act of 1874, that is, on such a petition as I have held, in the case of In re Scull [Case No. 12,568], to be the necessary form of petition. The clerk will enter in the present case the like form of order with that directed in the Case of Scull, if either party desires it.

It is proper to say that there are two acts of bankruptcy alleged in the petition. The direction for an order of adjudication was that it should be entered on the first act of bankruptcy alleged. That is an allegation that the debtor, on the 22d of November, 1873 (56 days before the filing of the petition), being a merchant, stopped payment of his commercial paper, and did not resume payment of it within a period of fourteen days. If the petition is to be proceeded with as to such first act of bankruptcy, it must conform to the act of 1874, by averring that the commercial paper was made or passed in the course of the business of the debtor as a merchant, and that he did not resume payment of it within a period of forty days. An amendment to that effect will be allowed to be made within the twenty days allowed for the amendment in regard to the number and amount of creditors.

Case No. 6,485.

In re HILL et al.

[5 Law Rep. 326.]

District Court, S. D. New York. 1842.

INVOLUNTARY BANKRUPTCY—DEFECTIVE PETITION—AMENDMENTS

This was a case of compulsory bankruptcy, and on the day for showing cause why a decree should not pass, exceptions were taken on the part of the debtors to the sufficiency of the proceedings; some of which were merely formal, and some rested on matters of substance.

John Van Vleeck, for petitioners.

P. J. Joachemssen, for bankrupts.

THE COURT decided, that the jurat subscribed by the commissioner need not contain a venue, when it could be sufficiently collected from the deposition itself, that the oath was administered where the officer resides. That if a debt must be due, to found these proceedings, yet a promissory note over due on its face when the petition was sworn to, and actually due by the expiration of the days of grace, at the time the petition was presented to the judge, and was acted on by him, was sufficient to authorize and support the proceedings; that the application to the court, is the time the petition comes into action, and not the date of its subscription or attestation. THE COURT further decided, that the petition on its face must show that an indebtedness above $2000 accrued, against the parties in their partnership capacity, and that it was not enough that the parties (by name) owed over $2000. It was further decided, that the petition must allege, that the acts of bankruptcy were committed during the continuance of the partnership, and for these defects the petition was disallowed.

On a motion to amend the petition in these particulars, subsequently made by the creditors, THE COURT decided, that this court has under the act [of 1841 (5 Stat. 440)] ability to allow amendments in support of the justice of a case, when by the more rigid rules of practice in bankruptcy in England, like favors might possibly be denied. But even there, as appears from the authorities cited, the refusal to permit amendments, usually rests on a reluctance to vary a commission issued and under execution, or to introduce new foundations for the proceedings, which shall also protect steps already taken without legal justification. THE COURT being satisfied from the affidavits of the creditors and counsel, that the defective averments in the petition, resulted from misapprehension of the counsel, who had the facts properly communicated to him, will permit the amendments to be made on payment of costs.

Case No. 6,486.

In re HILL.

[2 N. B. R. 140 (Quarto, 53).] [1]

District Court, N. D. New York. 1868.

BANKRUPTCY—CONTEMPT—STAY OF PROCEEDINGS.

The bankrupt act [of 1867 (14 Stat. 517)] does not contemplate a stay of proceedings by injunction on an order to show cause, issued out of a state court, why the bankrupt should not be punished for contempt for his failure to appear for examination on proceedings supplementary to execution.

[Cited in Clark v. Bininger, 38 How. Pr. 341.]

This was a motion to modify the injunction granted at the time of the filing of the petition restricting further proceedings before the county judge of Erie county on proceedings supplementary to execution. It appeared, that before the petition was filed in this court, the petitioner [Milo W. Hill] had (as alleged) committed a contempt in not appearing before the county judge, and an order had been made for him to show cause why he should not be punished. The injunction having been served upon the county judge, he doubted his right even to punish for contempt committed as alleged.

HALL, District Judge, said that he had some doubts whether the injunction as granted would stay the proceedings for contempt, but he did not consider that the bankrupt act contemplated a stay of such proceedings, and that he would grant the order modifying injunction as asked.

[1] [Reprinted by permission.]

HILL, In re. See Case No. 8,443.

HILL, The. See Case No. 9,711.

Case No. 6,487.

HILL v. The AMELIA.

[6 Ben. 475.] [1]

District Court, S. D. New York. April, 1873.[2]

POSSESSION—EQUITABLE AND LEGAL TITLE TO A VESSEL.

T. built a yacht, called the A., for D., in payment for which he was to receive a sum of money and another yacht belonging to D. He received part of the money, but did not take possession of the other yacht. D. sold the A. to H., by bill of sale, with the knowledge of T., who was present when the A. was delivered to H., and was employed by H. to take care of her. On the next day, T. took off her sails, delivered them to a cart which H. had sent for them, and took them to H.'s store, and there stored them. Afterwards H. paid T. $5, on account of his care of the yacht. Some time after, on H. coming for the yacht, T. refused to give her up to him, claiming that she was his own. H. thereupon filed a libel of possession against the yacht and T., to recover possession of the yacht. No papers had been taken out at the custom house for the yacht till after the sale to H., when T. took out a license on his own certificate, as builder: *Held*, that the admiralty had no jurisdiction of the action.

[Cited in Neuberg v. Cargo of Mineral Phosphate, 15 Fed. 287; The G. Reusens, 23 Fed. 405; Rea v. The Eclipse, 135 U. S. 608, 10 Sup. Ct. 876.]

This was a libel filed by the libellant to recover possession of the yacht Amelia. The yacht was built by the respondent [J. N.] Towns, for one Doncourt. Towns was to be paid partly in money and partly by another yacht belonging to Doncourt. Doncourt paid him part of the money, and told him where to get the other yacht, and ordered it to be delivered to Towns, but Towns did not take it. Doncourt sold the Amelia to [Abraham] Hill, the libellant, giving him a bill of sale therefor. Before Hill paid any part of the price, the three men met at Hill's store, and Towns was informed of the proposed sale, and Hill inquired of him if there were any claims against the yacht, and was told there were none. The three then went to the yacht, where Doncourt, in Towns' presence, delivered her to Hill, and Hill employed Towns to take charge of the yacht for him The next day Hill sent a cart for the sails, which Towns took off and put on the cart, and, going with them to Hill's store, helped to store them there. Hill afterwards, on one occasion, on Towns' request, paid him five dollars, on account of his taking charge of the vessel. Hill thereafter went to get the yacht, when Town refused to deliver her up, claiming that she was his. Hill thereupon filed this libel to recover possession of her. No papers had been taken out at the custom house for the yacht, until after the sale to Hill, when Towns took out a license on his own certificate, as builder.

Benedict, Taft & Benedict, for libellant.

M. Jacobs, for respondent.

BLATCHFORD, District Judge. As the legal title to the vessel is in the respondent Towns, and has never passed from him, by a bill of sale, and as the libellant is seeking, therefore, in this suit, to enforce a merely equitable interest against such legal title, and a possession asserted by the respondent under it, I think the case is one of which a court of admiralty will not take cognizance, to deliver possession of the vessel to the libellants. A petitory suit, to try the title to a vessel, must be confined to, and based on, a legal title. Kellum v. Emerson [Case No. 7,669]; Kynoch v. The S. C. Ives [Id. 7,958]. Whatever rights the libellant has must be enforced in some other forum. The libel is dismissed, with costs.

[This decree was affirmed by the circuit court on appeal. Case No. 275. Pending the final decree, an application for an attachment for contempt against the claimant was denied (Id. 16,534), he having forcibly seized the vessel.]

HILL (BELL v.). See Case No. 1,252.

Case No. 6,488.

HILL v. BONAFFON et al.

[2 Wkly. Notes Cas. 356.]

Circuit Court, E. D. Pennsylvania. Oct. 2 1876.

EQUITY PLEADING—MULTIFARIOUSNESS.

On demurrer, multifariousness of bill can only be taken advantage of by the party suffering therefrom.

Sur demurrer to bill. The bill set forth the following facts: In 1870, Hill mortgaged certain real estate to Bishop and Bonaffon, his joint creditors, as security for their debt. In 1874, Hill mortgaged a portion of the same property, by a deed on its face absolute, to Bishop, as security for another debt due by him to Hill alone. Bishop then took and still held possession. Both debts had been paid. Hill having subsequently been adjudicated a bankrupt, his assignee filed this bill against Bishop and Bonaffon, praying for satisfaction of the first mortgage, for an account, for a reconveyance by Bishop, and for a decree that the tenants of the property should attorn. To this bill, Bishop demurred on the ground of multifariousness.

G. T. Bispham, for demurrer: Bonaffon, the joint mortgagee of the first mortgage, has nothing to do with the dispute between the parties to the alleged second mortgage. Tasker v. Small, 3 Mylne & C. 63.

Cadwalader, District Judge: Has not complainant the right to have removed from his title the possible cloud resting upon it from

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

[2] [Affirmed in Case No. 275.]

Bonaffon's connection with the first mortgage?

N. Sharpless, contra.

THE COURT (CADWALADER, District Judge) overruled the demurrer on the ground that multifariousness could only be taken advantage of on demurrer by the person suffering,—in this case, Bonaffon, not Bishop.

HILL (DEN v.). See Case No. 3,784.

Case No. 6,489.

HILL v. DUNKLEE.

[1 MacA. Pat. Cas. 475.]

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

PATENTS — INTERFERENCE PROCEEDINGS — COMPETENCY OF WITNESSES — DISCLAIMERS — PRIORITY OF INVENTION—LACHES.

[1. An inventor who is a party to the record, and who has a real interest in the case until a short time before he is to be examined as a witness, cannot become a competent witness by assigning his invention.]

[2. It is irregular and suspicious to call a witness twice to the same point, and cannot be allowed except for cause shown.]

[3. A disclaimer which, taken in the connection in which it occurs, is limited to the application in which it is made, does not prevent the inventor from claiming, in a subsequent application, the matter before disclaimed.]

[4. In the sense of the patent law of 1836 (5 Stat. 117), he is the first inventor who, by words, drawings, or otherwise, first makes known the principle of the invention, so that another would be able from such description to put it in use; and it is not necessary that the inventor should have put it into practical operation. Having done this much, he is entitled, as against a later inventor, to obtain a patent, provided he uses reasonable diligence in perfecting and maturing the invention and filing his application.]

[Cited in Lamson v. Martin, 159 Mass. 562, 35 N. E. 78.]

[5. A delay of about three years, during which the inventor was engaged in constructing a machine capable of producing a manufactured article, which was the subject of the invention, *held* not an unreasonable delay, such as would bar his right as against a subsequent inventor, who first made application for a patent.]

[This was an appeal by Samuel L. Hill, assignee of Anson A. Swift, from a decision, on interference, in favor of Henry Dunklee, assignor to Harold Kelsea, in respect to invention of an improved manufacture of sewing silk, twist, or cord.]

F. A. Brooks, for appellant.

Edmund Burke, for appellee.

MORSELL, Circuit Judge. The appellant filed his application and specification on the 15th of February, 1856, in which he thus describes his invention: "My invention consists in a new or improved manufacture of sewing silk, twist, or cord—it being made by interlooping a single strand, so as to lay together, and side by side, between each two adjacent interloopings of it, three straight portions of the strand. After this has been done, the whole is to be twisted together, so as to form one single line or cord." The claim is described in these words: "I do not claim a manufacture of silk twist, as made by laying and twisting together three different strands, but what I do claim is my improved manufacture of twist, sewing silk, or cord, as made by looping or interlooping a single strand, and subsequently twisting it into one line or cord." The specification itself is referred to for a particular description of the mode. The petition and specification of the appellee appears to have been filed in the patent office on the 17th of December, 1855, for identically the same invention, described in the same terms, and claimed by the appellee likewise, by a description in the same terms; and thus the only matter of difference between the parties is which of them was the first and original inventor; for the purpose of trying which before the commissioner he, according to the established rules of the patent office, appointed a day, and authorized the taking of depositions by each of the parties; upon the return of which depositions the said case was tried before the commissioner, according to the appointment aforesaid thereupon, and on the 9th of June, 1856, he awarded priority of invention to the said Kelsea, assignor to said Dunklee.

The appellant duly filed in the patent office his reasons of appeal from this decision, which are, in substance—First. That the said decision is at variance with what both parties understood the claim to be, i. e., a new manufacture and a new fabric. Second. Because the priority of invention was awarded to Kelsea, though he did not (till long after Swift) ever form the requisite loop by the use of the material necessary to produce sewing silk, viz., strands or threads of manufactured silk. Thirdly. Because Swift, in February, 1853, first applied the looping process to raw silk, and twisted it to produce sewing silk, and thereby first made the new manufacture, and showed the feasibility of making it in this way. Fourthly. Because Kelsea's testimony by deposition was admitted by the commissioner. Fifthly. Because a controlling influence was given to the testimony of Sullaway, the same having been discredited, it is believed, by other evidence, and having been inconsistent with itself and wholly unworthy of confidence. The sixth and last is a general reason, because against the evidence, &c. The original papers having been laid before me, the case was heard on written argument of the parties.

The fourth and fifth reasons, being in their nature preliminary, will be first considered.

Kelsea was certainly a real party in interest to the proceedings and record in this case until a very short time before he was examined as a witness. The rule of law applicable has been several times on former occa-

sions of a similar kind declared by me, and although it has been disregarded, will be repeated and insisted on. In the case of Scott v. Lloyd, 12 Pet. [37 U. S.] 149, the judge, in delivering the opinion of the court, says: "The decision in Willings v. Consequa [Case No. 17,767], where the court held that a party named on the record might be released, so as to constitute him a competent witness, has been cited and relied on in the argument. Such a rule would hold out to parties a strong temptation to perjury, and we think it is not sustained by principle or authority." The testimony of that witness must be rejected as incompetent. From the papers before me, I have reason to believe that the same rule applies to Swift as a witness. His testimony, therefore, must be also rejected.

Next, as to the testimony of the witness Sullaway. It is contended that his second deposition is wholly unworthy of credit, and ought to be entirely rejected. As to the point that sewing silk was successfully made by him soon after his interview with Kelsea, it is contended that his statements on this point are not credible, because Kelsea's idea and talk with him was about a new machine to make silk, and he would not be likely to direct his thoughts to the product, but to the machine. It is not perceived that there is much force in this objection, especially as the machine was an instrumentality intended as part of the means of perfecting the manufacture, and naturally connected with the subject. Second. Sullaway's statements on this point were made in a second deposition made by him in the case; and it is both irregular and suspicious to call a witness twice to the same point; and this is not allowed except for cause, which did not exist in this instance. Kelsea's letter to Sullaway shows absence of good ground for the second deposition. I think this objection must be sustained. The proposition of law which it states is correct. If after a witness has been examined in-chief and cross-examined he might be called up for re-examination, and examined as to new matter, or substantially on the points he had already been examined and cross-examined on, it might protract the proceeding interminably, and it would open a door for practicing with and suborning the witnesses, to the utter perversion of the ends of justice. The re-examination ought, therefore, to be confined to a reaffirmance of the facts already stated and in explanation of the facts stated by the witness upon cross-examination. So I consider the law, which is to be found stated in volume 3 of Starkie (page 1751). He says: "As the object of re-examining a witness is to explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination. Where the witness has been cross-examined as to declarations made by him, a counsel has a right on re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be of themselves doubtful, and also of the motives by which the witness was induced to use those expressions; but he has no right to go farther, and to introduce matter new itself and not suited to the purpose of explaining either the expressions or motives of the witness." As to the other parts of the objection to this witness' testimony, I have examined with care the various parts of his deposition and that of Atkins, who is supposed to contradict him, and think that, although there are some variances and perhaps inconsistencies, yet, as there has been no extrinsic testimony to impeach his general character for truth, and considering his explanations and apparent frankness and candor, there is not such gross improbability or willful and corrupt misrepresentations as to afford a sufficient ground to reject his testimony; but as the re-examination, for the reasons before given, was in violation of the rule of evidence, his second deposition must be rejected.

I now proceed to the consideration of the issue between the parties upon the merits.

The invention for which a patent is applied for, as agreed by both parties, is a new or improved manufacture of sewing silk, twist, or cord, the result or product of interlooping a single strand so as to lay together and side by side, between each two adjacent interloopings, three straight portions of the strand, and then twisting them together so as to form one single line or cord. Upon an examination of the testimony on the part of the appellant, without the necessity of stating in detail, I am satisfied it proves that as early as February or March, 1853, Swift showed that he had trebled and twisted from a single strand of silk by looping and interlooping sewing silk, and that there is some evidence from which it may be inferred that he got up a machine for the purpose of twisting, &c. This being so, there is prima-facie evidence that he was the first and original inventor of said manufacture. To destroy the effect of said testimony on the part of the appellant, the appellee has adduced the testimony which will be next considered. And first he relies upon the appellant's being estopped from setting up such a claim as he has done in this case by the following acknowledgment contained in the specification of the appellant, filed as the ground of his application for a patent, and in said patent for his machine for trebling and twisting sewing silk from a single thread, in the year 1855: "I do not claim the principle of trebling a thread or strand of silk by enchaining loops formed therein," &c. The authorities cited and relied on would be entirely sufficient to sustain the position; but in the connection in which it stands, the general sense must be restrained to the purpose for which it was used, that is, that it was so to be considered in that application.

The appellee contends that in the summer

of 1852 he had conceived and described the idea of manufacturing sewing silk trebled from a single thread, and that he has a right to date his invention from that period; that when the idea was so conceived, explained, and actually demonstrated by experiment, the idea of twisting was, of course, combined with it, if not expressed and actually done, for the three-stranded cord thus made from one thread could not be sewing silk or silk twist until it had undergone the operation of twisting. The witness Sullaway testifies that Kelsea, at his (Sullaway's) house in Canton, Massachusetts, in December, 1852, said he had got an idea of a twist machine that he was getting up to match three threads from one bobbin or thread; he showed him how he was going to do it, and if it worked as he expected, he was going to get a patent for it; he showed him with a spool of cotton how he was going to loop it to make it silk and twist; he (the witness) fully comprehended it, and tried the experiment after Kelsea had showed him, and had done it several times. In explaining by words how the operation of trebling silk from a single thread was performed, as shown by said Kelsea in 1852, witness says that it was done by looping; he says that he had been engaged in the manufacture of sewing silk about ten years. In answer to a cross-interrogatory, he says that he was enabled to fix the time to be December, 1852, by reckoning from the time he lived in the house where he then resided; that he has a memorandum of the time when he moved. In further answer to cross-interrogatory, he says that he thinks he tried experiments himself in trebling, the same week of the interview, and that the looping was successful. On this point, Phebe A. Kelsea, in her deposition, says that she first heard her father speak of making sewing silk of a single thread trebled in the manner above described in the summer of 1852—"as early as that." This, then, so far as it respects the year, if not the month, is corroborative of what Sullaway testifies to, and I think must be considered as satisfactorily proved. It is true it comes from the party who claims to be the inventor, but from the necessity of the case it must be allowed. The idea must have been conceived at least as early as this period, or it would have been impossible to have described it, especially so, as the witness is shown by Kelsea the way in which his idea was to be carried out, forming a part of the res gestae. And this being all the evidence on the part of the appellee to prove the particular point of the origin or date of the invention, is it sufficient for that purpose? In the argument on the part of Kelsea it is contended that it amounts to proof that the invention was complete when it was explained and demonstrated to Sullaway. On the part of Swift, it is contended that in a case such as this, of two rival inventions, priority cannot be awarded to one so long as anything remains to be done to render the idea or conception certain, successful, or practicable. The plan must be tried and tested, and something complete and practicable must be arrived at. A practical result, a new thing, must be attained, and not an idea only, to constitute priority of invention. To support the position thus taken, the counsel for the appellee has referred to several decisions by Judge Story and Judge Nelson. A brief notice will be taken of them. The first is the case of Washburn v. Gould [Case No. 17,214]. That was a case of a claim set up as a prior inventor by the defendant in his defense to an action brought for a violation of the patent right of the plaintiff. The judge states as a reason for his decision that the prior invention so claimed had not been proved satisfactorily; that the plaintiff had a right to rest upon his patent, which was prima-facie evidence that he was the first and original inventor; and that if the defendant's evidence was doubtful, the plaintiff was entitled to the benefit of it. In the case before me there has been no patent granted, but the reverse; it has been refused by the commissioner. This reason for the presumption cannot, therefore, arise here.

There are two passages relied on, to be found in Washburn v. Gould [supra]. The passages quoted are: "Whoever perfects a machine, &c., is the real inventor." "He is the inventor who first brought the machine to perfection and made it capable of useful operation." Judge Story refers to Pennock v. Dialogue [Case No. 10,941]. The terms used in the passages alluded to are certainly very broad; but upon a careful examination of the case, it will be found that in the last part of it, where the judge applies the law to the facts specifically, the decision rests upon the grounds I have before mentioned of the presumptive evidence in favor of the patentee. Pennock v. Dialogue does not support the principle to the extent mentioned in the passages quoted by the appellee's counsel. In the case of Woodcock v. Parker [Id. 17,971], the passage referred to is: "The first inventor who has put the invention into practice, and he only, is entitled to a patent." The same language is used in the case of Bedford v. Hunt [Id. 1,217]. The decisions were made by the same learned judge. With respect to the first case (Woodcock v. Parker), the judge says: "In the present case, as the defendants claim their right to use the machine in controversy by a good derivative title from Samuel Parker, if the jury are satisfied that said Parker was the first and original inventor of the machine, the plaintiff cannot, under all the circumstances, maintain his action, notwithstanding he may have been a subsequent inventor, without any knowledge of the prior existence of the machine or communication with the first inventor. It is not necessary to consider whether, if the first inventor should wholly abandon his invention, and never reduce it to practice, so as to produce useful effects, a second inventor might not be

entitled to the benefit of the statute patent, because here there is not the slightest evidence of such abandonment." That is the point of the decision; and, as there is no evidence of abandonment in the present case, I do not perceive how it can answer the appellant's purpose. The decision in the case of Bedford v. Hunt [supra] has been fully and ably considered by Judge Cranch in the case of Heath v. Hildreth [Case No. 6,309], with which I entirely agree. The substance of that opinion on the present point is that the statute of 1836 carefully excludes from the fifteenth section the words "but had been in use." This, like the sixth section of the act of 1793 [1 Stat. 322], states the matters which may be given in evidence under the general issue in an action for infringing the plaintiff's patent; that none of the patent laws (statutes) have ever required that the invention should be in use, or reduced to actual practice, before the issuing of the patent, otherwise than by a model, drawings, and specifications, containing a written description of the invention and the manner of making, using, and constructing the same, &c.; and that the statute does not limit any time in which the inventor must apply for a patent, nor does it declare a forfeiture by reason of any delay. The delay, therefore, seems to be unimportant, unless it amounts to evidence of abandonment of the claim. The other two cases referred to [Many v. Jagger, Case No. 9,055, and Parkhurst v. Kinsman, Id. 10,757], decided by Judge Nelson, appear to have been decided on the same principle laid down in Washburn v. Gould, already noticed.

The rule of patent law as contended for by the appellant's counsel seems to be rested upon the unqualified expressions used in the cases cited as applicable to all cases. It will be found, however, from a more particular consideration that this cannot be so, and that it can be applicable only in those cases where, from a long and unreasonable delay and unsuccessful experiments, or an acquiescence in the invention's becoming public, evidence is furnished of an abandonment by the person claiming to be the first and original inventor; his prior right becomes thereby forfeited and lost. Under our statutes, he only is entitled to a patent who is not only an original inventor, but the first or original inventor, unless, under the circumstances just stated, without knowledge of the first invention, he may be deemed the original inventor, and as such entitled to a patent. An invention being an intellectual process or conception, for the purpose of showing who, in point of time, is the prior inventor, he who first makes it known sufficiently by describing it in words or drawings will be considered to be the first discoverer, and vested with an inchoate right to its exclusive use, which he may embody, perfect, and make absolute by proceeding to mature it in the manner which the law requires. In this case, therefore, if it even be conceded that the manufacture was not made until completed or perfected, yet if the evidence shows that the appellee has made known to the witness, by describing to him the principle of the manufacture, showed him how it was to be effected, so that he could himself do it, declared his purpose by such means to accomplish the end, and by means of a machine which he would construct perfect the said manufacture; was using reasonable diligence in perfecting and maturing his said invention and making it complete,—it would be most unjust under such circumstances that he should be prejudiced by such necessary delay. If the appellee might, therefore, by describing and manifesting the invention in the year 1852, as before stated, be considered as prior in point of time, has he by any subsequent laches on his part forfeited that right? This is the next part of the subject remaining to be considered. He seems to have considered from the time of the discovery that to make the manufacture available it would be necessary to construct a machine for the special purpose. To do this, required pecuniary means. He was poor, and lacked them. During the years 1853 and 1854 he seems to have been endeavoring to procure such means and to construct the machine; and about the 10th or 15th of November, 1854, with the assistance of his son, and on or about the 20th of November, 1854, or the beginning of the year 1855, the machine was completed, and it is proved that the same was successful and the end accomplished, and that sewing silk was trebled from one strand and twisted. There is also proof that in said interval the appellee showed to several witnesses sewing silk trebled from a single strand and twisted.

Of the difficulty and importance of constructing this machine, the letters of the appellant fully show; and that considerable delay was necessarily occasioned, is to be inferred from the fact that the appellant himself had not even then been able to construct one, though from his desire to purchase he must have deemed it also very important for the purpose. I think, therefore, that the appellant is not chargeable with unreasonable delay; and if not, although it were admitted that he had not perfected the invention in the month of December or June, 1852, yet, when he had done so in the year 1854, his right had relation back to this first discovery, and therefore that the commissioner was correct in awarding priority of invention in this case to the appellee.

[Patent No. 19,283 was granted to H. Kelsea, February 2, 1858.]

Case No. 6,490.

HILL et al. v. The EMMA PETERSON.

[6 Pa. Law J. 80.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1846.

PRACTICE—APPEALS—MODIFICATION OF DECREE.

Appeals from the district court to the circuit court on questions of mere fact, or depending on sound discretion, will be discouraged in the circuit court, unless in such cases where reason and sound policy require a modification of the decree of the court below.

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

[This was a libel by Hill and Wheelton against the schooner Emma Peterson, for salvage.]

GRIER, Circuit Justice. Before proceeding more particularly to notice the merits of this case, I would premise a few remarks indicative of the principles which will hereafter govern this court in cases of appeal from the district court. I am very unwilling to encourage such appeals, and more especially in questions of mere fact, or depending on sound discretion. It would lead to speculation on the temperaments and dispositions of the respective judges, and appeals would be taken on a mere calculation of chances. I have the greater confidence in the correctness of these views, as I find they coincide with those of the learned Judge Story on the same subject, as expressed by him [Rowe v. The Brig, Case No. 12,093], and which I will adopt in his own words: "Salvage," says he, "is principally said to rest in the discretion of the court. A discretion, however, which is not to be exercised at the mere arbitrary will of the judge, but as far as possible to be governed by principles of law and sound reason. I confess that I never feel more distressed than when I am called upon to exercise a general and unlimited discretion. In cases of this sort, it can hardly be presumed that different judges, even when possessing equally enlightened and sound judgments, would form precisely the same estimate; and yet it is very desirable to discourage appeals upon slight grounds, or with a view to take the chance of a different opinion. In deciding, therefore, upon the decrees of the district court in cases of salvage, my inquiry never has been so much whether their allowance was the same as I should originally have made, as whether, under the circumstances of the case, justice and sound policy clearly indicate a different measure; and distrusting my own judgment, I have, on all occasions, to apply the spirit of those decisions which a higher tribunal has recognized and enforced, and to follow in the path of authorities, rather than venture upon new and untried courses of my own." If this case, therefore, had been one in which the property libelled had clearly been shown to have been derelict and abandoned, I should have affirmed the decree of the district court, even though I had considered the salvage allowed either more or less than I would have originally decreed. But I am constrained to believe, after a careful examination of this case, that justice and sound policy require some modification of the decree of the district court.

Case No. 6,491.

HILL et al. v. The GOLDEN GATE.

JOHNSON et al. v. The AMBASSADOR.

[6 Am. Law Reg. 273.]

Circuit Court, E. D. Missouri. April Term, 1857.[1]

MARITIME LIEN—SUPPLIES—DISCHARGE—JUDICIAL SALE.

1. It is settled that there can be no lien by the general maritime law for materials or supplies furnished a ship in the home port.

[Cited in Taylor v. The Commonwealth, Case No. 13,788; The Red Wing, 14 Fed. 869.]

2. Hill v. The Golden Gate [Case No. 6,492], opinion by Wells, J., affirmed.

3. A judicial sale in a proceeding in rem will discharge maritime liens, whether general or statutory, in whatever jurisdiction it may be decreed.

4. The operation of the boat acts, on the Western rivers, considered. The cases cited and commented on.

5. The foreign or domestic character of a vessel must be determined by the residence of her owners.

6. If a vessel is navigated by charterers, who have exclusive control of her, they are to be deemed the owners pro hac vice.

[Cited in Harney v. The Sydney L. Wright, Case No. 6,082a.]

7. A general maritime lien cannot be divested by the legislature of a state.

[Cited in The Skylark, Case No. 12,928; The E. A. Barnard, 2 Fed. 722.]

8. An admiralty sale alone can judicially pass a title to a vessel discharged of liens.

[Cited in The Skylark, Case No. 12,928.]

[Appeals from the district court of the United States for the Eastern district of Missouri.

[Libels by Hill & Conn and others against the Golden Gate, and by Johnson and others against the Ambassador, to enforce liens for supplies. The libel of Hill & Conn and others was dismissed in the district court (Case No. 6,492), and the various libellants appeal.]

Before CATRON, Circuit Justice, and TREAT, District Judge.

TREAT, District Judge. These cases are appeals in admiralty. As they involve, to some extent, the same legal propositions, they will be considered together. The Golden Gate was owned in Indiana, enrolled in Kentucky, and chartered in Missouri. By

[1] [Affirming Case No. 6,492.]

the terms of the charter-party, the exclusive management and control, as well as the profits, of the vessel, were vested in the charterers. Whilst the latter were engaged in navigating her, the libellants furnished, at St. Louis, the supplies in question. After these supplies were furnished, the vessel was seized under the Missouri boat act, and the claimant became the purchaser at the judicial sale ordered by the St. Louis court of common pleas. The libellants did not present their demand for allowance by said court pursuant to the boat act. The Ambassador was enrolled at Cincinnati, and her owner resided at Newport, in Kentucky, on the opposite side of the Ohio river. All of the business of the vessel was transacted by him in Cincinnati, of which the town of Newport, although in another state, is, in business matters, practically a suburb. The libellants' demand is for labor and materials furnished in Cincinnati. This vessel had been sold under a decree in admiralty, by the United States district court of Ohio, and, according to the terms of sale, the United States marshal had taken of the purchasers a mortgage to secure the time payments. The mortgagee and purchasers put in answers and claims. The demand of the libellants accrued after said sale and mortgage.

The well-considered and elaborate opinion of Judge Wells, in deciding the case of Hill v. The Golden Gate [Case No. 6,492], in the district court, leaves but little to be added concerning the propositions there ably discussed by him. His clear and exhausting review of the authorities upon those points renders it unnecessary to repeat or re-examine them. It will be sufficient now, so far as those propositions are concerned, to state the conclusions at which this court has arrived, and to present some of the more obvious reasons on which those conclusions are based.

It has been settled, and is therefore not open for review in this court, that there can be no lien, by the general maritime law, for materials or supplies furnished a vessel in her home port. The General Smith, 4 Wheat. [17 U. S.] 443; Peyroux v. Howard, 7 Pet. [32 U. S.] 343; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 390; Pratt v. Reed, 19 How. [60 U. S.] 359. It is admitted by the learned advocates, that the libellants have a lien by the general maritime law, if the home port of the Golden Gate was Louisville, Kentucky, (the place of enrollment,) or in Indiana, (the residence of her general owners;) and if the home port of the Ambassador was in Kentucky, (the residence of her owner at the time the repairs were furnished her at Cincinnati.) The first question, therefore, to be decided is, as to the home port of the Golden Gate—whether the supplies by the libellant were furnished to a domestic or foreign vessel. If St. Louis was her home port, then the libellants have no maritime lien; and the local lien given by the Missouri statute "concerning boats and vessels," has been lost, if the judicial proceedings in the court of common pleas divests or extinguishes the local or statutory liens created by that act.

By the United States statutes—acts of December 31, 1792, and of February 18, 1793 [1 Stat. 286, 305]—a vessel must be enrolled or registered as of the port at or nearest to which her owners, or managing owner resides, and the enrollment must state the residence of her owners. Hence the courts have held, according to a recognized rule in analogous cases, that the residence of the owners, as stated in the enrollment, is prima facie correct. It is not the port of enrollment that determines the character of the vessel, but the residence of the owners, and the enrollment is prima facie evidence of the latter fact. Where the enrollment, therefore, states the residence of the owners to be in another state, the vessel prima facie belongs to that other state. If the enrollment misstates the fact, the character of the vessel is not concluded by that misstatement, but the truth may be given in evidence for the benefit of the parties interested. The United States statutes are framed to meet the fact that the necessities of commerce have not required the establishment of ports of enrollment at every town or village, either on the sea-coast or navigable rivers of the Union, and consequently the owners of vessels may often reside at towns where there are no such established ports, or even in towns remote from navigation. The reason of the maritime rule with regard to liens, requires a disclosure of the residence of owners, and the policy of the United States laws also demands the enrollment or register of vessels used in the coasting or foreign trade. Documents required by law are presumed to give accurate statements of what the law requires them to authenticate. As it is admitted that neither the charterers nor general owners of the Golden Gate had any credit in St. Louis, that the supplies were necessary for the running of the vessel, and that, consequently, there was a necessity for relying on the credit of the vessel, within the rule laid down in Pratt v. Reed, 19 How. [60 U. S.] 359, the right of the libellants to recover depends on the decision of the question, whether the residence of the general owners, or of the charterers, under the facts in evidence, determines the character of the vessel. The district court held that, as the charterers were residents of St. Louis, and the supplies were furnished there for the purpose of victualling the vessel, St. Louis must be considered her home port with respect to this transaction. The case of Tree v. The Indiana [Case No. 14,165] sheds no light on the question; for it merely recognizes the rule, already stated,

with regard to the prima facie effect of an enrollment. The contract was made with the charterers. An action at common law would lie directly against them upon the contract. They were alone interested in the profits of the voyage, had the control of the vessel, and could make contracts for running her. It is true, liens may attach, for certain purposes, under the general maritime law, notwithstanding the charter party, and the vessel will be held thereby against the general and special owners, or she may be hypothecated, in specified emergencies, either by the master or by the charterers; but the special owners or charterers will be none the less liable, in the first instance, on all contracts made by them, or made on their account, for running her on the prescribed voyage. They had the sole right to appoint the master, determine the voyage, order the stores, select the crew and receive the freight money. No one would, if applied to by them for supplies, wait for the assent of the general owners, or think he was dealing with the latter. If they were known to him, and were of undoubted responsibility, he would deal with them without looking further; and if they were insolvent, or in doubtful circumstances, he would refuse to supply the stores ordered by them. He would treat them in all respects, pro hac vice, as the only owners with whom he had to deal. They would be liable to him on their contract; and at common law he would proceed directly against them. They are the immediate parties to the contract—not the general owners. Hence it has been frequently decided, both by common law and admiralty courts, that supplies for a ship are furnished on the credit of the master and owner when ordered by the master, but when the ship is out of the employment, or entirely beyond the control and management of the general owner, the charterer, whether under a parol or written contract, is held therefor, and not the general owner. Frazer v. Marsh, 13 East, 238; Reeve v. Davis, 1 Adol. & E. 312; Cutler v. Thurlo, 20 Me. 217; Thompson v. Hamilton, 12 Pick. 428; Muldon v. Whitlock, 1 Cow. 290; Manter v. Holmes, 10 Metc. [Mass.] 402; The Monsoon [Case No. 9,716]; The Nathaniel Hooper [Id. 10,032]; Skolfield v. Potter [Id. 12,925]; The Volunteer [Id. 16,991]; Gracie v. Palmer, 8 Wheat. [21 U. S.] 632; Philips v. Ledley [Case No. 11,096]; Fisher v. Willing, 8 Serg. & R. 118; Certain Logs of Mahogany [Case No. 2,559].

If, then, the charterer is primarily liable, and the general owner is no party to the contract—if the former is owner for the voyage, why should not his residence be her home port for the voyage? Weaver v. The S. G. Owens [Case No. 17,310]; Drinkwater v. The Spartan [Id. 4,085]; The Phebe [Id. 11,064]. As under the navigation acts and ordinances of most nations, the general owners and charterers must necessarily be of the same country, this question would not be likely to arise in those countries; and we are not aware that it has ever been expressly adjudicated, except by the district court, in this case. It must therefore be considered in the light of established principles, and by rules fairly deducible therefrom. The point is not, whether an existing maritime lien binds the vessel as against the owners, when the contract is made by the charterer, or whether supplies furnished a vessel, when out of the employment of the general owner and in a foreign port, give a maritime lien; but whether the port where the supplies are furnished is, pro hac vice, a foreign port, so that a maritime lien exists therefor, at all, as against either the charterer or the general owner. To determine whether a maritime lien exists at all, in this case, the residence of the owners must be ascertained; that is, the residence of the owners for the time being. If the dealings and personal credit, primarily, would be with the special owner, then his residence ought to be considered the home port, within the spirit of the maritime rule; or otherwise, the reasons on which that rule is founded, would cease altogether, viz: that a lien is given because there is a necessity for relying upon the credit of the vessel itself, the solvency or responsibility of the contracting party being unknown, and his residence being beyond the territorial jurisdiction of the courts of the country where the supplies are furnished. And further, as the charterer, and not the general owner, is personally responsible for the supplies, it is his solvency and residence that are alone to be regarded. It is therefore considered by this court, that the decision of the district court on this point is correct; that under a full charter-party, the residence of the charterers, quoad all contracts for supplies of the kind named, during its continuance, is the home port of the vessel. The libellants had, therefore, no maritime lien when their libel was filed in this case. The Missouri statute had given them a local lien, which, still existing, would be enforced in admiralty; but that lien was extinguished by the proceedings, under that statute, in the court of common pleas. They did not prosecute their claim before that court, according to the statute, against the funds arising from the judicial sale of the vessel; and, by the terms of the Missouri act, said sale divested all local liens created by the act; and the purchaser (who is the claimant here) took the vessel, discharged of all Missouri liens. "When any boat or vessel shall be sold, under the eleventh section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free from and discharged from all previous liens and claims under this act." Section 13 of the Missouri "Act concerning boats and vessels," approved March 26, 1845 [Dig. Laws Mo. 1845, p. 180]. In the case of

the Ambassador, the owner resided in Newport, Kentucky, opposite Cincinnati, Ohio, where the boat was enrolled. He was an officer on the boat, and transacted the business of the boat in Cincinnati. Cincinnati was the port nearest his residence—the place where he was to be found for business purposes. Newport is substantially suburban, for business transactions, to Cincinnati; and although in different states, separated from each other by the Ohio river, they are so intimately connected in maritime or commercial matters, as to constitute one port within the maritime rule governing the character of a vessel. The solvency of the owner may be presumed to be as well known at his place of business as on the other side of the ferry, and he was constantly, or almost daily, within the territorial jurisdiction of the Ohio courts. The general rule, that the ports of one state are foreign to the ports of all other states, must not be held to mean that a port on one side of a river which is the dividing line of two states, is necessarily limited in its extent, and for all purposes, to the side of the river where the main business of the port is done; for it frequently happens, that the port nearest to the owner is in another state; and by the collection and enrollment laws of the United States, the business of the boat, under those laws, must be transacted at the custom house of said nearest port; that, for all port purposes, under the United States statutes, said nearest port 'ncludes the residence of the owner; that the place of the owner's residence and of his business are substantially the same, and are included within the true meaning of the port where the enrollment is made. In this case, the evidence would justify the conclusion, perhaps, that the residence of the owner was upon the boat; but assuming the facts to be, that Cincinnati was his place of business, and that his residence was on the opposite side of the ferry, inasmuch as the enrollment was at Cincinnati, and the business, both of the boat of her owners, was done in that city, and as Newport is substantially a suburb of Cincinnati, the home port of the vessel is held to be Cincinnati. The lien, therefore, of these libellants, if they have any, must be by force of the laws of Ohio. By those laws it was essential to a lien, that a libellant's demand should be sworn to and recorded, within four months from the time it accrued. Swan's Rev. St. Ohio, p. 551 et seq. No sworn account was filed by them for record, as required, and they have no lien, therefore, under the Ohio law.

The argument, that as the work done on this vessel added to her value, and thereby benefited both the owner and mortgagee, and that, as the work might have been made a lien on the vessel, the case should be considered as falling within the rule, that courts of admiralty will take cognizance of demands which, in their inception, were liens, is evidently misapplied here.

Admiralty courts have no general chancery powers. Dean v. Bates [Case No. 3,704]; Kellum v. Emerson [Id. 7,669]; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; [Andrews v. Wall] 3 How. [44 U. S.] 568; Remnants in Court [Case No. 11,697]; 3 Hagg. Adm. 129; 1 Ves. Sr. 154. They will not notice the claims of general creditors of the owners, or parties in interest. The Flora, 1 Hagg. Adm. 303. The work in question was not done at the instance of the mortgagee, nor was there, at any time, a lien therefor upon the boat. The mortgagee, out of possession, would not have been personally liable for those repairs, even if made in a foreign port. They were not ordered by him, and they were not necessary for the preservation of his security. McIntyre v. Scott, 8 Johns. 159; Phillips v. Ledley [Case No. 11,096]; Brooks v. Bondsey, 17 Pick. 441; Lord v. Ferguson, 9 N. H. 380; Birkbeck v. Tucker, 2 Hall, 121.

The propositions already cited are conclusive against the libellants in each of these cases, without considering the more important question presented both to this court and to the district court, and ably discussed by the learned judge of the latter court in his published opinion. But as there are other cases awaiting the decision of that question, and which stand upon an agreement to abide the decision of these cases upon the effect of judicial proceedings and sales of vessels by the state courts under state laws, it is proper for us to consider that subject at this time. To understand properly the Missouri decisions cited in argument, reference must be had to the different Missouri statutes under which these decisions were made. The act of 1835 declares that "every boat or vessel used in navigating the waters of this state shall be liable first for all debts contracted," &c., and that "any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent or consignee of a boat or vessel, may, at his option, institute suit against such boat or vessel, by name." That act made no provisions for settling or marshalling the various demands recognized, nor directing any other than the usual course of proceedings upon common law judgments, except that the final process was an order of the court for the sale of the boat or vessel for the judgment and costs. It required that order to be executed and returned by the sheriff, in the same manner as executions. When a suit was instituted under the act, a warrant for the arrest of the boat or vessel issued, in the first instance, and the sheriff detained the boat or vessel until the final order of the court, unless she was previously discharged by giving the bond prescribed therefor by statute. In the case of Dobyns v. Sheriff of St. Louis, 5 Mo. 256, it was held that the act of 1835 [St. Mo. p. 102] gave no lien upon the boat. A suit had been commenced by attachment on

the 31st day of October, 1837, against the owners of that boat, and the boat levied upon, according to the provisions of the attachment act. Said suit was prosecuted to judgment. On the 11th of November, 1837, a suit was instituted against the boat, by name, under the act of 1835, and soon thereafter three additional suits were commenced under the same act, in all of which judgments were rendered for the complainants. The boat was sold under an order of court, granted in the last named cases. The plaintiffs in the attachment suit claimed the proceeds of said sale, and the court ordered the sheriff to pay them over to said plaintiffs. The supreme court of Missouri affirmed the decision of the court below, holding that the act of 1835 gave no lien upon the boat to the creditor, that it merely provided for suits against boats, by name, in order to facilitate the collection of demands enumerated in the statute, and the levy of the writ of attachment fastened a lien upon the vessel, which must be satisfied out of the proceeds of the sale before the judgments rendered in the other suits. The act of 1835 was amended in 1839 [Laws Mo. p. 13], so as to make the demands enumerated a lien; but no provisions were made for settling priorities or distributing the proceeds of the sale among the different lien creditors. In The Gen. Brady v. Buckley, 6 Mo. 558, the court held that the purchaser at the sale under the order of the court, as provided by the boat act, took her discharged of all liens, and not subject to the lien demands existing prior to those upon which the judgment was rendered, and that preference was to be given to the most diligent. A similar question to that often discussed in admiralty courts was presented for adjudication—whether the right of the material man was jus in re or jus ad rem. If the furnishing of supplies named in the act gave a lien upon the boat and other liens subsequently arose under the same act, would it not follow that the last liens were subject to the prior ones? As no provision was made whereby all the lien creditors could be cited before the court, when a boat was ordered to be sold, and compelled to litigate their demands against the proceeds of the sale—and as the statute was silent concerning priorities and the mode of divesting statutory liens—the state courts were necessarily embarrassed with the conflicting rights springing from that imperfect act. The rule was adopted, therefore, that a judicial sale under said act discharged all prior liens, and that the demands of those who first commenced suit were entitled to preference, or, in other words, that "priority of levy under the act, and not of time when the respective demands accrued, determined the right of preference." In The Charlotte v. Hammond, 9 Mo. 59, it was ruled that the lien given by the statute was independent of possession, and that whoever purchased a vessel of the owners, took her subject to all existing statutory liens, whether he had notice thereof or not. In The Raritan v. Smith, 10 Mo. 527, it was decided that the classes of demands mentioned in the statute were entitled to priority according to their respective numbers. That boat had been sold under a judgment had on a demand of the first class, and the question for adjudication was, whether a judicial sale divested all liens of the same and of inferior classes. The court, after distinctly stating the difficulties presented by the imperfect provisions of the act, and announcing the maritime rules in similar cases, decided that the purchaser took the vessel free from all liens, and added the remark,—"It should be borne in mind, in considering these questions, that a proceeding in rem against a boat is not the only remedy a creditor is allowed by law. He may sue those who were owners at the time the debt was contracted, or to whom the credit was given." It was also held, in The Raritan v. Pollard, Id. 583, that the boat act did not extend "to contracts not made in this state, and to vessels not employed in the navigable waters of the state." In Finney v. The Fayette, Id. 612, the supreme court of Missouri had before them a question broader than the interpretation of the Missouri statute and the effect of judicial proceedings under it. In that case the complainant had a demand against the boat, within the provisions of the Missouri act, and the defence was—that, subsequent to the date of the last item in said demand, said boat had been seized and sold under a similar act of Illinois, and that the present owner became the purchaser at that judicial sale. It was contended that, by the sale in Illinois, all prior liens existing under the Missouri as well as Illinois statute, were divested, and, therefore, the complainant could not proceed against the boat, by name. A demurrer to the plea was overruled by the court below, and the case taken to the supreme court on a writ of error, where it was decided that "this case is similar in principle to that of The Raritan v. Smith, decided at the present term of this court. It was there determined that the rules of the maritime law were, in proceedings against steamboats, to govern, when there was a failure of statutory regulations. Maritime liens in respect to the mode in which they may be discharged, vary from other liens. A judicial sale will divest them in whatever jurisdiction it may be decreed." The operation of the boat acts of 1835 and 1839, and also of 1845 were held in the case of Noble v. The St. Anthony, 12 Mo. 261; Twitchell v. The Missouri, Id. 412; Fisk v. The Forest City, 18 Mo. 587; and James v. The Pawnee, 19 Mo. 517,—to be as adjudicated in the prior case of The Raritan v. Pollard, 10 Mo. 583, viz: not to embrace contracts made out of the state or to extend to boats not used in navigating the waters of the state.

By the Missouri statute of 1845 the defects

of prior acts were remedied to some extent. That statute expressly declared the rule of priorities, and provided for bringing in all lien creditors named in the act, to assert their rights to a distributive share of the proceeds of the judicial sale of the boat. In The Sea Bird v. Beehler, 12 Mo. 569, the defence to a suit under the boat act was, that subsequent to the accruing of the demand sued on, the boat had been sold under judicial proceedings in Louisiana, according to the provisions of the statutes of that state. It was held, that the judicial sale in question did not divest the complainant's lien under the Missouri act. The court adhered to its former decision, however, "that a judicial sale under our law as it now stands, or under the law of a sister state of a similar character, would convey a title clear of all prior liens, there can be no question;" and then distinguished the judicial sale in Louisiana from judicial sales under statutes similar to those of Missouri and Illinois. It says: "But if we carry the principle further, and hold that a sale in Louisiana in an ordinary suit by attachment, under laws which make no provision for the application of the proceeds of such sale to the payment of any debt, other than the one upon which the suit was founded, and in the enforcement of which the sale was made, we destroy the rights of our citizens who are creditors. * * * The doctrines of the maritime law in relation to judicial sales of libelled vessels, are an exception to general principles. The exception is founded not only on principles of public policy, but is entirely consistent with the most rigid justice. Such sales are not made for the benefit of any particular creditor, but for the benefit of all persons interested. Provision is made for the distribution of the proceeds, pro rata, among all who will come forward and establish their claims within a given time. The proceeding is entirely in rem and all the world are bound by it. But what analogy is there between such a sale as this and an ordinary sale under an ordinary execution? Such executions are solely for the benefit of the party plaintiff, and can only operate upon the title of the defendant. A sale under these merely conveys the title of the defendant in execution. The liens of strangers are not divested. If it were so, their rights must be divested by a proceeding to which they are not parties, of which they have no notice, and in the benefits of which they could not participate, if they did have notice. We do not understand, therefore, that the prior decisions of this court are designed to embrace all judicial sales, but only such as are made here or elsewhere, under proceedings analogous to those of courts of admiralty, in which any number of claimants may unite in libelling a vessel; and in the benefits of which not only these claimants but all others who choose, may participate." So in the case of Ritter v. The Jamestown, 23 Mo. 348, a similar view of the Louisiana statutes is taken, and the cases of The Sea Bird v. Beehler, and also of The Raritan v. Smith, and of Finney v. The Fayette [supra], are commented upon and approved. The court says, that in the last two cases, "the proceedings were against the boat, were in rem, and a judicial sale, in such proceedings, passed the boat to the purchaser, discharged from all liens created by law. In the case of The Sea Bird the proceedings were not alone against the boat; they were not in rem; they were against the boat and owners of the boat. They were not such proceedings as admiralty courts use against vessels, and therefore not to be controlled by the rules of such courts."

These Missouri decisions have been succinctly stated, in order that the difficulties which they recognize may be more distinctly seen. Independent of the embarrassments arising from defective legislation on the subject prior to 1845, the learned judges who delivered the opinions cited, refer to the necessity of applying the just rules of admiralty, in order that the rights of all persons interested may be duly respected. A careful examination of the Louisiana acts, and of the decisions of the Louisiana courts, it is apprehended, will show that they are as broad in their operation, and as careful of the rights and interests of all concerned in the boat or vessel, as either the Illinois or Missouri acts, and as analogous to proceedings in rem. The "privilege" referred to in the Louisiana Code, and the commencement by "attachment with the right of intervention," is the creation of a "lien on the price," with the right to proceed by seizing the vessel in the first instance; other parties in interest being permitted to intervene for the proceeds of the sale. Although the technical terms used are borrowed from the civil law, the proceedings are almost precisely the same as in the Missouri courts. Articles 3204, 2748, 2304, 3499, 3500, Code La.; and cases of Peyroux v. Varion, 7 Pet. [32 U. S.] 324; Packard v. The Louisa [Case No. 10,652]; Leland v. The Medora [Id. 8,237]; Abat v. Nartigue, 8 La. 190; Shirley v. Fabrique, 15 La. 140; Terry v. Terry, 10 La. 79; Lee v. His Creditors [2 La. Ann. 994]; Scott v. His Creditors [3 La. Ann. 40]. If a judicial sale under the Missouri acts divest all liens, then a judicial sale under the equally liberal proceedings in the courts of Louisiana should have the same effect. There is no difference in principle; and nothing in the nature of the practice requires a different rule. The views so clearly and correctly stated by the supreme court of Missouri in The Sea Bird case would, if applied to the judicial proceedings under the Missouri boat act, (as limited in their operation to contracts made in the state,) lead to the logical conclusion, that at least such lien demands as are not cognizable in the state courts, are not divested by the judicial sale. If an Illinois creditor cannot intervene upon an Illinois contract, which,

according to the lex loci is a lien, and so with lien creditors in other states, how can the proceedings in the Missouri courts under the Missouri act be considered proceedings strictly in rem, or as having the force of admiralty sales, within the admiralty principles recognized and defined in the case of The Sea Bird? A Louisiana creditor is not permitted to intervene, if he desires to do so, nor any creditor, except those presenting Missouri contracts. A proceeding in rem is "for the benefit of all interested"—all may come and establish their claim to a distributive share of the common fund—and, therefore, "it is entirely consistent with the most rigid justice," and "all the world is bound by it." If those in interest do not choose to intervene for their share of the proceeds, their refusal or neglect should not affect the title of the purchaser who has given full value for the vessel. But it is equally important that the court which exercises such powers, should have the requisite jurisdiction—that it should not be a local court, restricted in its action by local statutes, and governed by rules utterly subversive of the well-settled maxims of maritime jurisprudence. It should not be compelled to ignore the rights of all persons, save those of its own locality, and to give to home creditors exclusive privileges—denying the liens which have grown up elsewhere than within the territorial limits of the state—if it undertakes to enforce maritime liens, and to be governed by admiralty principles. The demands of foreign material men and creditors are liens by the maritime law, within the rule of necessity, but not the claims of domestic creditors. The General Smith, 4 Wheat. [17 U. S.] 443; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; Pratt v. Reed, 19 How. [60 U. S.] 359. By the decisions of the supreme court of Missouri upon the boat statute, demands in the home port are enforced to the exclusion of all foreign demands; thus reversing the maritime rule as laid down by the United States supreme court, or going even beyond a mere reversal; for in the admiralty courts of this country, local liens are recognized and enforced. If the doctrine of the Missouri cases obtains in state courts, the necessary consequence must be, that each state will disregard the rights of the citizens of all other states, and the adjudications of other state tribunals, and a perpetual conflict will exist concerning boats and vessels employed in the coasting trade, or upon our large Western rivers. Each state will enforce, through its own tribunals, its own local liens in favor of its own citizens, and will disregard the liens and rights of the citizens of all other states. If the judicial sale under the order of a state court, divests all liens, whether given by the general maritime law, or by common law, or by local statutes, and foreign creditors are prohibited from intervening; then the same difficulties, conflicts and injuries to commerce will be reproduced, which the grant of exclusive jurisdiction to the federal courts was expressly designed to prevent. Const. U. S. art. 3, § 2.

But the Missouri decisions, fairly construed, perhaps, do not cover "maritime liens." They interpret the Missouri statute, and declare the effect of a judicial sale under it, and also give the same effect to other state statutes of a similar character. Although they look to the proceedings and principles of general maritime jurisprudence for analogies to guide in the interpretation and administration of the local law concerning vessels, and hold that local liens are divided by judicial proceedings under the local statutes; they cannot be considered as maintaining the doctrine that their decisions have the force and effect of admiralty decrees. Indeed, the opinion in The Sea Bird case clearly recognizes the distinction. The Missouri boat act, and the similar statutes of other states, are not designed to confer upon the respective state courts jurisdiction in admiralty, nor to make the proceedings under them proceedings properly in rem. They are not proceedings in rem, any more than the local proceedings in suits by attachment; although they make provisions for the rights of other creditors besides the one who institutes the suit and causes the seizure of the vessel. Strictly considered, there are no suits in rem, except admiralty suits, and no courts have admiralty jurisdiction, or jurisdiction strictly in rem, except federal courts.

If the Missouri statute is to be construed as designed to cut off all maritime liens, or even those it expressly recognizes, it would certainly be inoperative to do so. But as it has been held to be exclusively "intra-territorial" in its operation, it is evidently intended to give a lien to material men and others at the home port, and to provide a speedier and more efficacious remedy for home creditors. Many of the creditors embraced within its terms have liens by the general maritime law, independent of the statute, which could be enforced in admiralty courts. They are also permitted to prosecute their demands, and to intervene, in the state courts; and to that extent, have an additional remedy. That cumulative or statutory remedy is limited, however, by the terms of the act of 1845, to six months for material men, and to three months for seamen; the latter class of creditors being permitted to sue for only two months' wages, and required to bring suit within thirty days after the termination of the contract. Their common law remedy, it is presumed, still remains. The domestic creditor of a home vessel cannot, under that statute, proceed directly against the boat after the expiration of six months, nor does his lien continue for a longer period; yet his cause of action, in the ordinary form, still remains unimpaired against the owners and parties to the contract. His statutory right to proceed under that act, and the lien given by it, are further limited by the proceedings and judicial sale authorized

by its terms. After a judicial sale by order of the state court under the provisions of that statute, all prior liens created by the act itself, together with local liens, and all right to proceed against the boat directly for prior demands in the local court are divested. The remedy thus given does not oust the federal courts of their exclusive jurisdiction, nor necessarily interfere therewith. The state proceedings are not strictly or properly proceedings in admiralty, or in rem, although the state courts refer to the latter for analogies to guide them, and for principles to determine the rights of the parties and the interpretation and obligation of the contracts made for the boat. As Missouri creditors having maritime liens, are permitted to use that statutory remedy, the nature of their demands must be ascertained by the rules of maritime jurisprudence. In a suit by foreign attachment, or by the attachment act of Missouri, the property of the debtor is seized in the first instance, and the levy fixes a lien; yet a sale of the property, either pendente lite or after final judgment, passes to the purchaser only the title of the defendant, subject to all prior incumbrances. The incumbrancer may, in certain cases, intervene for the protection of his rights; but the proceedings in the attachment suit are not properly in rem, although inaccurately so called—the purchaser acquires no greater rights to or in the property than the attachment debtor had at the time. So under the Missouri boat act, the judicial sale passes to the purchaser only the title of the owners, divested of all common law and statutory liens of Missouri, but subject to all liens existing by maritime law and fixed by the laws of other states. Missouri has an undoubted right to determine what liens, other than maritime, shall or shall not be recognized with reference to chattels or chattel-interests within her territorial jurisdiction, and what demands shall be made to operate as a lien upon such property; but she cannot legislate so as to oust or impair the exclusive federal jurisdiction in admiralty, or to divest rights vested under that jurisdiction. She cannot legislate for states beyond her territorial jurisdiction, nor for chattels or other property beyond her limits.

Illinois, Kentucky, Louisiana, and every other state, have the same powers as Missouri, and are under no greater or less federal restrictions, and may also enact laws to operate upon all chattels and real estate within their jurisdictions respectively. No one state can legislate for another, or determine what property laws shall be operative in other states. Hence the courts of each state are governed by its legislation, both in determining the effect of transactions or agreements within the state, and in enforcing its statutes. They proceed according to the local laws, in such cases, and may or may not, as the local system or policy directs, permit, by comity, the local laws of other states to be enforced through their agency. If any citizen of Missouri has a maritime lien, enforceable in the federal courts, and the state enacts that, in addition to the federal and to the former common law remedy, the demand may be recovered in a more expeditious mode provided therefor by statute, there is no necessary conflict or interference with federal jurisdiction in admiralty, whether the additional mode of proceeding be under boat acts, or attachment laws, or through summary and amended forms of proceeding by execution under judgments in assumpsit, or debt or covenant. The additional facility is not a negation of admiralty jurisdiction, nor an infringement upon it. The purchaser under such judicial proceedings, knows that he takes cum onere, and no one is injured. He can acquire no better title than the defendant had and the state can give. The state has made liens, and provided for their extinguishment, with a due regard for the rights of all under the statute. The power to create has been exercised, also the power to limit. It has acted therein within the clear range of its powers over the subject matter, and it cannot act beyond. If any one of its citizens, having a maritime lien, elects to recover his demand through the peculiar statutory proceeding, there is no more valid reason for holding that he should not be permitted to do so, or that the whole proceeding is void for want of jurisdiction as being within the exclusive cognizance of the admiralty courts than there would be for pronouncing the concurrent remedy at common law, by assumpsit, replevin or detinue, or by attachment process, as not within the saving clause of the ninth section of the judiciary act. 1 Stat. 73. The moment the demand is satisfied, either on execution or by voluntary payment, the lien is at an end, however created. Hence, if a libellant has a demand against a Missouri boat, which is not a maritime lien, but merely a lien created by the Missouri statute, he cannot enforce the same in an admiralty court against the boat in the hands of a purchaser under a judicial sale ordered by a Missouri court, according to the boat act of 1845, if his demand accrued prior to said sale. If he had a maritime lien, cognizable by the state court, he might proceed in that court or in the admiralty court, at his option. If he did not appear in the state court and procure satisfaction of his demand, the proceedings there constitute no bar to his recovery here, nor does the judicial sale by the order of the state court divest his lien upon the vessel. He had an undoubted right to pursue his clear remedy in admiralty, or his other and concurrent remedy at common law, or in the state courts. The federal courts having exclusive jurisdiction in "all cases of admiralty and maritime jurisdiction," can alone pass, by a judicial sale in admiralty, a title

to a vessel free from all liens. Courts of common law cannot proceed in rem, but have concurrent jurisdiction by common law proceedings. Brevoor v. The Fair American [Case No. 1,847]; Mankin v. Chandler [Id. 9,030]; O'Callaghan v. Riggs [Id. 10,400]; The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 458; Waring v. Clarke, 5 How. [46 U. S.] 441; [New Jersey Steam Nav. Co. v. Merchants' Bank] 6 How. [47 U. S.] 344; [Cutler v. Rae] 7 How. [48 U. S.] 729; 1 Kent, Comm. 377; De Lovio v. Boit [Case No. 3,776]; The Wave [Id. 17,300]; Davis v. New Brig [Id. 3,643]; Hallett v. Novion, 14 Johns. 273; Percival v. Hickey, 18 Johns. 257.

The difficulties urged upon our attention with respect to local liens and the proceedings in state courts to enforce them, and the embarrassments arising therefrom under the decisions in admiralty, present very grave questions; and were these decisions now open for review here, it might be important to consider the whole subject, so as to arrive at some result which would obviate, as far as possible, the real or apparent conflict. The boat act of Missouri and the proceedings under it are, by virtue of the undoubted authority of the state to legislate with regard to common law rights and interests in chattels, within her territorial jurisdiction. It may be a difficult task to reconcile the recognition of a lien, not maritime, as enforceable in admiralty against the vessel itself, with the exclusive jurisdiction of admiralty courts—that is, that they may proceed, in the first instance, to enforce a mere local lien, by adjudicating the demand and decreeing the condemnation and sale of the vessel, so that said sale shall pass a title free from all liens and incumbrances whatsoever; and thus draw within their jurisdiction the adjudication of all common law demands for which a local lien may be given by any state, and impart to those liens such force and effect as belong solely to maritime liens. If the local law can create a lien, and provide the mode of enforcing and divesting it, why should not all proceedings by virtue of that local act be confined to the local tribunals? The power to create the lien results from the power to prescribe rules for the transfer, mortgage, &c., of chattels—a power equal, in all respects, to that over real estate within the same territorial limits. Treating a vessel as the common law treats it—merely as a chattel—and then considering its migratory character, and that its owners are often non-residents, the state of Missouri has deemed it expedient to fasten liens upon it, in favor of its own citizens, who furnish money, repairs, &c., to enable the vessel to prosecute her voyages. In so doing, it acts upon the vessel only from the common law point of view, as an ordinary chattel. It has no power to treat it as the admiralty courts do, or to divest maritime liens. It can divest the liens of its own creation, and none other. Its courts act just as courts of equity do with partnership assets in the hands of a receiver, or in marshalling equities under a creditor's bill to funds in court; where the purchaser of the property, sold under the order or decree, takes no better title than the respondents could give. The boat act of 1845 provides for marshalling its local liens and the enumerated maritime liens, and requires those holding the local and other liens to come in and share, according to their recognized rights, the fund in court arising from the sale cum onere. The local liens are divested, and those having them are required to pursue the fund in court, or be remitted to their common law actions against the parties. Those having liens under the maritime law, of the description named in the act, may also pursue their demand against the fund, and take their distributive share, according to the rules there prescribed; or they may elect to follow their remedies at common law or in admiralty. To the extent that they receive satisfaction of their demands under the statutory proceeding, their liens in admiralty, and their rights at common law, are extinguished; but no further. Because they are permitted to prosecute their demands in the state courts, they are not precluded from enforcing them also in admiralty, or from instituting the ordinary actions therefor at common law. But if the Missouri citizen, who holds a maritime lien which falls within the terms of that act, does not choose to pursue it in the state court, his lien is not diverted by the sale, notwithstanding the thirteenth section, which declares that "such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this act."

The language of the statute is precise, and presents no conflict; for the liens under the maritime law are not properly liens "under," or created by, that act. But how is it with a creditor having a maritime lien, who proceeds in accordance with that act, being the only party who obtains judgment under which a sale is ordered, when the fund arising from the sale is not sufficient to satisfy his demand? Shall he subsequently pursue the vessel, for the unsatisfied portion of his demand, in admiralty, and procure a condemnation and a new sale against the purchaser at the former sale? Or, if the funds derived from the former sale are sufficient to satisfy his demand, and, under the subsequent proceedings in the state court, the same is distributed among those having priority by the statute or mere local liens, is his demand to be considered as satisfied or unsatisfied in admiralty, and the boat again seized in the hands of the purchaser, for the same demand upon a judgment for which the former sale was ordered? The priorities named in the Missouri act, are not those recognized in admiralty; and, no doubt, it frequently happens, that those who

have merely local liens exhaust the fund, when maritime liens are actually before the court. So the creditor having a local lien, may proceed by the ordinary actions at common law, or as prescribed by the boat act, or in admiralty; and is he to be held concluded by his election, or permitted, after having proceeded in the state court to judgment, to libel the vessel in admiralty, for the original demand not satisfied out of the proceeds of a sale thereunder? Is the demand merged in the judgment? We are aware that there are many questions of this character, which may hereafter arise for adjudication. Many of the difficulties spring from the different manner in which a vessel is regarded at common law and in admiralty. By the former, a judicial sale passes only the interests of the defendants, if under a fi. fa., upon a judgment against them. If they had previously incumbered the chattel by mortgages, or any of the modes of hypothecation known to the common or local law, the chattel would still be subject to all of those outstanding interests, after sale on execution, just the same as would the defendants' realty, under similar circumstances. But, as a peculiar class of liens is created by the statute, and others may exist at common law by the acts of the parties, the whole of those liens and incumbrances the general assembly of Missouri has deemed it wise to marshal, according to rules enacted therefor, whenever the chattel has to be sold, under judicial process, against the boat. In order, also, to prevent multiplicity of suits, and various outstanding interests in a chattel, and a sacrifice of the vessel, and protracted litigation concerning the respective rights of the many interests in the property sold, the statute provides that, when a sale takes place under its provisions, not only shall the interest of the owners pass to the purchaser, but also the interests of all others having statutory or common law liens or incumbrances, leaving all who have maritime liens, (save a few,) wholly untouched, and granting to the excepted few permission to come in and share the proceeds. If the statutory liens, like common law incumbrances, were left to be enforced solely by the local or common law courts, or were cognizable in admiralty, like mortgages, only as against remnants and surplus, some of the embarrassments suggested might be obviated. Now, by adjudications, and by the rule adopted by the supreme court of the United States, any one having merely a local lien may libel a vessel, and proceed in rem in admiralty, upon that local lien, to condemnation and sale. The General Smith, 4 Wheat. [17 U. S.] 443; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 390; Read v. Hull of New Brig [Case No. 11,609]; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175, rule 12. The local law, without which the federal court would not, and could not act in admiralty upon the specified demand, is made to give a new sweep to federal jurisdiction, drawing within the vortex of admiralty the adjudication of common law and local demands, to be governed by other than the common law and statutory modes of proceeding. Instead of federal courts having exclusive jurisdiction in admiralty, and stopping where maritime demands and rights in admiralty stop, they take jurisdiction of local liens, and (by virtue of local enactments) not of maritime subjects merely, which are governed by rules of universal application, but of the various conflicting statutory and other regulations of the states; and then do not follow and enforce those state laws, but modify some of the provisions, disregard others, and balance the clashing rules of the local system of one state against those of another; until what was designed for a court of admiralty, whose decrees should be based upon maxims of universal recognition, and common to all civilized maritime countries, becomes a strange anomaly, exercising jurisdiction as varied as admiralty, common law and state legislation, and as irreconcilable as the many differing statutes of the various states at whose ports a vessel may touch, in the course of her many voyages. Admiralty courts cease thereby to derive their jurisdiction solely from the federal constitution and laws, and to be guided by admiralty rules, but virtually assume and exercise jurisdiction, as the same may be enlarged or diminished by mere state legislation, without the possibility of uniform proceedings with respect to the whole Union or harmony of federal action. Each case dependent on a local lien, has a law for itself. The furnishing supplies to a vessel touching at one port, will give a lien to be enforced in admiralty by United States courts, when precisely similar contracts, made under like circumstances in all respects at another port, will carry no right to cognizance by those courts.

Such considerations as these might have been urged with great force and propriety, if the questions they present were open for review or adjudication in this court. The conflicts and difficulties that frequently arise from different systems of jurisprudence, and from different principles belonging to even the same system, and often involved in the same facts submitted for adjudication, are incidental to all judicial proceedings. No argument therefrom will justify this court in departing from the rules formally settled by the United States supreme court. It is too late to question in this court, at this time, the existence of the rule which confines maritime liens to foreign vessels, or that recognizes in admiralty local and common law liens, or that holds the ports of different states foreign to each other. The General Smith, 4 Wheat. [17 U. S.] 438; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U.

S.] 390; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; Thomas v. Osborn, 19 Pet. [60 U. S.] 22. Whether a fuller consideration of the whole subject, and a more systematic adjustment of these questions, would produce a change of some of the existing rules, it is not for this court to determine.

After a long controversy, it has been settled that the grant in the constitution is neither limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the United States constitution was adopted; that admiralty jurisdiction is not taken away in cases where courts of common law may have concurrent jurisdiction; that exclusive admiralty jurisdiction is conferred on the United States courts; that it is not limited to tide waters, but extends to all public navigable lakes and rivers where commerce is carried on between different states or with a foreign nation; that it does not exist for the enforcement of the rights of mortgagees; that, in cases of collision, rules of navigation prescribed by the laws of a state, though binding upon the courts of that state, cannot regulate the decisions of the federal courts administering the general admiralty law; when repairs or supplies are procured by the master in a foreign port, in a case of necessity, and the credit has necessarily to be given to the vessel, or it is necessary to rely on the credit of the vessel, a maritime lien therefor exists; a mortgagee may be a claimant, or intervene for proceeds of a sale, but cannot libel the vessel for the mortgage debt; that no maritime lien exists for supplies furnished in a home port, but if given by the municipal law, they will be taken cognizance of and enforced in admiralty, and a libel may be filed therefor, and proceedings maintained against the ship and freight in rem, or against the master or the owner alone in personam. Waring v. Clark, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443; Fretz v. Ball, Id. 466; The New World v. King, 16 How. [57 U. S.] 469; Bogart v. The John Jay, 17 How. [58 U. S.] 399; The New York v. Rea, 18 How. [59 U. S.] 225; Thomas v. Osborn, 19 How. [60 U. S.] 22; Pratt v. Reed, Id. 359; Tod v. The Sultana, Id. 362; The General Smith, 4 Wheat. [17 U. S.] 443; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; Rule 12 Sup. Ct. Adm.

The jurisdiction of the United States courts is, therefore, not restricted by the narrow rules existing in England at the adoption of the United States constitution. Those restrictions resulted from the conflict there between the admiralty and common law courts, which ousted the admiralty courts of jurisdiction over maritime contracts in home ports. The doctrine of the United States supreme court follows the English rule, however, so far as to deny that a maritime lien exists for supplies or repairs furnished in a home port, instead of acting upon the more extended and general rule of the civil law, which recognizes no distinction between the home and foreign port in such cases. Abb. Shipp. 142. It then recognizes and enforces municipal liens given in home ports by state statutes. Thus the one rule cuts off the domestic creditor; and the other brings him back within admiralty cognizance, it may be with rights superior to the foreign creditor, who has a maritime lien; for the supreme court has expressly withheld all expression of opinion as to the rule of necessity, with reference to municipal liens. Pratt v. Reed, 19 How. [60 U. S.] 359. When the supreme court decided in the case of The General Smith that no maritime lien exists for supplies, &c., furnished in the home port, but that municipal liens would be recognized and enforced, the various states had to adopt statutes creating such municipal liens in order to protect their own creditors, and place them on equal footing with foreign creditors. If the civil law doctrine had been adopted, in stead of the English, there would have been no distinction between the home and foreign port as to the rights of material men and others, and there would probably have been no necessity for a recognition of municipal liens, except as against remnants and surplus, just as with mortgages. Municipal liens might have been treated as on the same footing with mortgages and other common law incumbrances. The adoption of the civil law rule, or that the various states of the Union are not foreign to each other within the maritime doctrine, might remedy some of the difficulties named. If no such distinction existed, between liens in home and foreign ports, there would be very little, if any necessity for the boat acts of the different states; and then a refusal to give to municipal statutory liens any better standing in admiralty than a mortgage or other common law incumbrance, would probably go far to establish uniformity in the maritime jurisprudence of the United States, and to remove the embarrassments suggested. Under the various rules now authoritatively established in this country, it frequently happens that a vessel is libelled in a home port, on a home demand, by virtue of the local lien given by statute, and condemned and sold; and that, on the final adjudication of the rights of libellants, claimants, and intervenors, not one maritime lien is presented for consideration, or really exists; yet the admiralty court has taken cognizance of and enforced only municipal liens, without having had any other jurisdiction than what sprung from local state legislation. In such instances, it is virtually turned into a tribunal to dispose of purely common law demands, arising from local legislation, which more appropriately belong to local tribunals. And whilst passing upon home demands against a domestic vessel, it often occurs that other demands are interposed, resting for their validity solely upon

the legislation of other states. The circumstances under which such liens are fixed by state legislation, and the limitations upon them, are very different. Thus, in Ohio, the demand has to be duly recorded within four months, and then the lien continues for two years. In Louisiana, in some cases recording is necessary, and in others not necessary; some demands are limited to sixty days, and others to departure on the second voyage. In Missouri no recording is required, but under the act of 1855, seamen's demands are restricted to wages for two months, and the right to pursue the boat therefor, by name, is limited to thirty days; whilst material men can enforce their demands on accounts for a year after the accruing of the last item, except that in St. Louis county, (where most of those demands arise,) the limitation of right to sue the boat is six months; thus seamen who are favored in admiralty are restricted by the local law, and different rules exist for residents of different counties, working the greatest injustice among citizens even of the same state. The different local statutes prescribe different rules of preference and of priority; and the judicial interpretation of them by the state courts of last resort is guided by analogies from different systems of jurisprudence—one local court looking to the maritime system, and another to the common law system. Here, in Missouri, the earlier adjudications upon the statute followed the common law rules, giving to a prior attachment, when levied, preference over the statutory liens; and to the statutory lien under which the vessel was first seized, preference over liens declared to be superior by the statute itself; but when a fuller boat act was adopted in 1845, the maritime law was held to be the proper source for rules of interpretation. As the decisions of the United States supreme court prior to the case of The Genesee Chief [supra] limited admiralty jurisdiction to tidal waters, the vast commerce of the Western states, inter sese, and with foreign nations, was left, so far as boats and vessels were employed within the territorial limits of the respective states, to be governed by common law rules, or such local statutes as might be, from time to time, adopted for the purpose of enforcing the rights of parties. As no state could exercise, or confer on its own courts the power to exercise admiralty jurisdiction, the various statutes and adjudications under them became more and more restricted in their beneficial operations, until they were confined to creditors resident in each state respectively. The local courts, like those of Missouri, were consequently embarrassed in deciding many cases before them; for, having no power to proceed in rem, they often felt the necessary injustice done creditors resident elsewhere, but with no authority to apply with full force the wiser maritime rules which give proper effect to the maritime demands of all persons, wherever residing. Under those local statutes conflicts of jurisdiction necessarily arose. Vessels sold under the order of a state court were not and could not be divested of maritime liens, nor of liens existing in other states; and consequently the purchasers at those judicial sales were controlled in their bids by the legal fact, that they were acquiring the property cum onere, —subject to all tacit and other liens which might exist against it at each port in every other state where the vessel had touched, it might be, during her lifetime. The decision in The Genesee Chief opened the door to the navigating interests of the West, for relief from a large portion of the burthens under which they had suffered. Still the early rule established in the case of The General Smith is in full force; and the necessity for local statutes to protect home creditors is not removed. Those statutes still remain.

Under the concurrent jurisdiction at common law, a vessel may be seized and sold to satisfy a judgment rendered against the owner, or the proceeds may be distributed according to the statutory rules governing the local courts; or it may be brought within the cognizance of said courts on their equity side; yet, according to the well settled doctrines on both sides of those courts, the judgments and decrees bind only the parties thereto and their privies, and the vessel being made "to plough the seas, and not rot by the wall," is soon beyond the territorial jurisdiction of those tribunals and subject to demands not cut off or concluded by the judgments or decrees thus rendered. From the very nature of the case, owners, mortgagees, lien creditors, and others having an interest in the thing sold, could not be personally served with a summons or subpoena within the state, because they were residents of the various Western states at whose ports the vessel had touched, and beyond the territorial jurisdiction of any one local tribunal. In admiralty courts alone, the power existed to make all the world parties to the proceedings. Similar embarrassments may arise in common law suits and in equity proceedings, it is true, with respect to other chattels; yet many of those conflicts have been settled by a long series of adjudications. It is impossible to adjudicate, in one suit, all points that may arise from the concurrent jurisdiction of admiralty and common law tribunals; nor would any court be guilty of an attempt to do so. In the cases now before this court for adjudication, and intended to be covered by this decision, some of these difficulties have arisen; and it has been thought proper therefore to present more at length than is usual, the source of the conflicts, the nature of the questions involved, and the principles by which they are governed. This has been done the more cheerfully, because the growing litigation in Western admiralty courts requires that the doctrines involved, and the nature of the system, should be understood at an early day. This department of jurisprudence has not received so large a share of professional attention in the interior states as in

those having tidal waters; because, until the decision of the United States supreme court in 1851, it was held that the general admiralty and maritime jurisdiction of United States courts did not extend above tide water on the Mississippi river. A careful examination of the maritime codes as interpreted by admiralty courts, will also indicate the necessity, in some cases, of a very different application of their established principles to river navigation in the West. Rules that grew up under ocean navigation and concerning sea voyages, may sometimes be found inapplicable with technical rigor to voyages along the navigable rivers of the Mississippi valley. With the increase of Western population and productions, a corresponding increase of Western commerce must occur. Hence the magnitude of the interests and of suits concerning river navigation, will continue to add to the practical importance of the various questions decided in the admiralty courts. Unfortunately, only a few, comparatively, of the many cases hitherto have involved sums large enough to authorize an appeal to the United States supreme court; and hence the various district and circuit courts are without the advantages which decisions by the court of last resort would afford. The decisions of the various district and circuit courts are, with few exceptions, unknown, and inaccessible to the profession generally, and to other courts. With a full appreciation, therefore, of the arguments of the able advocates in the cases under consideration, and of the necessity of educing from general principles of the maritime law some of the rules applicable to the facts, and with due regard at the same time to the decisions obligatory here as settled by the United States supreme court, this opinion has been more extended in its consideration of the views urged upon our attention than under other circumstances would have been deemed necessary. The conclusions at which this court has arrived, may be briefly stated, as follows: There can be no lien by the general maritime law for materials and supplies furnished a vessel in her home port. Whether a vessel is foreign or domestic must be determined by the residence of her owners, and her enrollment is only prima facie evidence of their residence. If a vessel is navigated by charterers, and by the terms of the charter party they have exclusive control of her,—directing her voyages, receiving the freight money, manning and victualling her, &c.,—then they are to be deemed, pro hac vice, the owners for the purpose of ascertaining the home port where she is libelled for supplies furnished to run her. The jurisdiction of the United States courts in all civil cases in admiralty is exclusive of the several state courts; and the latter have the jurisdiction of only the appropriate common law remedies. A lien given by the general maritime law cannot be divested by the legislature of a state. The boat act of Missouri cannot, and does not, deprive a person who has a lien under the general maritme law, of the right to enforce that lien in the United States courts. The acts of the various states creating municipal liens,—providing, as many of them do, for their enforcement in suits instituted against the vessels, by name, instead of against the owners, prescribing, too, the modes of proceeding therein and of divesting those municipal liens, declaring the rules of priority among domestic creditors, ordering the sale of the vessel and the appearance of the specified lien creditors to urge their demands against the proceeds when brought into the state courts, do not make those proceedings properly suits in rem or give to those courts admiralty powers or jurisdiction. Hence, the judicial sales made under such acts by the order of state courts, divest only the liens created by those acts and the municipal liens embraced within their terms. The purchaser in such cases takes, cum onere as to existing maritime liens, and as to the municipal liens of other states. A decree and sale in admiralty alone can pass, judicially, a title to a vessel, discharged of all liens and incumbrances whatsoever. Where the place of an owner's residence is substantially suburban to, or a part of the port where a vessel is enrolled, and he does his business or the business of the vessel at the port of enrollment, then the port of enrollment is to be deemed the home port of the vessel, although the residence of her owner is technically on the other side of a river separating two states and the two parts of the same port. For the purpose of determining whether Cincinnati was the home port of the Ambassador at the time the demand accrued, it is sufficient that she was enrolled there, and that her owner, although residing on the other side of the ferry, in Newport, Kentucky, did his business and the business of the vessel in Cincinnati. As the libellants' account was not sworn to and recorded, as prescribed by the Ohio statute, it is not a municipal lien under the laws of that state. Courts of admiralty have no general equity powers, and will not take cognizance of undefined equities, or of the rights of general creditors. The distinction between demands accruing for materials and supplies furnished in a home port, and when furnished in a foreign port; the rule that the ports of the different states are foreign to each other, within the operation of the maritime law; and the jurisdiction of admiralty courts, in cases founded solely upon municipal liens; and the power of such courts to pass upon the claim of a mortgagee, and order the proceeds of a sale in admiralty to be paid over to him, although he is not permitted to libel the boat for the payment of the mortgage money—these rules are not open for review in a United States district or circuit court, nor will those courts go behind the decisions and rules of the United States supreme court, because difficulties and embarrassments may arise from their application. The Missouri boat act provides for only a le-

gitimate exercise by its courts of their concurrent jurisdiction at common law over demands accruing in the navigation of boats and vessels. The fact that, in addition to the ordinary forms of suits at common law, Missouri has adopted a form of proceeding whereby a warrant is issued against the boat, in the first instance, and a suit is maintained against her by name, and also providing that Missouri creditors, who have a general maritime lien, may prosecute their demands under that act, does not interfere with the exclusive jurisdiction of the United States courts in admiralty, so as to render said act unconstitutional. An additional remedy at common law does not oust admiralty courts of their exclusive jurisdiction in admiralty. Whether the adoption of the rule of the civil law, with respect to supplies, &c., in the home port, or of any other rule different from what the United States supreme court has laid down, would be more consistent with the general maritime law, produce less conflict or difficulty, secure more uniformity, and enforce more wisely the just rights of parties, is a fit subject for the consideration of that court; but so long as those rules are adhered to by that tribunal, inferior courts must apply and enforce them. Municipal liens, within the terms of the Missouri statute, are divested by a judicial sale under that statute, and cannot thereafter be pursued in admiralty. As some of the points considered in this opinion were, as before stated, elaborately discussed by the learned judge of the district court, from whose decisions appeals were taken, and as he reviewed with great care and accuracy most of the United States statutes, and of the adjudicated cases bearing upon the questions involved, —Hill v. The Golden Gate [Case No. 6,492], and Ashbrook v. The Golden Gate [Id. 574],— and as this court fully concurs with him in his views as thus expressed, it has been deemed proper to avoid a repetition of the arguments and authorities cited by him, as far as practicable, and merely to present some additional suggestions corroborative of his conclusions. The decrees in each of the cases before this court are, therefore, in all respects, affirmed, with costs.

Case No. 6,492.

HILL et al. v. The GOLDEN GATE.

[Newb. 308;[1] 5 Am. Law Reg. 142; 36 Hunt, Mer. Mag. 449.]

District Court, E. D. Missouri. Sept. Term, 1856.[2]

MARITIME LIENS—ENROLLMENT OF VESSEL—OWNERS—CHARTER PARTY.

1. Whether a vessel is a domestic or a foreign vessel depends, subject to some modifications and exceptions, upon the residence of her owners, not upon the port of her enrollment.

[Cited in The Mary Bell, Case No. 9,199; City of St. Louis v. Wiggins Ferry Co., 11 Wall. (78 U. S.) 431; The Witch Queen, Case No. 17,916; The George T. Kemp, Id. 5,341; The Rapid Transit, 11 Fed. 329; The Jennie B. Gilkey, 19 Fed. 129.]

2. The lien against a vessel, in favor of material men under the general maritime law of the United States, also depends upon the residence of her owners, not upon the port of her enrollment.

[Cited in Hill v. The Golden Gate, Case No. 6,491; McAllister v. The Sam Kirkman, Id. 8,658; The Albany, Id. 131; The Norman, 6 Fed. 408; Stephenson v. The Francis, 21 Fed. 718; The Cumberland, 30 Fed. 451.]

3. When there is a charter party, and by its terms, the charterers are to have exclusive possession, control, and management of the vessel, to appoint the master, run the vessel, and receive the entire profits, they, and not the general owners, are to be deemed the owners, and are alone responsible for damages and contracts.

[Cited in The Samuel Marshall, 49 Fed. 757; Id., 4 C. C. A. 385, 54 Fed. 399; Norwegian Steamship Co. v. Washington, 6 C. C. A. 313, 57 Fed. 227.]

4. Thus, where a steamboat was owned in Indiana, enrolled in Kentucky, chartered by residents of St. Louis, Missouri, and contracted debts to residents of Missouri; *held*, that under the general maritime law of the United States, the charterers and the material man both residing in Missouri there was no lien upon the vessel.

[Cited in The Pirate, 32 Fed. 489; The Samuel Marshall, 4 C. C. A. 385, 54 Fed. 399.]

5. The act of congress, entitled, "An act to provide for recording the conveyances of vessels, and for other purposes," (9 Lit. & B. Laws, 440), does not extend to charter parties.

[This was a libel for supplies, brought by Hill, Conn, and others, against the steamer Golden Gate.]

John H. Rankin and Wm. Biddlecome, for libelant.

Geo. R. Shipley, for steamer.

WELLS, District Judge. The steamer Golden Gate was owned in Indiana, and enrolled at Louisville, Kentucky. The owners chartered her to certain persons who resided at St. Louis, Missouri. By the terms of the charter party the charterers were to have the boat for four months, with a privilege to renew the charter party, upon a specified notice, for four months more. The charterers were to pay the owners $800 per month for the hire of the boat, and were to have the entire and exclusive control and management of her for the time specified; were to receive her earnings, and keep her clear of all liens and claims. The charterers appointed the master, ran the boat, and during the charter party contracted debts in Missouri for materials and supplies, a part of which were furnished by the libelants, and are the same for which the libels in this case are filed. Other libelants furnished materials and supplies before the boat was chartered.

The principal question for the court now to examine and decide is, have the libelants in this case a lien upon the boat by the general maritime law of the United States, for the materials and supplies thus furnished? If materials and supplies be furnished to a ves-

[1] [Reported by John S. Newberry, Esq.]

[2] [Affirmed in Case No. 6,491.]

sel in a port of the state to which she belongs, the material men have no lien by the general maritime law; the presumption being that the supplies are furnished on the credit of the owners, and not on that of the boat. On the contrary, if the materials and supplies be furnished to a foreign vessel—that is a vessel belonging to a foreign country or to another state—then a lien is given on the vessel by the general maritime law; the presumption being that the material men looked to the vessel as well as to the owners for security. There may be a lien on a vessel for materials and supplies furnished in a port of the state to which she belongs, but in such case it is given by the local law of the state. 1 Conk. Adm. 56, and pages following. In regard to these principles there is no controversy.

The question whether the Golden Gate is subject to a lien by the general maritime law for supplies furnished in St. Louis, after the charter party was entered into, will depend for an answer on her being then in a foreign or domestic port. Does her being a foreign or domestic vessel depend on the residence of her owners, or on the port of her enrollment? As a general rule, which general rule, however, is subject to some modifications and exceptions, it depends on the residence of her owners or those who are, for the time, to be deemed and treated as her owners. If it depends on the residence of her owners, then the next question will be, who are to be deemed and treated as her owners in this case? Are they the general owners residing in the state of Indiana, or the charterers residing in St. Louis, Missouri? That the supreme and circuit courts of the United States look to the residence of the owners and not to the place of enrollment of a vessel to determine her character, will be apparent by examining the decided cases. The residence of the owners is proved and stated, and nothing is said about the enrollment. See the statement of the case and opinion in The General Smith, 4 Wheat. [17 U. S.] 438; The Nestor [Case No. 10,126], where Judge Story says: "Prima facie the supplies of material men to a foreign ship, that is to a ship belonging or represented to belong to owners residing in another state or country, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved. Statement of the case and opinion in The Chusan [Id. 2,717].

If the character of the vessel, foreign or domestic, depended on the enrollment and not on the residence of the owners, the statements and proof of the residence of owners, and the language of Judge Story in the case of The Nestor [supra] were idle and unimportant; and as nothing was said or proved about the enrollment, there could be nothing by which to determine the character of the vessel.

It is important to observe that the character of the vessel is only referred to for the purpose of ascertaining to whom and to what the credit is given; and in no other respect, so far as regards this case, is it important. If the owners reside in a foreign country or in another state, the material man is presumed to give credit to the boat and also to the owners; because he is presumed not to rely alone on the owners, who live so remote and who are beyond the jurisdiction of the courts of this state. If the owners reside in the same state with the material man, the latter can easily resort to them for payment, and readily enforce it in the courts; therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given; and has, therefore, nothing to do with the question of lien. If the material men were ignorant of the place of residence of the owners, they might presume, and I think the presumption would be reasonable, that the owners resided at or near the port where the vessel was enrolled; but in this case there is no room for presumption, as it is admitted that the libelants knew when the supplies were furnished, that the general owners resided in Indiana, and the charterers in St. Louis, and that the boat was enrolled at Louisville. I am aware of the case of Tree v. The Indiana [Case No. 14,165], and that it decides that a vessel is to be deemed to belong to the port where she is enrolled. It is founded solely on the third section of the act of 31st December, 1792, entitled "An act concerning the registering and recording of ships or vessels." 1 Lit. & B. Laws U. S. 288 [1 Stat. 288]. That section provides "that every ship or vessel hereafter to be registered, except as hereinafter provided, shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registration, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel, usually resides." The substance of the section is that the vessel is to be registered at the port to which she belongs; and for the purpose of registry, the port to which she belongs shall be deemed to be that at which the owner resides, or the port nearest to which he resides. The section is only directing at what port the vessel is to be registered, and has no other effect. It frequently happens, as it happens in this case, that the owners reside in one state, and the port nearest to them is in another state—and this is especially the case on the Ohio and Mississippi rivers, which divide states. The above act relates to registering vessels—those engaged in foreign trade. But a subsequent act, February 18, 1793,—1 Lit. & B. Laws, p. 305, § 2 [1 Stat. 305],—providing for the enrollment of vessels (those engaged in the coasting trade), expressly provides that the place of abode of

the owners shall be stated in the enrollment. According to the late and well considered case of Dudley v. The Superior [Case No. 4,115], which reviews the above case [Case No. 14,165], the place of enrollment is only prima facie evidence of the port to which the vessel belongs. See, also, Sharp v. United Ins. Co., 14 Johns. 201; and Leonard v. Huntington, 15 Johns. 302. It will be observed that when the port or place to which a vessel belongs is spoken of, it always means the port or place where the owners reside to whom the vessel belongs.

I have before remarked in this opinion, that the rule that a foreign vessel was subject to a lien for supplies, and that a domestic vessel was not thus subject, under the general maritime law, was not without exceptions and modifications; but it will be seen that those exceptions and modifications all show that the lien depends on the residence, or supposed residence, of the owners, and not on the place of enrollment. Thus, if the owners of a domestic vessel held out their vessel as a foreign vessel—that is, as belonging to persons residing in a foreign country—they are precluded by their own act from denying her foreign character, when libeled by material men; and there will be a lien for the supplies furnished, enforced in the admiralty. The St. Jago De Cuba,' 9 Wheat. [22 U. S.] 416, 417. Again: If an exclusive credit be given to the master, there is no lien, although she be a foreign vessel. The Nestor [Case No. 10,126]. Again: If the contract be made with the owners personally and not with the master, there is no lien—the presumption being that the credit was given to the owners personally, and not on the credit of the vessel. The St. Jago De Cuba, supra. The act of congress of the 3d of March, 1851,—9 Lit. & B. Laws, 635 [9 Stat. 636],—entitled, "An act to limit the liability of ship owners and for other purposes," (section 5) provides, "that the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act; and such ship or vessel," when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof." The above section applies, I presume, only to certain losses and injuries specified in the act, and moreover is declared not to apply to inland or river navigation; the last, as I suppose, was because the general maritime law of the United States was not at that time, March, 1851, thought to apply to the inland navigation, the decision of the supreme court of the United States declaring it to extend to inland navigation, not having, at that time, been made. But it applies in many cases, and to all navigation except the inland navigation; and shows that the place of enrollment can have nothing to do with it. And so far as the act provides, it shows the opinion of congress that the charterers are to be, and ought to be, considered the owners.

Having established, as I think, the proposition that the lien in favor of material men under the general maritime law, depends on the residence of the owners, and not on the place of enrollment, it becomes necessary to inquire who, in this case, are to be deemed the owners. The law, I think, is perfectly well settled, that where there is a charter party, and by its terms the charterers, as in this case, are to have exclusive possession, control and management of the vessel during the term specified—are to appoint the master, run the vessel, and receive the entire profits—they, and not the general owners, are to be deemed the owners, and are alone responsible for damages and contracts. Gracie v. Palmer, 8 Wheat. [21 U. S.] 632, 633; Marcardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 39; Abb. Shipp. (Eng. Ed.) p. 57, note 1, and cases there cited; Id. 288, 289, same paging and note; The Volunteer [Case No. 16,991]; Kleine v. Catara [Id. 7,869]. Indeed, upon principle as well as authority, there cannot be a doubt. It might as well be contended that if you hire your horse to another to perform a journey, you, and not he, would be responsible for his shoeing and food.

It was said in the argument of this cause, that the charter party was not recorded. This can make no difference, as the only effect of recording would be to give notice of its existence—there being no act of congress declaring it to be void for want of recording, and the material men expressly admitting that they knew of the charter party when they furnished the supplies. Abb. Shipp. (Eng. Ed.) p. 33, note 1, and cases there cited. There is an act of congress,—9 Lit. & B. Laws, 440 [9 Stat. 440],—entitled "An act to provide for recording the conveyances of vessels, and for other purposes." But it does not extend to charter parties; and the instruments which the act requires to be recorded, are not declared invalid as to those having actual notice thereof.

I come, therefore, to the conclusion, that for supplies furnished the Golden Gate at St. Louis, after she was chartered, the material men and the charterers both residing there at the time, there is no lien upon the vessel by the general maritime laws of the United States.

[The decision of the district court was affirmed by the circuit court in an opinion by Treat, District Judge. Case No. 6,491.]

HILL (GRISWOLD v.). See Cases Nos. 5,834–5,836.

Case No. 6,493.

HILL v. HOUGHTON.

[1 Ban. & A. 291; 6 O. G. 3; Merw. Pat. Inv. 150.] [1]

Circuit Court, D. Massachusetts. May 30, 1874.

PATENTS—"SPELLING BLOCKS"—NOVELTY—VALIDITY—INFRINGEMENT.

1. The reissued patent of complainant, is, for spelling blocks, cubical in shape, and having different letters of the alphabet upon two or more of their sides. It is shown, that, prior to the patentee's invention, spelling blocks of the same shape had been made, having numbers, letters and pictures upon them, and some of which, had two letters upon each block: *Held*, that, in view of this state of the art, it was not a patentable improvement, to place two or more letters on each block, even though the patentee may have been the first person to place them systematically, with a view to enlarge the usefulness of the blocks.

2. The first claim of the reissued patent, granted to the complainant, for new and useful spelling books, *held* invalid.

3. A patent for spelling blocks, cubical in shape, having different letters upon two or more of their sides, and upon one side of each block a numeral, by the aid of which, in connection with a printed key, the blocks needed for spelling any word, may be readily found, is not infringed, by the manufacture and sale of similar cubical spelling blocks, without numerals and a printed key, but having a picture, on each block, in place of the numeral.

[This was a bill by Samuel L. Hill against J. T. Houghton for the alleged infringement of letters patent No. 59,603, granted to the complainant November 13, 1866.]

J. Van Santvoord, for complainant.

A. A. Ranney, for defendant.

LOWELL, District Judge. The reissued patent of the complainant, is for a new and useful spelling block, and the nature of the invention, is declared in the specification, to consist, first, in placing different letters of the alphabet upon two or more sides of cubical or six-sided blocks, so that, by combining the blocks, words, in which the same letters occur more than once, may be readily spelled; and second, in placing, upon one side of each block, a numeral, by the aid of which, in connection with a printed key, the blocks, needed for spelling any word, may be readily found. The two claims follow this description. The defendant has made blocks with letters upon two or more sides, and each block contains a picture on the sixth side. It is proved, that six-sided cubical blocks, of wood, were in common use, as toys, before the plaintiff made his invention, and two sets are given in evidence, which were actually made, and have been, for twenty years, in the possession of the witness who identifies them.

This evidence is not impeached or disputed; the blocks, in both samples, are made of wood, and have letters and pictures and other devices upon them. One set is numbered consecutively, with conspicuous numerals, from 1 to 24, and this set has several pictures, illustrating each letter. The second set consists of twenty-four blocks, and has pictures, some of which illustrate the letter, and some do not. The first set has two letters on two of the blocks, combining I and J, and W and V, thus enabling the twenty-six letters to be placed on twenty-four blocks. The second set has five blocks, on each of which two letters are placed, though evidently not intended to enlarge the spelling capacity of the blocks, since the repeated letters are not those which would be much in demand. In this state of the art, we are of opinion, that it was not a patentable improvement, in spelling blocks, to place two or more letters on each block, even though the plaintiff may have been the first person to place them systematically, with a view to enlarge the usefulness of the blocks. In a machine, it may sometimes be invention, to adapt the machine to greater usefulness, by a plan which has been very nearly approached, but never actually reached, before; the point is often a somewhat nice one. In this case, we think the invention was fairly complete, when the blocks had been arranged for spelling a great variety of words, and, especially, when, for economy of space or other reasons, several of the blocks were impressed with more than one letter; otherwise the novelty, and the infringement must depend upon the particular letters which are repeated. We do not find that the second claim is infringed. The defendant has a picture on each of his blocks, and they appear to be put on without any system, and he has never used a printed key. It may possibly happen, that a child seeing the picture, would recognize the block, as being one with certain letters upon it; but this is no more than might happen with the old form of block, containing a picture and a numeral. The picture thus used, does not seem to us an equivalent for numerals, arranged for use with a printed key, if we construe the claim with respect to what had already been done, and thus confine it to the exact novelty which was introduced by the plaintiff.

Bill dismissed.

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[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 150, contains only a partial report.]

HILL (LOCKETT v.). See Case No. 8,443.

Case No. 6,494.

HILL v. LOW.

[4 Wash. C. C. 327.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

FUGITIVE SLAVE—OBSTRUCTION TO CAPTURE.

1. In an action for the penalty by the owner of a fugitive slave, for obstructing the plaintiff in seizing and arresting his slave, under the fourth section of the act of congress of February 12, 1793, c. 152 [2 Bl. & D. 332; 1 Stat. 305], whether the alleged slave owes service or labour, is a question for the jury to decide.

2. If the defendant, knowingly, obstructs the owner or his agent in seizing the fugitive, he cannot excuse himself against the penalty, by pleading ignorance of the law, or an honest belief, that the person was not a fugitive from service or labour.

[Approved in Johnson v. Tompkins, Case No. 7,416. Cited in Jones v. Van Zandt, 5 How. (46 U. S.) 230.]

[Cited in Sim's Case, 7 Cush. 306; Ela v. Smith, 5 Gray, 131.]

3. Mere obstruction, hindrance, or interruption, is no offence under this act, unless it be interposed to prevent a seizure in the first instance, or a recapture in case the fugitive, after seizure, should escape; and the offence in such case would be complete, although the owner should ultimately succeed in making the arrest.

4. After the arrest is consummated, no subsequent obstruction, whilst the custody continues, though it should afford an opportunity for escape, amounts to this offence, though it might possibly entitle the owner to an action at common law; or, if an escape in consequence of the obstruction should happen, it might amount to the other offence of a rescue.

This cause came before the court upon exceptions taken to the charge of the judge of the district court upon the first count in the declaration, judgment having been entered for the defendant upon the other counts. This count states, that a person held to labour in the state of Maryland, by the name of Ezekiel, had escaped into the state of Pennsylvania, and that the plaintiff, being the person to whom such labour of the said fugitive was and is due, did, on a certain day, at Philadelphia, seize and arrest the said fugitive from labour, to take him before a magistrate of the said city, in order to prove before him that the person so seized and arrested did, under the laws of the state of Maryland, from which he fled, owe service and labour to the plaintiff, the person then and there claiming the said fugitive; the defendant did then and there knowingly and willingly, obstruct and hinder the plaintiff in so securing and arresting the said fugitive when so arrested, pursuant to the authority given him by an act of congress; contrary to the form, &c.; whereby the defendant became liable to pay to the plaintiff the sum of $500, &c. &c. Plea, nil debet. Verdict and judgment for plaintiff on the first count.

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

WASHINGTON, Circuit Justice. The various objections which have been made by the counsel for the plaintiff in error to the charge delivered by the judge of the district court in this cause, have induced me to examine it by sections, and with all the attention of which I am capable. The case, as it was presented to the court at the first trial, required of the judge a construction of every part of the act of congress of the 12th of February 1793; and the light which he has shed upon a subject which, so far as I am informed, had never before been submitted to judicial investigation, relieves me from the necessity of travelling over the whole ground, especially as the questions which I have to consider were confined, at the last trial, to the case made by the first count, the substance of which has been stated.

There are two principles laid down in the charge in which I cannot concur, and to these I shall confine this opinion. I yield my entire assent to every other part of the charge.

1. The first objectionable part of the charge is that in which the judge is made to say that "whether the said Ezekiel was a slave, or owed service to the plaintiff, was not a question for the jury to decide, but was a question to be decided by the magistrate." It is very clear, I think, that this position is as much opposed to the policy, as it is to the words of the act of congress on which this action is founded. For it is the person "to whom the labour or service of the fugitive is due," or his agent, who is authorized by the third section to seize such fugitive, and to take him before the magistrate: and although the fourth section, in describing the person against whom the offences stated in it may be committed and who may sue for the penalty, styles him the "claimant," yet the pronoun "such" plainly refers for its antecedent, to the claimant mentioned in the third section; where he is described to be the person to whom the service of the fugitive is due, and to whom the certificate is to be given by the magistrate, if proof of the service due is made to his satisfaction. The declaration pursues the act of congress, by alleging that the plaintiff was the person claiming the fugitive so seized and arrested, and to whom he owed labour and service; which allegations, being put in issue by the plea of nil debet, it was incumbent on the plaintiff to prove. The expression I have used,—that the judge was "made" to lay down the position to which this objection is taken, was founded upon his own declaration in court, that it was not his intention to deliver the opinion imputed to him, but that, on the contrary, he dissented from it; that the sentiments which he had expressed were misunderstood by the counsel, and that the mistake was overlooked by himself, in a too hasty reading of the bill of exceptions. I have no doubt but that the observations of the judge upon this subject were made in reference to the particular case before him, in

which the fact of service due by the fugitive to the plaintiff was so fully established, as not to have been controverted at the bar; but which were, from misapprehension of the counsel, supposed to lay down a general principle of law applicable to all cases. I am confirmed in this opinion, not only by concessions made by the counsel for the plaintiff in error in this court, but by the declarations of the judge in his charge on the first trial, "that he considered the plaintiff's title to the fugitive sufficiently proved to have warranted the magistrate in granting him a certificate, and that he would not himself have hesitated to grant it." I must, nevertheless, confine my knowledge of this case to the record, and finding there this objectionable direction to the jury, my duty compels me to condemn it. Connected with the preceding subject, the charge proceeds to state, that "the intention, the mala mens, was not here inquirable into;" by which, I do not understand the judge to mean that an unintentional obstruction would render the person an offender under the law; but that if the defendant knowingly and willingly obstructed the plaintiff in seizing the fugitive, he could not allege, in his defence, ignorance of the law, or even an honest belief that the person claimed as a fugitive, did not, in fact, owe service to the claimant, and that such matters were unfit for the inquiry of the jury; and that it was sufficient to bring the defendant within the provisions of the law, if, having notice, either by the verbal declarations of those who had the fugitive in custody or were attempting to seize him, or by circumstances brought home to the defendant, that the person was a fugitive, or was arrested as such; he persisted, nevertheless, in obstructing the seizure, or in making a rescue. I collect this to have been the meaning of the judge from other parts of the charge; and thus explained, I entirely concur in that part of the direction to the jury.

2. The remaining objection to the charge is to those parts of it in which the following sentiments are expressed: "That the question for the jury was, whether the obstruction was such as prevented the free will of the master in arresting, and safe keeping the fugitive;" "that whilst proceeding to the place intended for safe custody, it is unlawful to hinder or obstruct the passage of the owner or his agent, or by force, or violence, or assemblage of people, to intimidate, or cause the claimant to go out of his course, and thus afford opportunity for escape. This, in effect, is an obstruction, hindrance, and restraint on the will of the claimant, and takes from him the power of safe keeping, till he has obtained a certificate for removal." There are some other parts of the charge which correspond with the sentiments thus expressed, and I understand the principle which they meant to lay down to be, that if the claimant, or his agent, be interrupted, or hindered, in the manner described in the charge, after the arrest, and whilst the claimant, having the fugitive in custody, is conducting him to the magistrate, or to a place for safe keeping, the offence of obstructing the claimant in seizing or arresting the fugitive, is committed. To this doctrine I cannot accede. Mere obstruction. hindrance, or interruption, is no offence under this act of congress, unless it be interposed previous to, or whilst the claimant, or his agent, is in the act of seizing or arresting the fugitive, or is endeavouring to make such seizure; and I consider the offence to be complete, if knowingly and willingly committed, although the claimant should ultimately succeed in arresting, or recovering possession of the fugitive. The act of seizing may be effected, either by the physical restraint of the fugitive, or by a moral restraint, as if the fugitive voluntarily, or by intimidation, accompany the person taking him, without requiring personal coercion. But whether the arrest be in the one way, or the other, being once consummated, no subsequent obstruction, whilst the custody continues, although it should afford an opportunity for escape, or be a restraint upon the free will of the claimant, can constitute the offence of obstruction or hindrance mentioned in, or intended by the fourth section of this act. Such conduct may subject the party to an action at common law, (as to which, however, I give no opinion at this time) or, if an escape of the fugitive should be the consequence of it, it might amount to the other offence of a rescue, within the same section, if the escape was effected by actual force, or intimidation; and in relation to this latter offence, I entirely concur in the opinion of the district judge, as stated in the charge. I by no means assent to the argument of the counsel for the plaintiff in error, that the offence of obstruction or hindrance cannot be committed after the first seizure has been completed; for if the fugitive, being once in custody, should, of his own accord, evade his keeper and escape, or, being excited by others to do so, should make the attempt, and an obstruction should be interposed to hinder the recapture of the fugitive, the offence would be precisely the same, as it would have been, had the same obstruction been interposed to the original seizure or arrest; and so on as often as the like hindrance may occur in repeated attempts to make the seizure after an escape had taken place. To render my meaning as intelligible to others as it is to myself, I will exemplify it by the following hypothetical case; for I have not read, nor have I paid the slightest attention to the evidence in this cause; thinking it forms, and ought to have formed, no part of this record. If the person in custody escape, or is excited by others to fly, and does so, this is not an obstruction within the meaning of the law; and whether a rescue or not, would depend upon the circumstances before mentioned as constituting that offence. But if the persons who promoted the escape,

or others, should knowingly and willingly impede or hinder the claimant, or his agents, in pursuing the fugitive, for the purpose of making a recapture, this would be an obstruction strictly within the words, and what I conceive to be the spirit of the law. Should the claimant, or his agents, in such a case, turn their backs upon the fugitive, and abandon all attempt to make a new seizure, not being hindered or obstructed by others, the mere stoppage, or interruption of the claimant, or the exciting of the person in custody to fly, would not amount to the offence stated in the count upon which this trial took place. I ought to observe, that much of the doctrine stated in this part of the opinion is contained in that part of the charge, in which the judge says, "if the fugitive be rescued, or escape from the first arrest, the same rules and principles apply to rescue or recapture, as has been mentioned in relation to the first taking. If the evidence do not amount to actual rescue; obstruction or hindrance (that is, as I understand it, in relation to the recapture) equally incurs the penalty." I am, upon the whole, of opinion, that, for these reasons, there is error in the judgment of the court below, that the same must be reversed with costs, and the cause be remitted to the district court, that a venire de novo may issue, and further proceedings be had thereon.

HILL (McKAY v.). See Case No. 8,845.

HILL (McNEIL v.). See Case No. 8,914.

Case No. 6,495.

HILL et al. v. MURRAY.

[6 Ben. 141.] [1]

District Court, E. D. New York. June, 1872.

SEAMEN'S WAGES—VOYAGE BROKEN UP.

A vessel was run on a reef in a well-known channel, where there was plenty of room, and was lost. The master was a man of experience in the waters, and accounted for the occurrence by his chronometer being wrong. The sailors brought suit against the owner of the vessel, to recover wages for the whole voyage, alleging that the voyage was broken up by fault of the owner. *Held*, that, as it did not appear that the accident was the result of negligence, or incompetency of the master, or that, when the vessel sailed, the chronometer was not a proper one in good order, it could not be held that the voyage was broken up by fault, fraud or neglect of the owner.

[Cited in The Wenonah, Case No. 17,412.]

[This was a libel by Henry Hill and others against Robert Murray, Jr., for wages.]

A. Nash, for libellants.

Goodrich & Wheeler, for respondent.

BENEDICT, District Judge. The demand of the libellants is for wages for the whole of a voyage for which they shipped, which, as they aver, was broken up by the fault of the owner. The faults charged are, in providing a negligent or unskillful master, who ran the vessel on shore, and in omitting to furnish the vessel with a proper chronometer, which misled the master as to his position, and caused the accident. The proofs show that the vessel did run on a reef, in the night, in a well-known channel where there was plenty of room, but they fail to show that this accident was the result of the negligence or the incompetency of the master.

The experience of the master in the waters, where the accident occurred, is not disputed, and no particular act of negligence on the part of the master is proved to which the accident is chargeable. The master accounts for the disaster, by the condition of his chronometer, but there is no evidence, that when the vessel sailed from port the chronometer was not a proper one in good order.

Upon such proofs it cannot be held, that the breaking up of the voyage was owing to the fault, fraud or neglect of the respondent. The libel must therefore be dismissed.

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

Case No. 6,496.

HILL v. MYERS.

[5 Cranch, C. C. 484.] [1]

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

CAPIAS—AFFIDAVIT.

The affidavit to hold to bail must show that the debt was due at the time of issuing the capias.

[This was a proceeding by Michael Hill against John Myers.]

The affidavit, made after the return of the writ, stated that the debt was "now" due, and did not state that any thing was due at the time of issuing the capias.

THE COURT, at the motion of W. L. Brent, permitted him to appear for the defendant without special bail.

MORSELL, Circuit Judge, absent.

HILL (NEALE v.). See Case No. 10,068.

Case No. 6,497.

HILL v. NORVELL et al.

[3 McLean, 583.] [2]

Circuit Court, D. Michigan. June Term, 1845.

PROMISSORY NOTE—NOTICE TO INDORSER—DAYS OF GRACE.

1. A notice of taking a deposition being left at the lodgings of a defendant, without specifying

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

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

the lodgings, is not sufficient, where the defendant swears he did not receive the notice.

2. A note payable without grace, in three months or any other specified time, is not due until the time shall expire; excluding the day the note is dated.

3. The usage of the banks in the District of Columbia, to make a demand on the fourth day of grace, only applies to notes negotiated by the bank.

[See Auld v. Mandeville, Case No. 653.]

4. Notes left for collection in the bank, are due on the third day of grace under the general commercial usage.

5. A notice to an indorser, who is a member of the senate or house of representatives of the United States, left in the post-office of the senate or house, congress being then in session, is not a sufficient service. If, however, the jury shall believe that the notice was duly received, it is sufficient.

[Cited in Manchester Bank v. Fellows, 28 N. H. 311; Terbell v. Jones, 15 Wis. 256.]

At law.

Mr. Backus, for plaintiff.

Bates & Romeyn, for defendants.

OPINION OF THE COURT. In this action the defendants are charged as indorsers on a note for three thousand six hundred dollars to the plaintiff, dated the 16th March, 1839, payable in nine months. A deposition was offered which was objected to for want of notice. The person who served the notice, swore that he left it at the lodgings of Norvell, the defendant, in Washington City, the 28th of March, 1845. Mr. Norvell filed an affidavit that he remained in Washington City, at Fuller's, his place of lodging, on the above day until half after five o'clock, when he left for Baltimore. That just before he left he inquired of the bar-keeper at Fuller's, whether any communication directed to him had been received at the house, and was answered in the negative. The court held the proof of notice insufficient, as it did not specify where the copy was left. The lodgings of defendant must have been ascertained by the information of others. The notary who demanded and protested the note, states in his deposition, that he made the demand of payment on the 19th of December, 1839; and that on the next day he deposited notice thereof in the post-office of the senate, Mr. Norvell being a member of the senate, which was then in session at Washington; and another notice in the post-office of the house of representatives, which was also in session, to Crary, the other indorser, who was a member of the house. It is objected that the demand was made prematurely. If this be so, it is fatal to the right of the plaintiff. A demand must be made of the maker when the note becomes due, and if made either before or after that time, the indorsers are discharged. In Story, Bills, pp. 378, 379, it is laid down "that the universal rule of the commercial world now deems a month, in all cases of negotiable instruments, to be a calendar month. A bill, therefore, due the 1st of January, payable in ten days, without grace, becomes due on the 11th of the same month, excluding from the computation the day of the date of the bill." And in page 380, he says, "a bill payable six months after date if payable without grace, becomes due on the corresponding day of the sixth month, excluding the day of the date of the bill, whatever number of days the months contain."

The above applies to notes without grace, but the days of grace are established and controlled by usage. They differ at different places, and bind parties who come within their operation. In Mills v. Bank of U. S., 11 Wheat. [24 U. S.] 431, the court held, "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not." The case of Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581, is cited, where the court say, "by the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof." This was the usage of the banks in the District at that time. As the note in question was dated the 16th of March, 1839, payable in nine months, it is insisted that the note without grace, was not due until the 17th of December ensuing; and adding four days of grace, that it was not due until the 20th of December, at which time the demand should have been made. That the demand having been made on the 19th of December, cannot charge the indorsers. In the case of Cookendorfer v. Preston, 4 How. [45 U. S.] 326, it appears that the usage of the banks in Washington and Georgetown was changed, so as to make the demand on all notes left for collection, on the third day of grace, conformable to the general commercial usage. As the demand of payment on the note before us was made on the third day, it was within the present usage, it not having been negotiated by the Bank of the Metropolis, although it was made payable there, and was deposited for collection.

The important question is, whether leaving the notices in the post-offices specified, was a sufficient service of them. The court instructed the jury that leaving a notice in the post-office of the place where the indorser resides, is not a good service. That it must be delivered personally to the indorser, left at his place of business or dwelling. That the indorsers in this case being members of congress, were residents of the city of Washington for the time being. And that leaving the notices at the post-offices of the houses to which they respectively belonged, was not a service within the rule. That in principle there could be no difference between the post-offices of the two houses, and the post-office of the city. Some evidence was given conducing to show an admission by one or both of the defendants, that they had received the notices, and

to show the manner in which letters left in the post-offices of the two houses, were distributed to the members after the adjournment. And the jury were instructed, that if they should find the notices were received by the defendants the day after the protest was made, they should find for the plaintiff; but if they should not so find, their verdict would be for the defendants. The jury found for the defendants.

Case No. 6,497a.

HILL v. PATTERSON.

[Hempst. 173.] [1]

Superior Court, Territory of Arkansas. Jan., 1832.

SLANDER—COSTS—VERDICT.

In actions for slander, or trespass vi et armis, the plaintiff recovering less than ten dollars, can recover only two thirds of the costs of suit. Geyer, Dig. 260.

Error to St. Francis circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

JOHNSON, J. This was an action of trespass on the case for slander, brought by [William] Patterson against [John] Hill. On the trial in the court below, Patterson obtained a verdict against Hill for one cent damages; upon which the court rendered judgment in favor of Patterson for the sum of one cent for his damages, together with his costs in and about the suit in that behalf expended. The only ground relied upon in the assignment of error is, that the court gave judgment in favor of the plaintiff below for all the costs by him expended about his suit in that behalf, when, according to the law, he was entitled to judgment for two thirds of those costs only. The forty-eighth section of the act regulating judicial proceedings (Geyer, Dig. 260) provides, that "if in any action of trespass on the case for slander, or action of trespass vi et armis, that may hereafter be instituted in any court of record within this territory, the plaintiff shall recover less than ten dollars, such plaintiff shall be allowed to recover two thirds of the costs given by law in such suit, and no more." In accordance with the above provision, the judgment should have been rendered for two thirds of the costs of the suit, and having been given for all the costs, is consequently erroneous, and must be reversed. Judgment reversed.

HILL (PERKINS v.). See Cases Nos. 10,986 and 10,987.

HILL (POLK v.). See Case No. 11,249.

HILL (ROBERTSON v.). See Case No. 11,925.

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

Case No. 6,498.

HILL v. SCOTT.

[5 Cranch, C. C. 523.] [1]

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

USURY—PROOF—WITNESS—RECOVERY.

1. A person who borrows checks payable to bearer, to raise money upon for his accommodation, but has not indorsed them, is a competent witness for the defendant to prove usury.

2. The plaintiff is affected by the usury, although he did not know it when he purchased the checks.

3. By the law of Pennsylvania, in case of a loan by the plaintiff to the defendant, at a higher rate of interest than six per cent. per annum, the plaintiff can only recover the sum actually lent, with lawful interest; and the burden of proof is on the plaintiff to show the actual amount paid by him to the defendant.

Assumpsit [by David Hill] against [Robert K. Scott] the drawer of sundry checks, payable to bearer, amounting altogether to $465, purchased by the plaintiff for $265, of a broker. These checks were lent by the defendant to W. B. Hart, to enable him to raise money upon them for his accommodation. The defendant, having given Hart a release, called him as a witness.

Mr. R. J. Brent, for plaintiff, objected to Hart as a witness, because, although his name is not upon the paper, yet he has passed it away, and upon principles of public policy ought not to be permitted to discredit the negotiable paper to which he had given currency, and to testify to his own turpitude.

But THE COURT overruled the objection.

Mr. Brent then prayed the court to instruct the jury, in effect, that the plaintiff cannot be affected by the usury unless he knew it when he purchased the checks. Floyer v. Edwards, Cowp. 115; Whitworth v. Adams, 5 Rand. [Va.] 333; Taylor v. Bruce, Gilmer, 42.

THE COURT (CRANCH, Chief Judge, not giving any opinion) refused to give the instruction. Mr. Brent then contended that by the law of Pennsylvania, to constitute usury, there must be a loan. See the Pennsylvania act of 1823 (Digest, p. 369). The act is only penal. The usury does not invalidate the contract against a stranger, without notice. Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 354; Turner v. Calvert, 12 Serg. & R. 46; Wycoff v. Longhead, 2 Dall. [2 U. S.] 92; Musgrove v. Gibbs, 1 Dall. [1 U. S.] 217.

THE COURT was of opinion, that if the jury should find the law of Pennsylvania to be as in the statute of 1823, and that this was a loan of money by the plaintiff to the defendant at a higher interest than at the rate of six per centum per annum, the plaintiff cannot recover more than the amount

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

paid by the plaintiff for the check with lawful interest thereon.

THRUSTON, Circuit Judge, however, was of opinion, that, in such case, the plaintiff could not recover any thing.

Mr. Bradley, for defendant, contended that the burden of proof was on the plaintiff to show what he paid for the checks, as they had been delivered by the defendant to Hart, in blank, to be filled up by him, to raise money upon for his accommodation, the defendant never having received any consideration therefor (Woodhull v. Holmes, 10 Johns. 231); and having given evidence that Hart received only $265 for checks for $465, post-dated five months.

THE COURT (nem. con.) was of opinion that if the plaintiff would recover more than the $265 on the checks for $465, he must show that he paid more for them.

Verdict for the plaintiff, for the amount paid by the plaintiff for the checks with lawful interest thereon.

HILL (SLOUGHTON v.). See Case No. 13,501.

Case No. 6,499.

HILL v. SMITH et al.

[2 McLean, 446.] [1]

Circuit Court, D. Illinois. June Term, 1841.

MORTGAGE—EQUITY OF REDEMPTION—MERGER.

1. An equity of redemption, at common law, can not be sold on execution.

2. When a mortgagee brings an action on a mortgage bond, obtains judgment, sells the right of redemption, and becomes the purchaser, on the supposition that such an interest can be sold, the equity purchased at the sale merges in the legal estate. And this principle holds equally, whether the purchase extends to the whole or a part of the mortgaged premises.

3. It is a general principle, where a greater and a less estate unite in the same person, the latter becomes merged in the former.

4. Where a contrary intention is shown by the person holding these interests, this effect may not result from the union of these estates.

In equity.

Mr. Krum, for complainant.
Hall & Edwards, for defendants.

OPINION OF THE COURT. This is a bill to foreclose a mortgage. To secure the payment of the residue of the purchase money, the defendant, Smith, executed a mortgage on the tract purchased. After the mortgage money became due the complainant commenced an action, at law, against the mortgagee on the bond, and recovered a judgment. An execution was issued, and the land, with the exception of one hundred acres, was levied on, and sold for three thousand dollars, leaving a balance on the judgment unsatisfied. To obtain this balance this bill was brought to foreclose the mortgage on the hundred acres not sold on execution. In his answer the defendant states, that there is a defect in the title, that he paid, at the time of the purchase, fifteen hundred dollars, and the sum of three thousand was collected on the judgment by a sale of the land mortgaged, excepting the hundred acres. That before the judgment, at law, the defendant, Smith, conveyed to the other defendants the hundred acres on which a foreclosure and sale are prayed by the bill. And the defendant insists that by the sale, at law, the complainant has received, with the payment made at the time of the purchase, more than the value of the land with the defect of title. He also, insists that the above proceeding discharges the mortgagee.

Several exceptions have been taken to the answer, some for impertinence, &c., which need not be stated. We think that the answer admits upon its face the amount unpaid on the mortgage, and the statement of the sale to Howard, &c., by the respondent, can not be held irrelevant, as if not expressly called for by the statements of the bill, it is necessary to show the extent and nature of the interest of the other defendants except Smith. Exceptions overruled. Several questions have been argued, as arising from the face of the bill and answer, which, although made in a somewhat irregular manner, will be here considered.

The first ground taken by the defendants' counsel, is, that the sale and purchase of the defendants' equity of redemption on execution, under a judgment for the mortgage debt, by the complainant, extinguishes the mortgage debt. And to this the cases of Tice v. Annin, 2 Johns. Ch. 125; Atkins v. Sawyer, 1 Pick. 351; 4 Kent, Comm. 157,—were cited. Whether the complainant acquired any right, under the sheriff's sale, may well be doubted. It is clear that at common law an equity of redemption can not be sold on execution. And we believe there is no statute subjecting this interest to execution, nor is it known that the supreme court of Illinois have so held. This point was examined in the case of Piatt v. Oliver [Case No. 11,115].

The above authorities seem to consider the purchaser of the equity of redemption, as resting upon that right only, whether a mortgagee or a stranger make the purchase. And that the payment of the mortgage money discharges the lien of the mortgage. This is undoubtedly the case where the purchaser is a stranger. On the supposition that the right of redemption may be sold on execution, the purchaser possesses himself of the right to redeem, and, on the payment of the amount due the mortgagee, the mortgage is discharged. But in this case the mortgagee was the purchaser, and the payment is to himself. Is the effect of such a purchase to

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

discharge the mortgage and give the purchaser a mere equity? What is the nature of this equity? It is a right of redemption while it remained in the mortgagor, or when sold to a stranger, but can it be so considered in the hand of the mortgagee? Prior to the purchase the mortgagee had the legal title, and by the purchase he holds this outstanding equity. The equity, then, and the legal title unite in the same person, and where this is the case the equity merges in the legal title. This is clearly the case, unless the party, in whom they unite, evinces a determination to keep them separate, or it is his interest to keep them so. This doctrine is examined by Sir William Grant, in the case of Forbes v. Maffatt, 18 Ves. 389. He says: "It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate, and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist, at law, and sometimes preserve it where, at law, it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances, it is with reference to the party, himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done, by him, to keep it on foot." This is the general doctrine on the subject. Lord Compton v. Oxenden, 2 Ves. Jr. 263; 4 Brown, Ch. 398; Gardner v. Astor, 3 Johns. Ch. 53; 2 Fonbl. 162, c. 6, § 8. If the equity of redemption could be sold, by the purchase of it, the complainant vested in himself, as mortgagee, the equitable and legal titles to the land sold; and there can be no reason why the equitable should not merge in the legal title. There can be no possible interest in the complainant to keep these titles separate, and by taking the deed, and other acts, he has shown a disposition to unite them. No objection is perceived to the application of this doctrine to the purchase of a part of the mortgaged premises as well as the whole. The purchase, in this case, extended to the whole tract, except the hundred acres which had been sold. In Wiscot's case, 2 Coke, 61, it is laid down: "If the reversion be granted to tenant for life, and another in fee, the estate for life is extinct for a moiety; for tenant for life can not purchase, or get the reversion or remainder of the same land, but the estate for life will be merged, having regard to the estate which he hath gotten in the reversion." So far as these estates united in the same person there was a merger. And so in the case under consideration. The legal estate of the mortgagee extended to the whole tract covered by the mortgage; the purchase of the equity extended to the whole except the hundred acres. To the extent, then, of the union of these two titles, in the complainant, there was a merger of the equitable right, and his title, to the extent of the sale, may be considered as valid. Whether the right of redemption was liable to be sold, at law, on execution, in this state, the court do not decide —they are inclined against it.

The second ground taken by the defendant, is that he has sustained damages by the proceeding of the defendant, and the defect of title, which raised an equity against the demand of the complainant. As it regards the suit by the mortgagee, on the bond complained of, it was no more than prosecuting a remedy in a legal form. The defect in the title is not set up in such a form as to authorize the court, in a suit like this, to inquire into the amount of damages sustained, if any. The complainant is liable on his warranty, and to that the defendant must resort, unless he shall make a case different from the one set up in his answer. Should the complainant, for the better securing of his title, ask to have set aside the sale of the equity of redemption, in order that the entire tract may be sold under the mortgage, the court will, probably, permit the necessary amendment of his bill to be made. Some objection is made as to Smith, the mortgagor, being made a party. He was clearly a necessary party. The cause will be continued for final hearing at the next term.

HILL v. STORRS. See Case No. 1,291.

HILL (STOUGHTON v.). See Case No. 13,501.

HILL (STRING v.). See Case No. 13,535.

HILL v. TOWNS. See Case No. 16,534.

Case No. 6,500.

HILL et al. v. The TRIUMPH.

[2 N. Y. Leg. Obs. 115.]

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

SEAMEN'S WAGES—FORFEITURE—COSTS.

1. On a libel being filed in admiralty on the civil side of the court to recover seamen's wages, it appearing that the libellants had been guilty of insubordinate and mutinous conduct on the voyage, yet their having subsequently performed duty on board, and having aided in bringing the vessed safely into port: *Held*, that their wages should not be totally forfeited.

2. Where the libellants were guilty of such insubordinate and mutinous conduct on board of the vessel on the voyage, and the master had arrested and imprisoned the libellants on a criminal prosecution for the offence, they should not in addition to the punishment for the criminal offence charged against them, absolutely forfeit their wages for the voyage.

3. Where one of the libellants had been guilty of embezzling the cargo, and had abandoned the vessel without leave before the final relinquishment by the master of prosecuting the voyage according to the original contract, he, the libellant, should not recover wages, although criminally punished for the offence of mutinous and disorderly conduct on shipboard.

4. Where a suit had been brought against a vessel by summons or citation before the ten days had expired, mentioned in the act of congress of 1790, § 6 [1 Stat. 133], and the master of the vessel had neglected to appear upon such summons and show cause, and the proceedings were taken by default against the vessel: *Held*, that the claimants were not bound to answer in bar of the suit, and that it had been prematurely brought.

5. The respondents were bound by the acts of the master, and when the master had arrested and imprisoned the crew on a criminal charge before the voyage was ended, and when one of the crew had been discharged on a hearing before the magistrate from the criminal complaint, and the others had been committed to prison and were awaiting the trial, and no orders of the master had been given that such prisoners should return to duty when discharged, this worked a discharge of the crew from the vessel and absolved the relationship of master and seamen.

6. Costs are in the discretion of the court in admiralty cases, and the court in the present case decreed such costs as the libellants had actually paid to the marshal and the clerk of the court, but not generally in the cause.

7. Where the principles of a cause had been settled by a decree upon hearing, the libellants should recover such prospective costs generally in the cause, as they might be put to should the claimants and respondents further litigate the suit.

8. Seamen might recover their wages and claims for short allowance on the voyage, although they had been guilty of mutinous and disobedient conduct, where they had afterwards returned to duty and been criminally prosecuted for the offence.

9. Although they recovered their claims in full as charged in the libel, yet the court would grant them costs in whole or in part, according to the incumbrances and equities of the case.

This was a libel in admiralty filed by the libellants against the brig Triumph for a balance of wages due them on a voyage from New Orleans to the city of New York. The vessel sailed from New Orleans in the month of March, 1841, and arrived at the port of New York the 6th of May following. The libellants were seamen, and shipped for the voyage and to return. The first article of the libel stated that the libellants shipped at the rate of $15 per month, and signed the usual shipping articles. The second article set forth that they arrived in New York in the month of May, 1841, and were discharged. Under this article the libellants offered proof, that while the vessel lay in the stream in this city, in the East river, they were taken out of the ship by the United States marshal of the Southern district of New York, and committed to prison upon the complaint of the master, where they had remained during some thirty days awaiting for a trial upon a charge of disobedience of orders, and an endeavor to make a revolt and mutiny on board of said vessel on said voyage, and they claimed that in point of fact these acts of the master were a discharge of the libellants out of the service of the ship, and that they had been discharged if not in point of fact by the master, they had been discharged by act and operation of law. The third article alleged the faithful performance of duty. The fourth article alleged that on the voyage, the libellants had been kept on short allowance for 15 days, and they claimed double pay under the act of congress passed July 20, 1790 (section 9). The libel was filed upon a summons issued May 9th, 1841, pursuant to the act of congress passed July 20, 1790 (section 6); and it appeared the summons having been served in the regular way, by leaving the same on board of the ship, the master neglected to appear on the return day, the 10th of May, and the certificate of the judge that time was sufficient cause of complaint whereon to found admiralty process against the vessel was taken by default, and the attachment was issued pursuant to the act. The master intervened by his proctor, and stated in the first article of his answer that the voyage commenced at New Orleans on the 30th of March, 1841, that the libellants signed shipping articles for a voyage from New Orleans to New York, and back to New Orleans, and that the voyage did not terminate at New York. In the second article of the answer he set forth by way of defence, that the cargo of the vessel had not been discharged when the attachment was issued and the vessel arrested in this suit, and that the libellants had not been released from their contract which was in full force and effect. The third article of the answer set forth that the libellants revolted and mutinied on the 17th of April, on this voyage, and they refused to do duty and assumed the command of the vessel in opposition to the will of the master, and for some time had the control and management of the vessel in opposition to the wishes and commands of the master. The fourth article of the answer set forth that the libellants had plundered the cargo and embezzled one barrel of gin on the voyage. The fifth article of the answer set up the desertion of James Hill, from the vessel at the port of New York, on the 6th May, before he was arrested, and that he was continually absent from the vessel from thence hitherto, without the consent of the master or any officer thereof. The sixth article of the answer set forth a denial that the libellants were put on short allowance, and alleged that on the 22d of April, on the voyage, the galley and cooking apparatus were washed away in a storm, and the cooking of the vessel was discommoded by the perils of the seas. The cause came on to hearing. It appeared that Ward and Cook were arrested May 6th, 1841. Hill was arrested May 7th, while on shore, and after he had left the vessel. The libellants were examined May 8th, on the criminal charge, before the committing magistrate, when Cook was discharged, but he had not been directed by the master to return to duty in the vessel. The master was present at the examination as a witness before the committing magistrate, and knew that Cook was at large.

Upon the argument of the cause, the respondents to the first point set up by way of defence that the suit had been prematurely brought, that under the act of congress no process could be issued against the vessel under ten days, and that although a summons had been issued, yet the libellants had done this at their peril, and that the master was not bound to take any notice of the summons, but might come in and set up by way of defence at the hearing, that the suit had been prematurely brought and therefore the libellants' suit must be dismissed with costs, and referred to several authorities upon the doctrine of bringing suits before the right of action accrued. To this ground of defence, the libellants' advocate replied, that here was a dispute between the master and seamen in regard to their wages, and that the men were entitled to their rights under the maritime law at once,—that they had been discharged from the vessel by the acts of the master, and the voyage broken up, and cited the act of congress 1790 (section 6). They further replied, that in cases of admiralty jurisdiction, the courts are required to proceed according to the practice of the civil law, and that the summons is a process known to that law under the name of "citation" (see Act Cong. 1789 [1 Stat. 93]; The Adeline, 9 Cranch [13 U. S.] 244), and particularly referred to 4 Chit. Gen. Prac. 143; and urged that the effect of the defendants not appearing at the time, was a default and contempt, and that all the claimant could do was to contest the claim on its merits on the ground of payment or forfeiture. That by the civil law the summons or monition might be served personally, or by affixing it upon the outer door of the defendant's house, or upon the church door. In the latter cases it is called a "service viis et modis," and they cited Proc. Prac. 75; Betts, Prac. 63; 2 Clerke, Prac. tit. 9. They again urged that the party respondent had omitted to make a defence in the first instance, and that he had decoyed the libellants into an expensive litigation, and the court would frequently compel a party to pay costs, although the libel against him was dismissed (cited Dunlap, Prac. 102; 4 Paige, 450), and urged that the defendant and respondent, in any event, ought to pay the costs of this suit, which are in the discretion of the court (Hagg. Ecc. 195; 7 Ves. 28; 2 Atk. 552).

No distinct averment had been made in the answer that the suit had been prematurely brought, and for want of such a special allegation the libellants could not be prejudiced in this stage of the case, and that the respondent must answer the cause on its merits. 1 Chit. Pl. 474; The Crusader [Case No. 3,456]. The respondents' advocate, in the next place, alleged that the contract of the libellants was in full force, they not having been discharged from the vessel, and no right of action having yet accrued by the terms of it. To this it was replied that Cook had been discharged by the tacit consent of the master, which was as good as an express consent, and that the acts of the master had discharged the other two from the vessel. The respondents then urged that the embezzling of the cargo and disobedience of orders on 17th April, forfeited the wages and cited Abb. Shipp. 471. It was proved that Hill, one of the libellants, broached the barrel of gin on the voyage, but there was no evidence direct to show that Ward and Cook participated in it. Hill admitted this offence to one of the witnesses, and stated that he had broached a barrel of gin, and had taken a hand-saw and sawed off the hoops and passed them on deck, and threw the hoops and staves overboard on the voyage, after a large portion of the gin had been drunk up on board. In regard to the disobedience of orders, it appeared that the vessel ran, on the breakers off Cape Hatteras, by somewhat of negligence in the master and officers to watch their soundings. This was at the eastward of the Dry Tortugas shoals, on the voyage from New Orleans to New York, on the 27th April. That the serf and breakers ran over the vessel's deck and swept away the galley and cooking-house, and that for two or three days before 22d April the men had been a good deal on deck, much wet, up at nights, without any warm drink or victuals, and on one occasion particularly, the day after the vessel got off Cape Hatteras' shoals, the men went below, refused to come on deck and do any more duty that day; that from that time for several days, the men had refused duty, and finally had set the captain at defiance, and alleged that he did not know navigation, and the mate took the command of the vessel. A gale of wind came on, but the libellants generally assisted in the navigation of the vessel to New York. To a question put to the mate, when he was asked, whether either of the libellants had committed a riot on board, he answered, "Yes, they did amongst themselves." One of the witnesses testified, that the libellants, after the vessel ran on to Cape Hatteras, appeared several times pretty drunk. One of the witnesses testified, that the captain was below when the vessel ran on the shoals; that the three libellants had previously remonstrated with the captain in regard to running in so near the land, previous to striking the shoals; that at Cape Florida the men remonstrated with the captain about running so near Florida reef. The libellants' advocate contended that the master, having undertaken to punish the men by a criminal prosecution, he could not now set up a forfeiture of the wages for the same offence (Luscomb v. Prince, 12 Mass. 576; 6 Mass. 348); and further urged, that no person could be twice punished for the same offence; that the court ought to decree payment of the wages under such circumstances that the respondent had had his election to plead a forfeiture of the wages, for

refusal to do duty and for a disobedience of orders, and dismiss the libel with costs to the libellants, or to arrest them for a criminal prosecution; that having elected to proceed by a criminal prosecution, that he was bound to abide by it, and could not avail himself of a plea of forfeiture.

It appeared in evidence, that on one occasion during the voyage, when at the wheel, Hill had assaulted the captain who came aft to give an order in regard to the steering of the vessel. The counsel for the respondents urged that Hill, one of the libellants, had evidently deserted the vessel at New York, and thereby forfeited the whole of his wages, and could not, in any event, be entitled to recover. The libellants' counsel urged, that there could be no forfeiture after the voyage was ended, and that it evidently was the intention of the master to have terminated the voyage at the port of New York, inasmuch as he had arrested the crew in a criminal prosecution, and cited Edwards v. The Susan [Case No. 4,299]; Thompson v. The Philadelphia [Id. 13,973]; Swift v. The Happy Return [Id. 13,697]. The respondents' counsel also urged that the court was bound to forfeit the wages of the whole of the crew for disobedience of orders during the voyage. To this it was replied that the crew on the 17th April, were put on short allowance of meat, and had been deprived of warm drink and food from the loss of the galley; and it further appeared, that they had been put on short allowance of even cold water, and that their refusal to do duty under such circumstances, was not enough to forfeit their wages, especially when the master was prosecuting them criminally for this offence, and stated, that although the captain went below and the mate took command of the vessel at Cape Hatteras shoals, yet they brought the vessel into port and returned to duty. Abb. Shipp. p. 473, notes 1, 2, p. 472. The respondents' counsel cited various authorities to sustain the positions that they had advanced during the argument, and referred to Dunlap, Adm. Prac. pp. 96, 99, and to Act Cong. 1790, § 5.

Nash & Noble, for libellants.
Robinson & Benedict, for respondents.

BETTS, District Judge. This cause, having been heard upon the pleadings and proofs, and it appearing to the court that the libellants, James Cook and Peter Ward, were duly discharged from the vessel by the master thereof before suit brought, and it furthermore appearing to the court that, although the said two libellants were guilty of insubordinate and mutinous conduct on the voyage in the pleadings mentioned, yet, that having subsequently performed duty on board and aided in bringing the vessel safely to port, and having also been arrested and imprisoned on the complaint of the master on a criminal prosecution for said offences the libellants ought not, in addition to punishment for the criminal offences charged against them, to forfeit absolutely their wages for the voyage. It is therefore, ordered, adjudged and decreed that the said Peter Ward and James Cook recover their wages due according to their agreement in this cause; and unless the proctor for the claimants consents, that a decree be entered for the amount demanded by the libel, it be referred to the clerk to compute the amount of wages due the said libellants respectively and report thereon with all convenient speed; but because of the gross misconduct of the said libellants on the said voyage, it is further ordered and decreed, that they recover costs only to the amount actually paid the marshal in this cause, and also the expenses of the reference to the clerk, if such reference shall become necessary under the conditions of this decree. And it appearing to the court that the libellant Jas. Hill abandoned the said vessel without leave before the first prosecution of her voyage was relinquished by the master, and never afterwards returned to duty on board, and that he was guilty of embezzlement of part of the cargo of the said vessel on her said voyage, it is ordered and decreed that the libel on his behalf be dismissed with costs against him to be taxed.

[Further proceedings upon the distribution upon the sale of the vessel are given in Case No. 14,182.]

HILL (UNITED STATES v.). See Cases Nos. 15,364 and 15,365.

Case No. 6,501.

HILL v. WASHINGTON.

[5 Cranch, C. C. 114.] [1]

Circuit Court, District of Columbia. March Term, 1837.

SLAVES—MUNICIPAL REGULATIONS—RECORDS.

Under the power "to lay and collect taxes upon the real and personal property within the city," the corporation of Washington has a right to pass a by-law requiring every person bringing or sending any slave or slaves into the city, to hire or reside therein, to cause such slave or slaves to be recorded in the books of the corporation, and to deposit with the register an affidavit that such slave or slaves are bonâ fide his or her property.

Appeal from three judgments rendered by a justice of the peace against the appellant [Ann A. Hill] for the penalty of $20 in each case, for not causing three slaves to be recorded on the books of the corporation, which she had brought into the city to reside; and for not depositing with the register an affidavit that they were bona fide her property, within twenty days after bringing them in, contrary to the by-law of the 5th of April, 1823 (chapter 80, § 5).

Clement Cox and Mr. Dandridge contended that the corporation of Washington had no

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

power to make such a by-law, as their charter gives them no such express power, and as it is not necessary for the exercise of any power expressly given.

Mr. Bradley, contra. It is necessary that slaves should be registered in order to enable the corporation to execute the power to restrain the nightly meetings of free negroes and slaves. It is necessary also in order to ascertain when slaves are here without being under the control of their masters. It is also necessary, in order to know (when a slave is fined) who the owner is who is to pay the fine. The corporation itself is to judge of the necessity of the means used to carry into effect its express powers. A tax is laid expressly upon the slaves of non-residents, higher than upon the slaves of residents. A register of the slaves of non-residents is necessary in order to make this discrimination.

In reply, it was said, that the powers of corporations are to be construed strictly. 2 Kyd, Corp. 167; 7 Cow. 606. That the corporation has no authority to discriminate between the slaves of residents and non-residents as to their taxation. That under the general law, the owners of slaves have a right to bring them here and the corporation has no right to prevent them, nor to burden them with extraordinary taxes.

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

CRANCH, Chief Judge. The power "to lay and collect taxes upon the real and personal property within the city," includes the power to use the means of ascertaining such property, and the owners thereof. Slaves might be brought into the city and hired out here for years before the officers of the corporation could know it. It is necessary, to the full enjoyment of the right of taxation, that some means should be used to ascertain the bringing in of that kind of property as soon as possible. The means adopted in the by-law is reasonable and proper, and therefore warranted by the charter.

MORSELL, Circuit Judge, dissented.

Case No. 6,502.

HILL et al. v. WHITCOMB et al.

[1 Ban. & A. 34; Holmes, 317; 5 O. G. 430; 1 Am. Law T. Rep. (N. S.) 382.] [1]

Circuit Court, D. Massachusetts. Feb. 13, 1874.

PATENTS—GRANTEE—SUIT FOR VIOLATION BY—RIGHTS.

1. A licensee under a patent, with the exclusive right to use, rent and vend a patented article within a specified territory, cannot maintain a suit for an injunction and account against parties using the patented article in violation of the license.

[Cited in Hammond v. Hunt, Case No. 6,003; Goddard v. Wilde, 17 Fed. 846; Webster v. Ellsworth, 36 Fed. 328; Blair v. Lippincott Glass Co., 52 Fed. 227.]

2. A licensee cannot maintain an action for infringement in his own name.

3. When the patentee sells to a person a machine, embodying the patented invention, with a covenant that the vendee shall be the exclusive licensee, and have the sole right to use the patented invention within a specified territory, and thereafter sells to another the patented invention, in violation of the contract, the licensee cannot enforce his rights by bill in equity, under the jurisdiction conferred upon the federal courts by the patent act.

[Cited in Vaughan v. East Tennessee, etc., R. Co., Case No. 16,898; Hartell v. Tilghman, 99 U. S. 554; Albright v. Teas, 106 U. S. 620, 1 Sup. Ct. 550.]

4. The licensee might seek relief for the breach of contract under the general equitable jurisdiction of the federal courts, but in that case he must bring himself within the rule with regard to the citizenship of the parties, otherwise he must seek redress in the state courts.

[Bill in equity to restrain alleged infringement of an exclusive right of the complainants [Wade H. Hill and others] under letters-patent for improvements in printing-presses, granted Edwin Allen Oct. 22, 1867 [No. 70,063], Nov. 12, 1867 [No. 70,773], and Feb. 4, 1868 [No. 73,943], and for an account. The Allen Manufacturing Company, the owner of the patents, granted to the complainants the exclusive right to use, rent, and vend, presses containing the patented improvements, in the county of Worcester, Massachusetts, and state of Rhode Island; and covenanted to protect and defend the complainants in the use and enjoyment of that exclusive right. Afterwards, and before the filing of the bill, the Allen Company sold at Norwich, Connecticut, to G. Henry Whitcomb & Co., defendants, for use in their factory at Worcester, a press containing the patented improvements; which press was, in fact, there used. Before the purchase of the press, G. Henry Whitcomb & Co. had notice of the grant of the exclusive right to the complainants. The Allen Company was joined as defendant.] [2]

Causten Browne and Jabez S. Holmes, for complainants.

[The complainants own the exclusive right to use, rent, and vend, in Worcester county, &c., presses containing the patented improvements. The press in use by the defendants Whitcomb contains those improvements. This being so, the complainants can maintain this suit. As they do not own the whole monopoly for the specified territory, they could not maintain an action at law for damages against a user of infringing machines. But neither the reason nor the language of the statute forbids them to maintain this suit in equity. Act 1870, §§ 55, 59 [16 Stat. 206, 207]. The right to maintain a suit in equity, on such a title as the complainants hold, is recognized

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 34, and the statement and briefs are from Holmes, 317.]

[2] [From Holmes, 317.]

by judicial decisions. Brammer v. Jones [Case No. 1,806]; Ogle v. Ege [Id. 10,462]; Goodyear v. Central R. Co. of New Jersey [Id. 5,563]; Sanford v. Messer [Id. 12,314]. All parties owning any part of the monopoly for the county of Worcester, &c., are before the court and subject to its decree. This case differs essentially from those in which it has been held that an unconditional sale of a patented article by one who has a right so to sell it, discharges it from all claim under the patent. In order to take a patented article out of the protection of the patent, there must be a sale of it, without condition or restriction, by one authorized so to sell it. Adams v. Burks [Id. 50]; Sanford v. Messer [supra]; Hawley v. Mitchell [Case No. 6,250]; Mitchell v. Hawley [16 Wall. (83 U. S.) 544]. The sale to the Whitcombs in this case does not meet these conditions. Upon the principle that equity will treat as done that which by agreement ought to have been done, it is to be taken in this case that the Allen Company sold the press to the Whitcombs, with the restriction which it was bound, and the purchasers knew it was bound, to put upon its use. Taylor v. Stibbert, 2 Ves. Jr. 437.] [3]

G. S. Hillard, M. F. Dickinson, Jr., and J. E. Maynadier, for defendants.

[The complainants have no right to the exclusive use of the patented improvements in such presses as that of the defendants. If they have, this suit cannot be maintained. The defendants' vendor, the owner of the patents, gave them such a title to the machine that it passed outside of the monopoly, and the defendants acquired the right to use it without regard to the patents. The royalty of the patentee has been paid; and the property sold passed from under the protection of the patent laws, and was subject, like other property, only to the operation of the laws of the state. Hawley v. Mitchell [supra], and cases cited; Adams v. Burks [supra]; Goodyear v. Beverly Rubber Co. [Case No. 5,557]; Washing Mach. Co. v. Earle [Id. 17,219]; McKay v. Wooster [Id. 8,847].] [3]

SHEPLEY, Circuit Judge. The Allen Manufacturing Company, being the owners of the rights secured by three different letters-patent of the United States, for the inventions of Edwin Allen in improvements in printing-presses, on the 1st of February, 1871, entered into a certain contract with the complainants. This bill is brought to enforce the rights of the complainants under that contract.

The contract begins with a recital that the Allen Manufacturing Company are the owners of a patent automatic envelope-printing press. In fact, they were then manufacturing a printing-press which they styled a patented automatic envelope-printing press, in the organization of which were included the inventions secured by the three patents above mentioned. "The exclusive right to use, rent, and vend, said presses in the county of Worcester and in the state of Rhode Island" is granted to Hill, Devoe & Co., the complainants, the Allen Manufacturing Company reserving for themselves "the exclusive right to manufacture said presses." The second clause in the contract provides that the company shall, within a reasonable time, supply all presses ordered by complainants in writing, and also that such presses shall be in all respects complete and perfect, and provided with all the improvements then in use with said presses, and owned or under the control of the party of the first part; and said parties of the second part, the complainants, "shall have the exclusive right to said improvements in the territory aforesaid under the terms of this agreement." The third clause is a covenant to protect and defend the complainants in the exclusive use and enjoyment of the said automatic envelope-printing presses in the territory aforesaid, and of the improvements aforesaid, and to protect them against all claims and demands of all persons for infringement or damage therefor. The fourth clause provides for the payment by complainants of the sum of one thousand dollars for each press ordered and received by them, and of a royalty of one dollar per day on each press on which envelopes can be printed of size No. 6, and corresponding royalties for other sizes, "when said parties of the second part shall be protected in the exclusive use and enjoyment of them according to this agreement." The fifth clause contains provisions concerning the sale by complainants to other parties, not material to the subject-matter of this inquiry. It is provided in the sixth clause that complainants shall have the exclusive right in said territory to use any and all improvements upon said presses which shall hereafter be made, and which shall be owned by, or under the control of, said parties of the first part, and shall have the right to adapt said improvements to all presses purchased by them before the date of said improvements.

The complainants were, therefore, not grantees of an exclusive right under the patents, or any of them, to the whole or any specified part of the United States. They were licensees, with the right of using, and vending to others to be used, within the specified territory, such presses embodying the patented inventions as they might purchase of the Allen Company, which owned the patents; having coupled with that license a grant of the exclusive right to use, rent, and vend, said presses in the specified territory upon the prescribed conditions, and a covenant for protection in "the exclusive use and enjoyment of said automatic printing-presses aforesaid, and of the improvements aforesaid."

Such a contract clearly gives the licensee no right of action for an infringement of the patent. To enable the purchaser to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others.

[3] [From Holmes, 317.]

Any assignment short of this is a mere license; and the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. Gayler v. Wilder, 10 How. [51 U. S.] 494; Sanford v. Messer [Case No. 12,314].

After the first day of February, 1871, the date of the contract, the Allen Manufacturing Company, at Norwich, in the state of Connecticut, sold to G. Henry Whitcomb and David Whitcomb, the other defendants, a certain printing-press manufactured by the company, of a style known to them as a job-press, being a press of different style from the one in use by complainants, but containing the inventions covered by the three letters-patent before mentioned; and the Whitcombs used this job-press from time to time in their business at Worcester. There is evidence in the case tending to show such notice of the contract between the Allen Manufacturing Company and Hill, Devoe & Co., the complainants, as would, according to the rules established in courts of equity, put them upon inquiry, and charge them with knowledge of all the facts to which such inquiry would lead. Complainants bring this bill against the Whitcombs and the Allen Manufacturing Company for the use of said press, charging it to be without their consent, and in violation of the orators' rights and privileges under said letters-patent, and the exclusive right and privilege granted to them, and as an infringement upon the exclusive rights and privileges of the complainants under the three letters-patent aforesaid.

All of the defendants strenuously insist that the sale of the job-press to the Whitcombs, to be used in Worcester, was not in violation of the exclusive rights and privileges granted to the complainants, by reason of the differences in the construction and operation of the job-press, as compared with the automatic envelope-press. I am, however, of opinion that, inasmuch as the job-press embodied in its organization the three inventions secured by letters-patent, and embodied in the organization of the press described in the contract, the sale of that press to be used in Worcester was a violation of the agreement of the Allen Manufacturing Company to protect the complainants in the exclusive use of the patented improvements in that territory. I am also of opinion, as before stated, that the Whitcombs, in a court of equity, would be charged, upon the evidence in this record, with notice of the equities of the complainants.

The complainants contend that the Allen Manufacturing Company have substantially agreed with the complainants that they would not sell the patented inventions to be used within the limits specified in the contract; that they were limited by the contract not to dispose of machines containing the patented inventions with an unrestricted right of use, but that the right of user should have been, by the conditions of the sale, restricted to territory outside of that territory within which they had covenanted to protect the complainants in the exclusive use. They claim that the defendant, the Allen Company, sold without such restriction, and the Whitcombs, defendants, bought with notice of such contract relations subsisting between the company and the complainants. They claim, therefore, that a court of equity will treat that as having been done which ought to have been done by the parties, and protect the complainants in their right to the exclusive use within the described limits.

This presents the question of the jurisdiction of this court. Objection is made to the equity jurisdiction, upon the ground that the complainants have a plain, adequate, and sufficient remedy at law, by an action for breach of the covenants and agreements in the contract; but this objection would not avail, if this court had jurisdiction by reason of the residence of the parties, for the reason that the remedy at law, in a case like this, would not be as practical and efficient to the ends of justice and its prompt administration as the equitable remedy. Wylie v. Cox, 15 How. [56 U. S.] 415; Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 312. Another objection is, that the bill in this case does not set out, as a claim for equitable relief, supposed equities springing from a violation of the contract and notice to the Whitcombs, but is a bill for injunction and account, on the ground of alleged infringement of the exclusive rights of the complainants, under the several patents set out in the bill. This objection is well taken. The bill cannot be sustained as a bill for infringement of rights under letters-patent. The complainants are licensees only, and as such cannot maintain an action for infringement in their own name. The defendants are not infringers of any rights under letters-patent. The Allen Manufacturing Company were the owners by assignment of the letters-patent, and sole owners for the United States. They cannot, therefore, be infringers. The other defendants, the Whitcombs, bought their press of the company, which had the power to convey to them a machine, with the right to use it anywhere in the territory owned by the grantors, which embraced the whole United States. They are not infringers under the patent law. The mere fact that the patentees, in violation of a covenant which they had made with other parties not to do so, had conveyed to them the unrestricted right to use the patented inventions, did not make them infringers of any rights under the letters-patent.

For these reasons the bill, in its present form, cannot be maintained. Inasmuch, however, as that objection might be obviated by an amendment of the bill, setting out the grounds of equitable relief upon which the complainants rely, I think it better not to rest the decision upon any technical grounds as to the form of the bill and the grounds of equitable relief set up in the record, but to consider

the case as if the grounds relied upon were well charged in the pleadings. The question then presented would be: When the patentee, or his assignee, of letters-patent for an invention, sells to a person a machine embodying the patented invention, with a covenant that the vendee and licensee shall be the exclusive licensee, and have the sole right to use the patented invention within a described territory; and thereafter sells to another the patented invention in violation of his contract, to be used in the described territory, such second vendee having notice of the first contract, can the licensee enforce his rights by bill in equity in the federal courts, without regard to the citizenship of the parties, under the jurisdiction conferred upon those courts by the patent act? The fifty-fifth section of the act of July 8, 1870, enacts "that all actions, suits, controversies, and cases, arising under the patent laws of the United States, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States; . . . and the court shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable." Is the case supposed a case or controversy arising under the patent laws of the United States? I feel compelled to come to the conclusion that it is not. It is a case arising under a contract in relation to a machine embodying in its organization three or more patented inventions. But it is a case arising out of the contract and the relations of the parties under that contract, and not under the patent laws of the United States. If the Allen Manufacturing Company were the sole manufacturers of a certain description of printing-presses not patented, and should sell one of such presses to the complainants, with a covenant that they would not sell any like press to any other person, to be used in the same territory to compete with the complainants; and afterward should sell to another person who had notice of the contract, a like printing-press, to be used in the same territory in competition with the first vendees, it would present a case furnishing precisely the same ground for equitable jurisdiction as that claimed to exist in the present case. It would present a case cognizable in a court of equity in the state of which the parties were citizens, if the court should be of opinion that there was not a full, adequate, and complete remedy at law. It would, in my opinion, present a case for equitable relief in this court, if, by reason of the parties being citizens of different states, this court had jurisdiction of the case. But it would not be, and this case is not, a bill to prevent "the violation of a right secured by patent," but of a right secured by contract. The machine purchased by the Whitcombs of the patentees had passed out of the monopoly and from under the protection of the patent laws of the United States, and was, like other property, subject only to the operation of the laws of the state. Goodyear v. Beverly Rubber Co. [Case No. 5,557]; Adams v. Burks [Id. 50]; Hawley v. Mitchell [Id. 6,250]; Bloomer v. McQuewan, 14 How. [55 U. S.] 549; Wilson v. Rousseau, 4 How. [45 U. S.] 646; Washing Mach. Co. v. Earle [Case No. 17,219].

In a court of general equity jurisdiction, the fact that the patentee had, in fraud of his contract, conveyed such a right to use the machine in the city of Worcester to one who had notice of the contract, would furnish a ground for equitable relief, for the very reason that thereby the purchaser had acquired the right to use the machine without violation of the patent laws, when the patentee had stipulated that no one but the first licensee should be able to do so without being liable as an infringer. The case is like that, cited by complainant's counsel, of Taylor v. Stibbert, 2 Ves. Jr. 437, where the vendor of real estate was bound to grant a lease, or answer in damages for non-performance. The purchaser bought with notice of the contract, and the court held that he must fulfil it. The equitable jurisdiction springs in that case from the breach of the contract, the notice of it to the vendee, and the want of an adequate legal remedy. Admitting that all these elements exist in the present case, they do not confer jurisdiction in this case over these parties; for these facts alone do not bring the case within any grant in the constitution to congress of judicial power, or any act of congress conferring such power on the federal courts.

Bill dismissed.

Case No. 6,503.

HILL v. WINNE.

[1 Biss. 275.] [1]

District Court, D. Wisconsin. Jan., 1859.

JURISDICTION — MORTGAGE IS CHOSE IN ACTION — ELEVENTH SECTION JUDICIARY ACT.

1. The United States courts have not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state.

2. A mortgage is a chose in action within the meaning of the eleventh section of the judiciary act [1 Stat. 78].

3. The rule that a promissory note payable to bearer is excepted from the prohibition of this section does not apply to an accompanying mortgage.

4. Doubtful jurisdiction not entertained.

Bill of foreclosure. The complainant represents himself as a citizen of the state of New York, and as such, claims the jurisdiction of this court. It is charged in the bill that the defendant made and delivered to one J. J. Tallmadge a note, whereby he promised to pay said Tallmadge or bearer, two thousand seven hundred dollars, for value received.

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

And to secure the payment thereof, executed and delivered to said Tallmadge the mortgage upon which this suit is brought, which note and mortgage have been sold and delivered by said Tallmadge to complainant. The bill prays the usual decree of sale of the mortgaged premises. The defendant pleads that he is a citizen of this state; and that J. J Tallmadge, the mortgagee, was at the date of the mortgage, and also at the time of the filing of this bill, a citizen of this state.

Finches, Lynde & Miller, for complainant.
Winsor & Smith, for defendant.

MILLER, District Judge. This is intended as a plea to the jurisdiction of this court. If this bill had averred that the note and mortgage were given to the complainant, in the name of Tallmadge, it might be inferred that the complainant was entitled to prosecute this suit, as the equitable owner of the mortgage. But it is averred that the note was given to Tallmadge, and he sold and delivered it to the complainant.

By the constitution and the act of congress, organizing the courts of the United States, suits at law, or in equity, can be sustained between citizens of different states; one of the parties being a citizen of the state wherein the suit is brought. A citizen of some other state may sue a citizen of this state, or a citizen of this state may sue a citizen of some other state, if found within this state, so that process can be served on him. It is certain that Tallmadge could not sustain a suit in this court against Winne, they both being citizens of the same state. By the eleventh section of the judiciary act (1 Stat. 78), "no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other choses in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

According to the prevailing practice in the circuit and district courts, under rulings of the supreme court of the United States, this plaintiff could prosecute a suit at law against Winne, the maker of this note, as this provision of law is inapplicable to notes payable to bearer; upon the ground that the original promise is to pay any person who may happen to be the bearer; and that as the interest in such a note passes by mere manual delivery, the plaintiff cannot, therefore, be said to claim in virtue of an assignment. Bullard v. Bell [Case No. 2,121]; Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318; Smith v. Clapp, 15 Pet. [40 U. S.] 125; Young v. Bryan, 6 Wheat. [19 U. S.] 146; Bonnafee v. Williams, 3 How. [44 U. S.] 574. This prohibition is decided in Gibson v. Chew, 16 Pet. [41 U. S.] 315, to embrace a joint suit against the maker and endorser of a promissory note, where they both are citizens of the same state; and for this reason, a law of a state authorizing such joint suit, is not to be recognized in the federal courts. Keary v. Farmers' & Merchants' Bank, 16 Pet. [41 U. S.] 89; Dromgoole v. Farmers' & Merchants' Bank of Mississippi, 2 How. [43 U. S.] 241. It also extends to a general assignee of an insolvent debtor (Sere v. Pitot, 6 Cranch [10 U. S.] 332), and to an assignee of a bond and mortgage (Sheldon v. Sill, 8 How. [49 U. S.] 441; Smith v. Kernochen, 7 How. [48 U. S.] 198).

The jurisdiction of this court is claimed for the complainant, on the ground, that as the note passed by manual delivery merely, without an assignment or endorsement, such transfer carried with it the equitable interest in the mortgage. It is true that, in equity, the debt or note is treated as the principal, and the mortgage as the incident, which passes by the transfer of the note, and is discharged by its payment. But we have a note and mortgage delivered by one citizen of this state to another; and at the time of filing the bill they are both citizens of the same state. There is no replication to this plea, that the plaintiff was either beneficially or equitably entitled to the contents of the note and mortgage at their inception. The bill sets forth that the mortgagee sold and delivered the note to the plaintiff. It should be pleaded, but it possibly may be inferred, that this suit is carried on in the name of the plaintiff for the mortgagee's benefit. If so, it is virtually a suit between citizens of the same state. If this matter had been specially pleaded, and not denied, it would be the duty of the court to dismiss the bill. Smith v. Kernochen, supra.

The note is a general security, not payable to any particular person; the mortgage is a special security to the mortgagee. The one is transferable by manual delivery; the other by assignment. The note is independent of the mortgage, and it may be sued on by the holder, under the presumption that it may have been delivered to him by the maker, as it was not made payable particularly to the person named as payee. But the mortgage is executed and delivered to the mortgagee, and his assigns, whereby we have notice that it is a contract or chose in action between citizens of this state, transferable at law only by assignment. Chief Justice Marshall, in the opinion in Sere v. Pitot, 6 Cranch [10 U. S.] 332, remarks: "Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the legislature when the law was framed, and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments." If there was any transfer of this mortgage it was a mere equitable one, which should not under the evidence on the face of the mortgage of the real parties,

entitle the complainant to prosecute this suit. With the same propriety might the jurisdiction of this court be claimed by a non-resident assignee of an insolvent debtor, who is a citizen of this state; or by the holders of mortgages given to railroad companies within this state, or their assigns, where their objects and the parties are strictly local. At all events, I consider the jurisdiction doubtful; and according to the practice of the court not to entertain doubtful jurisdiction, this bill will be dismissed.

HILL (ZEIBER v.). See Case No. 18,206.

HILLEARY (McCUTCHEN v.). See Case No. 8,742.

HILLEGAS (HANCOCK v.). See Case No. 6,010.

HILLEGAS (UNITED STATES v.). See Case No. 15,366.

Case No. 6,504.

HILLER v. SHATTUCK.

[1 Flip. 272;[1] 5 Chi. Leg. News, 289.]

Circuit Court, E. D. Michigan. Nov., 1872.

NEW TRIAL IN EJECTMENT—UNITED STATES STATUTE—AS TO PRACTICE.

1. Where the statute of a state allows a defendant in an ejectment suit a new trial upon the payment of costs, this statute is binding upon the circuit court of the United States in an action of ejectment.

2. Section 34 of the judiciary act [1 Stat. 92] construed. Whatever is conclusive as to title of land in the state court, is equally conclusive in the federal court.

[Motion by Clarissa C. Hiller against Gilbert M. Shattuck to vacate judgment and for a new trial.]

Mr. Joslyn, for plaintiff.

L. B. Taft, for defendant.

LONGYEAR, District Judge. The motion was argued by the learned counsel on both sides as involving a mere question of practice, depending upon the acts of congress and rules of court adopting the practice of the state courts, and especially the fifth section of the recent act of congress of June 1, 1872 (71 Stat. 179). The question involved, however, stands upon a broader and more permanent basis than these rules of practice. It is a matter of right, and as such, affecting as it does title to real estate, is binding upon this court. The main objection to the granting of the motion stated in the argument is, that it is a statutory right, and not a matter of practice, and, therefore, is not included in the practice acts of congress, or the rules of this court. In this I fully concur, but because it is a matter of right, I hold that it is binding upon this court, and, except as to the mode of enforcement, is independent of all such statutes and rules, as I will now proceed to show.

The state statutes involved in this consideration are paragraphs 6237 and 6238 of the "Compilation of 1871" of the statutes of Michigan (2 Comp. Laws, 1871, p. 1770), being sections 35 and 36 of chapter 195, "Ejectment." which are as follows:

"(6237.) Section 35. Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained.

"(6238.) Section 36. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs, executors, administrators, or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause; and the court, upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial; but no more than two new trials shall be granted under this section."

It is under the first paragraph of the latter section that this motion was made. By the plainest rules of construction these two sections must be construed together; and if the provisions of section 35 are binding upon the federal courts—as they clearly are, according to the authorities cited below—then the provisions of section 36 are equally so, because they constitute exceptions subject to which, among others, a judgment in ejectment is made conclusive as to title by the former section. If we adopt the one, we must the other.

Section 34 of the judiciary act of 1789 (1 Stat. 92) provides: "That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

Under this section the United States supreme court has always and uniformly held, that local laws constituting rules of property, and especially those respecting titles to land, constitute rules of decision in the federal courts, and are, of course, binding upon them. This doctrine is so well established, and so firmly engrafted upon the national jurisprudence, and I may add, so well understood by bench and bar, that no argument or citation of authorities is needed to

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

support it. I will, however, cite a few of the earlier and more important decisions of the supreme court by which the doctrine was established, and the rule defined, viz.: Polk's Lessee v. Wendell, 9 Cranch [13 U. S.] 87; Mutual Assur. Soc. v. Watts, 1 Wheat. [14 U. S.] 279; Shipp v. Miller's Heirs, 2 Wheat. [15 U. S.] 316; Gardner v. Collins, 2 Pet. [27 U. S.] 58; Thatcher v. Powell, 6 Wheat. [19 U. S.] 119; Shelby v. Guy, 11 Wheat. [24 U. S.] 361; Jackson v. Chew, 12 Wheat. [25 U. S.] 153; Green v. Neal, 6 Pet. [31 U. S.] 291.

It is equally well settled by the same high authority, as well as by the numerous decisions in the United States circuit court, that state statutes, like those of Michigan above quoted, defining the effect of a judgment in ejectment upon the title in question, are "laws respecting titles to land," and so within the general rule last above stated. In Blanchard v. Brown, 3 Wall. [70 U. S.] 249, a statute of Illinois, like the Michigan statute in all respects, being under consideration, the court say: "This court, in the case of Miles v. Caldwell, 2 Wall. [69 U. S.] 44, in construing a statute (of Missouri) no broader than the Illinois enactment, held, that whatever is conclusive of the title to land in the courts of a state is equally conclusive in the federal courts; that it is, in fact, a rule of property." In that case the court not only apply this doctrine to the Illinois statute, but they mention those other provisions of the statute in respect to new trials, evidently as constituting a part of the same enactment, and of course subject to the same construction and application. In addition to the above two cases, see Sturdy v. Jackaway, 4 Wall. [71 U. S.] 176, in which the above two cases are cited and approved; also Evans v. Patterson, Id. 224; Barrows v. Kindred, Id. 399.

I think enough has now been said and shown to furnish a complete solution of the question before the court, and to establish, it seems to me beyond a question, that the statute of Michigan governing new trials in ejectment suits constitutes the rule of decision for this court; and such I understand to have been the uniform practice of this court. The costs and damages having been paid, the motion to vacate judgment, and for a new trial, is accordingly granted.

Case No. 6,505.

HILLIARD v. BREVOORT.

[4 McLean, 24.] [1]

Circuit Court, D. Michigan. June Term, 1845.

EQUITY PLEADING — AVERMENT OF CITIZENSHIP — EXCEPTIONS.

1. A want of an averment of citizenship if not made in a bill or declaration, or where it is falsely alleged, should be taken advantage of by pleading.

2. Unless such an averment be contradicted, it need not be proved on the trial or hearing.

3. Where the exception is taken, the court will permit an amendment.

In equity.

Barstow & Lockwood, for plaintiff.

Vandyke & Harrington, for defendant.

OPINION OF THE COURT. This is a bill in chancery, to which a demurrer is filed, on the ground that there is no positive averment in the bill that the plaintiff is a citizen of the state of Ohio. The averment of citizenship, it is contended, must be clear and positive, as on that depends the jurisdiction of the court. [Thatcher v. Powell] 6 Wheat. [19 U. S.] 119. If this averment be doubtful, it can not be held sufficient. If the averment be a mere residence, and not a citizenship, it will not be within the law. But this averment need never be proved, unless it be denied in the plea and answer. If the citizenship be improperly or falsely alleged, the defendant must reply to it if he wish to controvert the fact averred. At one time, it was held by a circuit court of the United States that the fact of citizenship must be proved on the general issue, but this has long since been overruled, and the law is now settled as above stated. The court will permit an amendment, as a matter of course, of a defect of the kind alleged; but in the present bill, we think the averment is certain, and within the law. The demurrer is overruled.

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

HILLIARD (FOSTER v.). See Case No. 4,972.

Case No. 6,506.

HILLIARD et al. v. HARPER et al.

[The case reported under above title in 4 Law Rep. 334, is the same as Case No. 5,716.]

HILLIARD (UNITED STATES v.). See Cases Nos. 15,367 and 15,368.

Case No. 6,507.

HILLS v. ALDEN et al.

[2 Hask. 299.] [1]

District Court, D. Maine. Dec., 1878.

BANKRUPTCY — FRAUDULENT SALE BY ASSIGNEE — POWER OF REGISTER — ACQUIESCENCE OF CREDITORS.

1. A register in bankruptcy had authority, under the bankrupt act of 1867 [14 Stat. 517], as amended by the act of 1874 [18 Stat. 178], to designate the newspaper that should contain notices of sales, by the assignee, of the unencumbered real estate of the bankrupt.

2. The designation by a register, pursuant to rule of court of certain newspapers, approved by the court, wherein all notices required under the bankrupt law should be published, is a

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

designation of such newspapers by the district judge for each particular notice therein published.

3. Whether real estate under lease is unencumbered, quaere.

4. A mistake in judgment by the assignee, as to where a bankrupt sale should take place, or what special notices of it should be given in order that the largest sum may be realized, will not invalidate the sale, in the absence of fraud or collusion.

5. A sale by an assignee in bankruptcy, held at a place not the most desirable, and upon notice not the most advantageous, is not conclusive evidence of either fraud or collusion.

6. An assignee in bankruptcy takes only the title of the bankrupt, and can convey no more.

7. An assignee is not required to adjourn a bankrupt sale, to give a bidder, who does not offer to stand by his bid at the adjourned sale, time to search a title.

8. Creditors of a bankrupt, having seasonable and complete notice of an intended sale of the bankrupt's property by the assignee, who fail to exercise proper diligence to protect their own interests, must bear the loss occasioned by their neglect.

9. A creditor of a bankrupt, having full knowledge of the circumstances of a sale of the bankrupt's estate by the assignee, who silently allows the purchaser to dispose of the same, and knowingly receives, without objection, a dividend from the proceeds of such sale, cannot avoid the same for fraud and collusion.

In equity. Bill by [Joel H. Hills] the creditor of a bankrupt to set aside the assignee's sale of the bankrupt's estate for fraud and collusion between the assignee and purchaser; and because the notice of sale was insufficient under the act of 1874, c. 390, § 4 [18 Stat. 178]. [The court had previously refused to confirm said sale. Case No. 151]. The answer denied the fraud and collusion, and averred that the notice of sale was given in compliance with the act of 1874. The cause was heard upon bill, answer and proof.

Charles P. Mattocks, for orator.

George F. Holmes and Almon A. Strout, for respondents.

FOX, District Judge. The complainant, one of the creditors of Hiram O. Alden, the bankrupt, has brought this bill to set aside a sale of certain real estate, made by Hubbard, the assignee in bankruptcy, to Edward Alden, the son of bankrupt, upon the ground that the sale was not legally ordered or advertised, or fairly conducted; but that the same was collusive and fraudulent; that the assignee was deceived by the Aldens as to the value of the property, and that it was sold for much less than its real value.

This real estate is situated in the state of Illinois, and was sold by auction at Belfast, in the county of Waldo, in this state, where the bankrupt resided, to Edward Alden, for the sum of $1,240.

Was this sale made in accordance with the provisions of the bankrupt act? It appears that on the twenty-fourth day of March, 1877, the assignee in bankruptcy presented his petition, addressed to this court, to Mr. Register Hamlin, the register in charge of the bankrupt proceedings instituted by said Hiram O. Alden, therein praying for leave to sell, among other property, said real estate of the bankrupt, situated in said state of Illinois; and that, thereupon, on said twenty-fourth day of March, the said register granted to said assignee leave to sell said real estate; and by license under the seal of this court, attested by the clerk, it was ordered that said property should be sold at public auction; that notice of the sale should be advertised three successive weeks in the Republican Journal, a newspaper printed at Belfast in this district; and that a copy of the advertisement should be mailed to each creditor named on the schedules of said bankrupt postpaid, at least ten days before the sale.

Notice of said sale was given in accordance with the requirements of the license; and at the time and place appointed, the said real estate, having been advertised in parcels, was all purchased by said Edward Alden, he being the highest bidder therefor, the aggregate of his purchases being the sum of $1,240, as before stated.

The objection taken to these proceedings is, that the requirements of the act of June 22, 1874 (chapter 390, § 4), were not observed.

By this amendment of the bankrupt law, it was provided "that unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act, by any assignee or officer of the court, shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale."

At the October term, 1874, of the supreme court of the United States, the general rules and orders were amended; and by order No. V, the registers in bankruptcy were empowered to conduct proceedings in relation to the following matters when uncontested—viz., * * * "giving requisite directions for notices, advertisements, and other ministerial proceedings, * * * and generally dispatching all administrative business of the court in matters of bankruptcy, and making all requisite uncontested orders and directions therein, which are not, by the acts of congress concerning bankruptcy, specifically required to be made, done or performed by the district court itself; all of which shall be subject to the control and review of said court."

The contention on the part of the complainant is, that the register had no authority under the law to designate the paper in which the notice of this sale should be advertised;

but, that it was an act, which could be performed only by the judge, and could not by him be entrusted to the register.

The practice in this court, during the entire existence of the bankrupt law, has been for the register to designate the paper in which advertisements should be made of sales of unencumbered real estate, such papers having been originally selected in each county by the register for this purpose with the approval of the court; and any construction of the law, by which such proceedings should be declared invalid, would be attended with the most disastrous results in disturbing numerous titles, which have always been heretofore considered valid and effectual.

In the opinion of the court, this objection can not be sustained, the bankrupt act having empowered registers in bankruptcy to sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and the supreme court having, by its general rule and order No. V, empowered the register to give requisite directions for notices and advertisements, and to dispatch all administrative business of the court in matters of bankruptcy, and to make all requisite uncontested orders and directions therein, which are not by the acts of congress, concerning bankruptcy, specifically required to be made, done or performed by the district court itself, a register was authorized in this case to designate the paper for such advertisement.

An examination of the amendatory act of 1874 demonstrates that while there are many matters therein specified, which the court can alone act upon, in all such cases, the court being specifically mentioned, the selection of a newspaper is not one of them, as the language used in such case is, that "the judge shall designate the paper;" and this power thus conferred upon the judge, by force of general rule and order No. V, is alike conferred upon the register.

This precise question was presented to Mr. Justice Blatchford, in Re Burke [Case No. 2,157], in which he decided that the register may designate the newspapers in which notice of a sale by the assignees shall be published.

The opinion is brief, but, is so decisive of the question here presented, that it may well be here quoted at length. "General order No. V of the new general orders provides that the registers may make all requisite uncontested orders which are not by statute specially required to be made by the district court itself. Section 4, of the act of 1874, does not require newspapers to be designated by the court, but by the judge; while that same section does name the court as distinct from the judge in connection with the doing of certain things. Therefore, the register is, within section 4 of the act of 1874, the judge for designating newspapers.

If this construction of the amendatory act of 1874 is incorrect, and it should be held that the judge should himself designate the papers in which advertisements should be published for the sale of unencumbered real estate, under the long practice of this court, it may well be determined that this sale was duly advertised in a paper selected by the judge for this purpose.

Soon after the bankruptcy law went into operation, the registers were required by a rule of this court to select in each county some suitable newspaper for the publication of all advertisements required by the bankruptcy law; and, in compliance with this rule, the Republican Journal was selected for the advertisements required in the county of Waldo. The judge of this court was at the time advised of the paper so selected; and, with his sanction and approval, all notices in that county required by the bankruptcy law have been published in this paper. The court, therefore, had thus in fact designated this paper as the proper one for all such notices; and the advertisements as ordered by the register were made in accordance with the previous sanction and authority of the court.

It is said that about ten acres of one of the parcels so sold was under lease. The terms of said lease do not appear; and no objection is made by the bill that thereby such parcel was encumbered property within the meaning of the bankrupt law. This objection, properly taken, would have been applicable to only one parcel of the premises in controversy. Whether a lease would constitute an encumbrance within the meaning of the bankrupt law, which would require notice to the lessee of any intended sale of the premises, need not now be determined, as the complainant does not seek to avoid the sale on account of such lease.

The requirements of the bankrupt law having been complied with, it remains to be determined whether this sale was so tainted by fraud or collusion, that it is the duty of the court, at the instance of this complainant, to vacate the same.

The first charge made in the bill is, that "the assignee acted in collusion with the bankrupt and his son Edward in order to prevent purchasers from bidding at the sale; and that he wrote one Cushman, at Boston, who was a creditor of the bankrupt, that the Illinois property was not of much value according to his information, thereby inducing Cushman to take no steps toward purchasing or securing a purchaser for said lands, as he would have done, if he had been correctly informed by the assignee."

The assignee admits the writing of this letter in reply to one received from Cushman; but, he avers that it is true that he was so informed. He denies all collusion with the other defendants, and insists that he acted

in good faith for the benefit of the creditors, in order to realize the most for the property.

It appears that the complainant received a copy of the advertisement of the assignee, and was fully informed of the time and place of the sale, as were also Cushman, and all the other creditors; and that at the sale, the complainant was represented by an agent, by whom his own note of $2,500 was purchased for Hills' benefit, for the sum of $50.

An examination of the testimony fails to satisfy the court that the assignee was guilty of any falsehood in his reply to Cushman's inquiry. He stated truly the information which he had received, both from the bankrupt and his attorney, as to the value of these lands; and Cushman made no further inquiry of him as to the source of such information, or what reliance should be given to it, nor did he ask the court for time to be allowed him to examine respecting the value of this property.

These lands were in the vicinity of the property of the Kankakee Company, a corporation organized for the improvement of the Kankakee river, and which for a time, under the management of Hiram O. Alden, had acquired some credit and property; but previous to his bankruptcy, it had become utterly insolvent, and its property, which was heavily mortgaged, was much depreciated in value. The complainant was the treasurer of this company; Cushman was one of its directors; and the court has no question that, at the time of the sale, both of them were well acquainted with the situation of Alden's lands in Illinois, and of their value.

Cushman, in his deposition, would give the court to understand that by this letter of the assignee, he was induced not to attend the auction sale; but as he admits that, after the reception of the letter and before the sale, he had made inquiries of other parties well acquainted with the property, the court entertains great doubts whether he was at all influenced by the assignee's response to his inquiries, but is the rather of opinion, from his own statement, that although he was informed by others that these lands were of value, he concluded that nothing would be realized from the estate, by this sale, beyond the expenses in bankruptcy, and therefore took no steps to prove his claim until he was subsequently informed that a dividend would be declared.

The present suit, however, is not instituted by Cushman, but is brought by Hills; and it is shown by his own testimony that previous to the sale he was possessed of all the information respecting these lands that he had when he commenced this action. He admits that, previous to the sale, he consulted with Waters, who was the engineer of the Kankakee Company, who had been long acquainted with these lands, and who then represented them to him as worth from 40 to 60 dollars per acre; that he also consulted with Carpenter, who had resided in Wilmington near these lands, and who also represented them as valuable. He further admits that he had reason to suspect that these lands would sell for but a small amount, but that, having no funds to invest, he and Carpenter informed Claflin in relation to the property, and that, at their instigation, Claflin sent an agent to Belfast to attend the sale. This agent was there present and purchased of Hills this note and for Claflin certain bonds and obligations of the Kankakee Company, together with a tax title and other property, and also made repeated bids for the property now in controversy, Edward Alden being his competitor.

Chaplin, the agent, in his deposition states that, during the pendency of the bids on the land, he asked the auctioneer to stop for a moment, and then stated publicly in a loud tone to the assignee, that he had bid as high, his bid then having run up to perhaps $1,000, as he should venture to bid without looking up the title, and that he asked if any assurance of title was given in the sale, or, whether there would be any opportunity to look up the title before paying. The assignee answered, that no assurance was given, and no time would be given. He then requested the assignee to postpone the sale to allow him time to look up the title before the sale should be completed, and stated that he was prepared to bid a very large amount, largely in excess of what he had bid, if he could assure himself that the title was good, and that he thought he stated, or implied at least, that the land was worth a great deal more than what the bid amounted to. The assignee said it was his duty to sell the right of the bankrupt, whatever it was, and that he could allow no time to look up the title. The witness also states that, a day or two before, he had endeavored by telegram to ascertain about the title from the registry of deeds, but could get no information on account of the imperfect description of the property.

The assignee's testimony on this point is that, "while one parcel of the Illinois land was on sale, and after it had been bid for by Chaplin and Edward Alden, Chaplin asked me if I would adjourn the sale to give him time to examine the title; I declined to delay the sale, because I thought I had no right to do so after the property had been offered and bid upon. I think there was not any request for time to examine titles after the property was sold and before payment."

The evidence of Chaplin demonstrates that the letter of the assignee to Cushman in no respect influenced the actions of this complainant, or of Claflin, but that, on the contrary, relying on the information derived from others, Claflin attempted to purchase these lands at the assignee's sale, and was only deterred in so doing by doubts suggested as to the validity of the title, his agent proclaimng publicly at the sale that if the title was valid, they were worth much beyond the amount then bid for them.

The bill claims that there was collusion between the assignee and the Aldens in fixing on the time and place of sale, and in giving the notice of the sale; and that if public notice had been given where the land was situated, a much larger sum would have been realized. The evidence shows that the register, without any suggestion from any source, in the usual way determined the time and place of sale, and the newspaper, the one selected by the court, in which the advertisement of the sale should be published; and while the court is of opinion that, in the exercise of a sound judgment by the assignee, it would have proved much more advantageous to the creditors, if he had published notice of the sale in the Wilmington papers, yet, that it was but a matter of judgment on his part, and his omission so to do is not sufficient to overcome the positive testimony of himself and Alden, that there was no collusion between them.

The averment in the bill is, that these lands were worth, at least, $40 an acre; and from the testimony in the case, the court is inclined to the opinion that if a sale of these lands had been publicly advertised at Wilmington, to take place upon the premises, they would have produced $25 or $30 per acre; yet this is not an absolute certainty, as it was well known at that place that Alden was in bankruptcy, and that his estate must be disposed of by his assignee; but not one of the witnesses, who now testify that they would at public auction have given $40 per acre, took any steps to ascertain the intentions of the assignee, at what price he held this property, or how or when he intended to dispose of it.

The conduct of the assignee at the time of the sale, as testified to by Claflin, is also urged as evidence of fraud and collusion. An assignee in bankruptcy takes only the estate and interest of the bankrupt; all that he has to dispose of is the right, title and interest of the bankrupt in his property at the time proceedings are instituted; and the assignee, therefore, never gives any assurance of title.

Claflin says his request to postpone the sale, to permit an opportunity to examine the title, was made when his bid was in the vicinity of $1,000. These lands were sold in separate parcels; and the court does not find that any one parcel sold for near that amount; but that the aggregate of the sale was $1,240. If Claflin is correct in his reference to the amount of his bids, his request for delay must have been made after the last parcel was offered, and bids received therefor, and after the sales of the other parcels had been completed, so that their validity could not be affected by any subsequent proceedings on his part.

In disposing of a bankrupt's property, his assignee is bound to exercise an honest, fair judgment, and if, previous to a sale, an intended purchaser should request of him that time be allowed to examine the title, and this should be denied, the court might deem this a suspicious circumstance, bearing upon the fairness of the assignee; but no such suspicion can well arise after the property has been offered at auction, and numerous bids made therefor, and when the party, desiring delay, does not propose to be absolutely bound by his bid at the adjournment of the sale, but simply requests delay to investigate the title, proposing to advance his bid if the title should prove valid, but not to be bound thereby if any defect should be discovered.

Under such circumstances, an assignee might well be justified in refusing to postpone the sale, as the result might be that, by reason of the investigation, the title might prove to be worthless, or so defective that at the adjournment a purchaser could not be had at any price. A party thus asking for time, should, at least, obligate himself to stand by his offer; and as nothing of that kind was proffered by Chaplin, the court fails to discern evidence of fraud or collusion on the part of the assignee in refusing the requested delay. If Claflin or his agent was not satisfied with the title, they could have made application to the court, previous to the sale, for its postponement; and the court would have granted or refused the application as it should deem most for the benefit of the estate.

The advertisement describes lots five and six as "containing about sixty-nine acres under lease." It is said that only ten acres were under lease, and thereby intended purchasers were deceived. The assignee testifies that this description was taken from the schedule of the bankrupt, which he believed to be correct. The duration of this lease does not distinctly appear from any of the testimony, but, from inquiries put to several of the witnesses, the court is led to believe that the lease originally was given for three years, and, at the time of the sale, had nearly expired. The land was in pasture, and, from the testimony of the complainant's witnesses, the court infers that the value of the land was not affected by the existence of the lease, whatever it may have been.

In the present case, all the creditors were fully notified of the intended sale, a reasonable time before the day appointed, by a copy of the advertisement; by such notice, they were called upon to be vigilant, and were put upon due investigation and were required to take proper steps for further notice or examination as to the title or value of the property, if their interests were in any danger from the course adopted by the assignee. If, through their negligence, they have permitted the property to be sold for less than its fair value, and thereby have received a smaller dividend, they must bear the consequences; and especially should this complainant, as he admits that, previous to the sale, he possessed all the information as to the property which he now has, and that, after being informed of the conduct of the assignee, which he would now insist was

fraudulent and dishonest, he in silence allowed the purchaser to dispose of portions of the property, and received over $700 in dividends from the estate, a part of which was derived from the funds received from these sales, which he would now invalidate.

Bill dismissed.

Case No. 6,508.

HILLS v. HOMTON et al.

[4 Sawy. 195.] [1]

Circuit Court, D. California. Feb. 19, 1877.

MEANDERING STREAM — CONSTRUCTION OF PATENT — JURISDICTION OF NATIONAL COURTS.

1. Where the line as described in a patent goes to a station in the center of a creek; thence "meandering down the creek" upon a specified course for a designated distance to a station; thence on courses and distances from station to station along the general course of the creek, but actually crossing and recrossing several times for a number of courses to a designated station; "thence leaving the creek," etc., the creek through all its sinuosities will be regarded as the line intended, although it does not, through its entire course, correspond to the straight lines run in exact accordance with the courses and distances.

[Cited in Weiss v. Oregon Iron & Steel Co., 13 Or. 496, 11 Pac. 255.]

2. Where, in an action, the title to land in controversy held under patents issued upon confirmed Mexican grants, depends upon a controverted construction of the patents, the national courts have jurisdiction under the act of congress of March 3, 1875 [18 Stat. 470].

[This was a bill in equity by Miles Hills against James Homton and others.]

Wm. Matthews, for plaintiff.

John Reynolds, for defendants.

SAWYER, Circuit Judge. The plaintiff claims the land in controversy under the patent to the Los Vergeles Rancho, and the defendant, under the patent to the Rancho La Natividad. The line on the sides where the locus in quo is situated is common to both ranchos, being the dividing line between them. The only question is as to its location.

If the Gavilan creek, in all its meanderings, is the true line, the land is within the Rancho Los Vergeles, and belongs to plaintiff. If the line is to strictly follow the courses and distances in the general course of the Gavilan creek, without regard to its meanderings, a portion at least is within the La Natividad Rancho, and belongs to defendant.

The twelfth course, as stated in the Los Vergeles patent, goes to "the center of the creek station; thence (thirteenth course) north eight degrees and forty-five minutes west, meandering down Gavilan creek twenty-eight chains to station; thence north three degrees west, thirteen chains to station," and so on, the courses and distances being described in language similar to that of the last (thirteenth) course to the twenty-eighth course, which is: "Thence north fourteen degrees west, leaves the creek," etc. The line so described between the thirteenth and twenty-eighth stations crosses and recrosses the creek several times. The patent to La Natividad Rancho starts at a different point, comes round on the south and strikes Gavilan creek at station four, several stations higher up the creek than station thirteen on the Los Vergeles Rancho, the conclusion of the description of the third course and distance being "to the center of the Gavilan Creek station." The description then proceeds: "Thence meandering down the same north forty-seven degrees and thirty minutes west, twelve chains to station; thence north sixty-eight degrees west, ten chains and forty-four links to station," and so on in language similar to the last course and distance to the twelfth, which concludes "to course number thirteen of the Los Vergeles Rancho," etc. * * * "thence along the boundary line of Rancho Los Vergeles," etc., giving the same description as before stated in regard to the Los Vergeles patent from course thirteen to course twenty-eight, where the patent in this, as in the other case, says: "Thence leaving the creek," etc. In the plats annexed to both patents there are two lines drawn, representing the creek from station thirteen to twenty-eight in the Los Vergeles, and from station four to twenty-eight in the La Natividad patent, and the line drawn from courses and distances on both plats is drawn within the two lines representing the shore lines of the creek; thus showing that the surveyor-general designed to represent the lines as following the center of the creek. The plats form parts of the descriptions of the patents, and it is reasonable to suppose that if the surveyor-general had intended the line by courses and distance to be the exact line of the respective ranchos, he would have indicated in these plats the departures from the line of the creek, where there were any, in running from station to station along the general course of the stream. It is claimed by defendant that the words, "meandering down Gavilan creek," from station thirteen in the Los Vergeles, and station four in the La Natividad patents, where the respective surveys first strike the creek, have reference only to that single course, as they are not used in the other courses. But it would have been exceedingly awkward to repeat these words in each course. It seems to me that the surveyor-general simply intended to indicate that from the time the line commenced to follow the creek, it followed its meanderings until he indicated otherwise, which he did do when he came to leave the general course of the creek at station twenty-eight, where he says: "thence * * * leaves the creek," in one, and "thence leaving the creek," in the other; showing that the sur-

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

veyor-general intended to declare that he meandered the creek from the point where he first struck it, and continued meandering till he left it.

In the case of Quicksilver Min. Co. v. Hicks [Case No. 11,508], in this court, a similar question arose, in which Mr. Justice Field, who tried the case, says: "The patent to Fossat, in describing the land confirmed to him, gives the boundary line on one side as running to the center of Capitancellos creek, and 'thence meandering down the center of the same one chain and ninety links to station; thence north seventy-four degrees fifteen minutes west, five chains to station,' and so on from station to station, according to various courses and distances, to a point where the line leaves the creek. The several stations designated are on the bank of the creek and between the line drawn from one to the other and the creek lies the narrow strip of land in controversy. The defendant contends that the line drawn from station to station constitutes the boundary. The plaintiff, on the other hand, insists that the creek is the boundary, and that the courses between the stations only indicate the general direction of the stream, and that the stations are points fixed by the surveyor to enable him to compute the extent of land lying between the creek and the other boundaries. This latter view is undoubtedly correct. The language stating that the line meanders down the center of the stream settles the point. The stations could not, of course, be placed in the stream; nor could the estimate of the area in the tract confirmed be made from a tortuous line following the sinuosities of the creek. Of necessity, then, the stations had to be fixed on the bank, and they were fixed more or less distant from the creek, according to the condition of the bank at the points selected."

That case is precisely like the one in hand, and must control the decision. See, also, Cockrell v. McQuinn, 4 T. B. Mon. 61; Bruce v. Taylor, 2 J. J. Marsh. 161; McCullock v. Aten, 2 Ohio, 308; Lamb v. Rickets, 11 Ohio, 314; Brown v. Huger, 21 How. [62 U. S.] 306; Mayhew v. Norton, 17 Pick. 357; French v. Bankhead, 11 Grat. 136.

The Gavilan creek, as it existed at the time of the survey in September, 1858, from stations thirteen to twenty-eight, as shown by the patent and plat thereto annexed, to the Rancho Los Vergeles, must be held to be the dividing line between these two ranchos. The main controversy between the parties is upon the construction of their respective patents. The court, therefore, has jurisdiction under the act of congress of March 3, 1875.

The rental value is $30 per month. There must be a finding and judgment for plaintiff as to all that part of the premises described in the complaint lying northerly and easterly of the Gavilan creek, as it existed in the month of September, 1858, and for the mesne profits, at the rate of $30 per month, from July 15, 1875, till the present time, and it is so ordered.

HILLS (UNITED STATES v.). See Case No. 15,369.

HILMER v. The BOWEN. See Case No. 7,322.

Case No. 6,508a.

Case of HILTON et al.

[Cited in U. S. v. The Penelope, Case No. 16,024. Nowhere reported; opinion not now accessible.]

Case No. 6,509.

HILTON v. BECK.

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

Circuit Court, District of Columbia. Dec. Term, 1830.

REPLEVIN—COMPETENCY OF WITNESS—CONSTABLE.

In replevin, the defendant, (a constable who had seized the goods of the plaintiff in execution as the goods of Harrington,) was permitted to testify for himself, upon being indemnified by the plaintiff in the execution.

Replevin, for goods of the plaintiff [Samuel Hilton], taken by the defendant, a constable, as the goods of one Harrington, upon a fieri facias against him.

Mr. Wallach, for plaintiff.

Mr. Coxe, for defendant.

The defendant [Joseph W.] Beck, was permitted by the court to testify for himself, upon being indemnified by the plaintiff in the fieri facias.

See the case of Wise v. Bowen [Case No. 17,905], in this court, at April term, 1821, and Dixon v. Waters [Id. 3,936], at December term, 1824.

HILTON (CARR v.). See Cases Nos. 2,436 and 2,437.

HILTON (CRAIK v.). See Case No. 3,342.

HIMELY (ROSE v.). See Cases Nos. 12,045 and 12,046.

HIMILI (ROSE v.). See Cases Nos. 12,047 and 12,048.

HINCHLEY (LOVE v.). See Case No. 8,548.

HINCHMAN, The KATE. See Cases Nos. 7,620 and 7,621.

HINCKEL (EASTMAN v.). See Case No. 4,256.

Case No. 6,510.

HINCKLEY v. BYRNE et al.

[1 Deady, 224.] [2]

Circuit Court, D. California. April 22, 1867.

EJECTMENT — PLEA IN ABATEMENT—JURISDICTION —CITIZENSHIP.

1. In an action ex delicto, a plea in abatement by one defendant, to the effect that the

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

[2] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

court has not jurisdiction of his co-defendant, is bad on demurrer. Such objection is personal, and cannot be made by one defendant for another.

2. An action of ejectment against several defendants is in effect a separate action against each of them, and an objection to the jurisdiction of the court on account of the status of a particular defendant, can only be taken by such defendant for himself.

3. An allegation in a plea in abatement that all the defendants in an action are not citizens of California, is bad on demurrer for uncertainty; the plea should state which of such defendants are not such citizens.

4. Where both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case, on account of the character of the parties thereto.

5. Where the action is between a citizen of a state and the subject of a foreign state, the court has jurisdiction, on account of the character of the parties, without reference to the fact of which of them is plaintiff or defendant.

This was an action [by William H. Hinckley against John M. Byrne, Samuel Crim, Edward F. Beale, M. Myerstein, Deutsche Bucchendung, F. W. Barkhaus, D. Barkhaus, William Kroning, J. Brewster, S. Haas, Joseph Kohler, F. X. Huber, John Anthes, Hip Hing, Wau Hup, Soo Chung, San Jee, Sam Kee, Abel Guy, John Doe, Richard Roe, John Doe, Jr., Richard Roe, Jr., John Doe, 3, and Richard Roe, 3] to recover possession of a 50-vara lot in San Francisco, on the southwest corner of Sacramento and Kearny streets, alleged to be worth $300,000. Upon the part of some of the defendants there was a plea in abatement to the jurisdiction of the court on account of the status of some others of the defendants, to which the plaintiff demurred.

William T. Wallace and John B. Felton, for plaintiff.

G. F. & W. H. Sharp, for defendants.

DEADY, District Judge. The complaint in this action alleges "that the plaintiff is a citizen and actual resident and inhabitant of the state of Massachusetts, United States of America," and "that each and all of the defendants * * * are citizens and residents of the state of California." There are a large number of defendants. A portion of them plead in abatement to the jurisdiction of the court. One of them pleads separately, submitting to the jurisdiction, but denying the ouster and possession. A number of the defendants do not plead at all. To the plea in abatement, the plaintiff demurs that the matters therein pleaded are not sufficient to abate the action. The plea avers that at the time of the commencement of the action, nor since, all the defendants were not citizens of the state of California or of the United States, but that Soo Chung, Hip Hing, and William Kroning, are each and all aliens and citizens and subjects of the empire of China, except said Kroning, who is an alien. The first averment in this plea assumes that because all the defendants are not citizens of the state of California, the court has no jurisdiction over any of them, and further, that the defendants joining in this plea, who are citizens of California, with one exception, may make the objection that their co-defendants are aliens, although such alien defendants refuse to join in the plea but submit to the jurisdiction. For reasons which will appear hereafter, I do not deem it necessary to absolutely decide the questions suggested by this statement of the plea. But I think that the objection to the jurisdiction of the court, that any of the defendants has not the status as to citizenship or alienage to give the court jurisdiction over him, can only be made by such defendant.

In an action ex contractu where the defendants are jointly liable, such an objection when taken by the proper defendant would abate action as to all, for it must be maintained as a whole or fail. But the objection is a personal privilege and cannot be made by one defendant for another. This is an action ex delicto, without even a community between the defendants in the wrong complained of, except they happen to be within the exterior lines of the premises sought to be recovered. In effect, the action is a separate one against each of them. The defendants are entitled to separate defences for such parts of the property as they may choose to defend for and to have a separate verdict and judgment upon such defence. In such case, the objection to the jurisdiction of the court on account of the status of the defendant, should not be allowed to affect the jurisdiction as to other defendants. An allegation that all the defendants are not citizens of the state of California, even although all the defendants joined in such plea, would be bad for uncertainty, because it would not apprise the plaintiff which of such defendants were not such citizens, so that he could be prepared to support the controverted allegation with proof. But independent of these considerations, this demurrer must be sustained. The plea is bad in every respect. The constitution (article 3, § 2) provides that "the judicial power shall extend to all * * * controversies between a state or the citizens thereof, and foreign states, citizens or subjects." Section 2 of the judiciary act (1 Stat. 78) provides, that "the circuit courts shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state."

It has long since been settled that an action between aliens only cannot be maintained in the circuit court. That the language of the judiciary act, giving jurisdiction where "an alien is a party," must be restrained within

the terms of the constitution, which only "extends the judicial power" to an action between an alien and a citizen of a state of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case. Montalet v. Murray, 4 Cranch [8 U. S.] 46; Mossman v. Higginson, 4 Dall. [4 U. S.] 12; Piquignot v. Pennsylvania Ry. Co., 16 How. [57 U. S.] 104. But the second part of this plea in abatement assumes, that if the party defendant is an alien or subject to a foreign state, the court has no jurisdiction. This assumption is not warranted by the constitution or judiciary act, but is in direct contradiction of both. If the action is between a citizen of a state and the subject of a foreign state, the court has jurisdiction. It is immaterial which party is plaintiff or which defendant. In Jackson v. Twentyman, 2 Pet. [27 U. S.] 136, the court says: "That by the constitution the judicial power was not extended to private suits in which an alien is a party, unless a citizen be the adverse party." The case at bar comes within the latter alternative. Admitting the facts as affirmatively stated in the plea, the court has jurisdiction, because the plaintiff is a citizen of the state of Massachusetts, and the defendants, Soo Chung, Hip Hing and Kroning, are subjects of a foreign state. The action is between them and each is the adversary of the other. Then, whether these defendants are all citizens of the state of California, as alleged in the complaint, or a part of them are subjects of a foreign state, as averred in the plea, it makes no difference. The jurisdiction of the court is undoubted in either case.

I may add, that as a question of pleading, the plea is otherwise insufficient, as to Kroning. It alleges that he is an alien. To allege that a party is alien is not sufficient to give jurisdiction to the court. Wilson v. City Bank [Case No. 17,797]. By a parity of reasoning such an averment is not sufficient in a plea of abatement for the purpose of preventing the jurisdiction of the courts. The language of the constitution is, that the party is a citizen or subject of a foreign state. As a matter of practice I think the plea ought also to disclose the name of the particular foreign state of which the party claims to be a citizen or subject, so as to give the adverse party an opportunity to traverse it. The demurrer is sustained, with leave to the defendants joining in the plea in abatement to answer to the merits within five days, and upon the payment of the costs of the plea and demurrer.

Case No. 6,510a.

HINCKLEY et al. v. The NORTHUMBERLAND.

[See Case No. 6,511.]

Case No. 6,511.

HINCKLEY et al. v. The NORTHUMBERLAND.

[16 Hunt, Mer. Mag. 386.]

District Court, S. D. New York. March 3, 1847.

COLLISION—CONVERGING COURSES.

[Where one of two vessels upon a converging course commits the fault of luffing instead of keeping away, no damages will be awarded for the consequent collision, where the evidence shows that the other vessel maintained her course, and did not give way.]

[Libel in admiralty by Joseph Hinckley and others against the ship Northumberland (John Griswold, claimant), for $6,000 damages.]

This was a case of collision between the packet Northumberland and the schooner Louisa, which occurred during a bright moonlight night, off Long Island, Montauk Point, bearing N. N. E. distant forty miles, and the nearest land twenty-nine miles. The schooner was deep with coal, and sunk alongside in five minutes; her crew barely saving their lives, and some of them being hauled out of the water after she went down. Both vessels were alleged to have been close hauled—the ship on the starboard, the schooner on the larboard tack. Both were made out on the lee bow of each other, on converging courses, and at the distance of about two miles, and each supposed to be to windward of the other's track, (the ship going at the rate probably of five, the schooner at four, knots.) The schooner held on without altering her course, as did the ship, until within a few of her lengths from the schooner, when she ported her helm, and came into the wind, striking the schooner between her fore and main rigging. If the ship had not luffed, she might have cleared the schooner's stern or struck her abaft her beam and near her stern; if kept away, she would have apparently cleared the schooner.

Daniel Lord, Jr., and B. D. Silliman, for libelants.

Ogden Hoffman, W. I. Morton, and O. Hoffman, Jr., for the Northumberland.

THE COURT (BETTS, District Judge) held, that the ship committed a fault in not keeping away instead of luffing; but such fault having been induced by the wrongful act of the schooner, in maintaining her course and not giving way in time, affords no ground for the schooner to demand damages or remuneration therefor.

Libel dismissed, with costs to be taxed.

HINCKLEY (ROBINSON v.). See Case No. 11,954.

Case No. 6,512.

HINDE et al v. VATTIER et al.

[1 McLean, 110.] [1]

Circuit Court, D. Ohio. Dec. Term, 1830.[2]

EQUITY PRACTICE—PARTIES—EJECTMENT—FRAUDULENT CONVEYANCE—DEPOSITIONS—PROOF OF MARRIAGE—SPECIAL REPLICATION.

1. Where an individual is made a party, who is not within the jurisdiction of the court, on filing his answer and disclaiming all interest in the case, the bill may be dismissed as to him and the court may sustain jurisdiction as to the other parties.

[Cited in Heriot v. Davis, Case No. 6,404.]

[See note at end of case.]

2. Where the bill assigns as a reason for not making a person a party, that he is not within the jurisdiction of the court, the court will take cognizance of the cause in certain cases.

3. An agreement to admit certain depositions not regularly taken, and between other parties as evidence, extends to the final termination of the cause, though it should be taken to the supreme court and sent down for further proceedings.

4. A deed not fraudulent, if procured to be made by a father to his infant son, in payment of a just debt, though the father be embarrassed in his circumstances.

5. A purchaser who has notice of such facts as with ordinary diligence, would lead him to a full knowledge of an outstanding equity, is a purchaser with notice.

[Cited in Carr v. Hilton, Case No. 2,437.]

[Cited in Parker v. Foy, 43 Miss. 260; Great Falls Bank v. Farmington, 41 N. H. 42; Woods v. Wilson, 37 Pa. St. 380; Janvrin v. Janvrin, 60 N. H. 173.]

6. An instrument of thirty years standing, not impeached, need not be proved by the subscribing witness.

7. Marriage proved by general reputation, cohabitation, and the express recognition of the wife in the will of the husband.

In equity.

Mr. Clay, for plaintiffs.

Mr. Caswell, for defendants.

OPINION OF THE COURT. This bill was filed to obtain a title to lot 86, in the city of Cincinnati. All the parties claim under Abraham Garrison, who, it is alleged, sold and conveyed the lot to William and Michael Jones. The sale and payment of the consideration are shown by the following receipt, signed by Garrison: "Received, Cincinnati, 10th September, 1790, of William and Michael Jones, fifty pounds, thirteen shillings and three pence, in part of a lot opposite Mr. Conn's in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for, on or before the 20th day of this instant." The deed, it is stated, was executed in pursuance of this agreement, but was afterwards lost. And on the 26th March, 1800, William Jones, acting for himself and Michael Jones, conveyed the lot to Thomas Doyle, Jr., then an infant, whose father, Thomas Doyle, took possession of the lot in his son's name and retained the possession until his death. Thomas Doyle, Jr., having survived both his parents, died under age in the year 1811, leaving Belinda, a sister by the mother's side, his heir at law. Thomas S. Hinde married Belinda, who deceased, leaving several children, in whose behalf he prosecutes this suit. In 1814 Hinde alleges he took possession of the lot, placed a tenant upon it, and in the year 1819 obtained a deed of confirmation from Michael Jones. And the bill charges that James Findlay, Charles Vattier and others, having full knowledge of the complainant's title, but discovering that Garrison's deed was lost, procured another deed, or some one of them, from Garrison for the same lot, and have turned the complainant's tenant out of possession. Findlay in his answer states, that having obtained a judgment for a large sum against Charles Vattier, he received in satisfaction thereof, a conveyance of lot No. 86, with other property, and he took possession of the lot. In 1815, being informed that Garrison had a claim to the lot, and as he could find no deed on record, he purchased it from him for seven hundred dollars, and a conveyance was executed. Before this he had heard of the sale of the lot by the sheriff, as the property of Doyle, and that Vattier purchased it. Vattier states he purchased the lot for twenty dollars at sheriff's sale, as the property of Thomas Doyle; but, neither the return of the sale nor the deed of the sheriff can be found. He held the lot until he conveyed it to Findlay, and afterwards in 1818, Findlay re-conveyed it to him, and sometime after this he conveyed it to William Lytle. Lytle in his answer states, that in 1818 he purchased a part of lot 86 from Vattier, for fifteen thousand four hundred dollars. He knew nothing of the claim of Thomas Doyle, Jr., but before his purchase he heard that Hinde had taken possession. The defendant Ritchey purchased the part of the lot which James Findlay had conveyed to Abraham Garrison, Jr. A supplemental bill was filed, and also a bill of revivor, which represented the death of Belinda, wife of Hinde, whereby he acquired a life estate as tenant by the courtesy, and also making Garrison a party. It also represented that James Bradford, Thomas Doyle and John Bradshaw were brother officers in the army; that Bradshaw executed a voluntary bond to Thomas Doyle, Jr., the son of Thomas Doyle, binding himself to convey to him two hundred and fifty acres of land, part of a larger tract that was valuable. This bond was delivered to Doyle, the father, for the benefit of the son, who afterwards sold the land to Samuel C. Vance, for a considerable sum of money, which was paid. To indemnify his son for this sum of money which the father received he procured lot 86 to be conveyed to him, which was stated publicly when the conveyance was execut-

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

[2] [Reversed in 7 Pet. (32 U. S.) 252.]

ed. The father was then indebted, but not insolvent. After the execution of the bond to Thomas Doyle, Jr., Bradshaw died, leaving his whole estate to Thomas Doyle, the father. The estate of the father on his decease descended to his son, and on his death to his half-sister Belinda. The sale to Vance was confirmed by Hinde, after he became interested in the estate. It is stated that this lot was never sold on execution as the property of Doyle, but it remained open and unoccupied until 1814, when Hinde took possession, by placing a tenant upon it. And the supplemental bill further states that Vattier must have become acquainted with the state of the title, as the deed from Jones which recites the deed from Garrison to the Jones's was on record. And Vattier took depositions to prove that the consideration on which the conveyance was made to the son, was paid by the father. The conveyance of Vattier to Findlay is then stated, the deed from Garrison to Findlay, and also the re-conveyance from Findlay to Vattier. In his answer, Garrison admits the sale and conveyance to William and Michael Jones, and the payment of the purchase money. He disclaims all interest in the controversy, and prays to be dismissed, he being a citizen of the state of Illinois. In his answer to the supplemental bill, Vattier sets up fraud and denies the material facts, and says that the lot was sold on execution, but that a mistake being made in the deed of conveyance, the mistake was never corrected. Afterwards Vattier, on leave, filed a supplemental answer, stating that when the original bill was filed on the 5th October, 1814, Hinde and wife executed a deed to Alexander Cummins, conveying the lot in fee simple, which deed was duly recorded and a copy of it is made a part of the answer. The complainants, in their replication, admit the execution of the deed to Cummins, and aver that it was intended to vest the right to the lot in the said Cummins in trust for the said Hinde, to be held by him in trust for the heirs of his wife. And that the said Cummins did on the same day, the 5th October, 1814, convey the lot to Hinde. To this replication the defendants have filed a rejoinder. From the pleadings it is evident that neither Findlay nor Lytle has any interest in the case. The conveyance to Lytle by Vattier having been rescinded on finding that the latter had no title under the sheriff's deed, and the bill, therefore, as to these defendants may be dismissed. And, as there is no proof in the case which shows a notice to Ritchey, who purchased from Abraham Garrison, Jr., the bill must stand dismissed as to him.

The first question which is raised in the argument is, whether the court can take jurisdiction of the case, as Abraham Garrison is a citizen of Illinois. Some years ago this case was brought to a hearing in this court, and a decree was rendered, Garrison not being a party. This decree on being appealed to the supreme court, was reversed on this ground, and the cause was sent down for further proceeding. [1 Pet. (26 U. S.) 241.] It was under these circumstances that Garrison was made a party; and if this shall deprive the court of jurisdiction, it is clear from the decision of the supreme court, that the court can take no jurisdiction in the case. Garrison was held to be a necessary party as the equity set up by the complainants is claimed under him; and it is proper for the court to see, that in making a final decree his interest shall receive no prejudice. It is said that he should be a party as he might controvert the instrument signed by him, or deny the payment of the consideration. Now, it is evident no decree is prayed against Garrison, and it is difficult to see, as he has actually conveyed the lot to Findlay, how his rights could be injured by a final decree. Had the conveyance to the Jones's been proved, it will not be pretended that Garrison would be a necessary party, and it is difficult to distinguish, as it regards his interest in the case, between a conveyance to the Jones's and to Findlay. In either case, he is estopped by his deed to set up any right of an equitable nature. But, as the supreme court have so decided, it must be admitted that Garrison is a necessary party, and he is made a party to the suit. He admits the conveyance to the Jones's, and disclaims all interest in the case and asks to be dismissed, and the bill as to him stands dismissed.

The cases are numerous, where a reason is shown why a person is not made a party, as, want or jurisdiction, the court will retain the case and decree between parties before the court; if they can do so without affecting the interests of those who are without its jurisdiction. And it is fairly to be presumed, if the original bill had stated that Garrison, being a citizen of Illinois, was not within the jurisdiction of the court, and could not therefore be made a party, that the supreme court would have sustained the jurisdiction. The late proceedings in the case amount to this, and the additional fact is solemnly admitted by Garrison, that he executed a conveyance to the Jones's. This shows that he has no interest, in addition to his disclaimer, and as the bill has been dismissed as to him, it must stand as though Garrison were not a party to the suit, as he in fact is not, and the facts upon the face of the proceeding show why he is not a party. This objection, therefore, to the jurisdiction of the court cannot be sustained.

An objection is made to various depositions which were admitted at a former hearing of the case, and which were not legally admissible, except under an agreement previously made: and, it is contended, that this agreement cannot be considered in force now. That it cannot be extended beyond the hearing formerly had in the case, and on the appeal to the supreme court. And it is urged as an additional reason, that new matter has

been introduced into the case by the complainants and defendants, and also other parties. This objection does not seem to have much force. The agreement was, to admit the depositions now objected to, without any conditions, as to any subsequent changes in the cause that might take place. The effect of the agreement was to legalize the depositions; to place them on as favorable a footing as if they had been taken between the same parties, and in conformity to law. The objection, as to new parties, can only refer to Garrison, and he, in fact, is not now a party; but, if he were, the introduction of his name makes no change in the merits of the case.

The case has been brought to a hearing under the agreement, as to the admission of this evidence, and we think the agreement is as binding now, as it was before the former hearing. As well might the objection be urged to the admission of depositions legally taken and used at the former hearing. They stand on no better footing than the depositions covered by the agreement. The receipt of Garrison is objected to, because it has not been proved by the subscribing witness. This receipt is more than thirty years old, and the instrument is apparently authentic, and stands connected with other facts proved, which go to establish it; and under such circumstances, proof of its execution, by the subscribing witness, may be dispensed with. 1 Starkie, 342. Circumstances go strongly to show, independently of the admissions of Garrison, that a deed was made by him to William and Michael Jones; but whatever doubt may be suggested as to the execution of the deed, there can be none as to the receipt which vests the equity to the lot in them. The bond set up in the supplemental bill for two hundred and fifty acres of land, executed by Bradshaw is proved, and also the other facts connected with it. This land was sold for four hundred dollars, which were received by Thomas Doyle, the father who assigned the bond. This act, it is said, was not obligatory on Thomas Doyle, Jr., and on coming of age, he might have disaffirmed the contract. If this were admitted it cannot avail, for he died before he became of age, and his legal representatives affirmed the contract. In consideration of having received and appropriated the above sum, the father procured the deed for the lot to be made to his son. Thomas Doyle, Sr., was at this time somewhat embarrassed; but there are no facts in the case, when viewed in connection with the circumstances, which show this to have been a fraudulent transaction. The motive of the father, in doing justice to his infant son, seems to have been commendable. William and Michael Jones were engaged as partners in trade, and at the time the deed was executed, it was, probably, the impression of William, the active partner, that he could convey the real estate of the partnership the same as the personal. The deed, however, having been executed by one of the partners only, could convey to Thomas Doyle, Jr., no more than a moiety of the lot. But as the deed of Garrison is not established, this conveyance, and the one that was subsequently executed by Michael Jones, could only be considered as conveying the equitable interest to the lot. The heirship of Belinda, the wife of Hinde, is controverted. James and Margaret Bradford, the father and mother of Belinda, were reputed to be married, and lived together as man and wife. And the will of Bradford recognizes her as his wife, and that she at the time was pregnant. On this point the proof is satisfactory, and is not shaken by the unsettled rumors, which may have been circulated as to the manner in which the marriage was solemnized. The facts authorize the presumption of a legal marriage. Thomas Doyle took this lot as a purchaser, and it descended to his half sister, he having neither brother nor sister of the whole blood. It is not material to enquire whether this lot was sold by the sheriff as the property of Thomas Doyle, Sr., for if it were sold, as alleged by Vattier, the sheriff could convey no title to it, as Doyle had none. In this purchase by Vattier, if made, no title was received, and consequently, if he conveyed the lot to Findlay, of which there is much doubt, having no right he could convey none. Findlay having investigated the title, was made acquainted with it by Henderson, the recorder, and he then for seven hundred dollars induced Garrison to make him a deed for the lot, which was worth at the time, more than thirty thousand dollars. Garrison, at the same time, conveyed to his son twenty-three feet of the lot. These circumstances, and the facts proved, go to establish notice, as against Findlay, and the enquiry then arises, whether Vattier, in receiving the conveyance from Findlay had notice. There would seem to be little room to doubt that Vattier had notice. He had examined the title, set up a claim to the lot under a sheriff's sale, and alleges that he conveyed it to Findlay. He knew it was called Doyle's lot, and of the sale to Doyle by William and Michael Jones, he had some knowledge. He knew of Doyle's, and subsequently of Hinde's claim. In searching the record he must have found the deed from William Jones, in his own and his brother's names to Thomas Doyle, Jr., which recited the deed from Garrison to them. In any point of view in which the facts can be considered, Vattier had notice of such facts as would have led him, by the use of ordinary diligence, to a full knowledge of the state of the title. Any want of knowledge, therefore, of which he may now complain, is chargeable to his own negligence. Sugd. Vend. 498; 1 Atk. 489; 2 Ves. Jr. 440; 4 East, 220. The conveyance to Cummins, as set up in the amended answer of Vattier, is answered by the special replication of the complainants, filed

without objection, that the lot was immediately re-conveyed to Hinde, for the use of his infant children. The beneficial interest is in the minor heirs of Belinda Hinde, and the suit is prosecuted as well before as after the conveyance to and from Cummins, in their behalf. These conveyances, therefore, do not change the nature of the interest now under consideration.

Upon a full consideration of the case, and finding the equity of the complainants sustained by proof, and that both Findlay and Vattier are chargeable with notice of the equity of Thomas Doyle, Jr., at the time they received their deeds for the lot, the court will decree that Vattier, Findlay having now no interest in the premises, shall convey all his right and title to the property to the complainants in pursuance of the right asserted in their bill.

NOTE. This case was appealed to the supreme court, and the principles laid down by the circuit court, so far as they regard the merits of the case were sustained; but the decree was reversed on the ground that the matter as to the re-conveyance of the lot by Cummins to Hinde, should have been introduced into the case by the amendment of the bill, and not by special replication. This point was not raised in the circuit court, the replication having been filed with the consent of parties, in fact, and without the knowledge of the court. It does not appear, however, on the record, that special leave was given to file the replication. [The cause was remanded with directions to permit the complainants to amend their bill so as to introduce the matter of the conveyance mentioned.] Vattier v. Hinde, 7 Pet. [32 U. S.] 252.

[During the progress of this suit in the circuit court an action of ejectment was brought by the lessee of Vattier v. Thomas S. Hinde and Wife, and a verdict obtained in favor of the plaintiff. Upon a writ of error being taken, the supreme court affirmed the judgment of the circuit court. 5 Pet. (30 U. S.) 398.]

Case No. 6,513.

HINDLEY v. The WELLINGTON.

[21 Int. Rev. Rec. 14.]

Circuit Court, N. D. Ohio. Dec. 24, 1874.

APPEAL IN ADMIRALTY—DECREE PRO FORMA—HEARING.

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

[This was a libel in admiralty by William Hindley against the schooner Wellington.]

It appearing in this case that no trial upon the merits was had in the court below, but a decree having been entered pro forma, it was held, that the circuit court would not hear and determine an appeal in admiralty where no hearing below was had, it being in admiralty cases an appellate court, not a court of original jurisdiction. By consent of parties, case remanded to district court for hearing.

Wiley, Terrell & Sherman, J. E. Cary, and J. F. Weh, for libellant.

Estep & Burke, for respondent.

Case No. 6,514.

HINDMAN v. SHAW.

[2 Pet. Adm. 264.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES—REFUSAL TO PROCEED ON VOYAGE.

1. A ship earned freight at one port of delivery; but was unfit to proceed from a port at which she touched in the progress of her voyage. The seaman refused to proceed in a vessel provided for the further transportation of the cargo, and claimed wages and an additional allowance. The court refused him wages or additional allowance, for the latter part of the voyage. Spanish laws alone fix the allowance, which in general is discretionary.

[Cited in The Saratoga, Case No. 12,355; Wells v. Meldrum, Id. 17,402; Thompson v. The Oakland, Id. 13,971; Nevitt v. Clark, Id. 10,138; Gurney v. Crockett, Id. 5,874.]

[Cited in Van Beuren v. Wilson, 9 Cow. 160.]

2. Distinction between a vessel sent out not sea-worthy, and one becoming so by a casualty.

[Cited in Hoffman v. Yarrington, Case No. 6,580; The Wenonah, Id. 17, 412; The Frank and Willie, 45 Fed. 490.]

[This was a libel for wages, by Hindman against Shaw, master of the brig Diligence.]

A ship had been at a port of delivery; and so far earned her freight. She sailed from Philadelphia on a circuitous voyage, and to return to that port. The seaman had shipped for the voyage. At a port, subsequent to her first delivering port, in Europe, she was found not sea-worthy. The cargo was reshipped for its destination, in another vessel, freighted for the purpose; the seaman was offered a continuance of his contract, in the freighted vessel. He refused; and now claimed his wages to the time of the ship's incapacity to proceed; and two months additional pay, for his expenses and loss of time, in returning home. The extension of his claim beyond the wages due on delivery of the first cargo, was the chief point in dispute.

BY THE COURT. This seaman comes before me with a barren case. I see no equity in his demand for the additional pay, and as little justice in his claim, after the delivery of the former cargo. The freight was earned to that time, and his wages attached to that fund. I do not feel myself warranted in allowing more than the wages to the first port, and for half the time of stay there. His refusal to continue his contract, though in another ship with the same cargo, is tantamount to desertion; and though there is some difficulty in bringing his case to that point, owing to the change of ship and strict construction of our laws; yet I think he has not a well-founded claim upon the freight, arising from the transhipped cargo, as he did not, though he had it in his option, assist in earning it. He cannot be entitled to the allowance, usual in common cases of voyages intermitted, by being broken up for the inter-

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

est, profit, or convenience of the owner. In such cases, I always exercise a discretion according to circumstances, and allow from one to three months pay, in addition. On a careful enquiry, repeatedly made, I do not find any precedents, exactly ascertaining the additional allowance. Where I have thought them entitled, I have given to seamen one month's pay, in voyages broken up in the West Indies, or distant ports of the United States; two months' pay, if in Europe; and three months, if in India; and in one case, four month's pay, under peculiar circumstances.[2] In all cases of voyages broken up, I have allowed the merchant an alternative. If the seamen were accommodated with passages and supplies to bring them home, equivalent to the allowance, I have suffered this to be substituted for the additional wages. If berths, on the terms of the original contract, were procured, and means of supply of necessaries, for the voyage of return, were furnished, I have refused additional pay. The only laws in which I have found any rate of allowance fixed, are those of Spain. These seem to fix the rates, according to the place of breaking up the voyage, at certain designated proportions. But in general, it is a matter of discretion, and the true point of justice not always easy to be found. In some cases there is a distinction (as there is in claims for insurance) between a voyage broken up by the default of the owner, in sending a vessel to sea, found to have been unworthy in the outset, and one rendered so by unavoidable casualty. In the former case, the merchant is delinquent, and subjects himself to all consequences: in the latter instance, he is unfortunate, and entitled to equitable consideration. It is somewhat similar to wreck, where freight, if goods saved, is due pro rata itineris, or entire, if sent to the place of destination. Seamen assisting in conducting the cargo to its intended port, participate in all the advantages; because they ensure to the merchant the acquisition of his fund, out of which wages are paid. But it is otherwise with those who will not afford their assistance, when both their interest and their duty require it. Nor do I think it material, where the seaman may, if he chooses, continue and fulfil his contract, when or how the vessel became unfit for the further performance of her voyage.

NOTE. Where seamen are sent home at the expense of the owner or master, they must be allowed for their time at the contract rate of wages. A change of the voyage, or voluntary deviation, is a breach of contract, and is governed by other principles than those which prevail when voyages are broken up from necessity or misfortune. The seaman must have his option to go the new voyage, on the terms of the old contract; if he makes his election to return home, he must be furnished with the means, and reasonable pay, according to the rate agreed. If the change or deviation is with intent to procure hands at less wages, or to afford an excuse for discharge of the mariners without lawful cause, wages for the voyage originally contracted for, are recoverable, and have been decreed. These are not singular cases: they have too often occurred. They fall within the principle, that full wages are due where the discharge is not for lawful cause. Anomalous instances, very atrocious, have been in proof: one, of a ship going out of her way, to put on shore two seamen, alleged to have been mutinous, but no testimony of this was exhibited; they were landed on a desert island in the East Indies, to which a savage race of sea rovers occasionally resorted. These victims were stripped of all their clothes by the savages, and experienced every extreme of distress and disease, in a tropical climate, to which one of them fell a sacrifice. The survivor returned, and I adjudged to him wages for the voyage; and left other circumstances, to be investigated in another tribunal.

[2] The passage to India being accounted equal to two and a half passages from the United States to Europe, I have deemed myself warranted, when uncommon circumstances urged the measure, to allow four months and upwards. I should not hesitate to allow more, in an extraordinary case.

Case No. 6,515.

HINDRY v. The PRISCILLA.

[Bee, 1.] [1]

District Court, D. South Carolina. 1792.

SALVAGE—DERELICT.

One half decreed by way of salvage, in case of a vessel found derelict on the high seas.

[Cited in Flinn v. Leander, Case No. 4,870.]

[This was a libel for salvage by William Hindry against the schooner Priscilla.]

BEE, District Judge. This is the first case, since my appointment as judge of the court of admiralty, of a vessel libelled as wreck found on the high and open seas; and, as far as the records of the court have been traced, the first that appears to have come before the court at any time. I have carefully considered the schooner Priscilla's situation, and the law relative thereto, and do pronounce the said vessel to be a wreck found drifting at sea, without any living animal on board, as specified in the libel, and proved in court by two witnesses. I condemn her accordingly; with her tackle, furniture, and apparel, as appurtenances found on board. I also order and direct that the marshal of this district do, on the 20th day of this month, after fifteen days' notice in one of the gazettes of Charleston, expose to sale, and sell at public outcry for the most money that can be obtained, the said schooner, with her appurtenances as aforesaid. And that, after paying out of the proceeds of such sale all the fees, costs, and charges of this suit, and the expenses of the sale, he pay to the libellants, the master, mariners, and owners of the brigantine Mentor, one half of the net proceeds of such sale, as salvage, for securing and bringing into port the said schooner. I order that the marshal deposit the other half-part of said net proceeds in the Branch Bank of the United States in this city; subject to

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

the future order of this court, and for the use of the former owner or owners of the Priscilla, or other person or persons by him or them duly authorized, and applying for the same. I further order that due notice thereof be given by the marshal, in one of the gazettes printed in Charleston, once in every month for twelve months ensuing. And that the marshal do, as soon as the sales are closed, render a due and just account of all payments and disbursements made for and on account of the said schooner.

Case No. 6,516.

In re HINDS et al.

[3 N. B. R. 351 (Quarto, 91).] [1]

District Court, N. D. New York. Oct. 29, 1869.

BANKRUPTCY—JUDGMENT—LIEN OF, ON REAL ESTATE—JOINT DEBTORS.

1. Creditors on a promissory note had judgment, docketed prior to proceedings in bankruptcy, against four bankrupts, as joint debtors, and sought to have it paid out of the proceeds of certain real estate in New York, purchased originally with partnership funds of J. A. and J. N. H., two of said joint debtors, and the legal title of which was in J. N. H., who, however, had not been served with process, nor appeared in said cause, and against whom there was no judgment on which his individual property could be sold. *Held*, said creditors had no valid lien at law on said real estate, nor had they a valid, equitable lien on the equitable interest of the partner J. A., by virtue of said judgment.

2. No lien is obtained on equitable interests by judgment and execution alone, and creditors took no proceedings to reach such equitable interest, or establish an equitable lien.

3. Proceedings in bankruptcy may be regarded as an equitable attachment, and the equitable interest vested in the assignee in bankruptcy for the benefit of all the creditors.

[In bankruptcy. In the matter of Joseph N. Hinds, Jacob Allen, Benjamin Allen, and Alvin B. Losee.]

HALL, District Judge. This is a petition asking that the amount due upon a judgment rendered against the four bankrupts, as joint debtors, in an action in which Joseph N. Hinds was not served with process, and in which he did not appear (so that there was no judgment upon which his individual property could be sold), be paid out of the proceeds of real estate, the legal title of which was in Joseph N. Hinds alone. The petition concedes that the judgment was not a legal lien upon the individual property of Joseph N. Hinds, and that it could not be sold thereon; but it alleges that the judgment was obtained upon a note given by the bankrupts in their firm-name of Hinds, Allen & Co., for the sole and only purpose of securing the payment of a note previously given by Joseph N. Hinds and Jacob Allen, under their firm-name of Hinds & Allen; that for a long time prior to 1867 (the petition on which the bankruptcy of Hinds, Allen & Co. was adjudged, was filed against them on the 23d of December, 1868), the said Joseph N. Hinds and Jacob Allen had carried on business under the firm-name of Hinds & Allen, and had, with the assets of that firm, purchased for the use and benefit of the firm, the real estate above referred to; that said real property was owned and occupied by the firm on the day, and long after the day, on which the said judgment was docketed; that the two firms aforesaid existed up to the time the original petition was filed in this case, and that such real estate has been sold by the order of this court, free from encumbrances. The order of sale reserved to the owners of such judgment the right to apply for payment thereof, out of the proceeds of the sale; and it is claimed that the petitioner is therefore entitled to the relief sought.

The judgment referred to was docketed, so as to become a lien on real estate, October 22, 1868; but the petition does not show at what time the debt, on which such judgment was given, was contracted, or at what time the real estate referred to was conveyed to Joseph N. Hinds, for the use and benefit of Hinds & Allen; or that the execution issued on the judgment had been returned unsatisfied in whole or in part. The affidavit of Joseph N. Hinds denies that the judgment referred to was recovered on account of a debt which was originally the debt of Hinds & Allen, and states that such debt was, from its origin, a debt against Hinds, Allen & Co., arising out of a purchase made by that firm in October, 1867; and in this he is fully corroborated by the testimony of the bookkeeper of these two firms. On these papers it is certainly most reasonable to conclude, that the real estate referred to was purchased subsequent to 1830, and a considerable time before the debt on which the judgment owned by the petitioner, who seeks its payment, was contracted.

The mere payment of one-half of the purchase-money of this real estate by Allen, at the time it was conveyed to Hinds, can give to the judgment-creditor no right to the same, by reason of his holding a judgment which binds the property of Allen alone; the provisions of the Revised Statutes of 1830 (which are still in force), contained in sections 51 and 52 of the article "Of Uses and Trusts," modified the previously existing law; and they are clearly inconsistent with the existence of any such right. These sections are as follows:

Sec. 51. "When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

Sec. 52. "Every such conveyance shall be presumed fraudulent, as against the credit-

[1] [Reprinted by permission.]

ors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

Under these sections no trust can result to the creditors of Jacob Allen, unless they were such at the time the conveyance was made to Joseph N. Hinds. Garfield v. Hatmaker, 15 N. Y. 475; Brewster v. Power, 10 Paige, 562. And except as against such then existing creditors, the whole estate vested in Joseph N. Hinds, discharged of any trust in favor of Allen or his creditors, except that growing out of their relations as partners, and the fact that the property was purchased and paid for by the firm, and was in equity copartnership property. But, assuming that Jacob Allen, as the partner of Hinds, had an equitable interest in this property, it is proper to inquire whether the judgment and execution against Jacob Allen, as one of the partners served with process, entitles the petitioner to any payment upon his judgment out of the proceeds of the real estate thus held by Joseph N. Hinds, on the ground that Jacob Allen had an equitable interest therein, which was in equity bound by such judgment and execution.

Prior to 1830, and under the express provisions of the statute of uses (1 Rev. Laws, 74, § 4), an equitable estate or interest in lands by reason of their being seized or possessed to the use of, or in trust for, the execution debtor, was the subject of sale by execution at law, provided, the judgment-debtor had the entire equitable interest (Lynch v. Utica Ins. Co., 18 Wend. 236); but the general rule was and is, that a mere equitable interest cannot be reached by an execution at law (Hendricks v. Robinson, 2 Johns. Ch. 283, 312; Jackson v. Chapin, 5 Cow. 485; Lynch v. Utica Ins. Co., 18 Wend. 249); and neither our Revised Statutes nor the Code provide for the sale of such equitable interests upon execution. It may therefore be safely assumed, that the interest of Jacob Allen in the lands purchased by and for the copartnership of Hinds & Allen, and the legal title of which was in Joseph N. Hinds only, was an equitable interest not bound by the judgment and execution against the property of Jacob Allen, and that the aid of a court of equity would be required to obtain satisfaction out of such equitable interest, of a judgment against Hinds & Allen, in a case where Hinds was not served with process and did not appear in the suit; and in a court of equity the proceeds of the sale of this property would not be applied to the payment of the judgment on which this petition is based, until all the debts of Hinds & Allen were fully paid.

There is, then, an insuperable objection to the granting of the prayers of this petition. The proof shows that the real estate sold, was in equity the property of the firm of Hinds & Allen, and that the judgment owned by the petitioner was obtained upon a debt of Hinds, Allen & Co., an entirely different firm. Under the general rule in regard to the distribution of copartnership and individual assets, which prevails in courts of equity, and which has been expressly adopted by the 36th section of the bankrupt act [of 1867 (14 Stat. 534)], the proceeds of the sale of the real estate referred to must be applied to the payment of the debts of Hinds & Allen, in preference to those of Hinds, Allen & Co., and no part of such proceeds can be applied to the payment of the debts of the latter firm, until the debts of Hinds & Allen are fully paid.

Even if the debt on which the judgment was given, was, when originally contracted, a debt of Hinds & Allen, as alleged in the petition (but which is disproved), the taking of the note of Hinds, Allen & Co., for that debt, and the obtaining of a judgment thereon, would clearly extinguish the debt against Hinds & Allen, and make it the proper debt of Hinds, Allen & Co. But it was insisted upon a prior application in respect to this judgment, that by the recovery and docket of the judgment against Hinds, Allen & Co., the judgment-debtor obtained an equitable lien against the real estate of Joseph N. Hinds, although his property could not be sold on the execution issued on such judgment.

The provisions of the Revised Statutes and of the Code which declare the effect of such a judgment necessarily repel such a claim. Purdy v. Doyle, 1 Paige, 558; Oakley v. Aspinwall, 4 Comst. [4 N. Y.] 514; D'Arcey v. Ketchum, 11 How. [52 U. S.] 174. These cases show that the judgment is not even evidence of indebtedness as against Joseph N. Hinds, and a fortiori it is no lien in equity, any more than at law, upon the separate property of Hinds.

But independent of the grounds already considered, it is quite certain that the prayer of the petition should be denied. It is, I think, well settled in this state that a judgment creditor obtains no lien in equity upon choses in action or equitable interests in real or personal property, by the return of his execution unsatisfied, but only by the filing of his bill in equity, or the taking of other legal proceedings to reach such choses in action, or equitable interests. Edmeston v. Lyde, 1 Paige, 637; Corning v. White, 2 Paige, 567. The proceedings in bankruptcy commenced by one or more of the creditors of the bankrupt, for the benefit of all, are in the nature of an equitable attachment as against the equitable estate of the bankrupt; and the assignee, as the representative of all the creditors of the bankrupt, and whose title relates back to the date of the filing of the petition, thereby becomes the owner of such equitable interest, with an equity superior even to a judgment creditor who has an execution returned unsatisfied, but who had obtained no equitable lien by filing a creditor's bill or tak-

ing other proceedings to reach such equitable estate. The commencement of the proceedings in bankruptcy may well be regarded as an equitable attachment; and as it is a cherished rule of courts of chancery that "equality among creditors is equity," such courts would give effect to such equitable attachment and preserve the rights thus acquired for the benefit of all the creditors of the bankrupt, even if the legal title of the assignee did not relate back to the filing of the petition. But if no lien had been acquired prior to the filing of the petition, none could be afterwards acquired by the judgment creditors, as the legal title of all the property of the bankrupt vests in the assignee by relation, under the express provisions of the bankrupt act, at the time the creditor's petition is filed against the bankrupt.

Besides the petition does not show that the execution issued on the judgment mentioned in the petition had been returned unsatisfied, and the general rule is that no lien is obtained on equitable interests or choses in action by judgment and execution alone, even where it is held that such lien exists after the return of an execution unsatisfied, on the ground that such return shows that the creditor has exhausted his remedy at law, and is therefore entitled to proceed in equity. The prayer of the petition is denied with costs.

HINDS (BOYLE v.). See Case No. 1,759.

Case No. 6,517.

HINE v. WAHL.

[Decree by GRESHAM, District Judge, sustaining the validity of reissued letters patent No. 4,372 of patent No. 73,425. This patent was granted January 14, 1868, to N. W. Green, and was reissued May 9, 1871. No opinion delivered. Decree reported in 4 Trans. Rec. 1882, p. 3216, clerk's office United States supreme court, and affirmed by divided supreme court, without opinions, December 18, 1882.] [Cited in Green v. French, 11 Fed. 591, and Andrews v. Eames, 15 Fed. 110. For other cases involving the same patent, see note to Andrews v. Denslow, Case No. 372.]

HINER v. The SEA GULL. See Case No. 12,578.

Case No. 6,518.

HINES et ux. v. CRAIG.

[1 Cranch, C. C. 340.] [1]

Circuit Court, District of Columbia. July Term, 1806.

PLEADING—PLENE ADMINISTRAVIT.

Outstanding judgments cannot be given in evidence, on plene administravit, but must be specially pleaded.

[This was an action at law by Hines and wife against Craig, administrator of Mitchell.]

Assumpsit, non assumpsit, limitations, and plene administravit.

E. J. Lee, for defendant, showed prior judgments outstanding.

Mr. Swann, for plaintiff, objected that, unless the defendant shows actual payment of those judgments, they cannot be given in evidence under a general plea of plene administravit, but must be pleaded specially.

And THE COURT so decided.

Case No. 6,519.

HINES et al. v. DEAN et al.

[4 Wash. C. C. 159.] [1]

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

PRACTICE—SERVICE OF PROCESS — JUDGMENT FOR WANT OF APPEARANCE.

When the summons is served ten days before the return day, the plaintiff, on filing his declaration, is entitled to enter up judgment by nil dicit, for want of appearance. But this must be done at rules.

[Cited in Wallace v. Clark, Case No. 17,098.]

The summons, in this case, having been returned executed to the last term, and no appearance entered, the plaintiff moved for judgment by default, under the act of assembly of this state of the 20th of March, 1724 (1 Smith's Laws, 165) referred to in the case of Smith v. Bohn [Case No. 13,015].

PER CURIAM. We should in this case follow the practice of the state courts under the above law, by granting the motion, if it did not contradict a written rule of this court, which directs pleadings, rules and judgments, for want of appearance or filing pleas, to be transacted at rules, to be held monthly in the clerk's office. In this case, the summons having been served, the plaintiff should have ruled the defendant to appear and plead, and if he had failed to do so, he might have entered up judgment, by default, nisi; which this court would, upon motion, make absolute or set aside, upon the defendant's entering his appearance and pleading to issue. The courts of this state having so construed the above law, as to give judgment, although the declaration was not filed before the return day, this court would also dispense with it, if it be filed before the rule to appear and plead is entered. The motion is, therefore, overruled.

Case No. 6,520.

HINES v. HEWITT.

[4 Cranch, C. C. 471.] [2]

Circuit Court, District of Columbia. Oct. Term, 1834.

APPRENTICE—BINDING—WHAT CONSTITUTES.

An entry on the minutes of the orphans' court in Alexandria, "that Peyton Hines be

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

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

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

bound apprentice to Peter Hewitt," does not constitute a lawful binding.

[Cited in Bell v. English, Case No. 1,250.]

This was a petition to be discharged from the service of Peter Hewitt, who claimed the petitioner as his apprentice. There was an entry on the minutes of the orphans' court of an order, "that Peyton Hines be bound apprentice to Peter Hewitt." This was the only authority shown by the respondent for holding the petitioner; and it was stated by Mr. Moore, the register of the orphans' court, that it was conformable to the usual practice of that court, and that no indentures were actually executed.

THE COURT (THRUSTON, Circuit Judge, absent) decided that it was not a lawful binding, and discharged the boy.

See the case of Bell v. English [Case No. 1,250], Oct. term, 1833.

Case No. 6,521.

HINES v. UNION PAC. R. CO.

[2 Dill. 269, note.] [1]

Circuit Court, D. Nebraska. May Term, 1873.

NEGLIGENCE—FELLOW SERVANTS.

Action by a brakeman against the company; the petition charging that the plaintiff, as brakeman, was engaged in coupling cars, and that the engineer in charge of the moving section of the train carelessly backed it with such force and speed as to cause the plaintiff's hand to be crushed, and that the engineer was incompetent, and the defendant knew it.

Mr. Redick, for plaintiff.

Poppleton & Wakeley, for the company.

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

THE COURT directed the jury, in substance, as follows:

1. That the engineer and brakeman, being both at their posts and in the line of their duty at the time, are fellow-servants, within the meaning of the rule which exempts the employer from liability to one servant for the fault of another, and that the general rule applied to the case under the pleadings and proof, unless the company was to blame for having an incompetent or improper person as engineer.

2. That no mere negligence on the part of defendant's engineer as to the rate of speed and force with which the train was run at the time of the accident will impose any liability on the defendant for the injury to the plaintiff.

3. That the plaintiff alleges and must show that the accident was caused by the negligence of the engineer, as charged in the petition, and also that the company was guilty of negligence, or want of reasonable care, in the employment of an incompetent engineer, or in retaining him in its employment after notice of his incompetency, or of facts and circumstances from which it reasonably appears that his incompetency ought to have been discovered, or from which notice thereof may reasonably be inferred.

There was a verdict and judgment for the defendant.

[In 2 Dill. 269, this case is published as a note to Fort v. Union Pac. R. Co., Case No. 4,952.]

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

Case No. 6,522.

HINGSLEY v. HERRIET.

[See Case No. 1,722.]

HINKLE (STEWART v.). See Case No. 13,430.

HINKLEY (BROWN v.). See Case No. 2,012.

HINKLEY (HENDRICKSON v.). See Case No. 6,357.

Case No. 6,523.

HINKLEY v. MAREAN.

[3 Mason, 88.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

PLEADING—IN BAR—LEX LOCI.

1. A discharge of the person and present estate under the insolvent acts of Maryland, cannot be pleaded in bar of a suit in the circuit court in Massachusetts, so as to discharge the party from the common execution.

[Cited in Woodhull v. Wagner, Case No. 17,975; Titus v. Hobart, Id. 14,063.]

[See Banks v. Greenleaf, Case No. 959.]

2. The lex loci governs as to remedies.

[Cited in Towne v. Smith, Case No. 14,115.]

[Cited in Hochstadter v. Hays, 11 Colo. 118, 17 Pac. 289.]

Assumpsit on a bill of exchange, drawn at Boston on the 12th of April, 1819, on the defendant [Thomas Marean], at Baltimore, for $2000, payable in sixty days to the plaintiff [David Hinkley], (an inhabitant of Boston), and accepted by the defendant at Baltimore on the 17th of April. The declaration alleged a breach by non-payment. The principal pleas were founded on the statutes of insolvency of Maryland of 1805 and 1809, whereby the defendant, being then an inhabitant of Maryland, and entitled to the benefit of the acts, was, on the 3d of September, 1819, duly discharged and his property assigned. The Maryland acts discharge the contract and "the person, estate, and effects of the insolvent, except any that may afterwards be acquired by gift, descent, or in his own right by bequest, devise, or in any course of distribution;" and the defendant accordingly (averring in one of his pleas, that he had not subsequently acquired any

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

such) prayed in the language of the acts, that his person, estate, and effects, save and except any property, if any, there be, after the 3d of September, 1819, by him acquired by gift, &c., may be discharged, and that the plaintiff may be precluded from further prosecuting his said suit and for his costs. To these pleas there was a demurrer and joinder.

William Sullivan, for plaintiff.
Bartlett & Shaw, for defendant.

STORY, Circuit Justice. My opinion is, that the pleas of the acts of insolvency of Maryland, set forth by the defendant, are bad in point of law, and offer no defence to the suit. So far as these acts purport to discharge the contract, it is sufficient to say, that they are void, falling directly within the authority of Sturgis v. Crowninshield, 4 Wheat. [17 U. S.] 122. So far as they authorize a discharge of the person, estate, or effects of the insolvent before the 3d of September 1819, they are merely local, and can have no authority here. They are addressed to the lex fori. The present suit is to be decided by the law of Massachusetts; and a discharge of the person of the debtor in another state, which leaves the contract in full force, has no effect to discharge the person here. No court gives effect to the local laws of another country or state, in respect to the forms or force of process. When the right exists, the remedy is to be pursued according to the lex fori, where the suit is brought. It is true, that in the case of Melan v. Fitzjames (1 Bos. & P. 138) a different rule was laid down by Lord Chief Justice Eyre and Mr. Justice Rooke, against the opinion of Mr. Justice Heath. But that case has been since disapproved of (Lord Ellenborough in Imlay v. Ellefsen, 2 East, 454, 455), and has been certainly overruled in the supreme court of New York. Smith v. Spinolla, 2 Johns. 198; White v. Canfield, 7 Johns. 117. But see [Miller v. Hall] 1 Dall. [1 U. S.] 229, 261; 3 Bin. 201; 5 Bin. 336. The general principle, which governs in cases of this nature, has been recognized in the supreme court of the United States on more than one occasion. Fenwick v. Sears, 1 Cranch [5 U. S.] 259; Dixon's Ex'rs v. Ramsay's Ex'rs, 3 Cranch [7 U. S.] 319. And the same principle has been in its full extent admitted as the law of Massachusetts. Pearsall v. Dwight, 2 Mass. 84. Considering then, as I do, that the discharge of the person in Maryland does not discharge the insolvent from arrest here, upon any subsisting contract against him, it is impossible, that the prayer of the plea can be granted. It would be to give a judgment wholly unknown to our laws, and wholly unauthorized by them. Judgment for plaintiff.

HINMAN (BRISCOE v.). See Case No. 1,887.

Case No. 6,524.

HINMAN v. CUTLER et al.

[2 Lowell, 364.] [1]

District Court, D. Massachusetts. Dec., 1874.

PRACTICE—JOINT DEFENDANTS—STAY OF PROCEEDINGS.

1. In this district, if there is a stay of proceedings against one of several joint defendants, pending action upon his discharge in bankruptcy, the case cannot proceed against his co-defendants, unless the plaintiff chooses to enter a nolle prosequi as to him.

2. A qualified judgment cannot be entered against one of several joint defendants, which leaves the liability of his co-defendants undetermined.

The plaintiff, as assignee of a bankrupt, brought an action in the district court of the United States, against Cutler and others, composing the firm of Cutler, McLean & Co., to recover certain sums of money alleged to have been paid to that firm by the bankrupt as a preference. A verdict was rendered for the plaintiff at a former term of this court, and the defendants filed exceptions to the rulings of the judge who had presided at the trial, which were allowed; but, before judgment had been entered on the verdict, the defendants became insolvent, and all but one of them took proceedings in bankruptcy, and were adjudged bankrupt, about six months since. The plaintiff now moved for judgment against the defendant not in bankruptcy, but did not ask to discontinue against the others.

C. Allen and W. A. Field, for plaintiff, cited Hoyt v. Freel, 8 Abb. Pr. (N. S.) 220.

T. P. Proctor, for defendants, cited Tinkum v. O'Neale, 5 Nev. 93.

LOWELL, District Judge. Section 21 of the statute [of 1867 (14 Stat. 526)] which provides for a stay of proceedings in suits against a bankrupt, until he shall have an opportunity to obtain and plead his discharge, is silent concerning actions in which the bankrupt is only one of the defendants; and it may be that, in different districts, the rule may vary in such cases, because the practice of the state courts now governs our practice, and that may not be uniform. But, in Massachusetts, I apprehend there is no authority for holding that, if one joint defendant is entitled to a continuance, the case may proceed against the others. At common law, such action is inadmissible; and no statute has been cited to support it. The same rule which requires partners to be joined, authorizes any one of them to object to a judgment being obtained while the liability of his co-defendants remains undetermined. One of the questions in this case will be, whether the defendants are jointly liable; and that question cannot yet be answered, because a defence is law-

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

fully interposed, the validity of which will depend on facts yet to be ascertained.

No question is raised concerning any right of the plaintiff to discontinue against part of the defendants, and take judgment against the others. He is not willing to do this; and my judgment is asked upon the right to proceed against one of the defendants; reserving further action hereafter in the same suit against such of the others, if any, as shall fail to obtain a discharge in bankruptcy. It is insisted that some sort of qualified judgment may be rendered, which will do no injury to the bankrupts, and yet enable the plaintiff to pursue his remedy against the remaining defendant. For this position, Hoyt v. Freel, 8 Abb. Pr. (N. S.) 220, is cited. The learned judge in that case, reasoning from sound premises, has reached a conclusion that seems to me unsound. It is true that, by the very terms of the statute, no partner or joint contractor is be discharged by the discharge in bankruptcy of the person or persons liable with him; and this is one of the leading rules of all bankrupt laws. But it does not follow that no action shall be delayed until it can be determined whether the bankrupt defendant is to remain one of the joint debtors or not. If a necessary party to a suit has not been fully served with process, or is entitled to delay for any other reason, the whole suit must await the completion of the service or other proper action. Apart from technical considerations, it is a matter of substantial interest to a defendant to have his right of contribution from his co-defendants ascertained by the same judgment that establishes his own liability. It seems to me, therefore, that the case cited by the defendants—Tinkum v. O'Neale, 5 Nev. 93—is well decided.

A qualified judgment may be rendered against a bankrupt where it is necessary, in order to enable the plaintiff to realize an attachment which is not dissolved by the bankruptcy, or to ascertain the amount of a debt that is in dispute; but, as I have had occasion to say before, the judgment in such cases ought to show on its face the purpose for which it is rendered. There is no hint in the statute that a judgment may be entered for the purpose of giving, against co-defendants with the bankrupt, some remedy which the usual course of justice would not give.

I ought to say that, upon the face of the record when the motion was made, there would appear to be an amount in dispute, namely, the whole amount of the verdict; for the defendants contended that the rulings were contrary to law. But as they have undertaken to stipulate that the verdict shall be accepted as conclusive evidence of the amount, and that proof may be made against the assets for that sum, the judgment cannot be entered in order to settle that question.

The motion was not pressed on the ground that the debt was one contracted by fraud, and so not dischargeable in bankruptcy. The learned counsel for the plaintiff very frankly said that this question would arise more properly after the discharge was granted, if it should be granted.

Motion for judgment denied.

HINMAN (UNITED STATES v.). See Case No. 15,370.

Case No. 6,525.

In re HINSDALE et al.

[6 Ben. 231;[1] 12 N. B. R. 480; 1 N. Y. Wkly. Dig. 127.]

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

REGISTER'S FEES—SECOND MEETING—TRUSTEE.

If a trustee, who has been appointed under the 43d section of the bankruptcy act [of 1867 (14 Stat. 538)], call a second general meeting of the creditors, the fees of the register incident to such meeting are not chargeable against the estate.

The register in this case certified to the court that the property of the bankrupts [Richard H. Hinsdale and Edward E. D. Doughty] had been, pursuant to the 43d section of the bankruptcy act, conveyed to a trustee, to be distributed under the direction of a committee of the creditors; that the question had arisen whether the estate was liable for the fees of the register incident to a second general meeting of the creditors; and that, in his opinion, the estate was not so liable.

BLATCHFORD, District Judge. Assuming, though it is not so stated in the certificate of the register, that the second general meeting was called by the trustee, I find in the act no authority or direction for the calling of such meeting by the trustee. I see nothing, therefore, in the facts certified that can warrant the charging against, or paying out of, the estate of the bankrupts, the fees of the register upon or incident to such meeting.

[In Case No. 6,526, an order was made requiring certain creditors to accept the composition agreed upon at a meeting of creditors.]

Case No. 6,526.

In re HINSDALE.

[9 Ben. 91;[2] 16 N. B. R. 550.]

District Court, S. D. New York. April 24, 1877.

ENFORCING A COMPOSITION—ENJOINING SUITS BY CREDITORS.

1. Under Act June 22, 1874, § 17 (Stat. 182), authorizing the court to enforce the provisions of a composition in a summary manner, on mo-

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

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

tion, it can enforce only the executory provisions of the composition.

[Cited in Pubke v. Churchill (Mo. Sup.) 3 S. W. 831.]

2. The taking by a creditor of the money and notes provided for by a composition is not an executory provision which can be so enforced, nor can the court, after the time for paying the composition has passed, enjoin a creditor who refuses to accept the money, from suing the debtor for his bill.

[Cited in Re Nebenzahl, Case No. 10,074; Re Waitzfelder, Id. 17,048.]

3. But, while the composition is pending, the court may enjoin a creditor from suing the debtor on an unsecured debt set forth in his statement; and the composition is pending until all notes given for it fall due.

[Cited in Re Tifft, Case No. 14,031.]

In bankruptcy.

W. S. Palmer, for debtor.

Bell, Bartlett & Wilson, for Kayne, Spring, Dale & Co.

Henry M. Walker, for L. M. Bates & Co.

BLATCHFORD, District Judge. In this case a petition in involuntary bankruptcy was filed against the debtor on the 25th of January, 1877. No adjudication of bankruptcy has been made. The debtor filed a petition on the 9th of February, praying for a meeting in composition. A meeting was ordered and such proceedings were had that a composition was proposed and accepted. It was confirmed by the court, by a final order, on the 10th of March, 1877. The terms of the resolution of composition are: "That the payment of thirty-five cents on the dollar of the debts due from the said Richard H. Hinsdale to his creditors respectively, to be paid in money at the times herein stated, and to be evidenced and secured in the manner following, that is to say, one-third thereof to be paid in cash within thirty days from the entry of the order directing the composition resolution to be recorded, and the schedules exhibited to the meeting of creditors filed, the balance to be paid in two equal instalments, at three and six months from February 15th, 1877, to be evidenced by the notes of said Richard H. Hinsdale, the last note to be endorsed by Thomas Lord, Jr., of Huntington, Long Island, who is satisfactory, as endorser, to the undersigned, shall be and is hereby accepted by the undersigned in full satisfaction and discharge of the debts due and owing to them from said Richard H. Hinsdale."

The debtor now applies to the court for an order requiring four of his creditors, namely, L. M. Bates & Co., Moore, Tingue & Co., Kayne, Spring, Dale & Co., and Cresswell, LaLanne & Co., to accept the composition. The terms of the application as to the first three of the creditors are, that the court will require them "to accept and be bound by said composition," and to "release and discharge all property" they "may have belonging to said Hinsdale," and to "discontinue all suits and actions pending against him" upon their claims therein. The terms of the application as to the fourth creditor are, that the court will require them "to accept, receive and be bound by the composition resolution and proceedings herein and for leave to pay the money and deposit the notes coming to" them "into court." It is shown, that, within thirty days after the 10th of March, the debtor tendered to the four creditors respectively the proper sums of money and the proper notes provided for by the resolution of composition, and that such tenders were not accepted.

Cresswell, LaLanne & Co. have not proved their debt. Moore, Tingue & Co. proved their debt in the composition proceedings. Kayne, Spring, Dale & Co., proved their debt in the composition proceedings, and are recorded as being represented at the meeting, but they took no other part in the proceedings. They now set up, in opposition to the application of the debtor, sundry matters on which they rely as tending to show that the composition is one which ought not to have been confirmed; that the debt of the debtor to them was contracted by fraud, and that they do not desire to take their dividend in composition, because they prefer to come in for their dividend under a voluntary assignment made by the debtor, in Pennsylvania, of property of his in that state.

L. M. Bates & Co. did not prove their debt in the composition proceedings. They have commenced attachment proceedings in Pennsylvania against property of the debtor, and also an action in that state against him, to recover their demand. Their attachment proceedings were commenced on the 9th of January, 1877. On the 22d of February, 1877, they obtained a judgment against the debtor in a state court in Pennsylvania, and made a levy on a stock of goods there. They claim that their judgment relates back to the date of their attachment; that the composition cannot affect the security they hold; that, as there has been no adjudication in this case, and no assignee in bankruptcy has been appointed, this court has no possession of, or jurisdiction over, any assets in Pennsylvania; that to enjoin L. M. Bates & Co. now will deprive them of their rights under the laws of Pennsylvania; that the debt to them was contracted by fraud, and will not be discharged by the composition proceedings; that they have proved their debt under the assignment in Pennsylvania, and the estate there will pay fifty-five per cent.; and that the composition here was not and is not for the best interest of all the creditors.

By the statute (Act June 22, 1874, § 17; 18 Stat. 182), the debtor is to propose a composition. The creditors are to pass a resolution to accept the composition and are to confirm such resolution. The court is then to confirm the composition. The statute contains these provisions: "The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses

and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors. * * * Every such composition shall, subject to priorities declared in said act, provide for a pro rata payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up. * * * The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

It is contended, for the debtor, that the court has power to grant the application now made, and to enjoin the creditors from doing anything except to receive and accept the money and notes, and that, in doing this, the court will be enforcing the provisions of the composition. On the part of the creditors it is urged, that there are not found in the composition in this case, any provisions which are enforceable against a creditor; and that the court cannot compel a creditor to do an affirmative act which is not provided for in the resolution of composition and is not thereby specifically agreed by the creditor to be done.

I am of opinion, that, when the statute says that the court may enforce, on motion made, in a summary manner, "the provisions of any composition," it extends only to the executory provisions of the composition—to those things which the resolution of composition provides shall be done in the future by some one named in it, as specific affirmative acts. Thus, if the resolution of composition provides that the debtor shall pay money or give promissory notes to the creditors, or that the debtor shall execute a deed of trust or a conveyance or mortgage of property, as security for the payment of the composition, or that a general assignee under a state law shall convey to the debtor the assigned property, to be held by him free from any claim of creditors under the assignment, or that the assignee in bankruptcy shall transfer to the debtor, or to a trustee for the creditors, the property in his hands—these and kindred provisions of an executory character are provisions which may be enforced, on motion made, in a summary manner. But, a general provision, in a resolution of composition, that a payment of so much money, at such time or times, and to be evidenced by such and such promissory notes, shall be accepted by the creditors in satisfaction of the debts due to them from the debtor, is, in no proper sense, an executory provision, as respects the creditors. The language is used because it is the language of the statute. But the statute, in saying that the creditors may resolve "that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor," means, merely, that they may resolve that the payment of the money for the payment of which the composition provides shall satisfy the debts. If the money is tendered according to the terms of the composition, that is equivalent to payment, but the court has no power to imprison the creditor for contempt unless he will physically take the offered money. A protection of the debtor, by a summary injunction against the creditor, from the consequences of a refusal by the creditor to take the offered money and recognize the composition, such as the bringing of a suit by the creditor on the debt, is not within the proper purview of the enforcement of the provisions of a composition containing no other provisions than those in the present case.

When a discharge in bankruptcy is obtained, under section 5114 of the Revised Statutes, the bankruptcy court never undertakes to protect the debtor thereafter, by summary injunction, in the bankruptcy proceedings, from a suit against him by a creditor, to recover a debt. The debtor is left to set up the discharge by way of plea to the suit. There is no reason why any different course should be pursued after the close of a composition. If a suit is brought, the composition may be set up in defence; and, even if the creditor is in a position to at once issue execution against the debtor's property, the like thing happens often where a discharge is granted, and it is no greater hardship for the debtor to initiate proper measures to be relieved after the close of a composition than after a discharge.

It never could have been intended that the bankruptcy court should determine, in a summary way, such questions as are intended to be raised in the present case, in respect to the effect of the composition between the debtor and his creditors—the question as to the right of a creditor who proved no debt in the composition proceedings to enforce a security held by him, for the giving up of which there is no specific provisions in the composition—or the question as to whether the composition satisfies a debt created by fraud. These questions ought to be settled in plenary suits brought in a proper forum. The fact, that, if the bankruptcy court exercises the jurisdiction now invoked it would have to determine such questions, indicates that the only proper course is for that court, after the close of a composition, not to interfere except to enforce the specific executory provisions of the composition. The language and intent of the statute are abundantly satisfied by confining the action of the court to such remedies alone.

The bankruptcy courts in the United States which have considered this question have adopted the views above set forth. See In re Tooker [Case No. 14,096]; In re Lytle [Id. 8,650]. They are general views, subject to

modification by the circumstances of the particular case and according to the terms of the resolution of composition.

In the present case, it being an involuntary case and there having been no adjudication of bankruptcy and no warrant of seizure of the debtor's property, the court has acquired no jurisdiction over the debtor's property. The injunction now asked for is not sought under the authority of section 5024, as an injunction to restrain an interference with the debtor's property, until the hearing on the order to show cause why there should not be an adjudication. The bankruptcy court, however, has the undoubted right to protect a debtor while his composition is pending. Inasmuch as it is only necessary that a case of bankruptcy should be pending, by or against a debtor, whether an adjudication in bankruptcy shall have been had or not, to authorize a proceeding in composition, and inasmuch as (section 4991), the filing of a petition for adjudication either by or against a debtor is deemed the commencement of proceedings in bankruptcy, so as to cause the case to be pending, it follows, that the court in which a composition proceeding is properly pending has a right to enjoin the creditors from harassing the debtor so long as his composition proceeding is going on. As the proceeding in composition is a proceeding in bankruptcy, the court has not only (section 563) original jurisdiction of the proceeding, but (section 711) jurisdiction of it exclusive of the courts of the several states. Such jurisdiction extends (section 4972) to the close of the composition proceeding. The close of such proceeding is not necessarily, nor is it ever, the order of the court that the resolution of composition be recorded. Even where the composition is all to be paid in money at one time, a few days after the making of such order are necessarily allowed for such payment. But there are many cases like the present one. Here, one-third of the composition is to be paid by April 9th, 1877, one-third on May 18th, 1877, and one-third on August 18th, 1877. The creditors have given this time to the debtor. Until such time expires the debtor is not bound to make his payments. Until then the composition is still pending, because, until he shall fail to make the payments, it cannot be determined whether the composition will or will not fail. The debtor is entitled to be protected against suits on the original debts until such time arrives, in equal measure with his title to be protected before the resolution of composition was passed or confirmed. The debtor cannot, until such time arrives, use his composition proceedings as a shield against the original debts, in suits to be brought or pending either by him or against him. Therefore, in the meantime, the court of bankruptcy must protect him by injunction. But the debts to which an injunction can extend are only the debts to which a composition can extend, that is, unsecured debts, or debts in respect to which any security has been surrendered or given up.

I am of the opinion, therefore, that the debtor is entitled to an injunction to restrain these four creditors from bringing or further prosecuting any suits against him in respect to unsecured debts the amounts of which are set forth in his filed statement, until the 18th of August, 1877. There is no objection to an order giving leave to the debtor to deposit in this court the money and notes to which these four creditors are now entitled under the resolution of composition.

[See Case No. 6,525.]

HIPKIN (UNITED STATES v.). See Case No. 15,371.

HIPKINS (FRANKLIN BANK v.). See Case No. 5,056.

Case No. 6,527.

The HIRAM.

[2 Gall. 60.] [1]

Circuit Court, D. Massachusetts. May Term, 1814.[2]

PRIZE CAUSES—APPORTIONMENT OF COSTS.

Of the rule for apportionment of costs among the several claimants in prize causes.

Some inquiries were made at the bar respecting the apportionment of costs in these cases, which were prize causes, among the several claimants of the ship and cargo.

STORY, Circuit Justice. In taxing the costs in prize causes, where there are several claims, some of which are disposed of by a final decree of condemnation, while others stand suspended upon appeal, the practice has been to tax the costs and expenses, which have accrued specially upon each claim so finally disposed of, as a separate charge against the same, and to add thereto an average proportion of the general costs and expenses, which have accrued in reference to all the claims in the cause. In this manner all parties are made to bear a reasonable proportion of all charges, according to the final event of their particular claims.

[NOTE. The decree of condemnation in this case was affirmed by the supreme court in an opinion by Mr. Chief Justice Marshall, who said that sailing under an enemy's license is cause of confiscation. In such cases the knowledge of the agent will affect the principal, although he be ignorant of the fact. 1 Wheat. (14 U. S.) 440.]

HIRAM, The (HOOPER v.). See Case No. 6,675.

HIRAM PERRY, The. See Case No. 9,019.

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

[2] [Affirmed in 1 Wheat. (14 U. S.) 440.]

Case No. 6,528.

In re HIRSCH et al.

[Cited in Re Henderson, 9 Fed. 198. Nowhere reported; opinion not now accessible.]

Case No. 6,529.

In re HIRSCH.

[2 Ben. 493;[1] 1 Am. Law T. Rep. Bankr. 92; 2 N. B. R. 3 (Quarto, 1).]

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

INJUNCTION—ATTACHMENT—JURISDICTION.

1. Where, previous to the passage of the bankruptcy act [of 1867 (14 Stat. 517)], an attachment had been issued out of the supreme court of the state of New York against the property of H., who made a motion to set aside the attachment, which was denied, and he appealed from the order denying his motion to the general term of the court, but the plaintiffs in the suit in the meantime proceeded to judgment and execution, under which funds levied on under the attachment had been paid to the sheriff and by him paid to the judgment creditor, so that, at the time of the passage of the bankruptcy act, no proceeding was pending in that suit except the appeal from the order above mentioned, and thereafter the judgment debtor filed his petition in bankruptcy and obtained an order from the bankruptcy court that the creditors show cause why they should not be restrained from enforcing their claim, with a stay of proceedings meantime, and before the order to show cause was returnable, the appeal in the state court above referred to, was called in its order and dismissed by the plaintiffs' attorney, he having had notice of the stay granted by the bankruptcy court, and a motion was thereupon made for an attachment against the judgment creditor and his attorney for disobedience of the stay: *Held*, that as that appeal, if successful, would not have affected the judgment which had been recovered against the bankrupt, or replace the money which had been paid to the creditor, or give the assignee in bankruptcy any right which he would not otherwise possess, the dismissal of the appeal could not be said to be a violation of the order of this court forbidding proceedings to enforce the plaintiffs' claim.

2. Whether a bankruptcy court has power to enforce the protection of the bankrupt against suits pending outside of the district, and brought by parties residing and being outside of the district, or how obedience to its orders is to be enforced outside of the district, Quere.

[Cited in Paine v. Caldwell, Case No. 10,674.]

This was a motion for an attachment against George Kretz, and Titus Eldridge his attorney, for a contempt, in disregarding an order of this court made in the above-mentioned bankrupt proceedings. The facts were as follows: The petition of the bankrupt [Francis A. Hirsch] was filed in the Eastern district of New York on the 22d day of May, 1868, and, upon the same day, the petitioner was declared a bankrupt. The proceedings in bankruptcy thereupon proceeded and were still pending, the bankrupt not having as yet received his discharge, and no assignee having as yet been appointed. Prior to any of these proceedings, and prior to the passage of the bankruptcy act, George Kretz and a Dupont Davis had commenced an action against the bankrupt in the supreme court of the state of New York, and obtained an attachment against his property, by virtue of which a certain amount of money in the Bank of America, in the city of New York, had been attached. A motion was thereupon made in behalf of the bankrupt, in the state court, to set aside the attachment, which motion, at the time of the commencement of the bankruptcy proceedings, was pending before the general term of the supreme court, in the city of New York, upon an appeal taken by the bankrupt from an order denying the motion to set aside the attachment. The bankrupt thereupon applied to this court for an injunction to restrain further proceedings in the action in the state court and obtained an order directing the plaintiffs in that action to show cause, before this court, why all proceedings on the part of the said creditors to enforce the payment of their said claim, either by proceedings in the action aforesaid or otherwise, should not be stayed to await the determination of this court in bankruptcy on the question of the discharge of said bankrupt, and that, meanwhile, all proceedings of said plaintiffs to enforce the payment of their claim be stayed. Before the return day of this order, it happened that the appeal was called in its order upon the calendar of the state court, and was then dismissed by the plaintiffs' attorneys after notice of the stay granted by this court. This motion was made for an attachment against the creditors and their attorney for a contempt of this court in violating the stay.

BENEDICT, District Judge. The difficulties surrounding this proceeding, which were suggested to counsel upon the original application, and which impelled me to issue an order to show cause, with a stay meanwhile, instead of a peremptory injunction, have not been removed by the argument which has been had. There is certainly difficulty in holding that any provision of the bankruptcy act confers upon this court the power to issue an injunction which shall run into all the states in the Union, and be effective to stay proceedings which may be pending against the bankrupt in any court of any state. According to the theory of the judiciary act [1 Stat. 73], the jurisdiction of the district courts is limited to their respective districts. According to the theory of the various laws relating to the federal judiciary, the jurisdiction of the district courts is limited to their respective districts. The jurisdiction conferred upon these courts by the bankruptcy act is indeed an extended one, for the proper exercise of which it would seem necessary, in certain cases, that the orders of the bankruptcy court should run throughout the United States; but it is certainly difficult to affirm that this extended

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

power has been conferred by any of the provisions in the bankrupt law. If, however, it can be held that this power is necessary to the exercise of the jurisdiction expressly conferred, and therefore to be implied, and that when the bankrupt has surrendered all his property to a district court, before which alone his proceedings in bankruptcy can be considered to be pending, he has the right to look to that court for the protection against suits, pending the adjudication upon his petition, which the act expressly declares that he shall have, and which it is not easy to see that any other court can grant, and that every creditor of the bankrupt, wherever he may be, is a party to the proceedings under the petition, and therefore subject to the orders of that court, whether served in or out of the judicial district in which the petition was filed, still another difficulty arises in regard to the method of enforcing obedience to such orders by parties residing and being out of the judicial district, which is the present case. If an attachment be issued, to whom shall it be directed? I find no authority conferred upon this court to issue process to the marshal of any other district, directing him to arrest those persons and bring them before this court. In criminal cases, the practice in regard to delinquents out of the district is regulated by the 33d section of the judiciary act (1 Stat. 91), where it is provided that, for any crime or offence against the United States, the offender may be arrested wherever he may be found; and, if such arrest is within a district other than that in which the offence is to be tried, the judge of the district where the delinquent is arrested issues his warrant to the marshal of his district, directing the removal of the delinquent to the district where the trial is to be had. It might be that upon an attachment for contempt being ordered, the proceedings could be considered as thenceforth a criminal proceeding, and so the offender brought before the judge of the district where the arrest might be made, and then transferred to this court under the provisions of the judiciary act. But if not, then I do not see how this court can do more than issue its writ to the marshal of the district, to be executed only within this district. Such a proceeding, however, in this, as in most cases, would be entirely futile and unavailing as a means of enforcing the orders of the court, for the offenders do not reside in the district, and there is no evidence that they can ever be found therein. These difficulties I am not, however, required to solve in the present case by means of the facts shown upon the return of the order to show cause, for it appears that prior to the commencement of the action in the state court, the bankrupt had, by a general assignment, transferred all his property to an assignee for the benefit of his creditors. The money in the Bank of America would therefore pass to this assignee, if not bound by the attachment which was subsequently issued upon the commencement of the action in the state court, and would in no event pass to the assignee in bankruptcy when appointed. The action of the state court, moreover, as it now appears, had proceeded to judgment before the passage of the bankruptcy act, and the money attached in the bank had been paid to the sheriff, and by him paid to the plaintiffs upon the judgment and execution issued thereon, so that at the time of the commencement of the bankruptcy proceedings the only proceeding pending in the state court was an appeal taken by the bankrupt from an order denying a motion to set aside the attachment, and this appeal, if successful, would in no way affect the judgment which has been recovered in this action, nor would it retake from the plaintiffs the money received from the bank, nor would it give the assignee in bankruptcy any right which he would not otherwise possess. It therefore seems clear that no action of the plaintiffs in regard to this appeal would tend to enforce any demand against the bankrupt, nor deprive the assignee in bankruptcy of any property or right. When, therefore, the appeal being called upon the calendar for argument, the plaintiffs dismissed it for want of prosecution, the counsel for the bankrupt being present and not desiring to proceed, they cannot be said to have disobeyed the order of this court, which forbade all proceedings to enforce their said claim. The motion must, therefore, be denied.

Case No. 6,530.

In re HIRSCHBERG.

[2 Ben. 466;[1] 1 N. B. R. 642 (Quarto, 195); 1 Am. Law T. Rep. Bankr. 123.]

District Court, S. D. New York. June 20, 1868.

ATTORNEY'S COSTS UNDER SECTION 28 OF THE BANKRUPTCY ACT.

Where attorneys of a voluntary bankrupt presented and proved a claim for legal services in preparing the petition and schedules, and advice in relation to it, and for disbursements: *Held*, that no part of it was a debt to be paid in full, under the twenty-eighth section of the bankruptcy act [of 1867 (14 Stat. 530)].

[Cited in Barnes v. Rettew, Case No. 1,019; Re Comstock, Id. 3,074; Re Jaycox, Id. 7,239; Re Gies, Id. 5,407; Re Elmendorf, 9 Fed. 546.]

By the Register:

[I, Isaiah T. Williams, one of the registers in said court in bankruptcy, do hereby certify, that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the respective parties, to wit: Mr. Henry Morrison, who appeared for the bankrupt [Louisa Hirschberg], and Mr. Albert Smith,

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

who appeared for the assignee appointed by the creditors of the said bankrupt, who requested me to certify the same to the judge for his decision. The bankrupt filed her petition on the 28th day of January, 1868, and was adjudicated bankrupt on the 29th of the same month. Her schedules show trade debts to the amount of $1,563.32, of which debts to the amount of $1,073.47 have been proved. The assets of the estate after the assignee's and other expenses have been paid, show a balance of $182.29, to divide among the creditors. In addition to the debts above mentioned, the bankrupt has inserted in schedule A, No. 1, the following as a debt to be paid in full, according to the provisions of the twenty-eighth section of the act: "Morrison, Lauterbach & Spingarn, New York City, attorneys, $250 in January, 1868, for legal services in preparing the petition and schedules and advice in relation thereto." Messrs. Morrison et al. have filed satisfactory proof of their said claim.

[To this claim the creditors and their assignee object, on the ground that the bankrupt ought to find means to pay the expenses of her bankruptcy proceedings from other sources, and that the claim is not for fees and expenses of suits, and the several proceedings in bankruptcy under the act, within the meaning of the twenty-eighth section of the act. On the other hand, it is insisted that the only unobjectionable course that lay open to them was, to put in their claim for services in filing the petition, &c., and disbursements in the bankruptcy proceeding as a preferred debt. The bankrupt having no means of paying them, except out of the property which she was bound to surrender to her creditors, they were bound, in fairness, to deliver all up in the first place, and then claim to be paid for their services and disbursements therefrom. They further state that their disbursements in the matter have been over $100, and that so far at all events, whatever may be said as to their claim for services, their claim is for costs in the proceedings, allowed priority by the twenty-eight section of the act. It occurs to the register to remark, that the conduct of Messrs. Morrison, Lauterbach & Spingarn in the matter seems to have been conscientious, perhaps more so than the course ordinarily pursued by solicitors in such cases. It is clear that the funds from which the solicitor is paid, must come from what should be the assets of the bankrupt, or from his future earnings. In pursuing the course here pursued, the solicitor submits the amount of his compensation to the court under the eye of the creditors. In the course ordinarily pursued he obtains his compensation from the same fund, the amount being measured by the good feelings of the bankrupt, and under some temptation to give him a larger sum than the creditors would sanction, or the court might think a just compensation. If the act will bear this construction, it would seem to tend to a better practice than that which it is believed now generally prevails.] [2]

BLATCHFORD, District Judge. I do not think that the claim in question, or any part of it, even to the extent of the disbursements embraced in it, is a claim to be paid in full, under section 28 of the act. The fees, costs, and expenses, named in the first of the five subdivisions, in section 28, are those incurred by, and due to, the register, clerk, assignee, and marshal, and not those incurred by the bankrupt, or due to his attorney in the proceedings, for services or disbursements in connection with such proceedings.

HIRSCHFIELD (UNITED STATES v.). See Case No. 15,372.

Case No. 6,531.

HISCOCK v. JAYCOX et al.

[12 N. B. R. (1875) 507.] [1]

District Court, N. D. New York.

MARRIED WOMAN—DOWER—MORTGAGE—SUBROGATION—REAL ESTATE AS PARTNERSHIP ASSETS.

1. A feme covert, by charging her inchoate right of dower for her husband's benefit, does not thereby become a surety for him.

2. An agreement that a feme covert is to be compensated for a release of her contingent right of dower is not to be implied.

3. Where real estate is covered by a mortgage, the inchoate dower attaches to the equity of redemption only.

4. If the holder of a note the indorser of which is secured by a mortgage, proves the note as unsecured, this does not extinguish the mortgage, for the assignee is thereupon subrogated to the rights of the holder.

[Cited in Starks v. Curd, 88 Ky. 164, 10 S. W. 420.]

5. The intent to consider real estate partnership assets may be implied from the fact that the losses in the transaction are to be sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm.

6. When real estate is impressed with the character of personalty, the onus is on the party who alleges that it has lost that character, to show, not only that the partnership creditors have been paid, but that, as between themselves, the accounts of the partners have been settled.

7. A feme covert is not entitled to dower in real estate which was held as partnership assets.

[This was a suit by Frank Hiscock, assignee, etc., against Mary C. Jaycox and Frances Green.]

Frank Hiscock and William C. Ruger, for assignee.

Geo. F. Comstock and A. H. Green, for defendants.

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[2] [From 1 N. B. R. 642 (Quarto, 195).]

[1] [Reprinted by permission.]

WALLACE, District Judge. The complainant, as assignee in bankruptcy of Jaycox & Green, brings this action to determine the validity and extent of the rights of the defendants to dower in the real estate of the bankrupts. Of this real estate, the largest portion in value is alleged by the assignee to have been partnership assets of the bankrupts, as to which no dower interests exist; other portions belonged to the bankrupts individually; and a large part of that owned by the bankrupts jointly, and all of that owned by them individually, was, at the time of the filing of the petition in bankruptcy, subject to a mortgage, executed by Jaycox & Green and their wives, the defendants, to George F. Comstock, to secure him against liability as indorser for the firm upon negotiable paper made, or to be made, by them. At the time of the adjudication in bankruptcy Comstock was charged as indorser upon paper of the firm to the extent of ninety-five thousand dollars. After the adjudication, the holders of the notes indorsed by Comstock, and secured by the mortgage, proved them as unsecured claims against the bankrupt estate. Subsequently, upon the application of the assignee in bankruptcy, and upon notice to Comstock and the defendants in this action, the district court authorized the assignee to sell the real estate at public or at private sale, free from the lien of the mortgage, and discharged from the dower interests of the defendants, transferring such liens and interests to the fund to arise from the sale. Finally, upon the consent of Comstock and of the defendants, and with the approval of the court, the assignee conveyed the mortgaged real estate to Comstock, in satisfaction of a number of the notes which had been proved against the estate, thus relieving the estate from claims against it to the extent of sixty-three thousand dollars; and by the order sanctioning this conveyance, the rights of the defendants were transferred to and made a lien upon the general fund in the hands of the assignee.

Upon these facts, and others which will be adverted to hereafter, several questions arise, which may be most conveniently considered in the following order:

First. What is the character and extent of the defendants' rights, assuming that their dower interests attached to all the real estate? Under the stipulation of the parties the defendants are to be treated as though they were creditors of the bankrupts to the extent of their rights, and the amount due them is to be enforced as a lien on the fund in the hands of the assignee. It is insisted on their behalf, that inasmuch as their dower interests have been sold to satisfy their husbands' debts, they are entitled to be treated as sureties who have paid the debt of their principals, and permitted to enforce a lien for the full value of their original dower interests. To sustain this position, it is necessary to maintain that a wife who joins with her husband in a mortgage of his real estate, for his benefit, is, in respect to her inchoate dower interest, a surety for the husband. It has long been settled, that when a wife pledges her separate property for the husband's debt she becomes a surety in respect to the debt, and entitled to enforce all the rights of a surety; and it is not to be denied that her inchoate dower interest in her husband's lands is a valuable right, which may be the subject of a contract between her and a purchaser, that will be enforced for her separate benefit. Thus, a note given by a purchaser as a consideration to the wife for uniting with her husband in the conveyance of the husband's land to the purchaser, becomes her separate property. Nims v. Bigelow, 45 N. H. 343. It does not follow, however, that her dower interest is in such sense her separate property as that her contracts with her husband in regard to it are to be treated as those of a feme sole. No case has come under my observation, where an agreement between husband and wife, made upon the consideration of her release of dower to the husband, has, while executory, been enforced. In nearly all the cases a third person has intervened in the contract between the husband and wife (3 Paige, 440; [Sykes v. Chadwick] 18 Wall. [85 U. S.] 141), and in the others the agreement had been executed. The character of the interest is inconsistent with that of separate property. It is not the subject of grant or assignment; it originates in the husband's seizin, and she cannot, without the husband's consent, separate it from his estate in the land (Marvin v. Smith, 46 N. Y. 571); and it is not her separate estate within the meaning of the statutes which permit a married woman to deal with such estate as a feme sole (Sykes v. Chadwick, 18 Wall. [85 U. S.] 141–145). The proposition, that by charging it for her husband's benefit she becomes a surety for him, is not correct, because she does not thereby charge her separate estate. The relation, as between them, rests on the doctrine that she is as competent in equity to contract with her husband in reference to her separate estate as a feme sole is (Hudson v. Carmichael, Kay, 613), or, as expressed by Lord Camden (Earl of Kinnoul v. Money, 3 Swanst. 202): "As to the transaction the court regards the marriage as dissolved;" and hence the same implication arises between them as arises when a stranger pledges his property for another's debt. In the release of her dower, can it be said the court will regard the marriage as to that act dissolved, when the subject of the release is a right which not only owes its origin, but its future existence, to the marriage relation? But it is unnecessary to rest the denial of the proposition contended for upon technical reasoning. If it should be conceded that an agreement may be made between husband and wife, whereby she is to be compensated for a release of her dower.

such an agreement is not to be implied (Hall v. Hall, 2 McCord, Eq. 269); and her rights as surety when she mortgages her separate estate for the husband's debt, arise from the implied assumpsit which springs from the transaction. If there is no implied assumpsit there is no suretyship. If, by joining with her husband in a mortgage on his lands for his debt, the relation of principal and surety arises, she would be entitled to require his interest in the land to be first sold on the foreclosure; as in the case where she mortgages her own land for his debt she may require his interest as tenant by courtesy to be sold in the first instance. Neimcewicz v. Gahn, 3 Paige, 614. The exercise of this right would introduce an innovation in foreclosure sales, and would defeat the main object for which, according to common understanding, the wife joins in the execution of the husband's mortgage, viz., in order that a perfect title may be obtained if it becomes necessary to foreclose. In conclusion, the fact that the doctrine now contended for on behalf of the defendants has never been advanced in any of the adjudicated cases is of itself a cogent argument against its existence.

It follows, that the rights of the defendants were, at the time the real estate vested in the assignee, simply those of inchoate dower interests. So far as they relate to the real estate covered by the mortgage to Comstock, these interests were, in the most liberal view of inchoate dower interests, in the equity of redemption only; the surplus standing in the place of the land after enough has been carved out to pay the mortgage debt.

Second. It is insisted for the defendants, that the mortgage to Comstock has been extinguished by force of the proceedings had in bankruptcy subsequent to the adjudication, and consequently that their dower interests attach to the entire proceeds of the land mortgaged. This argument proceeds upon the assumption, that when the holders of the notes secured by the mortgage proved the notes as unsecured debts against the estate in bankruptcy, as to them the mortgage was extinguished; and while it may have been kept on foot to protect Comstock as indorser for such sum as he might be called on to pay upon the notes, when the land was conveyed to him, the mortgage was extinguished as to him. The argument is inconclusive, because, if the premises are correct, it does not follow that the mortgage has ever been extinguished as to the assignee. If the owners of the notes were in equity the owners of the mortgage, by proving their notes as unsecured debts their lien was transferred to the assignee. When the assignee's title vested in the real estate of the bankrupts, the land mortgaged was, as between the assignee and the owners of the mortgage, the primary fund for the payment of the mortgage debt. The owners of the mortgage had no right to call on the general estate in bankruptcy for the payment of the mortgage debt; they could not be admitted as creditors, except for the balance of their debt after deducting the value of their lien. This being so, if the assignee, instead of permitting the owners of the notes to prove them against the general estate, had taken the funds in his hands and paid the holders of the notes in full, he would not have thereby extinguished the mortgage, but the payment would have been deemed in equity a purchase. The general estate, being secondarily liable, would have been substituted in equity to the mortgage security, when its funds were appropriated to the payment of the mortgage debt, for which, as against the general creditors, the land was the primary fund. Where, as in the present case, the payment was not voluntary by the assignee, equity imperatively demands that he should be substituted in the security held by the owners of the notes. The owners of the notes having two funds—the mortgaged property and the estate in bankruptcy—while the general creditors, whom the assignee represents, had but one, have resorted exclusively to that one to which alone the assignee could resort; and upon familar doctrine in such case the latter is entitled to be substituted in the rights of the former, and the mortgage is deemed alive for all the purposes of the assignee's protection. Hunt v. Townsend, 4 Sandf. Ch. 510; Besley v. Lawrence, 11 Paige, 581; Eddy v. Traver, 6 Paige, 521.

I have thus far considered the question without reference to the cases which hold, that by the terms of the bankrupt act [of 1867 (14 Stat. 517)], when a secured debtor proves his debt as unsecured, such proof operates as a relinquishment of the security to the assignee. Without questioning the correctness of these decisions, I prefer to rest my conclusions upon the general principles of equity jurisprudence, which are applied, in all their vigor, in the marshaling of assets and the administration of estates in bankruptcy. If, at the time the real estate was sold, the assignee was the equitable owner of the mortgage to the extent that the holders of the notes would have owned it if they had not proved their notes, Comstock was certainly the owner of any remaining interest in the mortgage. The mortgage then was an existing security to the full extent of the mortgage debt. The sale did not change the rights of the parties; it merely transformed the land into money, leaving the rights of all parties precisely as they were before. The lien of the mortgage being the first on the land became the first on the fund, and the rights of the defendants do not attach to it, until enough has been realized from it to satisfy the mortgage. As it is conceded that only about seventy thousand dollars was realized from the sale of the real estate in bankruptcy, while the paper for which the mortgage was security, and on which Comstock was charged as indorser,

was of larger amount, it follows that the defendants have no interest in the land covered by the mortgage to be enforced as a lien upon the general fund.

Third. It remains to determine whether certain real estate not covered by the Comstock mortgage was subject to dower interests of the defendants. It is insisted for complainant, that this real estate was partnership assets of the bankrupts, and inasmuch as the partnership accounts and debts have never been settled, no dower interests have attached. Jaycox & Green became partners in 1851 as dealers in merchandise. In 1853–4 they purchased jointly the real estate in question now, taking conveyances upon the face to themselves as tenants in common. Of this real estate one portion was purchased partly with individual funds, and partly with funds of the firm; it was bought upon speculation, to be subdivided and sold; money was advanced from firm funds to purchasers for the building of houses; the proceeds of sales were paid into the funds of the firm, and used in their business, and any losses that might occur were to be sustained by firm funds; a large portion of this is now held under contracts by purchasers, for which deeds have not been executed. Another portion was purchased to secure a debt owing to the firm, the firm paying its funds for the remaining consideration money. After these purchases, the firm was reorganized by the introduction of new members, at which time the assets of the new firm were inventoried, and the real estate was not included in the inventory. Moneys received from sales and for rent of the real estate were paid into the new firm, and credited on the books to the old firm. None of the real estate now under consideration was used in the mercantile business of the original firm, or of the new firm. The second firm was reorganized, and a third formed, and this was reorganized, and a fourth formed; during these changes Jaycox & Green remained members of each firm, and at the dissolution of the fourth firm its assets were transferred to them, and they continued sole partners until their bankruptcy. The debts of each firm, except those of the bankrupt firm, have been paid in full. It does not appear whether or not the accounts of the partners have been paid, or adjusted as between themselves.

Upon these facts, which are all that I deem material, the question arises whether the real estate was, at any time, partnership assets; and if so, whether it has, at any time, ceased to be such, so that the dower rights of the wives attached. Where real estate is purchased by partners with partnership funds, from the moment of its acquisition it is impressed with the trusts created by the intention of the parties in respect to the purchase; and will be regarded in equity, as realty, or as personalty, according to the intention of the purchasers. If the purchasers intended that the real estate should be used or held for the purposes of the partnership, it will be deemed in equity partnership assets. The intent may be implied from the subsequent acts of the parties in regard to the subject of the purchase. And it will be presumed that the parties intended to treat the real estate as partnership assets, if it was subsequently subjected to the uses of the partnership business. But, according to the weight of authority, the mere fact that the purchase was made with firm funds will not render the land partnership property; but such a purchase will simply give rise to a resulting trust, under which the parties will prima facie take equal moieties, unless it appears that they contributed unequally to the consideration. These propositions are clear upon the authorities.

But this case presents a feature which is exceptional, and a question which is not clear upon the authorities. The real estate, though purchased with the funds of the firm, was not purchased for the mercantile business of the partners; but it was purchased as a speculation, in which the capital was to be derived from, and the losses were to be sustained by, the assets of the mercantile firm, and the profits which might accrue were to augment the capital of the mercantile firm. Is not the intent of the partners to consider the real estate partnership assets, as clearly to be implied from these facts, as it would be if it appeared that subsequent to the purchase they used the real estate corporeally for partnership purposes? I think it is.

Were it not for the statute of frauds, it would be competent for the parties to a purchase of real estate, to impress the real estate with any trust as to its disposition which they might desire, and to do so by parol agreement. The doctrine of resulting trusts is invoked to escape the operation of the statute, where the purchase is made with joint funds; in which case, as the trust is implied, it is not within those which by the statute must be declared or manifested in writing; and it may be shown by parol. Suppose a case, then, where two contribute in equal proportions to a purchase of real estate, upon the verbal agreement that it shall be sold and the proceeds invested in a mercantile business in which the parties are engaged, and subjected to the losses that may arise in that business. Is there any reason, when the trust arises by the investment of joint funds, and may be shown by parol proof, why the extent and incidents of the trust may not also be shown by parol? Where a mercantile firm purchases for mercantile uses, it is competent to show by parol the interests of the respective partners, and the state of the firm indebtedness, in order to define the extent of the trust which such a purchase impresses on the land. If the objection, in the case supposed, rests upon the interdiction of the statute of frauds, it

would equally apply in the case of a purchase by a mercantile firm. As said in the note to Dyer v. Dyer, 1 White & T. Lead. Cas. Eq. 348: "When it is once settled that payment of the purchase money raises an equity and a trust which override the deed, the practice in reason and conscience ought to be, to admit all legal evidence that can explain, define, and determine the equity." If such evidence is competent, then the proof here that the parties purchased the real estate in question to deal with it as a commodity, and to subject its proceeds to the contingencies of their mercantile business, fastened a trust upon the real estate commensurate with that intention. And upon principle, where two persons purchase real estate with joint funds, intending to deal with it as a commodity, and to share the profits or loss which may arise after it is converted into money, they are partners as to the transaction, and their intention to treat the real estate as personalty, converts it into personalty in equity, until the purposes of the partnership have been fulfilled. By the statutes of this state relating to trusts, an implied trust is not permitted to arise from the payment of joint funds, where, by the agreement of the parties, the conveyance is taken in the name of one of them only; but, with this exception, there is no reason why equity should not enforce the intention of joint purchasers with joint funds to deal with the real estate purchased as personalty, and impress upon it the partnership trusts with the parties contemplated. The cases of Ludlow v. Cooper, 4 Ohio St. 1, and Kramer v. Arthurs, 7 Barr [7 Pa.] 165, countenance this conclusion.

These views must control the rights of the parties as to that portion of the real estate in question which was purchased in part with individual funds, and in part with the firm funds of the bankrupts, upon speculation, to be subdivided, sold, and the profits or losses divided between them. As it was not used, or designed to be used, for their mercantile business, the fact that it was bought in part with individual and in part with firm funds, would not, according to the weight of authority, in the absence of other evidence, imply their intention to consider it as firm assets. But their intention to deal with it as personalty, and as partners, is clearly established; and this court must regard it as personalty until the satisfaction of all the trusts which have been impressed upon it.

As to that portion of the other real estate, which was purchased in part to secure a firm debt, and in part with firm funds, upon the authority of Buchan v. Sumner, 2 Barb. Ch. 165, which is approved in Collumb v. Read, 24 N. Y. 505, I should have no hesitation in holding it to be partnership property, were it not that here the firm debt was but a part of the consideration, and not the whole, as in Buchan v. Sumner; and the payment of the balance with firm funds, in the absence of any intent to use the land for the mercantile business, of itself would not indicate the intent of the purchasers to constitute it partnership assets. It appears, however, that the rent received from this real estate was credited in the firm accounts in the same manner that moneys arising from the mercantile debts of the original firm were credited; and in view of the fact that real estate speculations of the firm were frequent and extensive, it may fairly be assumed that they regarded themselves as partners in all the transactions where they purchased together.

As the real estate in question was impressed with the character of personalty, the onus is on the party who alleges that it has lost that character, to show, not only that the creditors of the partners have been paid, but that as between themselves the accounts of the partners have been settled. Until this has been done the land remains partnership assets. Dyer v. Clark, 46 Mass. [5 Metc.] 562; Goodburn v. Stevens, 1 Md. Ch. 420; Tillinghast v. Champlin, 4 R. I. 173–207; Buchan v. Sumner, 2 Barb. Ch. 165. If it appeared that the accounts between the partners had been satisfied, the real estate would have resumed its original character as realty, and the dower interests of defendants would have attached; and the debts of the new firm could not be satisfied from the real estate to the prejudice of the dower interests.

It only remains to consider the rights of the defendants as to the real estate described in Schedule I, annexed to the bill. As to this, there is nothing to show that it was to be held by the bankrupts otherwise than as tenants in common with Allen Munroe; it does not appear that it was purchased with joint funds, and the defendants' dower interests attached to it. A decree is directed, that the defendants have neither of them any claim against the bankrupt estate, or any lien on the fund in the hands of the assignee, aside from the value of their respective dower interests in the real estate described in Schedule I, annexed to the bill. And it is referred to D. F. Gott, Esq., register in bankruptcy, as master pro hac vice, to compute and report the sum due defendants by reason of such interests. Upon the coming in of his report, the decree will be settled upon three days' notice by either party, and the question of costs is reserved until that time.

[For other cases treating of rights of creditors whose claims are secured by mortgage, see In re Jaycox and Green, Cases Nos. 7,240 and 7,242.]

HITCH (ALLEN v.). See Case No. 224.

HITCH v. JORDAN. See Case No. 13,068.

HITCHCOCK v. The CLYTIE. See Case No. 2,913.

Case No. 6,532.

HITCHCOCK et al. v. GALVESTON.

[2 Woods, 272;[1] 2 Cent. Law J. 331.]

Circuit Court, E. D. Texas. Dec. Term, 1874.[2]

ENTIRE CONTRACT—BREACH—NEGOTIABLE COUPON BONDS—POWER OF CITY TO ISSUE.

1. Parties entered into a contract with the city council of Galveston, whereby they agreed to fill, grade, tamp, roll, and curb certain specified sidewalks, and to lay down and fabricate thereon an asphalt pavement, and to obtain the written consent of the owners of lots abutting on said pavements, to the laying of said asphalt pavement. Without obtaining such consent, the contractors proceeded to fill, grade, etc., the sidewalks, but before completing the work preparatory to the laying of the pavement, they were forbidden by the city authorities from going on with the work, and the contract was repudiated by the city. In a suit brought by the contractors to recover for the work actually done, and also damages for the breach of the contract by the city, *held*, that the contract was entire; that the obtaining of the consent of the property holders to the pavement named was a condition precedent, to be performed before any work was done, and there could be no recovery in the action unless it was averred and shown that such consent had been obtained.

[See note at end of case.]

2. A municipal corporation has not inherent power to issue negotiable coupon bonds which shall circulate as commercial paper, and be unimpeachable in the hands of a bona fide holder.

[Cited in Hopper v. Town of Covington, 8 Fed. 779.]

3. A city was authorized by its charter to exact the cost of sidewalk improvements from the owners of abutting lots to be collected by assessments on the property; to raise money for general and special purposes by taxation; and to issue bonds for a single purpose which was not sidewalk improvements: *Held*, that these provisions of the charter excluded the power to issue negotiable coupon bonds to pay for sidewalk improvements.

This cause was tried on the defendant's demurrer to plaintiffs' petition. Under the system of pleading which prevails in Texas, much of the evidence on which plaintiffs relied to sustain their cause was set out in the petition. The case as made by plaintiffs' petition was substantially as follows: On February 28, 1874, the plaintiffs, as partners, entered into a contract in writing with the city of Galveston, by which they agreed, for a compensation therein named, to fill, grade, tamp, roll, curb and pave certain sidewalks in the city of Galveston. This contract was made in behalf of the city by the mayor and the chairman of the committee of the common council on streets and alleys, by virtue and in pursuance of certain ordinances of the city council. The plaintiffs, the petition averred, immediately after the execution of the contract, entered upon the performance of the work, and continued it, at great labor and expense, for forty days, when they were compelled by force and the power and authority of the defendant, to desist from and abandon the work, and, although always ready and anxious to perform the said contract and complete said work, have ever since been wrongfully and willfully forbidden and prevented by the defendant from so doing. The work done by the plaintiffs at the contract price was worth $18,194, and the profits on the unfinished portion of the work, not including the paving, would have been $127,990.57. For the aggregate of these two sums, to wit, $146,184.57, and for $50,000 general damage, the plaintiffs asked judgment. The petition set out as exhibits, and as a part of itself, the contract in full and the several ordinances of the city council, by authority of which it was claimed the contract was made. It was also averred, in an amended petition, that after its execution by the mayor and chairman of the streets and alleys committee, the contract was approved and ratified by the action of the city council.

It appeared from the exhibits to the petition that, by the contract upon which the suit was brought, the city of Galveston bound itself to pay to the plaintiffs, under the name of D. G. Hitchcock & Co., in the bonds of the city of Galveston, styled "Galveston City Bonds for Sidewalk Improvements," to be taken at par, a named rate for every square yard of pavement laid down by the plaintiffs upon certain sidewalks designated in the contract; said pavement to be composed of asphalt in bulk, rolled solid to the thickness of three inches: "provided, however, that the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting on said sidewalks to the laying down of the said pavement, which written consent or selection of the said pavement shall be filed in the mayor's office with the city clerk." The contract further bound the city to pay to the plaintiffs in the same bonds to be taken at par, a specified price for the filling necessary to be done, preparatory to the laying of the pavement, under which term of "filling" were included grading, tamping and rolling; also, a specified price for the wooden curbing that might be needed or used in filling up and grading the said sidewalks preparatory to the putting down of the pavement. The contract, after thus specifying the work to be done and the prices to be paid therefor, proceeded as follows: "In consideration of all the foregoing, the said D. G. Hitchcock & Co. bind themselves to lay down and fabricate the said pavement in the manner and style above set forth and stipulated; and they also bind themselves to fill, grade, tamp, roll and curb the said sidewalks as above set forth and stipulated, and to receive in payment for all said work the respective prices above stated, and in the bonds of the city of Galveston, styled 'Galveston City Bonds for Sidewalk Improvements,' at par." The charter of the city of Galveston is a public act of the legislature of Texas. In section 8 of article 3 of title 4, it is provided that the city council shall have power "to establish,

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

[2] [Reversed in 96 U. S. 341.]

erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and crossings. * * * The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk, and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot or part of lot or block on which it fronts, together with the cost of collection, in such manner as the city council may, by ordinance, provide, * * * and the balance of the proceeds of sale, after paying the amount due the city and costs of sale, shall be paid by the city to the owner." Section 2 of the same article and title declares that the city council shall not borrow, for general purposes, more than $50,000. Section 3: That the city council shall have power "to appropriate money and provide for the payment of the debts and expenses of the city." Section 4: That the city council shall have power "to provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created." The ordinances set out in the petition as authority, by virtue of which the contract sued on was made, were two ordinances, approved August 19, 1873; an ordinance approved October 21, 1873, and an ordinance approved February 3, 1874. The first ordinance, approved August 19, 1873, authorized and directed the mayor and chairman of the committee on streets and alleys "to make a contract or contracts with proper and responsible parties, to fill up, grade and pave the sidewalks on both sides of the hereinafter named streets, and to curb the same; and for this purpose they were directed to advertise for the period of thirty days for bids or proposals to fill up, grade, pave and curb, in part or in whole, the sidewalks herein named." The ordinance then proceeded to specify the sidewalks to be thus improved. Section 2 of this ordinance, as amended by section 1 of the ordinance of October 21, 1873, provided that "said sidewalks shall be paved with either of the following materials: Asphalt, hard bricks, laid in a bed of Portland cement and properly grouted; concrete, made of Portland cement, mixed with other proper materials; or with tiles or stone, laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard bricks, and capped with a plank of heart pine, three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts." Section 5 of the same ordinance provided that "the cost of filling, raising, curbing and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property abutting and fronting thereon, and shall be assessed against the same in the following manner." The section then declared how the cost of the work should be assessed against the property, and that it should be a lien thereon until paid. Section 6 provided that the assessment should be paid in five annual installments, with interest. On the same day on which this ordinance was approved, another was approved, which authorized the mayor to have printed or engraved coupon bonds of the city of Galveston to the amount of $250,000, to be styled "Galveston City Bonds for Sidewalk Improvements;" to draw interest at ten per cent., and to be payable to the bearer in fifteen years, provided that the city council should have the right to redeem at par any or all of said bonds at any time after five years from their sale or disposition. This ordinance also provided that the assessments made on property for the construction of sidewalks should, as they were collected, be appropriated to the payment of the interest on said bonds, and form a sinking fund to pay the principal at their maturity, or when redeemed. The ordinance of the 3d of February, 1874, provided that sidewalks on both sides of certain other streets therein named should be filled up, graded, curbed and paved; and it then proceeded to direct that "the sidewalks shall be filled up to the grade established by the civil engineer, and curbed with cypress wood, stone or brick, and a pavement six feet in width, laid in the center of the same—the said pavement to be composed of either asphalt, hard brick laid in Portland cement, or other proper materials, tiles or stone." This ordinance authorized the mayor and chairman of the streets and alleys committee "to make a contract or contracts with proper and responsible parties to fill up, grade, curb and pave the said sidewalks," and directed that the cost of the work should be assessed against the owners of the lots, in the same way as prescribed in the ordinance of August 19, 1873. All these facts appeared either from the petition of plaintiffs or from the charter of the city of Galveston, of which, being a public act, the court took judicial notice.

F. Charles Hume, for plaintiffs.

Wm. P. Ballinger and Geo. Flournoy, for defendant.

WOODS, Circuit Judge. The defendant alleges numerous grounds of demurrer, many of which I do not think well taken. As in my opinion, some of the grounds of demurrer are well taken, it is not necessary to notice particularly those which are overruled.

The first ground of demurrer is the general one, that the facts stated in the petition are not sufficient in law for the plaintiffs to have and maintain their action against the defendant.

I pass over the question whether the city council could delegate the authority to the mayor and chairman of the streets and alleys committee to make the contract in question. Let it be conceded that the power of these two officers was as full as the power of the city council itself to make the contract. The question meets us at the threshold of the

plaintiffs' case, Have they made the necessary averments to entitle them to a recovery, conceding that the contract was a valid one and binding on the city of Galveston?

The ordinances by virtue of which the mayor and chairman of the committee acted are to be considered in giving construction to the contract. These officers act as the agents of the city, and the contract recites that it is made in accordance with the authority vested in them by the city council. It is to be presumed that the agents of the city made the contract in pursuance of the powers conferred upon them, and the plaintiffs, being bound to know the extent of the authority of the agents with whom they were contracting, made such a contract with them as they were authorized to make. Story, Ag. § 73. Both the ordinances which empower the mayor and chairman of the committee to contract require them to enter into contracts with responsible parties to "fill up, grade, curb and pave the sidewalks designated." It is clear to my mind that this is authority to contract for filling, grading, curbing and paving, and not for filling and grading without curbing or paving. It was not necessary for the mayor and chairman to contract with the same party to do all the work. But they were required to contract to have all this work done by somebody. The mayor and chairman so construed their authority, and entered into the contract with the plaintiffs, by which the plaintiffs bound themselves to "lay down and fabricate the said pavement in the manner and style above set forth and stipulated;" and also "to fill, grade, tamp, roll and curb the said sidewalks, as above set forth."

The authority given to the city by its charter was to construct "sidewalks," the ordinances contemplated the construction of sidewalks, and the chief end and purpose of the contract was the construction of sidewalks. The filling, grading and curbing were only the preparatory steps necessary to the completion of a sidewalk by the putting down of the pavement. The main purpose and the ultimate object were the pavements. No sane man supposes for a moment that the city council desired to raise a bank of sand in front of the lots of the citizens and leave it so, or that such was the purpose of the ordinance or the contract. If the city council had not decided to complete the sidewalks by paving them, they would not have entered upon the work at all. So the contract was intended to provide for paving as well as filling, grading and curbing, and did provide for it. It is clearly not the purpose of the contract that a part of the work should be done and not the residue. The plaintiffs agree to do the whole. The performance of a part only without the consent of the city council is no performance and does not entitle the plaintiffs to a recovery. If there is a condition precedent to the performance of a part of the contract and the contract is an entirety, that condition precedent must be performed, or the whole contract fails. Now, what does the contract provide? The plaintiffs agree to fill, grade and curb and to pave with asphalt. There is no covenant to pave with anything else. But the contract says, in effect, you shall not pave with asphalt unless you obtain the written consent of the owners of the property abutting on the sidewalks to the laying down of an asphalt pavement, which written consent or selection shall be filed in the mayor's office with the city clerk.

It seems to me that the obtaining of that consent is a condition precedent to be performed before any part of the contract is binding on the city. The plaintiffs agree to fill, grade, tamp, curb, etc., preparatory to the laying down of an asphalt pavement, and then to lay the asphalt pavement, if the owners of the property will consent. It is not to be supposed that if they were prevented from completing a sidewalk by the refusal of the property holders to consent to an asphalt pavement, the contract authorized them to do the work simply preparatory to the laying of a pavement and then leave it in that unfinished condition. How do we know but that the inducement to pay the price specified for grading, etc., was in the fact that the plaintiffs had agreed to lay the asphalt pavement for the specified price? The city of Galveston has agreed by this contract to pay $1.25 per cubic yard for the filling, grading, tamping and rolling of a sidewalk, preparatory to the laying thereon of an asphalt pavement, and then to pay the price of $1.75 per square yard for the laying of such pavement. It has never agreed to pay the sum named for the work necessary to be done preparatory to the laying of any other than an asphalt pavement. This contract must be taken as a whole. The presumption is that the price of one part of the work depends upon the price agreed upon for another part. The price allowed by the contract for filling and grading and curbing may have afforded the plaintiffs a profit, while the price for paving would have afforded none, or even entailed a loss. That this is not mere conjecture is shown by the fact that the petition claims damages for the profit lost in the grading, etc., ranging from one to two hundred per cent., while it claims no loss of profit on the paving. Can the plaintiffs be allowed to pick out the profitable parts of the contract for performance and abandon the unprofitable? They have agreed to do the whole. They cannot do the whole according to the contract, they cannot be in a position to perform in full unless they have the consent of the property holders in writing to the laying down of the particular pavement mentioned in the contract, and that consent is filed in the office of the mayor. They must perform the whole contract, and they cannot, according to the terms of the contract, perform it without compliance with the conditions pre-

cedent. In other words, no part of the contract is binding on the city unless the other party to the contract has first obtained the consent of the property holders to the laying down of the pavement selected. There is no averment in the petition that such consent has been obtained, and without such consent the petition is fatally defective. Jennings v. Moss, 4 Tex. 452; Frazier v. Todd, Id. 461. The demurrer must, therefore, be sustained, on the ground that the petition does not set out facts sufficient to entitle the plaintiffs to recover.

2. It is objected that the city council had no power, either through an agent or by its own ordinance, to make the contract sued on in this case. The contract contemplates the issue by the city of Galveston of bonds to the amount of $250,000, with ten per cent. interest, due in fifteen years, or redeemable, if the city so elect, after five years, to pay for work to be done under the contract. The contract cannot be performed without the issue of the bonds provided for in the ordinance of August 19, 1873. It is denied that the city of Galveston has power, either express or implied, to issue the bonds for the purposes named in the contract, and I think the demurrer to the petition fairly presents the question. I am unable to find any authority in the city charter, either express or clearly implied, to issue bonds or borrow money for the purpose of constructing sidewalks. To pay out bonds is in effect a selling of them, or a borrowing of money on them. Rogers v. Burlington, 3 Wall. [70 U. S.] 666; Com. v. Commissioners of Allegheny Co., 37 Pa. St. 237; Seybert v. Pittsburg, 1 Wall. [68 U. S.] 272.

The clauses from the city charter already cited, and which are referred to by plaintiffs' counsel as containing the authority, do not confer any express authority to borrow money for other than general purposes, nor is the authority clearly implied. The power expressly given to appropriate money and to provide for the payment of debts and expenses of the city, to provide special funds for special purposes, to construct sidewalks, and to assess the cost of their construction upon the owners of the abutting lots, are powers usually found in city charters; but no fair intendment can be drawn from this of a power to issue bonds and borrow money upon them for special purposes. The reasonable construction therefore is, that money to pay debts and expenses, and to provide special funds, is to be raised by the means for raising money expressly given by the charter, namely: by taxation or special assessment, and not by the issue of bonds, which is only authorized for one specific purpose. As these means are prescribed, any other means not expressly given seem to be excluded. The power to borrow money and issue bonds, not being expressly given by the charter, and not being clearly implied from any of its provisions, the question is presented whether the city of Galveston or any other municipal corporation has this power without legislative authority expressly given or clearly implied.

It appears from the ordinance approved August 19, 1874, authorizing the issue of the bonds in question, and which is an exhibit to the petition, that the bonds were to be coupon bonds, payable to bearer at a future day. Both the bonds and coupons, therefore, would have all the qualities of commercial paper. Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Meyer v. Muscatine, Id. 384; Gelpcke v. Dubuque, Id. 175; Moran v. Miami Co., 2 Black [67 U. S.] 722. The charter expressly declares in title 5, which is exclusively devoted to taxation, that the city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one per cent. on the assessed value of all real and personal estate and property in the city, and provides for various other methods of taxation; and title 6 prescribes the method to be pursued for the collection of taxes. There is authority given by the charter to issue bonds; but that is for one special purpose, and that purpose is not the construction of sidewalks. See title 9, art. 1, § 1, where the authority to issue bonds is restricted to a single object, and carefully limited and restrained.

The question is therefore fairly presented, whether the city of Galveston was invested with implied power to borrow money for the construction of sidewalks, and issue therefor its negotiable bonds and coupons, payable to bearer at a future day. Dillon, in his work on Municipal Corporations (section 407), says: "Banking and trading corporations have implied or incidental power to make negotiable paper, and the same rule has in some cases been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the implied power to make paper which shall have this effect. The adjudged cases on this point are conflicting." The learned author (section 406) says: "In the author's judgment, the better opinion is, that there is no implied power in the officers of a town, county or city corporation to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to those ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse, and fraught with danger."

These views are sustained by recent decisions of the supreme court of the United States. In the case of Police Jury v. Britton, 15 Wall. [82 U. S.] 570, the court says: "We have therefore the question directly presented in this case, whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to

defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of bona fide holders, for the purpose of raising money or funding a previous indebtedness." In answering this question the court says: "The power to issue such obligations, and thus irretrievably to entail upon counties, parishes and townships a burden for which they have received no just compensation, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which was always to be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to incur obligations for work actually done in behalf of the county and parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that trustees or other local representatives of townships, counties and parishes have the implied power to issue coupon bonds payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated." And so the court held that the officers of a parish, county or other local jurisdiction invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities payable in future, of such a character as to be unimpeachable in the hands of bona fide holders, for the purpose of raising money or funding a previous debt.

The only difference between the case just cited and the one under consideration is, that the former was the case of a parish in Louisiana and the latter the case of a city in Texas. The questions raised and decided in the case of Police Jury v. Britton, supra, are identical in all respects with those presented in this. I shall follow this authority until overruled, because it is the judgment of the court of last resort, and also because I heartily approve it. In a more recent case (Mayor v. Ray, 19 Wall. [86 U. S.] 468), the same court held that neither the power to borrow money nor to issue commercial paper therefor belongs to a municipal corporation as an incident of its creation. To be possessed, it must be conferred by legislation, either express or implied. The case is decided, it is true, by a divided court, but there is no dissent from the proposition decided in the case of Police Jury v. Britton, supra. The point of difference between the judges seems to have been whether certificates of debt, city warrants, orders, checks, drafts, and the like, used for giving to public creditors evidence of the amount of their claims are or are not commercial paper, so that the holder takes them free from legal and equitable defenses, and with an absolute obligation on the part of the municipal corporation to pay them. But as I read the case, there does not appear to be any dissent from the general proposition, unless it be by Mr. Justice Hunt, that a municipal corporation, with power of taxation, given it for the purpose of raising means to carry on its functions, cannot raise money by issuing or selling its coupon bonds, due at a future day and payable to bearer, without legislative authority, expressly given or clearly implied. These two decisions by the supreme court of the United States are a law to this court which it follows with willing steps. A construction of the charters of municipal corporations which, without the express permission of the legislative power, gives their officers the power to issue bonds, having all the qualities of commercial paper, without limit as to amount or time of payment, affords an opportunity for the most stupendous frauds, and presents a temptation to their perpetration to a class of officials who, as the history of the country shows, are frequently rapacious and unscrupulous. One of the great evils of these times is the increase in the amount of the indebtedness of counties, towns and cities. The facilities which have been supposed to exist for the borrowing of money and the issuing of bonds by these local jurisdictions have fostered extravagance, fraud and peculation, and loaded the people with burdens grievous to be borne. The result has been the prosperity of cities has been destroyed, and the property of the inhabitants subjected to a public mortgage, in many cases equal in amount to the value of the property itself.

The assumption of authority by municipal corporations to issue bonds by virtue of their general corporate power is a recent one. It has always been denied by many courts of the highest respectability. In my judgment, it should never have been admitted. So dangerous a power should be expressly and deliberately conferred, so that the taxpayer may be protected by prudent guards and limitations. Whenever the power to issue bonds may become necessary for the prosecution of some work or improvement involving large cost, or for any other purpose, the power can be conferred by the legislature, with proper restrictions. But, in my judgment, no such authority ought to be implied from the general grant of corporate powers. But it seems to me that the provisions of the charter of the city of Galveston clearly exclude the power to issue bonds to pay for sidewalk improvements. The same section of the charter (section 8, art. 3, tit. 4), which confers upon the city council the power to construct sidewalks, points out with minuteness and precision the manner in

which the cost of their construction is to be defrayed. There is no escape from the language: "The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk," and "the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot on which it fronts." Here is a designation of the property which is to pay, and of the manner in which payment is to be enforced. These provisions exclude any other method of payment. They clearly exclude the idea that the city may pay for such pavements by issuing its coupon bonds, bearing ten per cent. interest, and payable to bearer in fifteen years. Mayor v. Ray, 19 Wall. [86 U. S.] 468. It is no answer to this to say that the city may, nevertheless, enforce payment from the owners of the lots. Suppose the lots do not pay the cost of the sidewalks? The city, by its issue of bonds, has made itself liable, and will have the deficiencies to meet. The city could not be made liable for these deficiencies if it had not assumed the liability by the issue of its bonds. Lake v. Village of Williamsburg, 4 Denio, 520; McCullough v. Mayor, etc., of Brooklyn, 23 Wend. 458; Baldwin v. City of Oswego, 1 Abb. Dec. 62; City of New Albany v. Sweeney, 13 Ind. 245. The city undertakes to pay in the first instance for these sidewalks, and to take the risk of reimbursing itself from the property owners. This is a clear departure from the authority conferred by the charter. "A corporation can act only in the manner prescribed by the act of incorporation which created it." Head v. Insurance Co., 2 Cranch [6 U. S.] 127. The city cannot assume a primary liability for these improvements. Reock v. Mayor, etc., of Newark, 33 N. J. Law, 131; City of New Albany v. Sweeney, 13 Ind. 245; McCullough v. Mayor, etc., of Brooklyn, 23 Wend. 458. The ordinance of August 19, 1873, which provides for the construction of the sidewalks, also declares that the cost of their construction shall be a charge against the property fronting thereon, and shall be assessed against the same. It then prescribes how the assessments shall be paid or its collection enforced. This, it seems to me, exhausts the power of the city council on this subject. It surely could not have been within the contemplation of the legislature that the city council, after taking these steps specially authorized by the charter, and amply sufficient for the payment of the cost of sidewalks, should then provide that the city itself should assume the primary liability, and advance the cost for the lot owners by an issue of its coupon bonds, payable to bearer in fifteen years.

My conclusions on this branch of the case may therefore be summed up as follows:

1. The power to borrow money and issue bonds for sidewalk improvements must be conferred upon the city council of Galveston before that body can assume to perform these acts.

2. This power is not inherent in a municipal corporation.

3. It is not expressly conferred by, nor can it clearly be implied from, any provision in the charter of Galveston.

4. The power is excluded by provisions found in the charter: (a) By the provisions for raising money by taxation for general and special purposes. (b) By the provision for issuing bonds, which is limited to a specific purpose, and that purpose not being sidewalk improvements. (c) By the provision that the cost of sidewalk improvements shall be borne by the owners of the abutting lots, and shall be collected by assessments on the abutting property.

In my judgment, the assumption by the city council of authority to issue these bonds for sidewalk improvements was not only unauthorized by the charter, but was a clear and flagrant violation of its meaning and spirit.

The result of the views above expressed is:

1. That the plaintiffs have not by their pleadings shown a good cause of action against defendant, for want of an averment that they had performed the conditions precedent, which were necessary to be performed in order to make the contract, even if authorized, binding upon the city; and,

2. That neither the city council of Galveston, nor any committee of its appointment had authority to make the contract sued on. It is therefore, absolutely null and void.

The demurrer to the petition of plaintiffs as amended is therefore sustained.

[NOTE. This case was then taken by the plaintiffs to the supreme court on writ of error, where the judgment was reversed in an opinion by Mr. Justice Strong, who said that the proviso with reference to the consent of the property owners referred to the materials to be used, and not to the execution of the work itself. Mr. Justice Bradley, Mr. Justice Miller, and Mr. Justice Field dissented, because they considered that the consent of the owners was a condition precedent to commencing the work. 96 U. S. 341. The defendant then filed additional demurrers, which were stricken off by the circuit court. Case No. 6,533. The plaintiffs, having obtained judgment against the city, garnished stocks owned by the city, but a decree of sequestration was refused. 50 Fed. 263. Pending an appeal of this case, the plaintiffs applied for a writ of mandamus against the city, which was refused on account of appeal, and because stocks garnished were more than sufficient to pay judgment if garnishment was finally upheld. 48 Fed. 640.]

Case No. 6,533.

HITCHCOCK et al. v. GALVESTON.

[3 Woods, 269;[1] 1 Tex. Law J. 393.]

Circuit Court, E. D. Texas. May Term, 1878.

DEMURRER—SUSTAINED BY CIRCUIT COURT—RIGHT TO FILE FURTHER DEMURRERS AFTER REVERSAL.

Demurrers were filed in the circuit court, on various grounds, to the petition of the plaintiff, and were sustained by the court. The cause was taken by writ of error to the supreme court, by which the judgment of the circuit court was reversed and the cause remanded. *Held*, that the defendants should not be allowed to file, in the circuit court, further demurrers to the plaintiffs' petition.

This cause was heard upon the motion of plaintiffs [D. G. Hitchcock & Co.] to strike out certain demurrers, filed by the defendant, to the petition of plaintiffs. At the December term, 1874, the cause had been heard upon demurrers, based on various grounds, filed by the defendant to the petition. The demurrers had been sustained by the circuit court on two grounds, and the petition dismissed. See Hitchcock v. Galveston [Case No. 6,532]. The cause was carried to the supreme court of the United States, on writ of error, and the judgment of the circuit court was reversed and the cause remanded. The supreme court held that none of the demurrers were well taken. See Hitchcock v. Galveston, 96 U. S. 341. After the case came back to the circuit court the defendant filed other demurrers, alleging other causes of demurrer. The plaintiffs moved to strike out the newly filed demurrers. The case was heard upon this motion.

F. Charles Hume, for the motion.

W. P. Ballinger and George Flournoy, contra.

BRADLEY, Circuit Justice. The petition in this case, as amended from time to time, was dismissed by the circuit court, on two grounds: First. Because the contract for paving the streets of Galveston, made with the plaintiffs, was upon the condition precedent that they should obtain the written consent of the owners of the property fronting and abutting upon the sidewalks to be paved; and that the whole contract was an entirety, and did not contemplate grading, filling or curbing separate from paving; and that the petition contained no allegation that this condition precedent had been performed, and hence alleged no cause of action. The supreme court held this position to be erroneous, declaring that the contract was severable, and that the condition precedent related only to the paving; and, as the petition only claimed damages for the breach of the contract so far as it related to grading, filling and curbing, the petition should not have been dismissed for this ground. The other ground on which the circuit court dismissed the petition was that the contract provided for the payment of the work in bonds to be issued by the city, having the character of negotiable instruments. The circuit court held that the city had no authority to issue such bonds, or to agree to do so, and therefore the contract was without authority. The supreme court decided that the dismissal of the petition on this ground was also erroneous; for, conceding that the city had no authority to issue such bonds (and whether it had or not the court did not decide), still, as the city had power to pave the streets, and to contract for that purpose, the contract might be valid in every respect, except as to the manner of payment; and, if the payment in bonds was not authorized, the plaintiffs would not be precluded from their rights to recover on their contract. The court say: "If payment cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful." Again: "The corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." Hitchcock v. Galveston, 96 U. S. 341. Besides deciding that the dismissal of the petition was erroneous, so far as related to the grounds on which it was placed by the circuit court, the supreme court felt bound to go further and inquire whether the demurrers presented any other grounds on which the judgment of the circuit court could be sustained. The court, therefore, examined with considerable care the points made with regard to the validity of the contract as depending upon the power of the city to make it, and the authority of the officers through whose agency it was made. The conclusion reached on this subject was, that the city had full power to make the contract, so far as the grading and paving were concerned, and that the officers were sufficiently authorized; and, if not, that the contract was abundantly ratified by the council after it was entered into.

This is all that has been decided in the case, and it may be recapitulated as follows: First, the petition sets out a valid contract on the part of the city of Galveston, in all respects, except perhaps the agreement to issue bonds in payment of the obligation incurred by it. Second, this contract is severable as between the parts that relate to paving and those relating to grading, curbing and filling; and the condition of obtaining the consent of the property owners does not relate to the latter. Third, the plaintiff's action is based on the latter portion of the contract, relating to the grading, curbing and filling; and they set out a sufficient breach of the contract, in that regard, on the part of the defendant to show a cause of action. Fourth, therefore the pe-

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tition should not have been dismissed. Some points raised by the demurrers to the petition are not decided by the judgment of the supreme court. First: Whether the defendants had a right to issue bonds, and to contract for so doing. This was decided by the circuit court in its previous judgment, but was regarded by the supreme court as immaterial on the question of dismissing the petition and was not passed upon. The former opinion of the circuit court will be adhered to, and the question will not be considered as open for further argument here. Second: Whether the plaintiffs are entitled to recover profits for that portion of the contract which was not performed. Third: What will be regarded as the measure of damages, both for work done and for profits on work not done, should it be held that profits are recoverable.

These points are still open for discussion, although it may be contended that they are inferentially decided by the judgment of the supreme court. I do not think that the defendants should be allowed to file any further demurrers to the petition. They had already demurred and answered three times before the case was taken to the supreme court. I think it would be an abuse of the right of amendment to allow any further demurrers to be filed. In the first place, it would be out of the order of pleading, inasmuch as a full answer had already been made to the facts; and, in the second place, it would be an abuse of the manner of pleading calculated to draw after it very inconvenient consequences. After the parties have gone to the highest court upon the validity of the petition, the court should examine with much jealousy any attempts to change the pleadings in the case. It would encourage speculation upon the opinion of the supreme court. There ought, some time or other, to be an end of raising legal objections. I think that end properly came in this case when the cause went to the supreme court. I have no doubt that it will be found that every material point of defense can be presented on the trial of the cause under the points which have been raised. An order will be made to strike out all demurrers filed to the petition since the cause has been remanded from the supreme court.

[See note to Case No. 6,532.]

Case No. 6,534.

HITCHCOCK et al. v. GALVESTON.

[3 Woods, 287.] [1]

Circuit Court, E. D. Texas. May Term, 1878.

PLEADING—FRAUD IN MAKING CONTRACT—CONDITION PRECEDENT — UNCERTAINTY OF CONTRACT —SUBSTITUTION OF NEW CONTRACT—VARIATION BETWEEN ORDINANCE AND CONTRACT.

1. Under article 1442, Pasch. Dig. Laws Texas, where a contract alleged to have been made by a city was executed by its mayor, the plea of non est factum need not be sworn to by the mayor.

2. In such a case, where the act of the mayor is questioned, the plea is properly sworn to by members of the common council, and an affidavit made by them to the best of their knowledge and belief, is sufficient.

3. Under the jurisprudence of Texas, the party making a charge of fraud must point out, at least in general terms, the acts upon which he relies to sustain it.

4. An agent or officer may have authority to make a contract, and yet be guilty of fraudulent collusion with the other party in making it. The terms of the contract, and all the circumstances of its negotiation and execution, and the conduct of the parties before and afterwards, may be examined for the purpose of proving such fraud.

5. The fact that the profits to be derived from a contract are very large, is no reason why they should not be recovered. Where the profits are unreasonable and unconscionable, that fact may be an indication of fraud in procuring the contract. But where the contract is established against all charges of fraud or other assaults on its validity, it is entitled to all the legal consequences and incidents of a valid contract.

6. A city ordinance authorized the mayor and chairman of the street committee to contract for grading and paving certain specified sidewalks, but directed them first to advertise for bids for the work. *Held*, that the advertisement calling for bids was a condition precedent to the making of a valid contract.

7. Under said ordinance an advertisement for bids, signed by the mayor, but not by the chairman of the street committee, is sufficient.

8. Bona fide contractors ought not to be prejudiced by too nice and critical a construction of an advertisement for bids, or because it is vague and general.

9. The advertisement for bids for grading and paving certain sidewalks declared, "All the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in this (the mayor's) office." *Held*, that the fact that there were no such specifications on file, then or at any other time, did not affect the authority of the mayor and chairman of the street committee to make a contract for the work.

10. Where the contract itself required the work to be done according to the specifications on file, and none were on file, but the contract itself specified the materials, and there was a common and well-known process of doing the work: *Held*, that the contract was not void for uncertainty, and the contractors might proceed to do the work in the usual and ordinary way, or refuse to perform the work for want of specifications, and seek damages for the non-fulfillment of the contract in that respect.

11. A contract for filling and grading sidewalks is not void because at the date of the contract no grade for the sidewalks was established.

12. A city ordinance authorized the mayor and chairman of the street committee to proceed to have sidewalks constructed in front of the lots of those owners who, for sixty days after notice to do so, failed themselves to construct such sidewalks. *Held*, that without such notice and failure, the officers had no authority to contract for the construction of said sidewalks.

13. Where a contract entered into between the officers of a city and contractors, imposed a more rigid condition on the contractors than was required by the ordinance by which the contract was authorized to be made: *Held*, that this did

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not avoid the contract; if the contractor consented, the city could not object.

14. The fact that the contract did not conform to the advertisement for bids, did not make it void, provided the contract was within the scope of the ordinance which authorized it.

15. The fact that a contract has been vacated and a new one adopted in its place, is a good defense to an action on the original contract.

This cause was heard upon the demurrers of the plaintiffs [D. G. Hitchcock & Co.] to several of the answers of the defendant. The substance of the answers demurred to will appear in the opinion of the court.

F. Charles Hume, for plaintiffs.

Wm. P. Ballinger and George Flournoy, for defendant.

BRADLEY, Circuit Justice. The first point raised on this demurrer is to the 6th plea of the original answer, which denies that the contract was the contract or deed of the defendant, the inducement or reason of the plea being that the mayor of the city, and the chairman of the committee on streets and alleys, who executed it, had no lawful authority to make and execute the same. It is contended that this plea should be supported by an affidavit, under article 1442 of Paschal's Digest. But it is evident that this article cannot be literally enforced where the defendant is a corporation; for a corporation cannot make an affidavit. And as the mayor is one of the officers whose act is questioned, I think the affidavit was properly made by a member of the common council. It is still objected that they only swear to their best knowledge and belief. But from the nature of the case, this was all they could properly swear to. Besides, it was held, in Compton v. Western Stage Co., 25 Tex. Supp. 67, that where the denial is to the authority of an agent to execute the deed, no affidavit is required. This demurrer, therefore, is overruled.

The next question raised by the demurrer is to the plea that the contract was obtained by fraud on the part of the plaintiffs, being the seventh plea in the original answer. It is objected that this plea is too general, and does not apprise the plaintiffs of the matters intended to be relied on as proof of fraud, or of the acts in which the fraud consisted. At the common law the plea of fraud is allowed to be general, as shown by Chitty on Pleading. But in equity, as a general thing, the specific acts of fraud must be shown; for fraud is there commonly set up as a ground of specific relief, such as the setting aside of a contract, etc., and hence the court requires that the complainant shall apprise the defendant of the specific grounds on which the charge of fraud is made, in order that he may have the benefit of his answer thereto.

I infer from the cases cited from the Texas Reports, that, in this state, the equitable rule is followed. Of course it cannot be expected that the party charging fraud can give all its details, for it is of the very nature of fraud to cover itself up with as much concealment as possible, and the details by which it is effected are more in the knowledge of the party who has committed a fraud than in that of the party who has been victimized by it. Nevertheless, the party making the charge must point out, at least in general terms, the acts on which he relies to sustain it. The defendants, in the present case, insist that they have done this by the several amendments to their answer. An examination of these amendments shows that they have, in fact, specified a number of facts which they insist are either direct acts of fraud, or are convincing proof that there was fraudulent collusion between the plaintiffs and the officers of the city who made the contract. Without attempting to specify all the acts relied on, the following may be cited by way of example: The defendants charge that the ordinances passed by the common council on the subject of paving the sidewalks, were not, in good faith, followed and observed either in advertising for proposals, preparing specifications, fixing the grade, notifying property owners to pave in front of their lots, or in framing the contract entered into with the plaintiffs; but that in each of these particulars there was a fraudulent departure from the ordinances—a departure calculated to defraud the city and the property holders, and to throw into the hands of the plaintiffs a most unconscionable advantage, with an option to do all the work, or only a part of it, as might be most profitable to themselves. The specific way in which these departures were made is pointed out; and, as a further proof of fraud, it is stated that the profits to be realized by the plaintiffs from the contract, and claimed by them, are grossly exorbitant and unreasonable, exceeding a hundred per cent. on the outlay which the work would require. And it is distinctly charged that the plaintiffs suborned persons to make bogus bids for the work, at high rates, so as to make it appear that the plaintiffs' bids were reasonable and moderate, and that by the suppression, or failure to furnish information as to the specification of the work, and the grades to be followed, other persons who might and would have bid therefor, were deterred from so doing. It seems to me that these specifications of proofs and acts are sufficient to sustain the plea of fraud as a pleading. Whether the proof, on the trial, will sustain the allegations, or will be sufficient to warrant a finding of fraud by the jury, is another question, with which I have nothing to do. I think, with these amended averments, the plea of fraud has ceased to be demurrable, and that the defendants may, if they can, set up a defense under it. This demurrer, therefore, must also be overruled.

The considerations already referred to will dispose of the objections made to several other portions of the defendants' answer, which,

if not sustainable as distinct grounds of defense, may, nevertheless be regarded as admissible when considered as specifications of proofs and acts of fraud under that general plea. To this class may be referred the allegations, that no specifications of the work to be done were ever made or filed in the mayor's office, and that no grade was established by the city engineer; and that no specifications, estimates or computation of the amount of work and material necessary to the construction of the sidewalks was made by him, or obtained by the mayor or chairman; that the contract was not in conformity to the advertisement for proposals; that the work contemplated by the advertisements and the contract would have exceeded all the provisions made by bonds or otherwise for the payment thereof; that the advertisements were so framed as to require bids for the entire work in bulk; and, in general, all the allegations of the answer which are made for the purpose of showing that the contract was fraudulently procured by the plaintiffs, or fraudulently and collusively entered into by the officers of the city who negotiated and executed the same. At the same time, all allegations made for the purpose of showing that the mayor and the chairman of the committee on streets and alleys, had no authority to enter into the contract by virtue of the charter and ordinances set out in the pleadings, and the advertisements for proposals must be regarded as overruled by the decision of the supreme court. The court had all these ordinances and advertisements before it, and duly considered the same, and came to the conclusion that such authority existed. The demurrer must be sustained, therefore, as to all those allegations of the answer which attempt to show a want of such authority. But although an agent or officer may have unquestionable authority to make a contract, he may be guilty of fraudulent collusion with the other contracting party in making it; and it may be void, and not binding on its principal, by reason of such fraud. And the terms of the contract, and all the circumstances attending its negotiation and execution, including the conduct of the parties before and afterwards, may be examined for the purpose of evincing and proving such fraud. It is, therefore, true that many of the allegations of the answer may be admissible as showing proofs of fraud on the part of the plaintiffs, and of the officers by whom it was negotiated, which would not be admissible as grounds for showing a want of authority on the part of the said officers to make it. This distinction must be constantly borne in mind in considering the several portions of the answer which are demurred to. So far as they are put forward as instances or evidences of fraudulent practice, they are admissible, for even if they should severally be insufficient by themselves to demonstrate fraud, yet, as circumstances, they may contribute to that accumulation of proof which is necessary to demonstrate it. If clearly irrelevant to the issue, of course they would be demurrable. But it is often very difficult, in a case of this kind, to say that this or that fact alleged can have no bearing on the question.

Guided by this general principle, it will not be difficult to designate those portions of the answer which are bad on demurrer and those which are sustainable. The first plea contained in the amended answer, filed February 20th, 1875, and extending to folio 164, inclusive, on page 47 of the printed record used in the supreme court, is overruled. The second and third pleas contained in the same amended answer, and occupying the residue thereof (except so far as the said third plea questions the authority to make said contract), are sustained, being in fact amplifications of the plea of fraud. In like manner, all the allegations contained in the amended answer, filed on the 29th day of May, 1878, for the purpose of showing that the mayor and chairman of the committee on streets had no authority to make the contract in question, are overruled; but all of said allegations, made for the purpose of showing that the said contract was fraudulently made are sustained. The allegation with regard to the notorious previous character of the plaintiffs is overruled, as evidence of that fact would not be competent, having no relation to this case. The allegation with regard to their insolvency is sustained, because that is a circumstance which would be competent on the question of fraud, if no security was required from them for the fulfillment of their contract. The plea that there was a novation or change of the contract agreed upon by the parties as reported to, and adopted by the common council on the 28th of March, 1874, is allowed to stand. If such a new contract was in fact made, as distinctly alleged by the defendant, and was afterwards repudiated by the plaintiffs, as also alleged, it would undoubtedly be a valid defense to this suit.

As to the question of the right of the plaintiffs to recover profits, which they lost by reason of the defendants' refusal to go on with the contract—which question was originally raised by the defendants' demurrer to the original petition, and which is now again presented by the present demurrer—my opinion is, that if the contract is good, valid and binding on the defendant, there is no reason why the ordinary consequences of such a contract should not follow. It is a settled rule of law that if a party to a contract is prevented from performing it by the other party thereto, he is entitled to recover as well such damages as he actually sustains as the profits which he would have realized. The loss of such profits is a part of the damage which he sustains. The expected benefits of the contract are his property. If the answer contains a plea denying the right to recover such profits, it is equivalent to a demurrer and must be overruled. When expected prof-

its are unreasonable and unconscionable, that fact may be one of the evidences of fraud in procuring the contract. But when the contract is established against all charges of fraud and other attacks upon its validity, it is entitled to all the legal consequences and incidents of a valid contract.

The only other question that occurs to me, as presented by the demurrer, is that relating to the measure of damages, as depending upon the agreement to pay for the paving in city bonds. I deem it unnecessary to decide whether such bonds would or would not have been valid. This is not a suit on the bonds, but on the contract. The parties negotiated the contract on the supposition that the bonds would be valid; that the city had power to issue such bonds. It is clear, therefore, under the decision of the supreme court, that the measure of damages must be the value of the bonds which the plaintiffs were entitled to receive on the supposition that the bonds would have been valid. This is the measure of value which the parties had in view, and on which their minds met. I think that these conclusions cover all the material points raised by the demurrer, and an order will be made in accordance therewith.

At a subsequent day of the term Mr. Circuit Justice BRADLEY delivered the following opinion, which is more full upon the questions presented by the demurrers:

The parties not being able to agree upon the form of judgment to be entered upon the opinion recently given by me in this case, and having desired me to review certain portions of that opinion, I have accordingly re-examined the case as submitted to me, and am convinced that I did not take an entirely correct view of the scope and effect of the judgment rendered by the supreme court. As the defendants, in their answer, filed December 16th, 1874, had spread upon the record the ordinances, Nos. 21, 26 and 37, under which the mayor and chairman of the street committee derived their power to make the contract in question; and as the plaintiffs, in their amended petition, had also spread the same ordinances on the record, it occurred to me that the question, whether these officers had pursued their authority under said ordinances in making the contract must have been impliedly, if not expressly, decided by the supreme court. But a more careful examination convinces me that I was mistaken. The plaintiffs had, in their original and amended petitions, relied on a subsequent ratification of the contract by the common council; and the supreme court, after deciding that the city had power to construct the pavements in question, and, if necessary, to incur a debt therefor; and that the common council could and did authorize the mayor and chairman of the street committee to execute a contract for that purpose, without inquiring whether this authority had been strictly followed, held that a ratification had been sufficiently alleged for the purpose of sustaining the petition, thus leaving the other question undetermined, as not being necessary to the case. Inasmuch, therefore, as the defendants deny the fact of ratification, the door is still open for them also to deny that the contract was made in conformity to the ordinances; for, if the ratification should not be sustained by proof, the authority conferred by the ordinances will become material. It is necessary, therefore, to examine the answers in this aspect of the case.

The points raised by the answers in this regard may be generalized as follows: First. That the mayor and chairman of the street committee did not advertise for bids and proposals as required by the ordinance of August 19th, 1873, before assuming to make the contract. Secondly. That no specifications were ever made by the city engineer as referred to in the advertisement that was made, and in the contract itself, and hence the contract was void. Thirdly. That no grade was established by the city engineer when the advertisement was made, nor when the contract was entered into; and that the power to establish such grade could not be conferred upon the engineer. Fourthly. That no notice was given to the property holders to do the work, as required by the third section of the ordinance of August 19th, as amended by that of October 21st. Fifthly. That the contract contained provisions repugnant to the ordinances, and did not pursue the terms thereof. Sixthly. That the contract did not correspond with the advertisements that were made.

I will take up these points separately.

First. As to the want of an advertisement for bids or proposals. The ordinance of August 19th, 1873, in authorizing the mayor and chairman aforesaid to make contracts for grading the sidewalks therein specified, directed them first to advertise for the period of thirty days for bids or proposals to fill up, grade, pave and curb, in part or in whole, the said sidewalks. This was a preliminary condition to be performed. A plea, therefore, denying that any such advertisement was made, would be a good plea. Kneeland v. City of Milwaukee, 18 Wis. 431; Wells v. Burnham, 20 Wis. 119. Such a plea is contained in the amended answer, filed February 20th, 1875. But the plea is a special one, denying, it is true, that any such advertisement for bids or proposals was made as required by the ordinance; but setting forth and showing what advertisement was made, and how it was published. It gave notice that proposals would be received at the mayor's office until a certain day named, to fill up to the grade and pave the sidewalks specified in the ordinance; describing the work to be done as prescribed in the ordinance; and stating that it would be paid for in bonds of the city, as also specified in the ordinance for that purpose; and that specifications of the

work would be prepared by the city engineer, and could be seen by calling at the mayor's office. It closed with these words: "Any other information desired will be furnished. The city reserves the right to reject any and all bids." It was signed by the mayor, in his official capacity; was dated the 14th of January, 1874, and was published in the Galveston Daily News from the 15th of January to the 16th of February inclusive, in every issue of the paper. It seems to me that this was a substantial compliance with the terms of the ordinance. It is objected that it was signed by the mayor alone, and not by the chairman of the street committee. I do not think that this was a fatal defect. It performed the office designed for it in the ordinance. It was a mere notice to the public that bids or proposals could be made at the mayor's office, and the mayor's official signature, as one of the committee, was sufficient to authenticate it. And I am unable to see that it was defective in any substantial respect. The defendant's counsel has criticised its terms as being too vague and general, and as including the whole work in one lump. This is not its necessary construction, and bona fide contractors ought not to be prejudiced by too nice and critical a construction of such an advertisement. If there was collusion between the plaintiff and the city officials, in making it vague and general, that is another matter which comes under the head of fraud. I think the advertisement shown by the plea was a sufficient compliance with the ordinance, and the demurrer to this part of the plea must be sustained.

Secondly. I have more difficulty with regard to the alleged want of specifications, which are referred to in the advertisement and in the contract itself. The advertisement states that specifications of the work for which proposals are invited will be prepared by the city engineer, and can be seen by calling at this (the mayor's) office. The contract declares that "all the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in the mayor's office." The plea alleges that no such specifications were prepared at all, at any time before the contract was made, nor during the publication of the advertisement, and none such were ever on file, or to be found in the mayor's office. I do not think that the fact, that there were no such specifications, affected the authority of the mayor and chairman of the street committee to make the contract they did. Omaha v. Hammond, 94 U. S. 98. Parties desiring to bid may have been sufficiently informed on calling at the office what the nature and requirements of the work would be. And it would be hard to visit upon the contractors the neglect of the city engineer to have the specifications completed. The greater difficulty arises from the provision contained in the contract itself, requiring the work to be done according to the specifications declared to be then in the mayor's office. Their actual presence in the office at the time of executing the contract was not a material circumstance, if they had been prepared and were then in existence. The identity of the specifications referred to would be ascertained by extrinsic evidence. But if they were not in existence, the question arises whether the contract must not fail for want of certainty. It is true, they must be regarded as referred to for the benefit of the city, and the city declared them to be prepared and in the mayor's office. Is not the city estopped to deny their existence? If not forthcoming when applied for by the contractors, might the latter not proceed and do the work in the usual way in which such work is accustomed to be done? The contract itself specified of what materials the paving was to be made, as soon as the choice of the property-holders was determined. As to the other work of filling up, grading, etc., the mode of doing it, beyond what the contract itself prescribed, is a common and well-known process. I am inclined to think that it was optional with the contractors either to refuse to do the work for want of the stipulated specifications, and to seek damages for non-fulfillment of the contract in that regard on the part of the city, or to go on and do the work in the ordinary and accustomed mode. Had the contract been to do the work according to specifications to be prepared by the engineer, a failure to prepare them, on the demand of the contractors, would have given them this option. There are cases, undoubtedly, where specifications referred to in a contract are absolutely essential to its due certainty, and to a possible performance of it—as where a builder contracts to build a house according to certain specifications to be furnished by the owner, or alleged to be already prepared by him. But I am inclined to think that the contract in this case was capable of substantial performance without the specifications. Under this view, I shall hold the plea to be bad.

Thirdly. The fact that no grade had been established when the contract was made does not, in my judgment, vitiate it. There is nothing in the contract that ties it to a grade then established; nothing repugnant to, or that would prevent, the grade being fixed from time to time as the work progressed. I do not think that the want of such grade can be pleaded to the validity of the contract. See 2 Pars. Cont. p. 563, and note.

Fourthly. The plea that no notice was given to the property-holders to do the work, as required by the third section of Ordinance 21, as amended by Ordinance 26, has given me much perplexity. The terms of the proviso on that subject are as follows: "Provided, that it is herein made the duty of the street superintendent to serve written notice on all the property-owners, or their authorized agents, whose sidewalks may not be of

proper material and in conformity with grade, to construct the same within a period of sixty days after notice, in the manner and with one or the other of the materials named in the first section of this amendment; and any fault or failure to comply with the requirements of such notice, shall then authorize the mayor and chairman of the committee on streets and alleys to proceed to have constructed the sidewalks in front of the property of any defaulting property-owner or owners, as provided in the ordinance to which this is an amendment." Here the authority of the mayor and chairman "to proceed" is limited upon the failure of the property owners to comply with a certain notice to be served upon them. If no such notice was given, and no such failure occurred, it is difficult to see how the mayor and chariman derived from the ordinance the authority "to proceed" to have the sidewalks constructed by contract. By the ordinary rules of pleading (supposing this to have been a necessary condition to be performed before the making of a contract), the plaintiffs were not required to allege its performance in their petition. It would be for the defendants to plead its non-performance. They have done so. They allege that no such notice was given. It may be urged against the validity of the plea, that the contractors were not bound to know whether this condition had been performed or not. But certainly they were bound to know whether the officers with whom they dealt had authority to act for the city, and what was the extent of that authority. This is a matter that affects the authority of the mayor and chairman of the street committee. The matter was one of importance. It seriously affected every property holder. As at present advised, I must decide that the plea is a good one, and that the demurrer to it must be overruled.

Fifthly. It is pleaded that the contract contains provisions on their face repugnant to the ordinances, and does not pursue the terms thereof. I do not use the words of the plea. This is its substance. One point made is, that the proviso requiring the consent of the property holders to the kind of pavement to be laid, is different in its terms and scope from the provisions of the ordinance in that respect. This and other discrepancies are also set up in the amended answer filed May 29th, 1878. Without going into particulars on this point, it is sufficient to say, that having carefully examined the ordinances, I do not see that the contract can be said to be outside of or beyond them in any such sense as to make it void. The contract must necessarily descend to particulars which the ordinances could not be expected to state; but I do not perceive that it contains anything repugnant thereto, or that might not fairly be embraced therein. The severance of the contract for paving from that of grading and filling was considered by the supreme court and sustained, as was also the application of the proviso for the consent of the property owners to one part, and not to the other. This proviso, it is true, requires the consent of the property owners generally, whilst the ordinance only speaks of a majority. The want of correspondence in this respect only imposes a more rigid condition on the contractor, and if he consented to it, no one else can object. But, as remarked, without attempting a minute criticism of the two documents, it seems to me that the contract, as written, was fairly within the power of the committee to make. The demurrer to this plea is sustained.

Sixthly. The objection made in the same connection that the contract did not conform to the advertisement for proposals, I do not think is tenable. The officers, in making a contract, were not bound to follow the advertisement, provided they kept within the scope of the ordinances. Besides, the advertisement could only indicate general outlines, and could not be expected to contain all the minutiae of a contract. The demurrer to this plea is also sustained. The disposal of these general subjects goes far to dispose of the whole demurrer. There are, however, some other matters contained in the amended answer filed May 29, 1878, which are demurred to, and which it is necessary to notice.

Some difficulty is experienced in separating this answer into distinct parts, or pleas, and in distinguishing the latter from mere argument and statements of law. As well as I can, I will consider its different parts so far as not already disposed of.

The first two pages (I shall have to refer to it in this way) consist of further demurrers to the petition, which have been disposed of by a previous order made at this term. The third page commences with a detailed statement of certain proceedings which are alleged to have taken place in the common council in October, 1873, being a report of proceedings by the mayor and chairman of the street committee, the adoption of the amended ordinance of October 21st, 1873, the subsequent ordinance of February 3d, 1874, the advertisement for proposals, the inadequacy of the bonds authorized to be issued to meet the payments of the contract, concluding with an averment that the ordinance of February 3, 1874 (No. 37), was procured, and the advertisement for proposals was made, collusively with the plaintiffs for the fraudulent purpose of securing the contract to them, and that the contract was obtained and procured by fraud. Without being able to see the relevancy of much of this statement, still regarding it as introductory to the charge of fraud, I think it may stand for that purpose only, including the short paragraph following, charging the plaintiffs with suborning bidders, etc. Several following paragraphs are covered by what has been already said.

The next portion of the answer necessary to be further considered, is that extending from the middle of page eight to the end of the first paragraph on page 10, purporting to set out the proceedings which took place in the common council at its meetings on the 24th and 28th of March, 1874, which are relied on by the plaintiffs as recognizing, ratifying and confirming the contract, but which the defendants deny to have that effect, and contend that, instead of a ratification, it was a novation, or the making of a new contract between the plaintiffs and the city. Since the plaintiffs referred to and partially set out the purport of these proceedings in their amended petition, and relied thereon for the purposes of ratification, the defendants had a right (analogous to the right of oyer at the common law) to set out the whole proceedings, including the reports of the majority and minority of the committee on that occasion. This being done, the construction and effect of the action of the common council on said reports are matters of law. The majority of the committee reported that the contract made with the plaintiffs was in some particulars, in their opinion, improvidently entered into by the contracting parties on the part of the city, particularly in the fact that the property owners were not allowed some particular time within which to make the contemplated improvements. They reported, however, that after an interview with the plaintiff Hitchcock, they had arranged with him to make such changes in the contract as would obviate and remove all objections to it. These were, to reduce the price for curbing from 45 to 30 cents; for edging from 9 to 6 cents, paying in bonds as originally contracted for; and, thirdly, to apportion the cost of filling equitably against the respective pieces of property to be improved; fourthly, to give the property owners thirty days to comply with the ordinance directing the improvements to be made. They also recommended an ordinance amendatory of that of February 3d, 1874 (No. 37). These amendments were intended to secure the due construction of the sidewalks by those property owners who should elect to construct the same. These recommendations of the majority of the committee were adopted by the council. The answer further alleges that the plaintiffs, in violation of the agreement so made with the committee, as reported by them, refused to carry out the same, and published a notice on the 7th of April claiming a right under the original contract, to do the whole work. This plea, in effect, denies that the contract originally entered into was ratified by the common council, but sets up that, by way of compromise, a new contract was entered into, which both parties acceded to, and that the plaintiffs afterwards refused to carry it out. Now, if all the facts can be proved which are set out in the report of the committee, and rehearsed in the plea, to wit, that the plaintiffs did make a new contract as stated, it seems to me, as stated in the former opinion, that it makes a valid defense to this action. The plea is, therefore, in my opinion, a good plea, and the demurrer to it must be overruled. The same plea, in effect, but stated with more categorical precision, is made at the conclusion of the answer, on the 12th and 13th pages thereof, and the demurrer thereto must in like manner, be overruled. I have revised a form of judgment prepared by the plaintiffs' counsel, which correctly expresses the conclusions to which I have come.

[See note to Case No. 6,532.]

Case No. 6,535.

HITCHCOCK v. ROLLO.

[3 Biss. 276; 2 Ins. Law J. 938; 4 N. B. R. 690; 4 Chi. Leg. News, 284.] [1]

Circuit Court, N. D. Illinois. June, 1872.

BANKRUPT ACT — ASSIGNEE — MUTUALITY — RULE IN EQUITY—PURCHASED CLAIMS — TWENTIETH SECTION BANKRUPT ACT CONSTRUED.

1. The assignee of a claim against an insolvent insurance company for loss under its policies, assigned after notice of insolvency, cannot set if off against his previous indebtedness to the company. The debts and credits are not mutual under the 20th section of the bankrupt act [of 1867 (14 Stat. 526)].

[Cited in Com. v. Shoe & Leather Dealers' Fire & Marine Ins. Co., 112 Mass. 135.]

2. Such a set-off would be unjust and inequitable.

3. Though courts of equity follow the law in allowing or refusing set-off, special circumstances may control the equity.

4. An assignee of a claim seeking to establish a set-off should show, not merely that he is the nominal owner of the claim, but that he has good equitable grounds for relief.

5. It seems, that a debtor to an insurance company might set-off a claim purchased before the filing of the petition, in good faith and for value, if without notice of the insolvency of the company.

[Cited in Jenkins v. Armour, Case No. 7,260; Lloyd v. Turner, Id. 8,436; Mattocks v. Lovering, 3 Fed. 213.]

6. A court of equity should construe the 20th section of the bankrupt act in furtherance of the main purpose of the law, and not permit one creditor to inequitably obtain payment in full, to the sacrifice of the claims of the other creditors.

7. The language of that section does not foreclose a court of equity from disallowing a set-off when it would work injustice.

[Cited in Ex parte Perkins, Case No. 10,982; Rollins v. Twitchell, Id. 12,027.]

This was a bill by Charles Hitchcock against William E. Rollo, assignee of the Merchants' Insurance Co., to establish a set-off. This case, in many respects, resembles the case of Drake v. Rollo [Case No. 4,066], immediately preceding. The complainant, on the 15th of May, 1867, borrowed of the insurance company the sum of $20,000, paya-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Chi. Leg. News, 284, contains only a partial report.]

ble in five years, to secure which he gave his notes, secured by mortgage on real estate in Chicago. The insurance company was rendered insolvent by the Chicago fire of October 9th, 1871, at which time complainant held three policies of insurance against the company, amounting to $11,000, upon which there was a total loss, which was regularly proved up against the company and adjusted. The company had also issued a policy for $1,500 to the firm of Hitchcock, Dupee & Everts, of which complainant was a member, covering property owned by them, upon which there was also a total loss. The company was also indebted to the firm upon open account in the sum of $877. These firm losses were regularly proved up and adjusted, and the company issued to the firm their certificate of indebtedness for the amount, which certificate was, on the 27th of October, assigned and transferred to the complainant, but there was nothing to show that value was actually paid for the assignment. It was admitted that the complainant, at the time of the assignment of the claims to him, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent. On the 17th day of November, 1871, a petition in bankruptcy was filed against the company in the district court of this district, upon which it was afterwards adjudged a bankrupt, and Mr. Rollo elected the assignee. This bill sought to set-off all of the above claims against the complainants' indebtedness to the company.

Charles Hitchcock, pro se.

A debtor for money borrowed may purchase the negotiable notes of an insolvent at any time before the filing of a petition in bankruptcy against him, and set them off under the 20th section of the act of 1867, notwithstanding he had notice of insolvency, and purchased for the purpose of making the set-off.

First—The purchase of such paper is a "giving of credit," which is mutual within the meaning of the bankrupt law. 2 Smith, Lead. Cas. 316, 317; Hankey v. Smith, 3 Term R. 507; Collins v. Jones, 10 Barn. & C. 777. The rule has never been questioned. In the following cases, cited by Mr. Hoyne in argument, viz.. Belcher v. Lloyd, 10 Bing. 310; Lackington v. Combes, 6 Bing. N. C. 71, and Fair v. McIver, 16 East, 130, it appeared that the parties claiming the set-off had no real interest in the notes, and the decisions proceed upon that ground.

Second—Such negotiable notes may be set-off under the bankrupt law. The only argument against the right is that "if allowed it violates the spirit and policy of the bankrupt law, defeats the equal distribution of the assets of the bankrupt, which it is the evident purpose of the act to accomplish, and, in effect, operates as a fraud on it." Congress has deliberately determined that the occasional failure of the chief purpose of the act in this way is on the whole a less evil than uncertainty as to the time within which credit may be given and set-off received. The earliest bankrupt law of England did not provide for the set-off of mutual debts or credits. This omission, as Lord Mansfield says, "shocked the sense of justice of mankind;" and in 1732, by 5 Geo. II. c. 30, § 28, the right of set-off was secured, "if the credits were given or the debts incurred at any time before the person became bankrupt." The act of bankruptcy was the limit after which credit could not be given. The act seems to have been considered subject to three objections: First—That a person might give the credit to a notorious insolvent at any time before an act of bankruptcy, and yet secure the set-off. Second—A person giving credit without notice of an act of bankruptcy might be deprived of his equitable right of set-off. Third—No limitation was fixed beyond which the giving of credit should not be called in question.

No suggestion was ever made in the courts that it was possible to meet these objections by construction based on the spirit and policy of the bankrupt law. In 1806, by the act of 46 Geo. III. c. 135, § 3, the supposed objections were removed and the right of set-off was secured, notwithstanding a prior act of bankruptcy "provided the credit was given to the bankrupt two months before suing out the commission, or provided the person claiming the right of set-off had not, at the time of giving such credit, notice of a prior act of bankruptcy, or that he was insolvent or had stopped payment." Here for the first time a set-off was, in terms, denied, where the claimant had notice at the time of giving it that the party was insolvent, or had stopped payment. The American bankrupt acts of 1800 and 1841 contained no similar provision. See sections 10, 13, and 42 of act of 1800 [1 Stat. 24, 25, 33], and sections 2, 3, and 5 of act of 1841 [5 Stat. 442, 444]. This act was in force and administered according to its terms for twenty years, when in 1825, by act of 6 Geo. IV., only such persons were excluded from the benefit of set-off as had, when they gave the credit, notice of an act of bankruptcy. Hawkins v. Whitten, 10 Barn. & C. 221. The same provision is to be found in all the acts of Victoria. Under these acts the English rule, so far as allowing a set-off when credit was given, even with notice of insolvency, was made to conform not only to the former English but also to the American law. The uncertainties attending the judicial inquiry into "notice of insolvency" was found to be an evil, and therefore the provision was repealed. In a case arising out of the fire of October 9th, 1871, by which all insurance companies were rendered insolvent, there is no difficulty in fixing notice of insolvency; but rules of law are general,

and in the great majority of cases the greatest uncertainty and consequent injustice would attend the inquiry. Congress had these acts before it when the bankrupt law was framed. It is a matter of public history that the author of the act, Mr. Jenckes, of Rhode Island, had carefully studied the English legislation upon the subject. The act of 46 Geo. III. contained language appropriate to accomplish the purpose of excluding the right of set-off in such a case as that before the court and under discussion. The courts of England had held that the repeal of the language secured the right, notwithstanding known insolvency at the time the credit was given, and yet congress passed the law of 1867, omitting all provision on the subject. It was evidently the intention to fix a certain time, viz., the filing of the petition, after which credit should not be given with a view to set-off, and prior to which no inquiry should be made as to notice of insolvency. The statutes of Massachusetts have a similar history. The early acts provided for a set-off of all claims "existing at the time of the first publication of the notice of the issuing of the warrant." In 1855, in the case of Aldrich v. Campbell, 4 Gray, 284, it was decided that claims "purchased for a valuable but not a full consideration against a debtor in embarrassed circumstances, who afterwards obtained a certificate of discharge in insolvency," could be set-off. In the following year, 1856, the supposed evil was met by a law providing "that no set-off should be allowed of a claim purchased with reasonable cause to believe the debtor insolvent." These acts and decisions were before congress when the bankrupt act was passed. It is wholly improbable that congress, with attention addressed to the subject, as appeared by the 20th section, should not have used either the language of the Massachusetts act of 1856 or the act of George IV. if the provisions of those acts had been approved. It would seem that, congress having deliberately and intentionally failed to deny a set-off where the party had notice of insolvency, it should not now be urged that the courts should interpolate the language in the act, and that what was denied by congress should be accomplished by interpretation.

McCagg, Fuller & Culver, for defendant.

The main argument of the complainant in support of his right to set-off claims for losses adjusted and purchased since the bankruptcy of the company, against loans obtained from it, is founded upon the proviso to the first clause of the twentieth section of the bankrupt act as construed in Re City Bank, etc. [Case No. 2,742]. This clause ought not to be construed as giving authority to allow all claims purchased before the filing of the petition, but only as a prohibition against allowing any to be set-off which are purchased after that date, leaving those purchased before to be allowed or not as shall appear just and equitable according to the previously settled bankrupt law. The allowance of mutual credits is designed to protect parties who have dealt with each other, and to preserve their equities by requiring only the balance to be paid as shall appear to be due upon the account stated between them. It is not to be construed to allow a party, after adjusting his own claims and having been allowed his own equities, to purchase the claims of other parties and tack them on his own to increase his allowance, to the prejudice of the other creditors. The theory of set-off, both in equity and by the bankrupt law, is that the balance found due upon a statement of the accounts between the bankrupt estate and its debtors or creditors, shall be paid to the other by the debtor party, because that would be the result of the dealings between the parties if their transactions were consummated; but it would frustrate all the theory and equities of the law to allow one debtor of the bankrupt estate, after satisfying his own equities, to buy the claims of a party who was simply a debtor of the bankrupt estate from the beginning, and have them allowed in full to satisfy the balance found due after satisfying his own equities.

The complainant did not deal with the bankrupt upon a real or supposed understanding that the claims thus purchased should be set-off, and to allow them to be set-off in full would be to give him a preference over the creditors of the bankrupt estate. Such preference would be the creation of a right by operation of law, not in favor of either party to the assigned claim, but in favor of one who has had all his own equities allowed and adjusted, and who has purchased no equity from any one else, and would result in an inequitable extinction of his own debt, to the prejudice of the other creditors of the estate. For this reason and because the bankrupt law was framed upon the theory of preserving the equities of the bankrupt and those dealing with him in respect of their transactions, the claims purchased after the known insolvency of the bankrupt ought not to be allowed to be used to disturb and destroy the rights of the creditors of the estate. The complainant may take such a dividend on the assigned claims as the assignor was entitled to, but no more, for he only bought a legal claim to which no equity was attached, and having had his own equities allowed so far as his own dealings with the bankrupt are concerned, he ought to be satisfied, and the court ought not by construction to extend the law of set-off in his favor, and clearly the express provisions of the bankrupt act do not require it. The authorities founded upon former British and American statutes, and the general equitable rules of set-off do not allow this to be done. Smith v. Hill, 8 Gray, 572; Smith v. Brinkerhoff, 8 Barb. 519; 2 Story, Eq. Jur. §§

1435–1437; 2 Smith, Lead. Cas. Eq. 366, 373, 374, 378; Smith v. Brinkerhoff, 6 N. Y. 305; Lee, Bankr. 283; Clarke v. Hawkins, 5 R. I. 219; Wat. Set-off, 190–193; Dickson v. Evans, 6 Term R. 57; Ogden v. Cowley, 2 Johns. 274; In re Receiver of Middle Dist. Bank, 1 Paige, 584; Staniforth v. Fellowes, 1 Marsh. 184; Ex parte Hale, 3 Ves. 304.

Thomas Hoyne, for defendant.

Complainant claims to set-off a claim for loss under a policy of insurance which he purchased after knowledge of insolvency of the company, caused by the great fire of 1871. The dealings between the parties consisted of a single transaction, that of complainant in obtaining a loan—there were no mutual dealings; mutual debts or credits; no accounts; neither is the claim of complainant reciprocal, as it did not arise out of the same transaction. It is insisted that under the 20th section of the bankrupt law this is a mutual debt, or a mutual credit between the parties to this suit, which upon an account between them being stated, one debt shall or may be set off against the other, and the balance only shall be allowed or paid. In Ex parte Globe Ins. Co., 2 Edw. Ch. 625, as respects this doctrine of the mutual right to set off claims, the chancellor holds that they must be such as arise out of the mutual dealings of the parties in the course of their business. When parties have had dealings so as to produce mutual debts and credits or reciprocal demands, growing out of the same transaction, it is the balance only which exists as a debt. The doctrine of set-off presupposes that there have been mutual dealings or reciprocal demands between the parties, and the section of the bankrupt act speaks only of mutual debts and mutual credits between the parties, and expressly provides for the statement of the account between them, and after one debt is set off against the other it is only the balance of the account which is to be allowed. Thus the section provides for the set-off of a claim only in cases where the parties have had some mutual dealings, and when some account of such dealings exists. Out of such dealings the claim is to arise, and then when such account is stated, and one claim is set off against the other, the balance only becomes a mutual debt or credit. Thus the section is in full accord with the nature of all set-offs, to which the whole doctrine of set-off is applicable. And besides this, this construction is in full accord with the policy of the bankrupt law, which recognizes only bona fide dealings; not contrived to work injustice or fraud, or to secure by any intrigue the preference of one creditor over another. The same construction is placed upon the English statute, although the language of the act is different from ours. Hawkins v. Whitten, 10 Barn. & C. 217, 21 E. C. L. 101; Fair v. McIver, 16 East, 130; Lackington v. Combes, 6 Bing. N. C. 71, 37 E. C. L. 515. In any case, if it appears that the claim to be set off is the result of a mere contrivance or color to make it appear that defendant was a bona fide holder of the claim, it is treated by the English courts as a fraud upon the act. Lackington v. Combes, 6 Bing. N. C. 71; Smith v. Hill, 8 Gray, 572; Howe v. Snow, 3 Allen, 113; Smith v. Brinkerhoff, 8 Barb. 519; Ogden v. Cowley, 2 Johns. 274; Dickson v. Evans, 6 Term R. 57. In Ogden v. Cowley, 2 Johns. 274, Chief Justice Kent remarks: "It would be unjust if one person who happened to be indebted to another at the time of his bankruptcy were permitted by any intrigue between himself and another so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act ex post facto." Any act which tends to defeat the purpose and policy of the law, and which is done in contravention of and with intent to defeat such policy and purpose is a fraud upon the bankrupt act. Bump, Notes, 455; Samson v. Burton [Case No. 12,285]; In re Gregg [Id. 5,797]. See Wat. Set-off, § 182, citing 8 Barb. 519. It would be difficult to conceive of a case where the injustice would be greater or the intention more manifest to defeat the purpose of the act, and where there was so little pretence of mutuality of dealing as in this case. The policy of insurance was purchased after it became known the company was insolvent—where there had been no dealing, no account kept, and where the claim was purchased after insolvency, with a view to pay a debt due a bankrupt, thus allowing the debtors to purchase in claims at 25 per cent. or less, paying their own claims at par, and exhausting the estate of the general creditors.

The next claim to set-off arises out of the relations of the stockholder to the company. Can the stockholder who is indebted upon his stock for nonpayment of his share or shares set off a debt due him from the company, before his own debt to the company be first paid in full?

1. There are some axioms of equity law which make this claim of the stockholder utterly inadmissible. The creditor must be first paid. In all associations of partnership, joint stock, or corporate organization, the capital is held to be pledged for the payment of the general creditor. The capital is a trust fund. If this fund has been distributed, so that it is in the hands of the stockholders, or in the hands of others than bona fide creditors, or purchasers, leaving debts unpaid, such holders take the property charged with the trust in favor of the creditors.

2. The capital stock of a corporation is a trust fund, for payment of debts of the corporation. Creditors have a lien, or right of priority upon it in preference to any of the stockholders, and no stockholder can entitle himself to any dividend or share of the capital stock until such debts are paid. 2 Story, Eq. Jur. § 1252; Curran v. Arkansas, 15

How. [56 U. S.] 307; Mumma v. Potomac Co., 8 Pet. [33 U. S.] 281; Nathan v. Whitlock, 3 Edw. Ch. 215, 9 Paige, 152; Lawrence v. Nelson, 21 N. Y. 158. In Hillier v. Allegheny Co. Mut. Ins. Co., 3 Pa. St. 470, it is expressly held that where the funds were not adequate to pay all losses occasioned by a fire which had occurred, the entire funds belong to the losers. The stockholder who is liable for unpaid installments cannot set off his loss, but must first pay in his capital, and then he shares pro rata with other losers. Long v. Penn Ins. Co. 6 Pa. St. 421; Osgood v. Ogden, *43 N. Y. 70; Lawrence v. Nelson, 21 N. Y. 158; Vose v. Grant, 15 Mass. 505; King v. Fowler, 16 Mass. 397; Wood v. Dummer [Case No. 17,944].

John Borden, also for the set-off, cited, in addition to cases cited by other counsel, the case of Young v. Bank of Bengal, 1 Deac. 622, where the doctrine of mutual credits is elaborately discussed by Lord Brougham, and numerous authorities commented on.

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

DRUMMOND, Circuit Judge. The only point not decided in the previous case is as to the claim assigned to the plaintiff. It is admitted that the plaintiff, at the time of the assignment, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

There are two questions which we may consider in this case, as they have both been argued, and exist either together or separately in several of the cases which were taken up at the same time. 1st. Can the claims assigned be allowed as a set-off? And, 2d. Does the knowledge which a person had of the pecuniary condition of the company, and the probable consequences growing out of the same, affect the right of set-off?

As to the first question: If the debt of the plaintiff were due, and no assignment had been made, in a suit brought against the plaintiff, he could not set-off the claim due on the policy to him and his two partners, because that would make the partners liable for the individual debt of each member of the firm. Dehon v. Stetson, 9 Metc. [Mass.] 341; Wat. Set-off, § 222, and the authorities there cited. If the case were reversed, and suit were brought by the plaintiff and his partners on the policy against the company, the latter could not set-off the debt due from the plaintiff. In each instance there is wanting that mutuality which the statute requires, and the debts exist in different rights. If the joint claim had become vested in the plaintiff, so that he could have brought suit in his own name, it might be different. Columbian Ins. Co. v. Black, 18 Johns. 149; Parker v. Beasley, 2 Maule & S. 423.

The case of Tucker v. Oxley, 5 Cranch [9 U. S.] 34, was cited and relied on at the argument. A firm had been dissolved and the partnership assets had passed to one of the firm, who had become bankrupt. The assignee brought suit against two persons on a debt due the bankrupt. They were allowed by a majority of the court to set-off a debt previously due to them from the firm. This was the ruling under the peculiar wording of the bankrupt law of 1800 [supra], and seems to be an exceptional case.

It is very doubtful whether that would be proper, under the present bankrupt law, which contains provisions as to the distribution of the joint and separate estate of partners, not in the law of 1800.

An assignee of a firm brought an action on a debt due the firm. It was held, by the supreme court of Massachusetts, that the defendant could not set-off a debt from one of the partners. Williams v. Brimhall, 13 Gray, 462.

Courts of equity follow the law in allowing or refusing set-offs, qualified by the rule that special circumstances may control the equity. 2 Story, Eq. Jur. 1437.

What are the special equities of the plaintiff? He alleges that the debt owed by him is not yet due; that the company is insolvent and in bankruptcy, and that the firm claims against the company were assigned to him with knowledge of the insolvency. If we concede that an assignment by the other partners might give the plaintiff the right to a set-off, we think it is incumbent on him, when he comes into a court of equity and seeks to have the assigned claims allowed as a set-off, to show that he is more than the nominal owner. In other words, his equitable grounds for relief should be clearly established. From all that appears in this case, the fair inference is that these claims were merely transferred to enable the holders of the fifteen hundred dollar policy to realize their claim in full out of an insolvent corporation. No special equities within the true meaning of the rule are shown.

As to the second and more important question—the words "mutual debts," and "mutual credits," used in the 20th section of the present bankrupt law are not essentially different from those to be found in most of the previous bankrupt laws of England and of this country, subject to various conditions and limitations. And the argument is that the court cannot go outside of the language of the section, and that if it is a mutual debt, or a mutual credit, it can in all cases be set-off, except when it is a claim in its nature not provable against the estate, or one purchased by or transferred to the bankrupt's debtor after the petition in bankruptcy is filed, those only being excluded by the terms of the law. And in support of this position, the case of Hawkins v. Whitten, 10 Barn. & C. 217, decided under the English bankrupt law of 6 Geo. IV., was relied on. The question there was, whether the defendant had the right to set-off notes of the bankrupts obtained by him after he knew that the bankrupts,

who were bankers, had stopped payment, but before he knew that an act of bankruptcy had been committed? And the court decided that he had such right, although he might have reason to believe them to be insolvent.

But the case was decided under a statute which had omitted the words of a previous statute, which declared that the set-off should not be allowed where the party had obtained the claims against the bankrupt after he stopped payment. The omission of such words where the law had been substantially re-enacted, with that exception, was an argument well nigh irresistible in favor of the construction given by the court, notwithstanding Lord Tenterden significantly asked whether it would not be a fraud on the bankrupt law.

It is said that in view of such a decision as this and of the English bankrupt laws, the twentieth section of our bankrupt law in making only two exceptions to the right of set-off in the case of mutual debits or credits —one a claim not provable against the estate, and the other a claim obtained after the filing of the petition—intended to allow all others. That principle goes very far, and we are not prepared to admit it to that extent. We believe many cases may be imagined where a court of equity would not permit a set-off, although not within the exceptions. For example: a person might have borrowed the whole capital of the insurance company, and be on the way to its treasurer to pay it, and meet a creditor who informed him he had a petition in his hands ready to be filed in the district court, and alleging the undoubted fact of the bankruptcy and insolvency of the company. In such case, if he had taken the money to buy up claims against the company at ten cents on the dollar, would equity allow the set-off because the petition was not then actually filed?

The case supposed is within neither of the exceptions of the twentieth section, and yet we cannot doubt that it would be the duty of a court of equity to disallow a claim of set-off which would thus permit a debtor to absorb the whole capital of the company by credits so purchased, for the reason that it would be unjust, and a substantial fraud on the bankrupt law.

The object of all general rules applicable to the rights of persons should be to promote the greatest good. It is upon that principle that the bankrupt law rests—the equal division among all creditors of the property of an insolvent company or individual.

We are called on to make the application of principles—not in a solitary case here and there, but under circumstances calculated to bring to a crucial test the soundness of rules —the insolvency and bankruptcy of numberless insurance companies whelmed in a common ruin, and where, if the doctrine contended for by the plaintiff is maintained, a comparatively few persons holding all their assets, amounting to millions, can retain them by going into the market and purchasing, with full knowledge of all the facts, claims against them for a nominal sum.

But one decision under the bankrupt law of 1867 [supra], was cited on the argument having a bearing on the point now under consideration,—In re City Bank of Savings [Case No. 2,742], by the district judge of California. It was held in that case that the fact that the creditor of the bankrupt at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off against the debt the claim thus assigned. The report of the case does not state explicitly whether the debtor, at the time of the assignment, knew of the insolvency of the bankrupt, but perhaps it may be an inference that such was the fact.

The court overruled the objection that the effect of allowing the set-off would be a fraud on the law, and seemed inclined to give an absolutely literal construction to the twentieth section, while admitting that the result would be to enable one creditor to obtain full satisfaction of his claim to the prejudice of other creditors.

We admit that this may be so, if there is good faith. We do not doubt that a debtor can purchase a claim against the creditor, at any time before the filing of the petition in bankruptcy, and set it off, provided the purchase is made without notice of insolvency, for value, fairly, and not in fraud of the law; and we thus give full effect to the statute.

If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it to be the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit one creditor in this way to obtain the payment of his claim in full, to the sacrifice of the claims of other creditors.

It is said that there must be some time fixed within which doubtful transactions can no longer be questioned. It is for a court of equity, or the bankrupt court in the exercise of its equitable powers, to decide, looking at all the circumstances of the case, under what limitations the right shall be placed.

Our attention has been directed to a case not cited on the argument,—Smith v. Hill, 8 Gray, 572. In that case the defendant purchased claims against a person, knowing him to be insolvent, and having reason to believe that he was about to be put into insolvency; and then, in a suit by the assignee, proposed to set off these claims against a debt he owed the insolvent. Under the statute mutual debts and demands could be set off; but the court held that the effect of allowing the set-off would be to interfere with the proper distribution of the estate of the insolvent, and would be contrary to the spirit of the insolvent laws; that it would enable a debtor to give a preference to such of the cred-

itors as he might favor, and would allow debtors to pay their debts by purchasing claims against the insolvent at a discount.

And that decision was not made under amendments which had expressly prohibited such set-off, but independently of them, and on the general ground that it would be inequitable to permit the set-off. We think the principles of that case are applicable to this, and that they constitute a true test to determine whether the set-off claimed here should be allowed. See Hill. Bankr. 224, who adopts the principle of Smith v. Hill; Avery & H. Bankr. 157; Wat. Set-off, 141.

We are of the opinion, therefore, on both of the grounds stated, that a set-off is not allowable. In construing our bankrupt law we have to regard it as a whole system—framed, doubtless, at that time in view of previous laws, both English and American; but where it was impossible to include all the various circumstances and contingencies which had given occasion to the numerous alterations and modifications of previous laws, and this is especially true of the twentieth section in relation to set-off.

Notwithstanding the language there is general, and only two exceptions are named, we must still think that it did not intend, outside of these exceptions, to foreclose a court of equity from disallowing a set-off when it would on the whole work injustice.

We think, therefore, we are at liberty to place such construction on our bankrupt law as is in harmony with the common sense of equity; and that such a set-off as the one claimed here ought not to be permitted, is abundantly manifest from the whole tenor of recent legislation, both English and American. We confess we think we go quite far enough, which we do in obedience to authority, when we admit that a man may borrow a part, or even the whole, of the capital of an insurance company, and then take out policies of insurance, it may be because of the loan, and in case of loss and insolvency of the company, set off the loan against the loss on the policy, even though it may leave other creditors with nothing. There may be instances where this can be done, when it would be difficult to reconcile it with our notions of a sound morality, or with that rule which requires us to do to others as we would have them do to us.

But we do not feel inclined to go further, and adopt a rule which would permit the debtors of a bankrupt company thus to realize, for a nominal sum, the full amount of their claims on the company, while other creditors thereby go empty-handed.

As to the assigned claims the set-off will not be allowed.

NOTE. Consult Drake v. Rollo [Case No. 4,066]; Sawyer v. Hoag [Id. 12,400]; and for a full discussion of the right of set-off as against liability on stock subscription, and money received as treasurer, see Scammon v. Kimball [Id. 12,435], Sept., 1873. For the general question of liability on stock subscriptions, after bankruptcy of the company, consult Upton v. Hansbrough [Id. 16,801]; Upton v. Burnham [Id. 16,799], and cases there cited. For opinion of supreme court in the set-off cases, affirming decree of the court below, consult Sawyer v. Hoag [17 Wall. (84 U. S.) 610.]

Case No. 6,536.

HITCHCOCK v. ROLLO.

[6 Chi. Leg. News, 9; 18 Int. Rev. Rec. 166.] [1]

Circuit Court, N. D. Illinois. June, 1872.

THE RIGHT OF SET-OFF IN EQUITY UNDER THE BANKRUPT LAW.

1. The same points decided as in the previous case.

2. Where a person borrowed money of an insurance company, and had taken an assignment of a policy of insurance issued to himself and his partners upon their joint property, the assignment being made after the insolvency of the company, *held* on a bill filed by the borrower to set off the debt due the company for a loss on the policy before the assignment was not allowable. The debts and credits were not mutual, nor existing in the same right.

3. *Held*, further, that the plaintiff, in such a case, should allege and prove not only that he is the nominal owner of the policy, but that in equity he has a right to stand in the place of the parties to whom the policy was issued.

4. Where a person has borrowed money of an insurance company, and is holder of a policy of insurance on which the company is liable to him for a loss on the same, and the company becomes insolvent, with proceedings in insolvency or bankruptcy imminent, and with the knowledge of these facts he obtained the policy with the purpose of setting off the claim under the policy for the debt he owed the company, *held* that the set-off was not allowable under the twentieth section of the bankrupt law [of 1867 (14 Stat. 526)], notwithstanding the policy might have been assigned to him before the petition in bankruptcy was filed.

[Cited in Hovey v. Home Ins. Co., Case No. 6,743.]

5. To allow the set-off under such circumstances would be a substantial fraud on the statute, and give an unjust preference to one creditor to the prejudice of other creditors.

6. Notwithstanding the two exceptions in the twentieth section of the bankrupt law, a court of equity is not foreclosed from disallowing a set-off outside of the exceptions if the circumstances show that to permit it would be inequitable.

[This was a proceeding by Charles Hitchcock against W. E. Rollo, assignee of the Merchants' Insurance Company.]

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

DRUMMOND, Circuit Judge. This case, in many respects, is like the case of Drake v. Rollo [Case No. 4,066], just decided. The plaintiff borrowed of the company twenty thousand dollars, on the 15th day of May, 1867, payable in five years. At the time of the great fire last fall, he held three policies of insurance issued to him by the company on property in Chicago, amounting to $11,000,

[1] [18 Int. Rev. Rec. 166, contains only a partial report.]

and on which there was a total loss. There was also a policy issued by the company to the plaintiff, Dupee and Evarts (these two last named being partners of the plaintiff) for $1,500, on property owned by the three, on which there was, at the same time, a total loss. There was also an account due from the company to the firm of Hitchcock, Dupee & Evarts for several hundred dollars. On the 27th of October, 1871, the firm assigned their claim to the plaintiff. The plaintiff filed a bill on the equity side of the court, in April last, to set off all these claims against the amount to become due the company for the money borrowed. The only point not decided in the previous case is as to the claim assigned to the plaintiff. It is admitted that the plaintiff, at the time of the assignment, knew the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

There are two questions which we may consider in this case, as they have both been argued, and exist either together or separately in several of the cases, which were taken up at the same time. 1st. Can the claims assigned be allowed as a set-off; and, 2d. Does the knowledge which a person had of the pecuniary condition of the company, and the probable consequences growing out of the same, affect the right of set-off?

As to the first question: If the debt of the plaintiff were due, and no assignment had been made, in a suit brought against the plaintiff he could not set off the claim due on the policy to him and his two partners, because that would make the partners liable for the individual debt of each member of the firm. Dehon v. Stetson, 9 Metc. (Mass.) 341; Wat. Set-Off, § 222, and the authority there cited. If the case were reversed, and suit were brought by the plaintiff and his partners on the policy against the company, the latter could not set off the debt from the plaintiff. In each instance there is wanting that mutuality which the statute requires, and the debts exist in different rights. If the joint claim had become vested in the plaintiff, so that he could have brought suit in his own name, it might be different. Columbian Ins. Co. v. Black, 18 Johns. 149; Parker v. Beasley, 2 Maule & S. 423. The case of Tucker v. Oxley, 5 Cranch [9 U. S.] 34, was cited and relied on at the argument. A firm had been dissolved, and the partnership assets had passed to one of the firm, who had become bankrupt. The assignee brought suit against two persons on a debt due the bankrupt. They were allowed by a majority of the court, to set off a debt previously due to them from the firm. This was the ruling under the peculiar wording of the bankrupt law of 1800 [2 Stat. 19], and seems to be an exceptional case.

It is very doubtful whether it would be proper, under the present bankrupt law, which contains provisions as to the distribution of the joint and separate estate of partners, not in the law of 1800. An assignee of a firm brought an action on a debt due the firm. It was held that the defendant could not set off a debt from one of the partners, by the supreme court of Massachusetts. Williams v. Brimhall, 13 Gray, 462. Courts of equity follow the law in allowing or refusing set-offs, qualified by the rule that special circumstances may control the equity. 2 Story, Eq. Jur. 1437.

What are the special equities of the plaintiff? He alleges that the debt owed by him is not yet due; that the company is insolvent and in bankruptcy; and that the firm claims against the company were assigned to him with knowledge of the insolvency. If we conceded that an assignment by the other partners might give the plaintiff the right to a set-off, we think it is incumbent on him, when he comes into a court of equity, and seeks to have the claims assigned allowed as a set-off, to show that he is more than the nominal owner. In other words, his equitable grounds for relief should be clearly established. From all that appears in this case, the fair inference is that these claims were merely transferred to enable the holders of the fifteen hundred dollar policy to realize their claim in full out of an insolvent corporation. No special equities, within the true meaning of the rule, are shown.

As to the second and more important question, the words "mutual debts" and "mutual credits," used in the 20th section of the present bankrupt law, are not essentially different from those to be found in most of the previous bankrupt laws of England and of this country, subject to various conditions and limitations. And the argument is that the court can not go outside of the language of the section, and that if it is a mutual debt or a mutual credit it can in all cases be set off, except when it is a claim in its nature not proveable against the estate, or one purchased by or transferred to the bankrupt's debtor after the petition in bankruptcy is filed, those only being excluded by the terms of the law. And in support of this position, the case of Hawkins v. Whitten, 10 Barn. & C. 217, decided under the English bankrupt law of 6 George IV., was relied on. The question there was whether the defendant had the right to set off notes of the bankrupts obtained by him after he knew that the bankrupts, who were bankers, had stopped payment, but before he knew that an act of bankruptcy had been committed. And the court decided that he had such right, although he might have reason to believe them to be insolvent. But the case was decided under a statute which had omitted the words of a previous statute, which declared that the set-off should not be allowed where the party had obtained the claims against the bankrupt after he stopped payment. The omission of such words where the law had been substantially re-enacted, with that exception, was an argument well nigh irresisti-

ble in favor of the construction given by the court, notwithstanding Lord Tenterden significantly asked whether it would not be a fraud on the bankrupt law.

It is said that in view of such a decision as this and of the English bankrupt laws, the 20th section of our bankrupt law, in making only two exceptions to the right of set-off in the case of mutual debits or credits, one a claim not proveable against the estate, and the other a claim obtained after the filing of the petition, intended to allow all others. That principle goes very far, and we are not prepared to admit it to that extent. We believe many cases may be imagined where a court of equity would not permit a set-off, although not within the exceptions. For example, a person might have borrowed the whole capital of the insurance company, and be on the way to its treasurer to pay it, and meet a creditor who informed him he had a petition in his hands ready to be filed in the district court, and alleging the undoubted fact of the bankruptcy and insolvency of the company. In such case, if he had taken the money to buy up claims against the company at ten cents on the dollar, would equity allow the set-off? The case supposed is within neither of the exceptions of the twentieth section, and yet we can not doubt that it would be the duty of a court of equity to disallow a claim of set-off which would thus permit a debtor to absorb the whole capital of the company by credits so purchased, for the reason that it would be unjust and a substantial fraud on the bankrupt law.

The object of all general rules applicable to the right of persons should be to promote the greatest good. It is upon that principle that the bankrupt law rests,—the equal division among all creditors of the property of an insolvent company or individual. We are called on to make the application of principles, not in a solitary case here and there, but under circumstances calculated to bring to a crucial test the soundness of rules,—the insolvency and bankruptcy of numberless insurance companies, whelmed in a common ruin, and where, if the doctrine contended for by the plaintiff is maintained, a comparatively few persons holding all their assets, amounting to millions, can retain them by going into the market, purchasing, with full knowledge of all the facts, claims against them for a nominal sum. But one decision under the bankrupt law of 1867 was cited on the argument, having a bearing on the point now under consideration,—In re City Bank of Savings [Case No. 2,742],—by the district judge of California. It was held in that case, that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off the claim thus assigned against the debt. The report of the case does not state explicitly whether the debtor, at the time of the assignment, knew of the insolvency of the bankrupt, but perhaps it may be an inference that such was the fact. The court overruled the objection that the effect of allowing the set-off would be a fraud on the law, and seemed inclined to give an absolutely literal construction to the 20th section, while admitting that the result would be to enable one creditor to obtain full satisfaction of his claim to the prejudice of other creditors. We admit that this may be so if there is good faith. We do not doubt a debtor can purchase a claim at any time before the filing of the petition in bankruptcy against the creditor, and set it off, provided the purchase is made without notice of insolvency, for value, fairly, and not in fraud of the law; and we thus give full effect to the statute. If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it is the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit a trick of one creditor to prevail for the payment of his claim in full to the sacrifice of the claims of other creditors. It is said that there must be some time fixed within which doubtful transactions can no longer be questioned. It is for a court of equity, or the bankrupt court in the exercise of its equitable powers, to decide under what limitations the right shall be placed, looking at all the circumstances of the case.

Our attention has been directed to a case not cited on the argument,—Smith v. Hill, 8 Gray, 572. In that case the defendant purchased claims against a person, knowing him to be insolvent, and having reason to believe that he was about to be put into insolvency, and then, in a suit by the assignee, proposed to set off these claims against a debt he owed the insolvent. Under the statute mutual debts and demands could be set off. But the court held that the effect of allowing the set-off would be to interfere with the proper distribution of the estate of the insolvent, and would be contrary to the spirit of the insolvent laws; that it would enable a debtor to give a preference to such of the creditors as he might favor, and would allow debtors to pay debts by purchasing claims against the insolvent at a discount. And that decision was not made under amendments which had expressly prohibited such set-off, but independently of them, and on the general ground that it would be inequitable to permit the set-off. We think the principles of that case are applicable to this, and that they constitute a true test to determine whether the set-off claimed here should be allowed. See Hilliard on Bankruptcy (page 224), who adopts the principle of Smith v. Hill; Avery & H. Bankr. Law, 157; Wat. Set-Off, 141a. We are of the opinion, therefore, that a set-off is not allowable on both the grounds stated.

In construing our bankrupt law we have to regard it as a whole system, framed, doubtless, at that time, in view of previous laws, both English and American, but where it was impossible to include all the various circumstances and contingencies which had given occasion to the numerous alterations and modifications of previous laws; and this is especially true of the twentieth section in relation to set-off. Notwithstanding the language there is general, and only two exceptions are named, we must still think that it did not intend, outside of these exceptions, to foreclose a court of equity from disallowing a set-off when it would, on the whole, work injustice. We think, therefore, we are at liberty to place such a construction on our bankrupt law as is in harmony with the common sense of equity; and that such a set-off as the one claimed here ought not to be permitted, is abundantly manifest from the whole tenor of recent legislation, both English and American. We confess we think we go quite far enough, which we do in obedience to authority, when we admit that a man may borrow a part, or even the whole, of the capital of an insurance company, and then take out policies of insurance, it may be because of the loan, and, in case of loss and insolvency of the company, set off the loan against the loss on the policy, even though it may leave other creditors with nothing. There may be instances where this can be done, when it would be difficult to reconcile it with our notions of a sound morality, or with that rule which requires us to do to others as we would have them do to us. But we do not feel inclined to go further, and adopt a rule which would permit the debtors of a bankrupt company to realize the full amount of their claims on the company for a nominal sum, while other creditors thereby go empty-handed.

[NOTE. In Drake v. Rollo, Case No. 4,066, it was held that as soon as the loss occurred the relation of debtor and creditor ensued, and the insured could set off his loss under the policy against a claim of the insurance company. See, also, note to Case No. 6,535.]

Case No. 6,537.

HITCHCOCK et al. v. SHONINGER MELODEON CO. et al.[1]

Circuit Court, D. Connecticut. 1875.

PATENT SUITS — DECISIONS IN OTHER CIRCUITS—ANTICIPATION—PRIOR ART—EVIDENCE—EQUITY PRACTICE—OBJECTIONS TO DEPOSITIONS.

[1. The decision of another circuit court as to the validity and infringement of a patent is entitled to great consideration, so far as it relates to points which are unaffected by a different state of the proofs.]

[2. The right of a patentee to be regarded as the first inventor is not defeated by trials and experiments which led to no practical result, and were abandoned.]

[3. Where prior invention, knowledge, and use by a third person, who has secured a patent, are set up by defendants, it is competent for complainant to meet the same by producing the said patent and the application therefor, together with the patentee's accompanying or contemporaneous declarations. But letters written by other persons, not witnesses, letters from officers of the patent office, and especially any abstract or digest of assignments, agreements, and other papers, not produced, are inadmissible.]

[4. It is not competent, as bearing on the state of the art, to introduce the testimony of persons whose business and experience were adapted to bring to them a knowledge of all improvements therein, to the effect that no such improvement as that covered by the patent in suit had previously come to their knowledge.]

[5. The Carpenter reissue No. 3,665, for a "tremolo attachment," *held* valid and infringed.]

[6. The better practice requires that objection to parts of depositions shall be made before the final hearing by motion to strike out, as the raising of objections at the hearing tends to inconvenience and confusion.]

[This was a suit in equity by Alonzo Hitchcock and others against the B. Shoninger Melodeon Company and others for the infringement of reissued patent No. 3,665.]

Before WOODRUFF, Circuit Judge, and SHIPMAN, District Judge.

WOODRUFF, Circuit Judge. This suit is brought to restrain the defendants from infringing certain letters patent [No. 3,665], reissued to the complainants, as assignees of Riley W. Carpenter, the original patentee, dated October 5th, 1869, for a "tremolo attachment." The answer impeaches the validity of the original and reissued patent; denies that the patentee was the first inventor of the thing patented; states that the same was known to others, and in public use, before the original patent to Carpenter; avers that the specifications are fraudulent, and made to deceive the public by untruthful statements and by concealment of the truth, and denies that the defendants have infringed. A suit was heretofore prosecuted in the circuit court of the United States for the Southern district of New York, in equity, by these complainants, against Tremaine and another, founded upon the same patents, and for infringing the patent by the sale of melodeons with the tremolo attachment manufactured by the present defendants, and in that suit the complainants obtained a decree establishing the validity of their patent, and their right to recover for the infringement complained of. In several forms the opinion of the court was declared upon topics material in the consideration of this case, and especially upon the validity of the patent, the novelty of the invention, and the fact of infringement. Hitchcock v. Tremaine [Cases Nos. 6,538–6,540]. The complainants herein, by their bill of complaint, charged that the defendants in that suit were the agents and salesmen of the defendants in this, and that that suit was defended by and at the expense of these defendants. This was, in substance, denied

[1] [Not previously reported.]

We do not think that the proofs here are such that the suit referred to operates to affect the defendants as an estoppel or otherwise. Their case is open here upon all the merits. The decision, however, so far as it embraces points arising in this case not affected by a different state of the proofs, is entitled to consideration, and, as our judgments concur therein, will be deemed conclusive and controlling.

An examination of the proofs in this cause, consisting in part of the same testimony used in the case above referred to, does not satisfy us that the case here is materially changed. There is, it is true, some testimony which, on its face, tends further to prove that the patentee was not the original inventor; but upon all the proofs we are not able to accord to it our credence. There are also some points made by the counsel for the defendants which do not appear to have been specifically passed upon in the case against Tremaine et al. But none of them, we think, have any force or effect to defeat the patent or the claim of the complainants to a decree. Upon the question of infringement, the case of the complainants is entirely free from doubt, and the title of the patentee to be regarded as the first inventor is not defeated by trials and experiments leading to no substantial success or practical result and which were abandoned. Such, at most, are the efforts which are mainly relied upon by the defendants to defeat that title. However this statement involves a disbelief of some or one of the witnesses, it is the conclusion to which we are constrained by all the proofs.

We do not think it necessary to discuss the case in detail. To follow the counsel through their elaborate, minute and learned briefs would be of little service to either of these, who, by the long litigation of both cases, are quite familiar with the subject. For the most part the opinion of Judge Blatchford in the former case expresses our conclusions in this. Neither the additional testimony, the further issues, nor our examination of the voluminous brief of the defendant's counsel, aided by his oral argument, have, in our opinion, withdrawn this case from the conclusions reached in the former. Instead of moving to strike out such portions of the depositions taken in the cause before the final hearing, so that the attention of the court might be directed solely to proofs recognized as admissible, the counsel for the defendants raised some objections to the admissibility of testimony on the hearing. This is a very inconvenient practice, tending to some confusion in the hearing and consideration of the case. The testimony as taken before the examiner contains very numerous objections. We are not called upon to notice any which were not renewed on the hearing, and, as to those objections which were well taken, all that we can do is to treat the evidence as struck out on the defendants' objection. Precisely how this is to be incorporated in the record for the purpose of any desired review is not obvious, unless perhaps by an order of the court striking out such testimony, either oral or documentary, so that it shall by the record appear that it was not made the basis of any finding of fact or the ground of the decree. The defendants' objection to eleven letters written by and to Taylor & Farley, marked B, B, from 1 to 11, was yielded to by the complainants and by consent they were struck out on the hearing. The defendants objected to numerous papers relating to letters patent granted to Lafayette Louis, the file wrappers and correspondence relating to his alleged invention, and to an abstract or digest of other papers relating to the various letters patent granted to him. The defendants had set up, as a ground of impeaching the claim that Carpenter was the first inventor, that Lafayette Louis had prior knowledge of the patented device, the prior use thereof by him, and that the said Louis had received letters patent therefor. Proofs had already been taken by the defendants tending, as claimed, to establish this specific branch of the defence. To meet such defence, as well as to show the state of the art at and before the granting of the letters patent to Carpenter, it was proper to produce the letters patent granted to Louis, his application therefor, and his declarations accompanying the same or cotemporaneous therewith, but we think that letters written by other persons, not witnesses in this cause, letters from officers of the patent office, and especially any abstract or digest of assignments, agreements and other papers, not produced, were inadmissible and they must be struck out. As bearing on the state of the art, testimony of persons whose business and experience was adapted to bring to them a knowledge of all improvements therein, that none such as Carpenter invented had before that come to their knowledge, was not incompetent. But declarations of Lafayette Louis subsequent to his alleged invention, were not competent to affect the defendants, he not being a witness in this case, and they must be struck out.

We do not find in the case grounds for admitting in evidence the agreement of the said Louis with Mason & Hamlin, nor the account of receipts and expenditures filed by Dora Louis in the matter of her application for an extension of the patent granted to her husband; they cannot affect the defendants; they must be struck out.

Several of the objections made on the hearing were sustained at that time, and the testimony objected to was struck out or deemed struck out. Whether a formal order was entered by the counsel we do not know, but all such testimony is rejected, and some of the printed testimony was waived by the plaintiffs' counsel, and not read. Some also was allowed by the court to stand for a special purpose only, e. g. as a contradiction of a witness, or merely to fix a date. If deemed material for any purpose in the future his-

tory of the cause, the record should be made to conform to all these rulings. Upon the proofs thus corrected, the complainants must have a decree according to the prayer of their complaint.

[For other cases involving this patent, see Cases Nos. 6,538–6,540.]

Case No. 6,538.

HITCHCOCK et al. v. TREMAINE et al.

[8 Blatchf. 440; 4 Fish. Pat. Cas. 508.] [1]

Circuit Court, S. D. New York. May 16, 1871.

PATENTS—TREMOLO ATTACHMENT—CONSTRUCTION OF CLAIM—ANTICIPATION—INFRINGEMENT.

1. The re-issued letters patent granted October 5th, 1869, to Alonzo Hitchcock, George G. Saxe and James H. Robertson, as assignees of R. W. Carpenter, for a "tremolo attachment," the original patent having been granted to R. W. Carpenter, June 27th, 1865, are valid.

2. The first claim of the patent, namely, "the application of means to the instrument, by which the air may be agitated to produce a tremulous note, as described," is not a claim to a principle, but is a claim to the described means of agitating the air.

3. A hollow rotating cylinder, with a horizontal axis, having two openings in it and extending from end to end of the cylinder, not acting as a valve, and not intercepting the flow of air to the reeds, but acting as an agitator of the air, without breaking any note, and operating simultaneously on all the notes, *held* to be a revolving beater, and to be substantially the same thing as the special form of revolving fan shown in the patent, in its mode of operation and effect, and to be an infringement of the patent.

[Cited in Hitchcock v. Tremaine, Case No. 6,539; Henderson v. Cleveland Co-operative Stove Co., Id. 6,351.]

4. An apparatus described in a prior patent, but not shown to have ever been used or to be practical, and belonging to a class of instruments which the invention in the subsequent patent was designed to supplant, and in respect to which it appeared that, as described in such prior patent, it could not be made to work successfully, *held* not to anticipate the subsequent patent.

[Cited in Ruggles v. Eddy, Case No. 12,118.]

5. An experiment, not perfected into an invention, not regarded by the experimenter as such, abandoned by him before being perfected, and then taken up by another, who tried to embody it in practice and made experiments, but did not make a practical thing of it, and abandoned it without perfecting it, no similar apparatus having been subsequently made for ten years, until the patented invention came into use, *held* not to anticipate such invention.

[This was a bill in equity, filed to restrain the defendants [Charles M. Tremaine and William B. Tremaine] from infringing letters patent [No. 48,366] for "improvement in tremolo attachment," granted to R. W. Carpenter, June 27, 1865, assigned to complainants and reissued to them May 18, 1869, and again October 5, 1869 [No. 3,665]. The invention consisted in producing a tremolo by an agitation of the air caused by a winged fan made to revolve by a spring and corded shaft. The claims of the original and the several reissued patents were as follows:

[Original patent: "The application of means to the instrument, by which the air may be agitated to produce a tremulous note, substantially as described."

[Reissue of May 18, 1869: "(1) The application of means to the instrument by which the air may be agitated to produce a tremulous note as described. (2) The arrangement of a fan or agitator in the instrument, at right angles to the keys, and parallel to the line of reeds or pipe-mouths, at any convenient distance from them, as described."

[Reissue of Oct. 5, 1869: "(1) The application of means to the instrument, by which the air may be agitated to produce a tremulous note as described. (2) The arrangement of an agitator, applied to the production of a tremolo outside the trunk, wind-chest, and other air-passages of the instrument, and operated independently of the bellows-power. (3) The arrangement of a fan, or agitator in the instrument, at right angles to the keys, and parallel to the line of reeds, or pipe-mouths, at any convenient distance from them as described."] [2]

Frederic H. Betts and J. P. Fitch, for plaintiffs.

George T. Curtis and B. E. Valentine, for defendants.

BLATCHFORD, District Judge. This suit is founded on reissued letters patent of the United States, granted to the plaintiffs, Alonzo Hitchcock, George G. Saxe, and James H. Robertson, as assignees of R. W. Carpenter, October 5th, 1869, for a "tremolo-attachment." The original patent was granted to R. W. Carpenter, June 27th, 1865, and was reissued to the plaintiffs, as his assignees, May 18th, 1869, and was reissued to them a second time, October 5th, 1869. The improvement is one in musical instruments. The specification says: "One of the most attractive ornaments of music, known as the "tremolo," and which is peculiarly effective with the voice, was, before the invention of the present improvement, but imperfectly effected by instrumentation. The nearest approach in instrumental music to this peculiar effect has consisted in the rapid reiteration of a note, instead of a general shake or vibration of the chord, and the best means known of producing it is the mechanism known as the "vox humana stop" of the organ, which consists of a valve hung on a spring in the trunk or wind chest, in such manner that the vibration of the spring rapidly closes and opens the passage, and breaks, as it were, the note into a number of parts, instead of conveying it to the ear in a continuous vibrating trill. But this tremolo, like

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 440, and the statement is from 4 Fish. Pat. Cas. 508.]

[2] [From 4 Fish. Pat. Cas. 508.]

all devices for the same purpose, made prior to this invention, was imperfect. Whether effected by what is called a butterfly valve, a balance valve, or other device acting within the air passages, the principle of operation is substantially the same, the tremolo being produced at a sacrifice of the fullness, power, and smoothness of the musical note; for, it is obvious, that, during that portion of the action of the valve when the air passage is most contracted, the note must be less smooth, full, and powerful than when the passage is most fully open; and, at all times, the presence of the valve in the wind chest or passage must act as an obstruction to the volume and roundness of the musical tone. This will be at once perceived by the ear, in listening to the tremolo produced by alternately opening and closing an air passage by means of a valve. The pulsations are sudden, distinct and harsh, and are more like blows than undulations. By this invention, an entirely new principle is introduced in the production of the tremolo. Instead of setting up a vibration within the air passage, the tremolo is effected by imparting a common vibration to the air, before entering the air passages, or after it has passed through the pipes or reeds. The principle of this invention, therefore, consists in imparting a common agitation to the air, in which the musical sounds are produced, in such a manner as to give rise to a tremolo, without checking the flow of the air through the pipe mouths or reeds, and which shall operate simultaneously upon all the notes of the organ or instrument, said tremolo being produced by an agency external to the wind chest or air passages of the instruments. The mode of imparting vibration to the air may be varied, in each particular case, according to the character of the instrument, or the preference of the manufacturer, without affecting the principle of the invention; for, experiment has demonstrated that, by whatever means the air in contact with that whose vibrations are producing musical tones, may be set in agitation, the tremolo will still be produced. When, for example, an air current is flowing towards or from the reeds or pipe mouths, an intercepting medium, alternately introduced and withdrawn, however gently, causes a vibrating or pulsating movement of the air, which produces a distinct tremolo, corresponding, in the frequency of its pulsations, with the alternating movements of the intercepting medium. This effect follows even when the agitation caused by the intercepting action is so slight as to produce a movement of the air which can hardly be made perceptible to the ear. This is proved by the fact, that, although the intercepting action be confined to one end of the reed board, the tremolo will extend to all the notes of the scale. The method in which we apply the principle of external agitation to the production of the tremolo, consists in the introduction of a revolving or swinging fan, vane, or beater into the instrument, in such a position, that, when it is put in motion by a treadle, or other suitable means, the blows upon the air, of the rapidly moving fan, impart to the notes, without impairing their continuity, a tremulousness that is very similar to the tremolo of the voice." The drawing annexed to the patent represents the upper part of the case of an ordinary cabinet organ, to permit the rotation of a pair of vanes or beaters, placed on a shaft. This shaft is placed at right angles to the keys, and in front of the reeds or pipe mouths, and is caused to revolve by the reciprocal action of a spring and a string, to which it is attached by making a few turns of the string around the shaft of the beaters, and leading it to a treadle or other suitable means by which it may be worked. The specification continues: "In playing passages where the tremolo may be desired, a slight motion of the foot causes the reaction of the spring to revolve the shaft, and occasions a succession of blows by the beaters upon the region of the swell, and produces the effect desired. Having thus described what is believed to be one of the best means of carrying the invention into effect, we wish it to be understood that this invention is not restricted to the details of the manner of application that we have specified, and which we prefer simply because they are the most convenient to adopt, as the revolving beaters are usually placed under the cover of the instrument, in the space that is commonly vacant behind the key board and swell; and they may be rotated continuously by a double connection with the pedal, or by any other suitable means of operation, such means constituting no essential part of the invention." The claims are: "1. The application of means to the instrument, by which the air may be agitated to produce a tremulous note, as described. 2. The arrangement of a fan or agitator in the instrument, at right angles to the keys, and parallel to the line of reeds or pipe mouths, at any convenient distance from them, as described."

The defendants have made and sold instruments with two different arrangements of apparatus for agitating the air to produce a tremulous note. One of them is called the "Burdett Organ" and the other the "Shoninger Organ." In both of them the agitator is arranged at right angles to the keys and parallel to the line of reeds. In the Shoninger organ, the special construction of the fan is precisely like that shown in the plaintiffs' patent, and it is actuated by equivalent means. In the Burdett organ, the agitator is a hollow rotating cylinder, with a horizontal axis, having two openings in it opposite to each other, and extending from end to end of the cylinder. This rotating cylinder is shown to be substantially the same thing as the special form of fan shown in the patent, in its mode of operation and effect. It does not act as a valve does, nor does it intercept

the air flowing to the reeds. It acts as a beater or agitator of the air, without breaking any note, as a valve in the air passage does. It does not check the flow of the air through the reeds, and it operates simultaneously on all the notes. It is a revolving beater quite as much as the revolving fan is, and it produces the tremolo without impairing the continuity of the note. It, therefore, infringes both of the claims of the patent.

There is no ground for the position that the first claim of the patent is void, as claiming to patent a principle. It is a claim to the described means of agitating the air. The specification, as required by the statute, points out the principle or character which distinguishes the arrangement of mechanism, but it does not claim to patent a principle. The means used undoubtedly introduce a new principle in producing a tremolo, that is, agitating the air externally to the air passages, without checking or throttling its flow through such passages. The first claim covers, as the means employed, the agitating fan or beater and the mechanism by which it is put in motion at the will of the person operating the instrument.

The answer sets up as a defence want of novelty, and alleges prior knowledge and use of the invention by Lafayette Louis, to whom letters patent of the United States were granted November 18th, 1856, and by Tristram Sawyer and Edmund Sawyer; also by Samuel Thatcher, H. K. White, John Smith, William Thatcher, Adam Wandling, William Kennedy and William Karr.

As to the Louis patent, it is not shown that the apparatus described in it was ever used or is practical. Whether practical or not, it belonged to the class of instruments which the invention of Carpenter was designed to supplant. It consisted of a long valve or two long valves placed over the reeds and under the swell, and turning on hinges, so that a vibratory movement could be imparted to them. The claim of the Louis patent states the object to be "to break and vary the force of the air passing through the reeds." Besides, the evidence is, that the apparatus, as described in the Louis patent, cannot be made to work successfully.

The only other evidence put in on the question of novelty relates to what was done by William Karr, Samuel Thatcher and William Thatcher. What Karr did was wholly experimental, was not a perfected invention, was not regarded by him as such, and was abandoned by him before being perfected. The Thatchers took up Karr's idea, and tried to embody it in practice, and made experiments, but did not make a practical thing of it, applied to a musical instrument, and abandoned it, without perfecting it. These things were done in 1855, but from that time until 1865, when Carpenter's invention came into use, no similar apparatus appears to have been applied to produce a tremolo.

There must be a decree for the plaintiffs, as respects both of the instruments, for a perpetual injunction, and an account of profits, with costs.

[For other cases involving this patent, see Hitchcock v. Tremaine, Cases Nos. 6,539, 6,540; Saxe v. Hammond, Case No. 12,411; Tremolo Patent, 23 Wall. (90 U. S.) 518.]

Case No. 6,539.

HITCHCOCK et al. v. TREMAINE et al.

[9 Blatchf. 385; 5 Fish. Pat. Cas. 310.] [1]

Circuit Court, S. D. New York. Feb. 1, 1872.[2]

INFRINGEMENT OF PATENT—ESTIMATION OF PROFITS.

1. In a suit in equity for the infringement of a patent for a tremolo attachment to an organ, on taking an account of the profits derived by the defendant from dealing in such attachment, it appeared that the defendant dealt in musical instruments not having such attachment, as well as in those having it: *Held*, that a proper part of the general expenses of conducting the defendant's entire business, such as clerk hire, rent of store, and the like, ought to be assigned to the dealing in such attachments, such part to bear the same proportion to the whole of such general expenses, that the sales of such attachments bore to the sales in the entire business.

[Cited in Brady v. Atlantic Works, Case No. 1,795; Winchester Repeating Arms Co. v. American Buckle & Cartridge Co., 62 Fed. 280.]

2. Such general expenses ought not to be apportioned according to the amount of profits on sales.

3. The patented attachment being a revolving fan, not including the apparatus for moving the fan, the profits on such apparatus ought not to be allowed.

[See note at end of case.]

[This was a bill in equity by Alonzo Hitchcock and others against Charles M. Tremaine and William B. Tremaine.]

[3][Exceptions to the master's report in the case of Hitchcock v. Tremaine [Case No. 6,538]. The nature of the exceptions is sufficiently set forth in the opinion.]

Frederic H. Betts, for plaintiffs.

B. E. Valentine, for defendants.

WOODRUFF, Circuit Judge. I think the estimate of the gains and profits which the master has reported to have accrued to the defendants from the infringement of the patent of the complainants, is erroneous, and unjust to the defendants. The complainants have seen fit to proceed against the defendants for the recovery of gains and profits, treating them as trustees in that behalf; and the recovery is to be for what the defendants have realized after deducting their expenses in dealing in the infringing article. The defendants are dealers in musical instruments, including pianos, melodeons, and organs with, and organs without, the tremolo

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 385, and the statement is from 5 Fish. Pat. Cas. 310.]

[2] [Affirmed in 23 Wall. (90 U. S.) 518.]

[3] [From 5 Fish. Pat. Cas. 310.]

attachment which has been decreed to be an infringement of the complainants' patent. See Hitchcock v. Tremaine [Case No. 6,538]. The conduct of their business necessarily involves certain general expenses, which are as truly expenses of dealing in one class of goods as of dealing in another class. Such expenses as general clerk hire, rent of store, salary of book-keeper, if any, and the like, concern the entire business, and, in any estimate of gains and profits, are properly apportionable to the several kinds of business done or kinds of goods sold, when the profits of either are to be separately stated. For example, to ascertain how much profit is gained by dealing in pianos, let it be assumed, that, of the aggregate sales in the business, one-half in amount are sales of pianos. Besides such special expenses as are peculiar to the receipt, transportation, and other peculiar service, if any, which pertains exclusively to the dealing in pianos, the general expenses are to be taken into view, one-half of which belong to the sales of pianos, as truly as the other half pertains to the sale of the other goods. This would be quite obvious, if a dealer in goods of several kinds were liable to account to some other persons, respectively, for the gains and profits which he had made by his dealing in each kind of goods. The gross proceeds of sales of each kind being ascertained, and a deduction from each being made, of such special or peculiar expenses as, in a pro forma account, would be chargeable to each, there would remain, for allotment to each account, its proportionate share of the general expenses incurred for the benefit of all, that is, for the maintenance and conduct of the business; and this distribution should be in the proportion of the several amounts of sales of each. It is not just to say, in respect to either, as is argued by the complainants here, that the general expenses are not increased by the presence of one class of goods, and would have been the same if the sales had been confined to the other classes. If that argument were supposed to prevail in an accounting for the profits of sales of one class, it would also prevail in each separate accounting, and so would be allowed in neither.

In the present case, the dealing in organs having the tremolo attachment was a part of the general business of the defendants. These were not sold without involving a part of the general expenses of the business. It may be true, that, in a given case, it costs the defendants no more to sell an organ containing the infringing attachment than it would have cost to sell an organ not containing the attachment; but, non constat, that, if the organ sold had not contained such attachment, it would not have been sold at all. The complainants are here demanding the profits of that sale. They must take them burthened with the just allowance for those disbursements which enable the defendants to offer the attachments to the public in a saleable form, and to keep them in the market, before the eye and within the reach of customers, and generally to properly conduct the business of selling and keep due account thereof.

This no one would for a moment question, if the defendants had kept a store for the sole purpose of dealing in the infringing attachments. Suppose, then, that the defendants, after dealing for a time in attachments alone, to be applied to organs by the purchasers, had concluded that it would facilitate and increase the sale of the attachments, if they procured organs, and caused the attachments, to be applied, and sold both. This would not affect the principle of computation or allowance of the general expenses, though it would bring in another item of sales, to be brought into an apportionment. And yet, in that case, it might be said, as is said here, that it costs no more to sell an organ with the attachment, than it would to sell an organ without the attachment.

In this respect, the computation by the master in this case is erroneous. He should have permitted the defendants to prove the general expenses of their business, incurred alike to effect the sales of all goods—that is, not specially incurred in reference to any particular class or kind; and these should have been apportioned according to the amount of gross sales, charging the sales of attachments with its relative share.

On the other hand, the master very properly refused to apportion these expenses according to the amount of profits on sales. Whether the defendants made any profits on their whole business or not, is quite immaterial to these complainants. They are not to be deprived of the gains made by selling the infringing attachments, because the defendants made less profits, or even no profits, on the sale of pianos, or, as the case may be, of some other musical instruments. To allow this, would permit the defendants to violate the rights of the complainants, and use the profits thereby gained to cover their losses on other sales.

In regard to the refusal of the master to permit the defendants to show that a portion of the profits on the sale of attachments, as found by him, arose from the sale of certain two parts thereof, which are not embraced within the patent of the complainants, but are patented by other parties, there was, also, apparent error. It is doubtful, indeed, whether the defendants could have proved it, if permitted, but the principle upon which they claimed to make this proof is not doubtful. The patent is for a device by which the vibration of the air is produced; namely, a fan or other instrument, made to revolve and agitate the air after it has passed the pipes or reeds which cause the sound. The means of moving the fan or beater, the complainants do not claim to be within their patent. Their instrument may be rotated by any convenient means, "such means," according to

the very terms of the specification, "constituting no essential part of the invention." It is the application of means to the musical instrument by which the air may be agitated to produce a tremulous note, as described, that is, after the air has passed the sound-producing mechanism, and the arrangement of the fan or agitator in the instrument, as described, which alone are claimed by the patentee. The motive power, whether pressure on a treadle, or other device, or the manner of applying the power, so as to cause the motion of the fan or agitator, are not claimed. This is the construction given to the patent by the court. Now, it is only the profits arising from the sale of what is patented, that the complainants should be allowed. Obviously, the expense of the apparatus for moving the patented device is to be allowed as a deduction from the proceeds of sale of the whole attachment. That expense has been allowed, in the allowance for the whole cost of the attachment, as sold by the defendants. If the defendants can show that they received an enhanced price for the patented attachment, by reason of its connection, in their sales, with a peculiar mode of producing or regulating the motion, so that the profit, or difference between the cost and the price of sale, was enhanced thereby, that enhancement is not due to the complainants. But it does not follow that the profits on the whole are to be divided into three equal parts, or into parts proportioned to the cost of the several three parts. The patented improvement must, necessarily, be supplied with some apparatus for producing motion, that is, it must be adapted to use, and the cost of such adaptation necessarily goes into the account, in ascertaining the profit on the sale; and unless the defendants can show that the peculiar apparatus by which, in the instruments which they sold, the motion was imparted or regulated, gave them an increased price, not due to the patented improvement however moved or adapted to use, then the cost of such apparatus alone is to be considered, as was done by the master in stating the account. And if, upon the proofs, it be found that the price realized from the attachment is due to the patented device for causing the vibration of the air, as described in, and claimed by, the specification, irrespective of any peculiarity in the mode of producing the motion thereof, then the profits are to be imputed to the complainants' patented device, and to be allowed to them, as was done by the master.

The report must be sent back to the master, to enable the defendants to make further proofs in accordance with these views, if they be able.

[NOTE. Cross appeals were then taken to the supreme court, where the ascertainment of profits as made by the circuit court was affirmed in an opinion by Mr. Justice Strong. 23 Wall. (90 U. S.) 518. For other cases involving this patent, see note to Hitchcock v. Tremaine, Case No. 6,538.]

Case No. 6,540.

HITCHCOCK et al. v. TREMAINE et al.

[9 Blatchf. 550; 1 O. G. 633; 5 Fish. Pat. Cas. 537.] [1]

Circuit Court, S. D. New York. May 3, 1872.

INFRINGEMENT OF PATENT—REHEARING — AFTER-DISCOVERED EVIDENCE.

1. The fact that the defendant, in a suit in equity, for the infringement of a patent, did not have proper expert testimony, on the final hearing, is no ground for granting a rehearing, where no application was made in the premises before the final hearing, and no excuse is shown.

[Cited in Ruggles v. Eddy, Case No. 12,118; De Florez v. Raynolds, Id. 3,743; Colgate v. Western Union Tel. Co., 19 Fed. 829; Spill v. Celluloid Manuf'g Co., 22 Fed. 96; Witters v. Sowles, 31 Fed. 10.]

2. The fact that, since the first hearing, the defendant has discovered that a patent earlier than the plaintiff's, and which was in evidence on such hearing, has been twice reissued, the last time since such hearing, is no ground for granting a rehearing.

[Cited in Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333.]

3. If there is nothing, in a prior original patent, to affect the validity of the patent sued on, no reissue of such prior patent made subsequently to the date of the patent sued on, can affect such validity.

4. On an application, after a hearing in a patent suit, to put in alleged newly discovered evidence, it must be shown that the party could not, with reasonable diligence, have obtained such evidence prior to such hearing.

5. Observations on prior unsuccessful experiments set up to defeat a patent.

[Cited in La Baw v. Hawkins, Case No. 7,960; Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 Sup. Ct. 447; Richardson v. Shepard, 60 Fed. 275.]

[Bill in equity by Alonzo Hitchcock and others against Charles M. Tremaine and William B. Tremaine.]

[2][This was a petition by the defendants to stay the entry of a final decree, in the suit Hitchcock v. Tremaine [Case No. 6,538], and for leave to file an amended answer, and to take proof in support thereof, and for a rehearing of the cause.]

Frederic H. Betts, for plaintiffs.

B. E. Valentine, for defendants.

BLATCHFORD, District Judge. The grounds set forth in the petition, for the relief asked, are: (1.) That the defendants did not have proper expert testimony on the first hearing; (2.) That they have discovered, since the first hearing, that a patent issued to one Louis, prior to the plaintiffs', and set up in their answer as anticipating it, has been twice reissued, one of such reissues having been granted since the first hearing; (3.) That, since the first hearing, they have learn-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 550, and the statement is from 5 Fish. Pat. Cas. 537.]

[2] [From 5 Fish. Pat. Cas. 537.]

ed that said Louis was the inventor of the identical device covered by the plaintiffs' patent, and made and sold many of such devices at least five years before the date of the plaintiffs' patent.

(1.) The want of proper expert testimony is no ground for granting a rehearing. Application should have been made to the court prior to the first hearing, for opportunity to procure and put in such testimony. No sufficient excuse is shown for not doing so.

(2.) As to the reissues of the Louis patent, all of them are subsequent in date to the plaintiffs' patent, and cannot affect its novelty or validity, if there is nothing in the specification or drawings of the original patent to Louis which affects such novelty or validity, as was decided by the court on the former hearing.

(3.) As to the alleged newly discovered evidence as to a prior invention by Louis of the plaintiff's device, the defendants fail to bring themselves within the principle on which amendments of answers after hearing are allowed,—India Rubber Comb Co. v. Phelps [Case No. 7,025],—by showing that they could not, with reasonable diligence, have obtained the testimony which they now wish to adduce, prior to the former hearing. On the contrary, the evidence shows that they could.

(4.) A careful review of the testimony given by Mrs. Louis, Bioren, and Frail, in regard to the alleged prior invention by Louis, leads to the undoubting conclusion, that, whatever he made resembling the plaintiffs' fan, in form, location, and operation, was an unsuccessful experiment, so far as he preceded Carpenter in time. The collateral evidence leads to the same conclusion. The patent to Louis, of June 10th, 1862, shows that, at that time, he had no invention of a fan external to the air passages. The newspaper publications show no such invention. And the testimony on the part of the plaintiffs is conclusive to show, that, prior to Carpenter's invention, patented in June, 1865, and even down to 1867, Louis had nothing in the way of an external rotating fan, except what may have been merely experimental, and was not considered by himself to be of any importance compared with other devices he employed to produce a tremolo. This is one of those cases, so often met with in the history of patents, where an invention, once perfected, has shown itself to be so useful and so highly appreciated as to have gone at once into so extensive use, that it is inherently impossible it should have been known before, and not have gone into general use. Its success leads infringers and rival inventors to set up crude and unsuccessful experiments as anticipating it, and dim recollections are stimulated, and conscience is strained, to clothe with living flesh what was an inert and useless skeleton.

The prayer of the petition is denied, with costs.

[For other cases involving this patent, see note to Hitchcock v. Tremaine, Case No. 6,538.]

Case No. 6,541.

HITCHEN et al. v. WILSON et al.

[1 Brunner, Col. Cas. 253;[1] 4 Hall, Law J. 275.]

Circuit Court, D. Maryland. May Term, 1812.

SEAMEN'S WAGES.

Where a vessel had been captured and condemned, and pending an appeal was restored, *held*, that the seamen were entitled to full wages.

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

This was a libel [by Benjamin Hitchen and others against William Wilson & Sons] for wages. The vessel had been captured and condemned. Pending the appeal she was restored to the underwriters, to whom she had been abandoned upon a compromise. The defendants were willing to pay the seamen's wages, after deducting the expense of recovering the property. But the district court decreed full wages; and the sentence was affirmed in this court.

Case No. 6,542.

In re HITCHINGS.

[4 N. B. R. 384 (Quarto, 125).][2]

District Court, E. D. Pennsylvania. Dec. 28, 1870.

BANKRUPTCY—SALE BY MARSHAL AS MESSENGER—FIXTURES—RIGHTS OF PURCHASER.

1. A sale by the marshal as messenger, under a special order of the court, prior to the appointment of an assignee, is to be considered as in the nature of a sale made by a provisional assignee.

2. In a sale so made of the lease, good-will, and fixtures of a grocery store, only such things (or their accessories) as are actually or constructively fastened to the freehold, will pass to the purchaser of fixtures.

3. A purchaser of the fixtures at such a sale may make claim upon the funds in the hands of the assignee for the sale, by the messenger, of such articles as were properly included under the sale of the fixtures and afterwards resold as movables.

[Cited in Giveen v. Smith, Case No. 5,467.]

At an adjourned third general meeting of creditors, held in said matter, on the 18th day of October, A. D. 1870, before Joseph Mason, register in bankruptcy, a claim of C. C. Selden was presented for proceeds of sale of certain articles sold by the marshal as messenger, and which said claimant alleged had been previously sold to him as part of the lease, good-will and fixtures of a certain store formerly in the occupation of the bankrupt.

The principal testimony taken in relation to said claim was as follows:

Conner C. Selden, the claimant, being duly sworn, was examined by George S. Selden, Esq., his counsel, as follows: "I was the pur-

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

[2] [Reprinted by permission.]

chaser of the lease, good-will and fixtures at the marshal's sale of Mr. Hitchings' property, which were the first things sold at the sale. I complied with the terms of sale, and paid fifty dollars cash at the time of sale, and the balance immediately after the confirmation of the sale. After the sale of the lease, good-will and fixtures, the marshal proceeded to sell the groceries and the articles set forth in the annexed schedule (being six tea-caddies, for seven dollars and fifty cents; one desk, seventy-five cents; refrigerator, four dollars; platform scales, twelve dollars and fifty cents; stove, three dollars; show-case, four dollars and twenty-five cents; fire-proof safe, twelve dollars and fifty cents; meat scales, three dollars and seventy-five cents; marble slab, three dollars; two molasses cans, fifteen dollars; lot of measures and funnels, sixty-two cents; cheese cover, one dollar and twenty cents; two cider barrels, seven dollars and fifty cents; tin cans, fifty-five cents; awning, twenty-nine dollars; awning frame, thirty-six dollars; three coffee bins, ten dollars and fifty cents; one meat saw, two dollars; meat knife, steel, and cheese knife, two dollars and fifty cents; measures, three dollars; cigar case, one dollar and seventy cents. A gas bill of thirty-nine dollars was also claimed to have been paid by the claimant). Against the sale of the articles in this schedule I protested, and they were afterwards sold. I think, at or about the prices named in said paper. I claimed that I had purchased all these articles when I purchased the lease, good-will, and fixtures. I claimed that they were included under the sale of the lease, good-will, and fixtures. It cost me considerable more than these articles sold for, to replace them. Q. Do you know whether Mr. Hitchings, the bankrupt, had bought these articles as a part of the lease, good-will, and fixtures from Mr. Cuyler, who had kept the store there previously? (Objected to by Wm. B. Robins, Esq., assignee.) A. I know from Mr. Cuyler, who told me that these articles had been sold by him to Mr. Hitchings in the sale of the lease, good-will, and fixtures."

Examined by Mr. Robins: "I made no exception to the return of the sale, except that I had protested at the time of the sale. I thought that the only thing that needed confirmation was the sale of the lease. I did not appear at the first meeting of creditors to make my claim. I didn't know of the time of any meeting of creditors."

By the Register: "On the day of the confirmation of the sale I settled with the marshal. I paid the balance of my bid for the lease, good-will, and fixtures immediately after the confirmation of the sale. I don't know whether I made any claim of set-off, or any objection to the payment of the amount bid, on account of the sale of the articles mentioned at the time of my settlement with the marshal. I gave the claim to my father, who is my counsel, seven or eight months before the present time."

William B. Robins being duly sworn, was examined by Mr. Selden, as follows: "I was present during part of the sale of Mr. Hitchings' property. I heard you publicly protest against the sale of certain articles, all except groceries, on the ground that your son had bought them, when he bought the lease, good-will, and fixtures. Shortly after I was appointed assignee you informed me that you intended to make a claim for the proceeds of certain articles, against the sale of which you had protested. You told me that you thought you could follow the fund, and didn't want to get in any controversy with the marshal."

By the Register: "I informed Mr. George S. Selden of this meeting of creditors, but not of the second meeting of creditors."

Samuel I. Wright, being duly sworn, was examined by Mr. Robins: "I was deputy United States marshal on the 29th of June, 1869, when I sold the property of Richard Hitchings, a bankrupt, under a special order of the court. I was specially deputized to sell this property. I sold the lease, good-will, and fixtures to C. C. Selden for one hundred and sixty-five dollars. I think the unexpired term of the lease, good-will, and fixtures were sold prior to the stock of groceries, etc. I offered for sale the unexpired term of the lease of the store, and the good-will and fixtures. The question was asked, I think, by the landlord, Who was to pay the back rent? It is my impression that I told him it would come out of the fund. I think it was also asked whether the gas bill would be paid? These announcements were made publicly. I stated generally that I supposed the back rent and the gas bill would be paid, I think all present at the sale heard these statements. I don't think there was anything said by me, when making the sale, as to what would be embraced by the fixtures. I simply offered for sale the unexpired term of the lease, good-will, and fixtures, and asked for bids thereon. Before that offer I had offered the stock, good-will, fixtures, lease, and everything together, upon which I got no satisfactory bid, none as high as the appraisement. I then offered for sale the unexpired term of lease, good-will, and fixtures as before stated. When I afterwards offered for sale the scales, marble meat slab, and several other articles, Mr. C. C. Selden objected. He claimed that he had bought those as part of the fixtures; I said I didn't understand it that way,—that I didn't understand I was selling those as part of the fixtures; he replied that he claimed them as part of his purchase, when he purchased the fixtures; he bought some of the articles, to the sale of which he had objected; he bought the scales, I cannot tell what else; he had paid me no deposit on the lease, good-will, and fixtures, when he protested against the sale

of the articles referred to; he didn't pay anything until the sale was concluded; he had an opportunity to withdraw his bid; he paid me fifty dollars at the close of the sale; I don't remember of his making any objection then; he didn't settle finally with me at the marshal's office. None of the articles mentioned in the paper produced were mechanically fastened or affixed in any way to the building, except the awning frame; with that exception they were all readily movable; the marble slab, I think, was fitted to the counter."

Cross-examined: "That (bill produced) is one of the hand-bills of the sale. I have an impression that I said something about withdrawing his bid, but I cannot say for certain."

William B. Robins re-examined: "I was present when the sale of the meat slab and several other articles was objected to; I heard nothing said about the bidder for the fixtures having the right to withdraw his bid."

By J. MASON, Register:

Upon consideration of the foregoing testimony, I am of opinion, that the sale by the marshal, as messenger under the order of the court, is to be regarded as in the nature of a sale made by a provisional assignee, and that the claimant is entitled to be paid out of the fund in the hands of the assignee, the sums for which the following articles were sold, viz:

Awning frame	$36 00
Awning as accessary thereto	29 00
Marble meat slab, fitted to a counter	3 00
Total	$68 00

—And that those are the only articles which could properly be designated fixtures and pass to the purchaser of fixtures, and that the amount of the gas bill paid by said claimant for gas furnished prior to said sale, should be refunded by the assignee.

November 11, 1870.

The assignee made the following exceptions to the report of the register:

First. Because he has decided that any of the articles sold at the marshal's sale as fixtures, were afterwards sold by the marshal.

Second. Because the register has awarded any sum of money from balance in assignee's hands to Conner C. Selden.

Exceptions were also made by the claimant, but none appear to have been filed of record.

After argument, it was ordered by THE COURT (CADWALADER, District Judge) that the exceptions of the assignee and of Conner C. Selden, to the report of the register in said matter, as to the claim of said Conner C. Selden to the proceeds of certain articles sold by the marshal as messenger under an order of the court, be overruled, and the report confirmed, and the assignee be directed to carry it into effect.

Case No. 6,543.

HITNER v. SUCKLEY.

[2 Wash. C. C. 465.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

INJUNCTION TO STAY WASTE — SERVICE UPON ATTORNEY.

Rule to show cause why an injunction to stay waste should not be granted, and why service of the subpoena upon the attorney of the defendant, in a suit depending against the defendant for slandering his title to the land mentioned in the bill, should not be considered as a service on Suckley. If a judgment at law be obtained, the service of a subpoena on the attorney of the plaintiff, he being absent from the state, will be deemed good, where the subject in controversy is the same with the matter in the suit for which the judgment was rendered.

[Cited in Eckert v. Bauert, Case No. 4,266; Ward v. Seabry, Id. 17,161; Sawyer v. Gill, Id. 12,399; Segee v. Thomas, Id. 12,633; Kamm v. Stark, Id. 7,604; Crellin v. Ely, 13 Fed. 423.]

Rule to show cause why an injunction to stay waste should not be granted, and why service of the subpoena, upon the attorney of the defendant, in a suit depending against the plaintiff, for slandering his title to the lands in the bill mentioned, should not be considered as a service on Suckley. The case was, that one Broom, being indebted to Hitner, executed a mortgage to him for securing the same, on a certain tract of land the subject of this injunction. Suckley, being a creditor of Broom, obtained a judgment against him; and the same land was taken in execution, sold by the marshal, and purchased by Suckley. The bill charges, that the defendant has committed, and threatens to continue committing, waste on this land, which will be rendered insufficient to discharge the debt due to the complainant. The defendant in equity, is plaintiff at law, in the action against the complainant, for slandering the defendant's title to this land, and the question was, whether service of the subpoena on the defendant's attorney in that cause, ought to be considered as a service on the defendant? The complainant's counsel cited 1 P. Wms. 523; 1 Har. Ch. Prac. 162, 208.

BY THE COURT. If a judgment at law be obtained by one person against another, and an injunction be applied for, the court will consider a service of the subpoena upon the attorney of the plaintiff at law, to be sufficient, if his client live out of the state. But the action at law by the defendant against the complainant, for slandering his title, is totally unconnected with the subject of controversy presented by this bill; and the court cannot consider the defendant's attorney in that action, as representing him in this case. The motion for the injunction was with-

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

drawn, on the counsel for the defendant promising to advise his client not to commit waste.

H. J. MAY, The. See Case No. 3,494.

H. LOGAN, The. See Case No. 611.

H. M. WRIGHT, The (Walsh v.). See Case No. 17,115.

Case No. 6,544.

HOADLEY v. SAN FRANCISCO.

[3 Sawy. 553; 8 Chi. Leg. News, 134; 1 Law & Eq. Rep. 64.] [1]

Circuit Court, D. California. Dec. 27, 1875.

REMOVAL OF SUITS FROM STATE TO NATIONAL COURTS.

A suit was pending in the supreme court of California on appeal from the judgment of the district court at the date of the passage of the act of congress of March 3, 1875 [18 Stat. 470], relating to the jurisdiction of the United States circuit court, in which the judgment was reversed and the cause subsequently remanded to the district court for new trial. At the first term of the district court at which a trial could be had after the filing of the remittitur and before any other trial, the suit was removed to the United States circuit court on application of the plaintiff: *Held*, that the case is within the provisions of sections 2 and 3 of said act of congress, and that it was properly removed.

[Cited in Crane v. Reeder, Case No. 3,356; Young v. Andes Ins. Co., Id. 18,151; Meyer v. Delaware R. R. Const. Co., 100 U. S. 473; Hendecker v. Rosenbaum, 6 Fed. 99; Phoenix Mut. Life Ins. Co. v. Walrath, 16 Fed. 163.]

[See note at end of case.]

[This was an action by Milo Hoadley against the city and county of San Francisco.]

Motion to remand the case to the state court, from which it had been transferred to the United States circuit court.

W. C. Burnett, for the motion.

S. W. Holliday, opposed.

SAWYER, Circuit Judge. This action was originally commenced in the district court of the state of California for the Twelfth judicial district on January 5, 1870. A trial was had and a judgment entered therein July 3, 1871. An appeal having been taken to the supreme court of the state, October 25, 1871, the judgment was reversed and a new trial ordered by that tribunal, February 3, 1875, and a petition for rehearing having been subsequently filed and denied, a remittitur issued in pursuance of the judgment of reversal, July 29, 1875, which was filed in the district court, September 20, 1875.

On November 15, 1875, which was before the term at which the case could be first tried in the state district court, the only court in which it could be tried, after it had been remitted to that court by the supreme court, the plaintiff presented a petition to the said district court, in due form, praying a removal of the case to this court, and it was accordingly removed. The defendant now moves to remand the case to the state court, on the ground that its removal was not authorized for the reason that it had already been tried in the state court before, and was pending in the supreme court on appeal at the time of the passage of the act of congress of March 3, 1875, under which the removal was had. It is not denied that the subject-matter of the suit is such as in that particular would authorize a removal.

Section 2, as to the point in question, provides that "any suit of a civil nature, at law or in equity, now pending, or hereafter brought in any state court," etc., may be removed. And section 3, that whenever any party entitled to remove a suit shall desire to do so, he "may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof for removal," etc. Thus it will be seen that the statute, in express terms, authorizes the removal of a suit pending in any state court at the time of the passage of the act, "now pending," as well as those that should be afterwards brought. But section 3 limits the time within which a removal may be had. It requires the election in either case to be promptly made. It requires the party to avail himself of the opportunity to remove at, or before, the first term at which a trial could be had, and before any trial after the right to remove attaches. This case was pending in a state court on appeal at the date of the passage of the act. The judgment of the court below had been reversed, and a new trial ordered, but there was pending a petition for rehearing. It was liable to be tried again, this liability depending upon the decision of the supreme court upon the petition for rehearing. All proceedings in the case in the district court were suspended pending the appeal; and it could not be tried in the district court till remitted from the supreme court. Upon the final reversal of the judgment with directions to try the case again, it stood in all particulars as though it had never been tried. The case not having been finally disposed of, but being liable to be tried again at the date of the passage of the act of congress, it was, in my judgment, a suit pending in a state court within the meaning of section 2, to which a right of removal attached; and the clause "the term at which said cause could be first tried and before the trial thereof," means "first trial," and "before the trial thereof" after the right of removal attached; and that is necessarily after the passage of the act giving the right of removal. In this case there was no trial, and no term when the cause could have been tried after the passage of the act, and after the right to remove attached, before the application for removal

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 1 Law & Eq. Rep. 64, contains only a partial report.]

was actually made and granted. Mr. District Judge Swing, of the Southern district of Ohio, held a removal to have been properly made in a cause pending in the state court at the date of the passage of the act of congress in which there had, prior to that date, been two trials and verdicts, both of which had been set aside, and where the cause stood awaiting a third trial at the date of the passage of the act. Andrew v. Garrett [Case No. 375].

I fully concur in the views expressed by the learned judge. The only difference between that case and this, is, that the present case was pending in the supreme court on a petition for rehearing after a judgment of reversal, and no trial could be had, or movement for removal made, until the petition for rehearing should be decided and the case remitted to the district court in which alone the new trial could be had. I do not think this circumstance affects the right of removal. It was a cause "now pending" within the meaning of the act to which a right of removal attached, and the removal was made at the first opportunity. The motion to remand must be denied, and it was so ordered.

[NOTE. A demurrer was then filed to the bill, and on the hearing thereof the court entered an order remanding case to the state court. This order was affirmed by the supreme court. 94 U. S. 4. The supreme court of California affirmed a judgment for defendant. 12 Pac. 125. The plaintiff then sued out a writ of error from the supreme court of the United States, and the judgment was affirmed in an opinion by Mr. Chief Justice Waite. 124 U. S. 639, 8 Sup. Ct. 659.]

HOAG (SAWYER v.). See Case No. 12,400.

Case No. 6,545.

In re HOAGLAND.

[18 N. B. R. 530.] [1]

District Court, S. D. New York. Aug. 16, 1878.

BANKRUPTCY — LIEN FOR RENT ON GOODS SEIZED BY MARSHAL—CLAIM FOR USE AND OCCUPATION.

1. A claim of the landlord for rent, for which, by the laws of the state, he had a lien on goods which have been seized by the marshal, is a preferred claim so far as the proceeds of such goods will go.

2. A claim by a landlord for use and occupation of premises by the marshal, for keeping and storing the goods, and costs on reference to adjust the amount of claim, are costs of administration, to be paid in full if the assets are sufficient; if not, to be paid pro rata with all other expenses of administration of the same class.

3. Costs of a claimant upon a reference to have the claim declared and enforced are to be paid out of the balance remaining after payment of all the expenses of administration.

4. The assignee cannot pay a claim for use and occupation of premises without an order of the court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class.

[In the matter of Charles D. Hoagland, a bankrupt.]

F. M. Scott, for petitioner.
E. H. Lewis, for assignee.
Mr. ——, for marshal.

CHOATE, District Judge. The bankrupt having a stock of goods upon premises in New Jersey, on which there was a lien by the laws of New Jersey for the rent of the premises, the goods were taken by the marshal and sold, bringing five hundred and fifty-eight dollars and thirty-five cents. The marshal also sold other goods belonging to the bankrupt, the proceeds of which were four hundred and eighty-four dollars and thirty-four cents. He paid over to the assignee after his appointment these two sums, less his bill for fees and expenses, amounting to four hundred and four dollars and fifty-nine cents, as adjusted by the register, and the sum of two hundred dollars, retained on the ground that he was liable to be sued by the New Jersey landlord for taking the goods from his premises without discharging the lien for rent. The amount actually paid over to the assignee was four hundred and thirty-eight dollars and ten cents. Upon the application of the New Jersey landlord, her claim for rent down to the commencement of bankruptcy proceedings has been adjusted at two hundred and twenty-five dollars, and her costs upon the reference, amounting to fifty-eight dollars and fifteen cents, were ordered to be paid her. The same landlord also has a claim for use and occupation of the premises by the marshal after commencement of the bankruptcy proceedings, which has been adjusted at one hundred and twelve dollars. The assignee has also paid to his counsel one hundred and twenty-five dollars. This payment is allowed by the register in his report, and it is not now contradicted.

As to the costs of the New Jersey landlord upon this reference, stated in the report to be thirty-eight dollars and fifty cents, it seems doubtful if there are assets enough to pay them. The costs of this reference, to have her claim declared and enforced, should be paid to her, provided there are assets enough after payment of all the costs and expenses of administration. But if the assets are not sufficient for this purpose, I see no propriety in allowing her costs. I see no occasion to allow counsel fees to the marshal, and I do not think there are any funds properly applicable to such a purpose. Let an order be entered directing the payment of the two hundred and twenty-five dollars to the petitioner Thayer, and charging claim of the assignee with one hundred and fifty dollars, paid for use and occupation by the marshal, saving his right to apply to the court for an order adjusting the amount that was due, if any, and for the allowance of such part of

[1] [Reprinted by permission.]

the sum actually due therefor, as shall be shown to have been properly paid by him to the party duly entitled to the same, ratably with other similar costs of administration, if any. Let it also be referred to the register to take proof of all sums due for the costs and expenses of administration, and upon the coming in of the report that any of the parties be at liberty to apply for further relief.

Case No. 6,546.

HO AH KOW v. NUNAN.

[5 Sawy. 552; 20 Alb. Law J. 250; 8 Am. Law Rec. 72; 18 Am. Law Reg. (N. S.) 676; 4 Cin. Law Bul. 545; 25 Int. Rev. Rec. 312; 3 Pac. Coast Law J. 415; 8 Reporter, 195; 13 West. Jur. 409; 27 Pittsb. Leg. J. 40.] [1]

Circuit Court, D. California. July 7, 1879.

POWERS OF BOARD OF SUPERVISORS OF SAN FRANCISCO—LIMITATIONS OF—SANITARY REGULATIONS—BOARD OF HEALTH—CLIPPING HAIR OF PRISONERS, ORDINANCE FOR—FOURTEENTH AMENDMENT U. S. CONSTITUTION—INEQUALITY OF PUNISHMENT—LEGISLATION OF CONGRESS—STATEMENT IN DEBATE ON ORDINANCE.

1. The board of supervisors of the city and county of San Francisco, the body in which the legislative power of the city and county is vested, is limited in its authority by the act which consolidated the government of the city and county, generally known as the consolidation act. It can do nothing unless warrant be found for it there, or in a subsequent statute of the state.

2. The power of the board to determine the fines, forfeitures and penalties which may be incurred is limited to two classes of cases: 1. Breaches of regulations established by itself; and, 2. Violations of provisions of the consolidation act, where no penalty is provided by law. It can impose no penalty in any other case; and when a penalty other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment.

3. The general supervision of all matters appertaining to the sanitary condition of the county jail in San Francisco is confided by the act of April 4, 1870, to the board of health of the city and county; and only in exceptional cases would the preservation of the health of the institution require the cutting off of the hair of any of its inmates within an inch of his scalp.

4. Accordingly, where an ordinance of the city and county of San Francisco, passed on the fourteenth of June, 1876, declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced, it was *held*, that the ordinance was invalid, being in excess of the authority of the board of supervisors, whether the measure be considered as an additional punishment to that imposed by the court upon conviction under a state law, or as a sanitary regulation, and constituted no justification to the sheriff acting under it.

[Distinguished in Re Wong Yung Quy, 2 Fed. 630.]

5. The ordinance being directed against the Chinese only, and imposing upon them a degrading and cruel punishment, is also subject to the further objection, that it is hostile and discriminating legislation against a class forbidden by that clause of the fourteenth amendment to the constitution, which declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of its counties and cities.

[Cited in Re Tiburcio Parrott, 1 Fed. 510; Re Wo Lee, 26 Fed. 475; Yick Wo v. Hopkins, 6 Sup. Ct. 1068; Re Lee Sing, 43 Fed. 362; Gandolfo v. Hartman, 49 Fed. 181. Quoted in U. S. v. Wong Dep Ken, 57 Fed. 212.]

[Cited in Ex parte Ah Cue (Cal.) 35 Pac. 557.]

6. The equality of protection thus assured to every one whilst within the United States implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.

[Cited in Re Tiburcio Parrott, 1 Fed. 510; King v. Gallun, 109 U. S. 101, 3 Sup. Ct. 86; Railroad Tax Cases, 13 Fed. 773; Claybrook v. Owensboro, 16 Fed. 302; Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. 582; Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 571; Gandolfo v. Hartman, 49 Fed. 181. Quoted in U. S. v. Wong Dep Ken, 57 Fed. 212.]

[Cited in Wasson v. First Nat. Bank of Indianapolis, 107 Ind. 221, 8 N. E. 97.]

7. The legislation of congress carrying out the provisions of the fourteenth amendment in accordance with these views cited.

8. While statements of supervisors in debate on the passage of an ordinance cannot be resorted to for the purpose of explaining the meaning of the terms used, they can be resorted to for the purpose of ascertaining the general object of the legislation proposed and the mischiefs sought to be remedied.

[Cited in U. S. v. Tithing Yard and Offices (Utah) 34 Pac. 59.]

This was an action to recover damages from the defendant [Matthew Nunan] for alleged maltreatment of the plaintiff. The facts of the case are sufficiently stated in the opinion of the court, with the exception of the law of April 4, 1870. The act of the legislature of that date, entitled "An act to establish a quarantine for the bay and harbor of San Francisco and sanitary laws for the city and county of San Francisco," in its second section creates a board of health for the city and county of San Francisco, consisting of the mayor of the city and county and four physicians residing there, to be appointed by the governor; and in its ninth section provides that the said board of health "shall have general supervision of all matters appertaining to the sanitary condition of said city and county, including the city and county hospital, the county jail, alms-house, industrial school, and all public health insti-

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tutions provided by the city and county of San Francisco; and full powers are hereby given to said board to adopt such orders and regulations and appoint or discharge such medical attendants and employees as to them seems best to promote the public welfare and not in contravention of any law." St. 1869–70, 717, § 9. By the thirty-fifth section "all acts or parts of acts in conflict with this act, or any of its provisions," are repealed. To the action two defenses were set up by the defendant; the second being a justification of his conduct under an ordinance of the city and county of San Francisco, which is mentioned in the opinion. To the plea setting up this justification the plaintiff demurred, and the case was submitted upon written arguments.

B. S. Brooks and J. E. McElrath, for plaintiff.

M. C. Hassett, for defendant.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

FIELD, Circuit Justice. The plaintiff is a subject of the emperor of China, and the present action is brought to recover damages for his alleged maltreatment by the defendant, a citizen of the state of California and the sheriff of the city and county of San Francisco. The maltreatment consisted in having wantonly and maliciously cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being regarded by them as degrading and as entailing future suffering.

It appears that in April, 1876, the legislature of California passed an act "concerning lodging-houses and sleeping apartments within the limits of incorporated cities," declaring, among other things, that any person found sleeping or lodging in a room or an apartment containing less than five hundred cubic feet of space in the clear for each person occupying it, should be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than ten or more than fifty dollars, or imprisonment in the county jail, or by both such fine and imprisonment. Sess. Laws 1875–76, p. 759. Under this act the plaintiff, in April, 1878, was convicted and sentenced to pay a fine of ten dollars, or in default of such payment to be imprisoned five days in the county jail. Failing to pay the fine, he was imprisoned. The defendant, as sheriff of the city and county, had charge of the jail, and during the imprisonment of the plaintiff cut off his queue, as alleged. The complaint avers that it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, according to their religious faith, with misfortune and suffering after death; that the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith; yet, in disregard of his rights, inflicted the injury complained of; and that the plaintiff has, in consequence of it, suffered great mental anguish, been disgraced in the eyes of his friends and relatives, and ostracised from association with his countrymen; and that hence he has been damaged to the amount of ten thousand dollars.

Two defenses to the action are set up by the defendant; the second one being a justification of his conduct under an ordinance of the city and county of San Francisco. It is upon the sufficiency of the latter defense that the case is before us. The ordinance referred to was passed on the fourteenth of June, 1876, and it declares that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and it is made the duty of the sheriff to have this provision enforced. Under this ordinance the defendant cut off the queue of the plaintiff.

The validity of this ordinance is denied by the plaintiff on two grounds: 1. That it exceeds the authority of the board of supervisors, the body in which the legislative power of the city and county is vested; and, 2. That it is special legislation imposing a degrading and cruel punishment upon a class of persons who are entitled, alike with all other persons within the jurisdiction of the United States, to the equal protection of the laws. We are of opinion that both these positions are well taken.

The board of supervisors is limited in its authority by the act consolidating the government of the city and county. It can do nothing unless warrant be found for it there, or in a subsequent statute of the state. As with all other municipal bodies, its charter—here the consolidation act—is the source and measure of its powers. In looking at this charter, we see that the powers of the board and the subjects upon which they are to operate are all specified. The board has no general powers, and its special power to determine the fines, forfeitures and penalties which may be incurred is limited to two classes of cases: 1. Breaches of regulations established by itself; and, 2. Violations of provisions of the consolidation act, where no penalty is provided by law. It can impose no penalty in any other case; and when a penalty other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment. It can take no other form. "No penalty to be imposed," is the language used, "shall exceed the amount of one thousand dollars, or six months imprisonment, or both." The mode in which a penalty can be inflicted and the extent of it are thus limited in defining the

power of the board. In their place nothing else can be substituted. No one, for example, would pretend that the board could, for any breach of a municipal regulation or any violation of the consolidation act, declare that a man should be deprived of his right to vote, or to testify, or to sit on a jury, or that he should be punished with stripes, or be ducked in a pond, or be paraded through the streets, or be seated in a pillory, or have his ears cropped or his head shaved.

The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceptional cases. Had the ordinance contemplated a mere sanitary regulation it would have been limited to such cases and made applicable to females as well as to males, and to persons awaiting trial as well as to persons under conviction. The close cutting of the hair which is practiced upon inmates of the state penitentiary, like dressing them in striped clothing, is partly to distinguish them from others, and thus prevent their escape and facilitate their recapture. They are measures of precaution, as well as parts of a general system of treatment prescribed by the directors of the penitentiary under the authority of the state, for parties convicted of and imprisoned for felonies. Nothing of the kind is prescribed or would be tolerated with respect to persons confined in a county jail for simple misdemeanors, most of which are not of a very grave character. For the discipline or detention of the plaintiff in this case, who had the option of paying a fine of ten dollars, or of being imprisoned for five days, no such clipping of the hair was required. It was done to add to the severity of his punishment.

But even if the proceeding could be regarded as a measure of discipline or as a sanitary regulation, the conclusion would not help the defendant, for the board of supervisors had no authority to prescribe the discipline to which persons convicted under the laws of the state should be subjected, or to determine what special sanitary regulations should be enforced with respect to their persons. That is a matter which the legislature had not seen fit to intrust to the wisdom and judgment of that body. It is to the board of health of the city and county that a general supervision of all matters appertaining to the sanitary condition of the county jail is confided; and only in exceptional cases would the preservation of the health of the institution require the cutting of the hair of any of its inmates within an inch of his scalp. Act April 4, 1870 (Sess. Laws 1869–70, p. 717).

The claim, however, put forth that the measure was prescribed as one of health is notoriously a mere pretense. A treatment to which disgrace is attached, and which is not adopted as a means of security against the escape of the prisoner, but merely to aggravate the severity of his confinement, can only be regarded as a punishment additional to that fixed by the sentence. If adopted in consequence of the sentence it is punishment in addition to that imposed by the court; if adopted without regard to the sentence it is wanton cruelty.

In the present case, the plaintiff was not convicted of any breach of a municipal regulation, nor of violating any provision of the consolidation act. The punishment which the supervisors undertook to add to the fine imposed by the court was without semblance of authority. The legislature had not conferred upon them the right to change or add to the punishments which it deemed sufficient for offenses; nor had it bestowed upon them the right to impose in any case a punishment of the character inflicted in this case. They could no more direct that the queue of the plaintiff should be cut off than that the punishments mentioned should be inflicted. Nor could they order the hair of any one, Mongolian or other person, to be clipped within an inch of his scalp. That measure was beyond their power.[2]

[2] "There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right. The state might, with even more color of reason, regulate the tables of its citizens than their methods of wearing their hair; for the first might do something towards establishing temperance in eating, while the other would be simply absurd and ridiculous. But if the state cannot regulate the fashions of the hair of those outside the prisons, what right can it have to regulate them for persons in confinement under its laws? In other words, what is there in the fact that one is undergoing confinement for a breach of the penal laws that can enlarge the authority of the state in this regard? The common impression that a prisoner under sentence is pretty much at the arbitrary disposal of his keeper is not only exceedingly erroneous, but it is one that leads to many abuses. The principle that limits his power we suppose to be clear enough; he may do whatever is necessary to give complete effect to the sentence of the law, but he cannot go a step further, because the prisoner is confided to him for that purpose, and for no other. He may therefore subject him to the restraint of irons, if necessary to his detention; he may compel him to submit to sanitary regulations essential to health; he may force him to work, if such is the sentence; he may require him to wear the prison uniform, not only because of his convenience, but because of its utility in preventing escapes, and he may compel the observance of other regulations which have the general purpose of the sentence in view, and are not purely arbitrary. But if

The second objection to the ordinance in question is equally conclusive. It is special legislation on the part of the supervisors against a class of persons who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the "Queue Ordinance," being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled. Brown v. Piper, 91 U. S. 42; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. [57 U. S.] 435; Scott v. Sandford, 19 How. [60 U. S.] 407. The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."

Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should in some quarter of the city overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork would be seen by every one to be leveled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.

During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been

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female prisoners were subjected to regulations shocking to the modesty of a virtuous woman, or male prisoners to those of an indecent nature, there should be no difficulty in holding that their rights were violated. Convicts have all the rights of other citizens, except as these are limited by the sentence of the law and proceedings for its proper execution. If the cutting off of the queue could be defended as a sanitary regulation, or as being needful and proper to prevent escapes, or as removing something that interfered with the performance of the convict's labor, when labor is a part of his punishment, there would be a show of reason for saying that the regulation came within the implied powers of the prison authorities. But nothing of this sort can be pretended. The wearing of the hair in this way is no more unhealthy than female fashions of the hair in general, and the convict can be kept as well and can work as well with it on as with it off. The regulation for the cutting off of the queue is, therefore, a regulation not important to the preservation of discipline in the prison or to the due enforcement of the sentence to imprisonment, and is therefore illegitimate and illegal." Judge Cooley in note to this case, 18 Am. Law Reg. 685.

regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution. That amendment in its first section declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any person (dropping the distinctive term citizen) of life, liberty or property, without due process of law, nor deny to any person the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.

Since the adoption of the fourteenth amendment, congress has legislated for the purpose of carrying out its provisions in accordance with these views. The Revised Statutes reenacting provisions of law passed in 1870 declare that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." Section 1977. They also declare that "every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." Section 1979.

It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is "caught upon the broad shield of our blessed constitution and our equal laws." [3]

We are aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither and expel from the state those already here. Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies. To that government belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The state in these particulars, with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted. The state may exclude from its limits paupers and convicts of other countries, persons incurably diseased, and others likely to become a burden upon its resources. It may perhaps also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government. That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain; whether they shall be restricted in business transactions to such as appertain to foreign commerce, as is practically the case with our people in China, or whether they shall be allowed to engage in all pursuits equally with citizens. For restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded. Be that as it may, nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the state, or of its municipal bodies, like the ordinance in question—legislation which is unworthy of a brave and

[3] Judge Black's argument in the Fossat Case, 2 Wall. [69 U. S.] 703.

manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation.

The plaintiff must have judgment on the demurrer to the defendant's plea of justification; and it is so ordered.

NOTE.—In Re Ah Fong [Case No. 102], the circuit court of the United States, referring to the police power of the state, under which it was claimed that the state could exclude certain classes of persons from its limits, said: "It is undoubtedly true that the police power of the state extends to all matters relating to the internal government of the state and the administration of its laws which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace and safety of society. Under this power all sorts of restrictions and burdens may be imposed, having for their object the advancement of the welfare of the people of the state, and when these are not in conflict with established principles, or any constitutional prohibition, their validity cannot be questioned. It is equally true that the police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; that the state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others who, from physical causes, are likely to become a charge upon the public, until security is afforded that they will not become such a charge, and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the state in this respect has its foundation, as observed by Mr. Justice Grier, in The Passenger Cases [7 How. (48 U. S.) 283], 'in the sacred law of self-defense, which no power granted to congress can restrain or annul.' But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin—the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference." In Chy Lung v. Freeman, reported in 92 U. S. 275, the supreme court of the United States, referring to the same subject, said: "We are not called upon by this statute (a statute of Calfornia) to decide for or against the right of a state, in the absence of legislation by congress, to protect herself, by necessary and proper laws, against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." Page 280. In Railroad Co. v. Husen, reported in 95 U. S. 465, the supreme court of the United States, referring further to this subject, said: "It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in The Passenger Cases, 7 How. [48 U. S.] 283, by Mr. Justice Grier, in the sacred law of self-defense. Vide In re Ah Fong [Case No. 102]. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state: for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons or such a use of property as is injurious to the property of others. They are self-defensive."

"Some of the cases in which legislatures have attempted to avoid the prohibition of special legislation by passing laws general in form, but applicable to single cases only, are instructive. It is known that many of the states have gone a great ways in requiring general legislation wherever it could be made applicable, and in forbidding special acts, in many cases. These provisions are often found to run counter to the desires of legislators, and they are then evaded, if evasion is found to be practicable. Thus, a legislature forbidden to grant divorces may undertake to empower a court to do so in a particular and exceptional case. Teft v. Teft, 3 Mich. 67; Simonds v. Simonds, 103 Mass. 572. Or, having no power to impose a pecuniary obligation upon a municipality, may attempt to do so indirectly, by giving validity and force to the unauthorized action of individuals. Hasbrouck v. Milwaukee, 13 Wis. 37; Marshall v. Silliman, 61 Ill. 218. See Williams v. Bidleman, 7 Nev. 68; People v. Supervisors of Onondago, 16 Mich. 254. Or, being prohibited from passing incorporation acts, may attempt to so remodel and extend the corporate powers of an existing corporation, as, in effect, to create a new corporation. San Francisco v. Spring Valley Waterworks, 48 Cal. 493. Many such illustrations might be given, but the principle which underlies them all is the same. The case of Devine v. Commissioners Cook Co., 84 Ill. 590, is particularly instructive. It was there held that designating counties as a class, according to a minimum population, which makes it absolutely certain but one county in the state can avail itself of the benefits of a law applicable to such class, is nothing but a device to evade the constitutional provision forbidding special legislation, and is void for that reason. Compare Welker v. Potter, 18 Ohio St. 85, and Kilgore v. Magee, 85 Pa. St. 401, which seem to be contra, but are distinguishable. If, therefore, the legislation condemned in the principal case [the one here reported] was calculated and designed to be offensive to and inflict pain upon people of one nationality only, and would have been void if in terms restricted in its application to that people, the general terms in which it is couched ought not to save it from condemnation. * * * Punishments are limited by the sentence of the law, and whatever is imposed beyond that is illegal, irrespective of its tendency. Moreover, the law itself is limited in respect to the punishments for which it may provide. The constitution prohibits those of a cruel and unusual nature, but the requirement of equal protection of the laws to all persons is also prohibitory. When the law imposes a punishment which only a certain class of persons, because of peculiar but innocent habits, sentiments or beliefs, can feel, and imposes it for the avowed purpose of affecting this class as others are not affected, it seems plain that not only is the equal protection of the laws denied to the class, but that they are directly and purposely subjected to pains and penalties which others of different habits, sentiments or beliefs are never expected to feel." Judge Cooley in 18 Am. Law Reg. 684.

HOAR (UNITED STATES v.). See Case No. 15,373.

HOBART (GORDON v.). See Cases Nos. 5,608 and 5,609.

HOBART (TITUS v.). See Case No. 14,063.

Case No. 6,547.

HOBART et ux. v. UPTON.

[5 Chi. Leg. News, 97; 17 Int. Rev. Rec. 6.]

Circuit Court, D. Oregon. Nov. 6, 1872.

STATUTE OF LIMITATIONS—ABSENCE FROM THE STATE—SAVING CLAUSE.

The Oregon act of December 16, 1853 [Code Or. 1854, p. 372], provided that no action should be maintained by a ward to recover any estate sold by his guardian under that act, unless the same was commenced within five years after the termination of the guardianship; excepting only that persons out of the state when the cause of action accrued might sue within five years after their return to the state: *Held*, that the exception or saving clause applied as well to persons who were never in the state as to those who were temporarily absent from it.

In equity.

Benton Killin, for plaintiffs.

E. C. Bronaugh, for defendant.

DEADY, District Judge. This action was commenced July 31, 1872, and is brought to recover the possession of an undivided one-tenth of 318 37-100 acres of land lying in Washington county, and described as being the west half of donation claim number 41. The plaintiffs, W. W. Hobart and Marin Elliott his wife, allege in their complaint that they are citizens of Nevada, and that the said Marin Elliott is the owner in fee simple of said undivided interest, and entitled to the possession thereof. The defendant [Charles B. Upton], in his amended answer admits his possession of the premises, but denies the ownership of said Marin Elliott, or that she is entitled to the possession of the premises; and for a further plea or defense alleges that the only interest ever owned by said Marin Elliott in said premises descended to her from her father, John Elliott, before November 3, 1854, and that on said day all said interest was sold and conveyed by the guardian of said Marin Elliott to Theodore S. and Theodore B. Trevitt, under whom the defendant claims, for a valuable consideration in pursuance of the provisions of an act of the legislative assembly of the territory of Oregon, passed December 16, 1853, relating to the sale of lands of persons under guardianship; and that said Marin Elliott was at the date of such sale a minor and non-resident of the then territory, now state of Oregon, and ever has been such non-resident; "and that more than five years have expired since the termination of said guardianship." To this special plea there was a demurrer by the plaintiff.

The question raised by the demurrer turns upon the construction of section 19 of the act referred to in the plea, which reads:—"No action for the recovery of any estate, sold by a guardian under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship; excepting only that persons out of the territory, and minors and others under legal disability to sue at the time when the cause of action shall accrue, may commence their action at any time within five years next after the removal of the disability or after their return to the territory."

Before considering this question, it is proper to observe that this plea is liable to the objection that it anticipates and undertakes to state the plaintiff's reply to the limitation prescribed in the section in question. It should have stopped short with a statement of the facts showing that the premises had been sold at a guardian's sale under which defendant claimed, and that the action had not been commenced within five years after the termination of the guardianship. Then if the plaintiffs wished to avail themselves of the disability provided for in the exception to the act, they would reply and state that they were out of the country when the cause of action accrued, and that five years had not elapsed since their return, or that they had not returned at all. 1 Chit. Pl. 614; Bulger v. Roche, 11 Pick. 36. But as the facts are all stated in the answer, and the plaintiffs have accepted the pleading in this respect, by demurring to it as insufficient in law, I will consider the matter as if the case stood upon a replication alleging the plaintiff's disability and a demurrer thereto.

It is claimed on the part of the defendant that the exception to the general rule prescribed in the section does not include or apply to any one who never was a resident of the country, because such a person cannot ever be said in the language of the exception to return to the state or territory. The force of this argument rests solely upon the fact that in its primary and proper sense the word return does not describe the act of coming to the country for the first time. The argument also makes no account of the fact that the persons who are given five years to sue in "after their return to the territory," are first described in the exception simply as "persons out of the territory;" which phrase as well includes those who were never in the country as those who are temporarily absent from it. The statute of 21 Jac. I. contained an exception in favor of persons "beyond seas," so that such persons were given ten years in which to sue after "coming into the realm." In Strithorst v. Graeme, 3 Wils. 145, it was held that this exception applied to foreigners, and that the statute did not begin to run against them until they came into England. The exception in the statute of James as to persons "beyond seas," extended only to the case of plaintiffs. To remedy this, the statute of 4 & 5 Anne provided that if any persons against whom there is a cause of action, shall be "fallen or come beyond the seas," when such cause of action accrues, the plaintiff shall be at liberty to bring his action against such persons "after their return," within the same time as is limited for such action by the statute of James. The statute of limitations of

the state of New York contained this provision of the statute of Anne. In Ruggles v. Keeler, 3 Johns. 267, Kent, C. J., delivering the opinion of the court upon the construction to be given to the act in this respect, said: "Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the English statutes, which also speak of the return from beyond seas of the party so absent. The word return has never been construed to confine the proviso to Englishmen, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad." See, also, 5 Bac. Abr. 235. In Hall v. Little, 14 Mass. 203, the plaintiff was a foreigner who had never resided within the United States, and the court held that he was within the exception in favor of persons "beyond the seas," when the right of action accrued. In Wilson v. Appleton, 17 Mass. 181, the ruling in the last case was followed, and the court says: "That the word return cannot restrict the operation" (of the exception) "to those only who have been in the commonwealth, and have left it for temporary purpose." In Bulger v. Roche, 11 Pick. 39, the parties were both aliens and without the United States when the cause of action accrued. Shaw, C. J., in delivering the opinion of the court, says: "The statute itself provides that it shall not be understood to bar any person, beyond sea. * * * This proviso in terms excludes the operation of the statute in all cases, where the plaintiff is out of the commonwealth at the time the cause of action accrues, without distinguishing whether the plaintiff be a citizen or one who has formerly resided in the state and who is casually absent, or a foreigner who has never been within it." In Von Hemert v. Porter, 11 Metc. [Mass.] 215, the plaintiff was a foreigner who had never been within the United States, and it was held that the statute did not run against him, because he was within the words of the exception therein—"absent from the United States." These cases and others are cited and commented on in Ang. Lim. § 204 et seq., as establishing the doctrine that the saving of the right to sue to persons "beyond seas," "absent from the state," etc., until after they return, applies as well to persons who have never been in the country as to those who have.

In the light of these authorities and the uniform construction that has been given to similar language in other statutes, no other conclusion can be reached, than that the plaintiffs are entitled to five years after their return to the state, to bring this action, whether they ever resided in it or not. They were "out of the territory" when the cause of action accrued, and are therefore within the purview of the exception or saving clause. The word return in like statutes having never been allowed to restrain or limit the saving clause to persons only temporarily out of the country, it ought not to be taken in that sense in the case before the court. In enacting the statute the legislature is presumed to have intended that the language of the exception should be taken and understood according to the long established construction in like case.

The demurrer is sustained.

[See Case No. 6,548.]

NOTE. In a similar action to recover possession of real property, brought [by Frederick Elliott against Charles B. Upton] to recover another undivided tenth of the premises described in the above opinion, the ruling of the court was the same. [Case not reported.]

Case No. 6,548.

HOBART et al. v. UPTON.

[2 Sawy. 302.] [1]

Circuit Court, D. Oregon. Dec. 2, 1872.

GUARDIAN—SALE OF LAND BY.

Under the act of December 16, 1853, relating to the sale of lands of persons under guardianship, a sale by a guardian of his ward's land, as against such ward or those who claim under him, is void, unless it appears that the same was made at public auction, after due notice of the time and place thereof.

[Cited in Goldsmith v. Gilliland, 23 Fed. 646.]

[Bill by W. W. Hobart and others against Charles B. Upton.]

Benton Killen, for plaintiffs.

John Catlin, for defendant.

DEADY, District Judge. This action is brought to recover possession of an undivided one tenth of 318.37 acres of land in Washington county, alleged to be the estate in fee simple of Marin Elliott, the wife of plaintiff, Hobart. On November 6, 1872, it was before the court on a demurrer to a plea of the special statute of limitations in case of lands sold at guardian's sale, when the plea was determined to be insufficient. [Case No. 6,547.]

On November 25, the cause was tried by the court without a jury, upon a denial of the allegations of the complaint.

On the trial, it was agreed that the plaintiff, Marin Elliott, was on October 7, 1854, the owner of the undivided interest in the premises, as alleged in the complaint, and is so still, unless the plaintiffs have since acquired such interest; and also, that if a certain alleged order of the probate judge of

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

Washington county, of the date last aforesaid, purporting to license one George W. Elliott, as guardian of said Marin Elliott, to sell the interest of said Marin Elliott in said premises, and the deed of said George W. Elliott thereunder to Theodore S. and Brookes Trevett, dated November 3, 1854, had the effect to divest said Marin Elliott of said interest, and to vest the same in said Theodore S. and Brookes Trevett, that said defendant has since acquired said interest by sufficient mesne conveyances.

A certified copy of said alleged order of sale and deed was introduced in evidence. The statute in force when these proceedings are alleged to have taken place, was the act of December 16, 1853, relating to the sale of lands of persons under guardianship. Section 20 of the act (Code Or. 1854, p. 372) provides that:

"In case of an action relating to any estate, sold by a guardian under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings. Provided, it shall appear:

"1. That the guardian was licensed to make the sale, by a probate court of competent jurisdiction.

"2. That he gave a bond that was approved by the probate judge;

"3. That he took the oath prescribed in this chapter;

"4. That he gave notice of the time and place of sale, as prescribed by law; and,

"5. That the premises were sold accordingly, at public auction, and are held by one who purchased them in good faith."

The order allowing the sale was made in vacation, and contains no description of the lands other than "said Marin's interest in and to an undivided portion of a land claim situate in Washington county, Oregon." It recites that it is made upon the petition of George W. Elliott, guardian of Marin Elliott, minor heir of John Elliott, deceased, "representing that it would be for his said ward's interest to dispose of the same at private sale." The petition appearing satisfactory to the court for the matters therein prayed for, it is therefore ordered, etc.—substantially that the guardian have power to sell, but whether at public or private sale, is not mentioned. The deed contains no reference to the order of sale, or the proceedings under it.

On behalf of the plaintiff, it is maintained that each of the five particulars contained in the proviso to section 20 of the act is essential to the validity of a sale under it, and that, unless it appears from the proof that all these things were had and done, as against the plaintiff, the sale is invalid. This position, it seems to me, must be conceded. When the act declares that a sale by a guardian "shall not be avoided on account of any irregularity in the proceedings: provided, it shall appear," as above stated, it in effect declares that if these things, or any of them, do not appear, such sale may be avoided on account of such irregularity; or, in other words, that it is invalid, and does not affect the title of the ward.

Many questions were raised, upon the argument of this case, by counsel for plaintiffs, which it is not necessary now to decide, for it is manifest that this sale is invalid—absolutely void—because not made upon notice of the time and place thereof, and at public auction.

The act (Code Or. 1854, p. 371) provides that the guardian shall give bond "to sell the land in the manner prescribed for sales of real estate by executors and administrators." A sale by an executor or administrator was required to be made in the county where the lands were situated, after notice of the time and place thereof, and at public auction (Id. 334).

The petition, according to the recital in the order, asked that the property might be sold at private sale, but the order is indefinite upon the point. It not appearing from the deed, or any subsequent proceeding, that the sale was public, after due notice of the time and place appointed therefor, but the most reasonable inference from such deed being that the sale was made privately and without notice, it is void as against the plaintiffs.

This being so, there is no question but that the plaintiffs are entitled to recover the possession of the premises.

[See Case No. 6,547.]

Case No. 6,549.

Ex parte HOBBS.

In re HAPGOOD.

[2 Lowell, 491;[1] 14 N. B. R. 495.]

District Court, D. Massachusetts. Sept., 1876.

BANKRUPTCY—FOLLOWING TRUST FUNDS.

1. Where a bankrupt, being trustee, has deposited trust money, with his own, in a bank, in his own name, his cestuis que trustent, or he as representing them, may have a trust declared in the trust-moneys.

2. The apportionment of the balance of the bank account may be ascertained from the dates of deposits and withdrawals of the trust, and the general funds, respectively.

Mr. Hapgood, the bankrupt, was trustee, under a private assignment made by S. Sutton & Co. for the benefit of their creditors. In the course of settling that estate, he sold machinery and other assets, and paid certain charges and privileged debts; and in February, 1876, he had received $1,500 or thereabouts more than he had paid out. The money received, when not paid out at once, was deposited in the Revere National Bank with Hapgood's own money and to his own

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

credit; and he testified that his average monthly balance in the bank was always equal to the amount due from him as trustee. In February, 1876, finding himself insolvent, he opened an account in the same bank as trustee, and drew out the $1,500 from his individual account, and deposited it to the new account. Within two months afterwards, he was adjudged bankrupt; and his assignee petitions to have this money so deposited to the new account declared to be assets for the general creditors of Hapgood, as having been set apart by way of preference. The bank submits to whatever decree the court may make. Hapgood defends on the ground that no preference was intended or was effected.

R. M. Morse, Jr., for the assignee, cited Bank of Commerce v. Russell [Case No. 884]; In re Hosie [Id. 6,711]; White v. Jones [Id. 17,550]; In re Janeway [Id. 7,208]; [In re Coan [Id. 2,915]; Wood M. & R. Co. v. Brooke [Id. 17,980];[2] School Dist. v. First Nat. Bank, 102 Mass. 174.

C. H. Fiske, for Hapgood, cited Pennel v. Deffell, 4 De Gex, M. & G. 372; Ex parte Sayers, 5 Ves. 169.

LOWELL, District Judge. The question raised by the case stated and submitted by the petition and answer, and which is thus brought within the jurisdiction of the court without the formality of a plenary action, is whether the bankrupt gave a preference to himself as trustee, by transferring a part of his bank account from his own name to himself as trustee. This question cannot be answered fully upon the facts as yet proved.

If it be true that the change in the form of the account operated to set apart a greater proportion of the deposit than was already affected by the trust, upon the principles presently to be explained, then it was an unlawful preference to that extent. In the United States it has been held, without qualification, that an insolvent has no greater right to pay or secure debts which he is under a very strong moral obligation to pay, than any others. On the whole, I consider this rule the only safe one; but it works hardship in some cases. If it be true that the now bankrupt deposited the trust money with his own account, simply for convenience, and always kept enough in the bank to enable him to pay out at any moment what he owed the creditors of Sutton & Co., it was the merest technical preference that he committed in setting apart that amount when he became aware of his insolvency. Still, it was a technical preference under the decisions, because he was merely a debtor to the trust; and he transferred a credit from himself, as an individual, to himself as a trustee, in order to make his trust secure.

But the defendant presents the case in another point of view, which is important: He says that if it be true that his general deposit of the trust funds and his own together made him a debtor to the trust, and subjected him personally to make good any loss that might occur from the failure of the bank, or from any set-off the banker might have against him, still his cestuis que trust-ent, and he as representing them, may have a trust declared in these moneys, and would have had such a right after his bankruptcy, though no separation had been made before that time. He cites Pennel v. Deffell, 4 De Gex, M. & G. 372. In that case an official assignee had two bank accounts standing in his own name, in which he deposited moneys belonging to various bankrupt estates, and moneys of his own. He died insolvent, and the contest was between his general creditors and his creditors in the trust; and the court decided, upon reasoning which is satisfactory to my mind, that a trust ought to be declared, not for the general creditors exclusively, but according to the facts; that is to say, taking the deposits and the withdrawals in the order of their dates, find out how much of the balance remaining at the death of the trustee belonged to the trust, how much to the general fund, and divide accordingly. They refused to admit that the whole should be attributed to the trust, until that was made good, any more than that the whole should be general assets. One of the learned judges says, that, if the former were the rule, it would follow that in all cases where trust moneys were paid by a trustee into a bank, they must be held to have remained there so long as the trustee may have had moneys of his own there to answer his drafts, whatever may have been the dealings with the account, and however long it may have continued.

There is no doubt that the assignee in bankruptcy is bound by all trusts and equities which attach to any property in the hands of the bankrupt. If the bankrupt had deposited his trust money, and nothing else, in a bank, the cestui que trust could follow it, whatever the name in which the account was kept: Kip v. Bank of New York, 10 Johns. 63. If, on the other hand, it had all been put in the bankrupt's name as trustee, the converse would be true: his general creditors could have it, if they could prove property in it. In either case, the only essential would be to trace the property. The only difficulty arises from the confusion of the trust money and the debtor's own money; and the case cited points out a reasonable and just mode of disentangling the account. It says: Prove what trust money has been paid in, and what of the bankrupt's money and when, and prove what has been drawn out and when; then, by striking the account at any time, you will find how the balance in the bank is to be apportioned, because you will see how that balance orig-

[2] [From 14 N. B. R. 495.]

inated, whether from trust money or not, or in what proportions.

I adopt that mode of settlement. The bankrupt may state the account, and ascertain how much, if any, of the money transferred 29th February, 1876, was trust money according to the method above mentioned; and for that sum he may retain the deposit. For any deficiency, he, as trustee, must take a dividend concurrently with his general creditors out of the general assets.

Case No. 6,550.

In re HOBBS et al.

[1 Woods, 537;[1] 4 Am. Law T. Rep. U. S. Cts. 190.]

Circuit Court, N. D. Georgia. Aug., 1871.

MISCEGENATION—CIVIL RIGHTS BILL—FOURTEENTH AMENDMENT.

The marriage relation between white persons and persons of African descent is prohibited, and declared null and void by the law of Georgia: *Held*, that marriage laws are under the control of the states, and that the law named is not annulled or affected by the civil rights bill of congress or the fourteenth amendment to the constitution of the United States.

[Cited in Bertonneau v. Directors of City Schools, Case No. 1,361; State v. Tutty, 41 Fed. 757.]

[Cited in Baylies v. Curry, 128 Ill. 288, 21 N. E. 595.]

The relators were tried before the thirty-fifth senatorial district court of this state in the city of Atlanta, for the offense of fornication. It appears by the record, that the ordinary of Fulton county, Georgia, on August 31, 1870, issued a license directed to any minister of the gospel, judge of superior court or justice of the peace, to join in the state of matrimony the relators, "provided there is no lawful cause to obstruct the same, according to the constitution and laws of this state." The following is a copy of the certificate, which is also before me: "I certify that William B. Hobbs and Martha A. Johnson were joined together in the holy bands of matrimony on the 1st day of September, 1870, by me. Owen George." The parties were severally put upon trial before the state court and pleaded not guilty; and after argument of counsel and charge of the court the jury returned a verdict of guilty against each. Whereupon the court sentenced William B. Hobbs to pay one thousand dollars and costs, or in default to be put to work on the city or town streets or public roads of the county for six months from date of the sentence. A similar sentence was passed upon Martha A. Hobbs (alias Johnson), that she pay a fine of two hundred dollars or be put to work, etc., for the term of three months. At the time the writ of habeas corpus was applied for, the relators were in the custody of the jailer of Fulton county. The petition, among other things, stated that the relators were restrained of their liberty in violation of the constitution and laws of the United States. The writ was granted and served by the United States marshal on the jailer, who brought the parties before the United States district judge, and made the proper return upon the writ, and the question of the discharge of relators was heard on the 22d day of August, 1871.

Thrasher & Thrasher and Oglesby, for relator.

W. G. Irwin, contra.

ERSKINE, District Judge. Counsel for the relators rely upon the fourteenth amendment to the constitution, and the act of congress passed April 9, 1866, commonly known as the civil rights bill. 14 Stat. 27. The first section of the fourteenth amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The fifth section provides that congress shall have power to enforce the amendment by appropriate legislation.

The civil rights bill was, as may be seen, passed a short time before the fourteenth amendment received the sanction of the people of the United States. In May, 1870, congress passed an act to carry into effect the fourteenth and fifteenth amendments, and by section 18 re-enacted the civil rights bill. 16 Stat. 140. The first section of this famous bill of rights is as follows: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary, notwithstanding."

The primary, but not the only question presented by the relators for consideration is, whether section 1707 of the Code (Irwin's) of Georgia is repugnant to the fourteenth

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

amendment and the civil rights bill, or to either of them—whether it invades or abridges any of the privileges or immunities—fundamental rights—secured to every citizen, by the constitution or the act of congress? The section referred to is in these words: "The marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void." This enactment was on the statute book when the state constitution of 1868 was framed. It was said, however, that it was the purpose of the convention to abrogate it by inserting section 11 of article 1. This is the section: "The social status of the citizen shall never be the subject of legislation." But the supreme court of the state, in June, 1869, in Scott v. State, 39 Ga. 321, unanimously held that section 1707 of the Code was not in conflict with this provision in the state constitution. McCay, J. (concurring in the judgment of Brown, C. J., and Warner, J.), said: "These and such laws have no bearing on the social status of the citizen. They still leave persons to choose their associates, though they provide that they shall not enter into a particular civil contract." This being the law of Georgia—this being the interpretation by the supreme court of the state of a clause in the state constitution—which clause or provision has not been challenged here as being obnoxious to the constitution of the United States—it becomes my duty to ascertain and decide whether section 1707 is an infraction of the fourteenth amendment or the laws of congress made for its enforcement.

[It may not be unworthy of observation that, since the decision of the state supreme court, in Scott v. State, there have been two sessions of the general assembly—composed of colored members as well as white—yet no effort whatever was made at either session to repeal or modify section 1707. And in October, 1870, a law was enacted to "Establish a System of Education" [Laws Ga. p. 57]. By section 32, it was provided that the white and colored youth should be taught in separate schools. On the final passage of the bill all the colored and nearly every white member voted in the affirmative.] [2] Though marriage is not unfrequently viewed in our own country, as well as by foreign jurists, as a contract in the common meaning of the term—and, indeed, it cannot be logically denied that it has, in a limited sense, properties which assimilate it to an ordinary contract, being a consentient covenant—yet it is something more; it is an institution of public concernment, created and governed by the public will of the state or nation. It is a relation which can be annulled only through the intervention of judicial tribunals, unless such power has been also given to the legislature. [Mr. Bishop, in his accurate and learned work on Marriage and Divorce, says (volume 1, § 3): "While the contract is merely an executory agreement to marry, it differs not essentially from other executory contracts; it does not superinduce the status. * * * But when the contract is executed in what the law regards a valid marriage, its nature as a contract is merged in the higher nature of the status."] [2] Nor, I apprehend, is marriage considered to be embraced within that clause of section 10 of article 1 of the national constitution, which prohibits the states from passing any law impairing the obligation of contracts; and Chief Justice Marshall, in Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518, observes "That the provision in the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general rights of the legislature to legislate on the subject of divorces." In another part of the opinion, the same great magistrate said: "The framers of the constitution did not intend to restrain the states in the regulation of civil institutions, adopted for internal government." Id. 629. And Mr. Justice Daniel, in Butler v. Pennsylvania, 10 How. [51 U. S] 402, said that "the contracts designed to be protected by the constitution are those by which perfect rights, certain definite, fixed private rights of property are vested." So, on principle and authority, it is plain that the institution of marriage is not technically a contract, nor can it be said to relate to property. The brief remarks on the subject of the marriage relation or status, and that it is not within the protection of section 10, art. 1, of the original constitution, have been made for the purpose of showing that, as words, as a general rule, are to be taken in their natural and ordinary sense, it is to be presumed that the word "contracts," as employed in the civil rights bill, possesses an equivalent, and not a narrower or broader meaning than the same word as used in the provision of the constitution just referred to. By looking to the act itself, this view will become conspicuously manifest. It provides that the colored citizen shall have the right to make and enforce contracts, sue, be parties, give evidence, inherit, purchase and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by the white citizens—equal privileges and immunities with the white citizen.

In the case of Live Stock, etc., Association v. Crescent City, etc., Co. [Case No. 8,408], which was decided in New Orleans, a few days after the passage of the law reenacting the civil rights bill, but before the reenactment obtained publicity, Mr. Circuit Justice Bradley (Woods, Circuit Judge, concurring) remarked that the civil rights bill was in pari

[2] [From 4 Am. Law T. Rep. U. S. Cts. 190.]

[2] [From 4 Am. Law T. Rep. U. S. Cts. 190.]

materia with the fourteenth amendment, and was probably intended to reach the same object. And he further said, that the court was disposed to hold "that the first section of the bill covered the same ground as the fourteenth amendment—at least so far as the matters in this case are concerned." And, so far as the questions in the case before me are involved, the language of Mr. Justice Bradley comes with direct pertinency. A careful perusal of the amendment and the bill makes it obvious that the design and object of both was, not only to guaranty, in the largest sense, to every citizen in the United States, the sacred right of equality before the law throughout the whole land; but also, to protect from invasion and abridgement all the privileges and immunities—essential rights—that belong to the citizen and which flow from the constitution. And I will here remark, that there still lie dormant in the national legislature, under the original constitution and the amendments thereto, vast and various powers which but await such exigencies as are necessary to call them into action. Any attempt on my part to enumerate or describe the fundamental rights of the citizen comprehended in the words "privileges and immunities," secured by the fourteenth amendment to all the citizens of the United States, would give but an unsatisfactory result. The same words are found in clause 1, § 2, art. 4, of the original constitution. But that clause applies only to citizens removing from one state to another. And the supreme court of the United States, in Conner v. Elliott, 18 How. [59 U. S.] 593, declined to describe or define the word "privileges," saying, "It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein."

In Gibbons v. Ogden, 9 Wheat. [22 U. S.] 188, Chief Justice Marshall said: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant." And Judge Cooley, in his work on Constitutional Limitations (page 59), uses the following clear and attractive language: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." And now it may be asked, does section 1707 of the Code, conflict with the fourteenth amendment, by abridging any of the privileges or immunities secured therein to the citizens—to the relators, white and colored, or deny to them the equal protection of the laws? Or does it conflict with the civil rights bill? The state law prohibits marriage between a white person and a person of African descent, and declares such marriage null and void. If this prohibition is transgressed, neither pains nor penalties follow to either party. But if the parties cohabit, the law of the state deems them guilty of fornication, and punishes them by fine, imprisonment and labor on the public highway, or any one or more of these penalties in the discretion of the court. Code, §§ 1707, 4245, 4487. In Barber v. Barber, 21 How. [62 U. S.] 582, Mr. Justice Wayne, speaking for the court, disclaimed any jurisdiction in the courts of the United States upon the subject of divorces. And Mr. Bishop says: "All our marriage and divorce laws * * * are state laws and state statutes; the national courts with us, not having cognizance of the matter within our localities." 1 Bish. Mar. & Div. § 87. [Congress, however, has enacted laws regulating marriage and divorce in the District of Columbia; and has likewise prohibited polygamy in any "territory or other place over which the United States has exclusive jurisdiction." Act 1860, c. 158 (12 Stat. 59); Act 1862, c. 126 (12 Stat. 501).][3]

I have given the matters involved in this suit careful consideration, and I am of opinion that neither congress, in framing the fourteenth amendment, nor the people, when they ratified it, contemplated that questions of this nature were comprehended within the terms "privileges and immunities" as employed in that instrument. The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the amendment, so long as the state marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the state law operates unequally; the marriage relation between whites and colored cannot exist under the statutes of this state—it is null and void as to both. And the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that—and none other—which is inflicted on the white citizen, the co-offender. In my judgment, neither section 1707, which inhibits marriage between a white person and a person of African descent, nor sections 4245 and 4487 which provide for the punishment of colored and white persons who are found guilty of the crime of fornication, fall within the influence of the provisions contained in the fourteenth amendment or the civil rights bill.

It is therefore ordered that the relators be remanded to the custody of the jailer.

[3] [From 4 Am. Law T. Rep. U. S. Cts. 190.]

Case No. 6,551.

HOBBS v. MAGRUDER.

[4 Cranch, C. C. 429.] [1]

Circuit Court, District of Columbia. March Term, 1834.

SLAVERY—PETITION FOR FREEDOM.

The sale, in the District of Columbia, of a Maryland slave brought here by her owner, does not give the slave a title to freedom under the Maryland statute of 1817, c. 112, which prohibits the sale to a non-resident of the state, of any slave having a contingent right to freedom.

[This was a petition for freedom by Rebecca Hobbs, a negress, against Thomas Magruder and Washington Robey.]

W. L. Brent, for petitioner.

Messrs. Swann and C. Cox, for respondents.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The facts of this case appear to be as follows: Margaret Stockett, being the owner of the petitioner as a slave for life, by her will made the following bequest to her daughter Eliza Ann Stockett: "After all my just debts are paid I give and bequeathe to my daughter Eliza Ann, all my property, both real and personal; and in case the said Eliza Ann should die without having an heir lawfully begotten of her body, it is then my wish and will that my negroes are to be free, and all the residue of the property to go to my nephew, George Henry McGill, to him and his heirs forever." Eliza Ann intermarried with Thomas Jones, a resident of the District of Columbia, and came to reside in this district with her husband, who brought the petitioner here and sold her to the defendant, Magruder; the said Eliza Ann, at the time of the sale, having had no issue of her body; but having since the sale, had issue of her body lawfully begotten, and now living. The petitioner claims freedom under the act of Maryland of 1817, c. 212. The first section of the act provides that no person shall knowingly sell or dispose of, to a non-resident of the state, any servant or slave who may be entitled to freedom upon any contingency, nor for a longer term than he is bound to serve, under the pain of penitentiary punishment, upon conviction on indictment in the county where the seller resides. The second section punishes the non-resident purchaser of such a servant or slave. The third section provides that no sale of such a servant or slave shall be valid unless in writing under the hands and seals of the seller and purchaser, &c.; and if the sale should be made without a compliance with the prescribed forms, the slave shall be free, unless the court or jury should be of opinion, that no fraud was intended by the omission of any one of the requisites. The sale was made in the District of Columbia, without a compliance with the requisites of the law of Maryland. Without deciding whether the petitioner had or had not a contingent right to freedom at the time of the sale, the court is of opinion that as the act of Maryland is of no force in this district, the sale here cannot be considered such a violation of the law of Maryland, as can give the petitioner a right to freedom.

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

Case No. 6,551a.

HOBBS v. WESTERN NAT. BANK.

[8 Wkly. Notes Cas. 131; Brown, Nat. Bank Cas. 187; 9 Reporter, 467.]

Circuit Court, E. D. Pennsylvania. Feb. 10, 1880.

EXECUTORS AND ADMINISTRATORS — NATIONAL BANKS — TRANSFER OF SHARES OF NATIONAL BANK STOCK—FOREIGN EXECUTOR — ACTS JUNE 16, 1836, AND APRIL 8, 1872.

Where the by-laws or articles of association of a national bank do not otherwise prescribe, the bank is bound under the acts of assembly of June 16, 1836, § 3, and of April 8, 1872, § 11, to recognize a transfer of its stock by a foreign executor, duly appointed in another state.

Case stated, wherein Elizabeth T. Hobbs, a citizen of the state of Maine, was plaintiff, and the Western National Bank of Philadelphia, a corporation organized under the laws of the United States, and doing business in the state of Pennsylvania, was defendant, showing the following facts:

Adeline T. Kittredge, the owner of certain shares of the capital stock of the corporation defendant, was a resident of, and died in, the state of Illinois in 1879, having duly made her will, which was admitted to probate there, and letters testamentary issued to Charles E. Towne by the probate court. The testatrix bequeathed the said stock to the plaintiff, Abbey W. Wells, and George W. Kittredge. The executor, in distribution and settlement of the estate, transferred the said shares to the plaintiff, and indorsed the said assignment and transfer upon the testator's certificate. A duly-certified copy of the will was filed in the office of the register of wills for the county of Philadelphia, but letters under the said will were not applied for or granted by the said register of wills. The plaintiff, producing the certificate aforesaid, with the transfer indorsed thereon, and a duly-certified copy of the letters testamentary issued by the said probate court, and a duly-certified copy of the will as filed in the office aforesaid in Philadelphia, requested the defendant to transfer to her the said shares of stock, and to issue to her a new certificate therefor. The defendant, acting under the advice of counsel, refused to do so. Rev. St. § 5139, enacts: "The capital stock * * * shall * * * be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." The defendants' by-laws and articles of association are silent on the subject. If the court shall be of opinion that the plaintiff

is entitled to the said transfer and new certificate, then judgment to be entered in favor of the plaintiff; otherwise judgment to be entered for the defendant.

Cuyler & Gest, for plaintiff.

In the absence of any provision upon the part of the bank for such a case, the court will adopt the laws in force in the state in which the property is situated. As the act states, the shares shall be deemed personal property, that is, the individual property of the holder, subject to the same rights and liabilities as any other personalty. The transfer of the stock does not affect the bank in its public capacity in any manner, or impair the powers delegated to it under the act of incorporation. The shares in dispute are simply the personal property of the testatrix, situated in Pennsylvania, and subject to the laws of that state in regard to transfer. At common law, and under the act of March 15, 1832, § 6 (Purd. Dig. 407, pl. 13), the executor could not have maintained an action to compel the bank to transfer (though if the bank had voluntarily transferred to the foreign executor, no ancillary administration having been taken out here, the transfer would have been valid). Shakespeare v. Fidelity Trust Co., 8 Wkly. Notes Cas. 92. But the act of June 16, 1836, § 3 (Purd. Dig. 420, pl. 80), enacted that the act of 1832, § 6, should not "apply to shares of stock in any bank or other incorporated company within this commonwealth, but such shares of stock shall pass and be transferable, * * * under the same regulations, powers, and authorities as were used and practised with the loans or public debts of the United States, and were used and practised with the loans or public debt of this commonwealth, before the said recited acts were passed, unless the by-laws, rules, and regulations of any such bank or corporation shall otherwise provide." The act of April 8, 1872, § 1 (Purd. Dig. 421, pl. 84), enacts that any executor, "acting under letters testamentary, * * * granted by any other state or territory of the United States," may "transfer any or all shares of stock * * * of any incorporated company of this commonwealth, standing in the name of any decedent, * * * whenever a duly-authenticated copy of the will * * * shall have been filed in the office of the register of wills for the county in which such incorporated company has its transfer office, or principal place of business." The act of 1872 is simply a restatement of that of 1836, specifying more minutely the precise manner in which foreign executors shall proceed. Under the act of 1836 the plaintiff is entitled to judgment.

C. Stuart Patterson contra.

The shares of the capital stock of a national bank are choses in action, not chattels in possession. They do not follow the domicile of their owner, but their situs is that of the corporation. 3 Burge, 751; Ang. & A. Corp. §§ 560, 561; Story, Confl. Laws, § 383; Robinson v. Bland, 2 Burrows, 1077; Attorney General v. Higgins, 2 Hurl. & N. 339; Mechanics' Bank v. New York & N. H. R. Co., 3 Kern [13 N. Y.] 627; Arnold v. Ruggles, 1 R. I. 165, 173; Gilpin v. Howell, 5 Barr [5 Pa. St.] 57; Slaymaker v. Gettysburg Bank, 10 Barr [10 Pa. St.] 373; Van Allen v. Assessors, 3 Wall. [70 U. S.] 584. The national banks are federal agencies, and not subject to state control. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316; Osborn v. Bank of United States, 9 Wheat. [22 U. S.] 738; City of Pittsburg v. First Nat. Bank, 5 Smith [55 Pa. St.] 48. Letters testamentary, or of administration, have at common law no extra-territorial force. Story, Confl. Laws, § 512; Mothland v. Wireman, 3 Pen. & W. 185; Preston v. Melville, 8 Clark & F. 12; Enohin v. Wylie, 10 H. L. Cas. 19; Fenwick v. Sears, 1 Cranch [5 U. S.] 259; Dixon v. Ramsey, 3 Cranch [7 U. S.] 319; Noonan v. Bradley, 9 Wall. [76 U. S.] 394. The statute law of Pennsylvania does not authorize a foreign executor to transfer the stock of a national bank located in Pennsylvania. The act of March 15, 1832, § 6 (Purd. Dig. 407, pl. 13), enacts that "no letters testamentary or of administration, or otherwise, purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this state." In Sayre v. Helme, 11 Smith [61 Pa. St.] 299, it was held that this statute prohibited a New York executor from maintaining a suit in Pennsylvania to collect a debt due to his testator. The act of 1872 is clearly inapplicable, for a national bank is not an "incorporated company of this commonwealth." The act of 1836 is also inapplicable, for, while the national banks are territorially "within this commonwealth," they are not subject to state regulation, and the transfer of their shares must be governed by federal not state laws. The only possible effect of the acts of 1836 and 1872 is to repeal, pro tanto, the act of 1832, but, as has been already shown, the disability of the foreign executor is, quoad the stock of a national bank, a common law, not a statutory, disability.

BUTLER, District Judge. The stock is the personal property of the shareholder (so declared by the act of congress), having all the ordinary incidents of such, liable to transfer by sale, and all other means ordinarily applicable to such property. On the owner's death it passes to his legal representatives, and is disposed of under the laws of the state, in the usual course of administration, as any other personalty of which he may die possessed. The purpose of the acts of assembly of 1836 and 1872 was, and their effect is, to invest executors and administrators, under letters granted by other states of the

Union, with the same authority over "shares of stock of any incorporated company, of," or "within this commonwealth, standing in the name of the decedent," as that conferred by letters granted here. The language was certainly intended to embrace all stock, of every description, which may pass to the legal representatives; and was designed to avoid the necessity for administration here. It is sufficiently comprehensive, we think, to include the stock of a national bank, which, though not incorporated by the laws of the state, is, nevertheless, a corporation "within the commonwealth," as contemplated by the act of 1836, or "of the commonwealth," as contemplated by that of 1872. The location of the bank is here—so fixed by the act of congress, and declared by the certificate issued under it. It can transact business nowhere else; and may, accurately, be described as a corporation within or of this commonwealth. Besides, if the language were less distinct, the act, being remedial in its nature, should receive a liberal interpretation, so as to embrace, if possible, the full extent of the mischief, or difficulty, contemplated. There is certainly as much reason for applying such a provision to one kind of stock, passing to the legal representatives of the deceased owner, as to another.

The plaintiff must be regarded, therefore, precisely as if the executor of Mrs. Kittredge's will had administered here. That the bank could safely recognize the transfer, under such circumstances, and therefore should do so, cannot well be doubted. It is not subject to the control of the state. But as its stockholders may transfer their interests, or the same may be transferred, by any method provided by the laws of the state for the transfer of similar property (in the absence of other provision by congress), the defendant cannot thwart the purpose to do so. If the bank had prescribed a method of transfer, as contemplated by the act of congress, the question now presented would, probably, have been avoided. But having failed in this, the duty of recognizing a transfer in pursuance of the laws of the state (the only method available to the plaintiff) is, we think, reasonably clear. The failure to discharge this duty is sufficient to support the suit. Judgment must therefore be entered for the plaintiff.

HOBOKEN LAND & IMP. CO. v. The COLUMBUS. See Case No. 3,043.

Case No. 6,552.

HOBOKEN LAND & IMP. CO. v. The SUNSWICK.

[N. Y. Times. Jan. 7, 1863.]

District Court, S. D. New York.

CAPSIZING OF VESSEL—IMPROPER LOADING—RECOVERY FOR LOSS.

[The owner of the cargo may recover for a loss caused by the capsizing of the vessel due solely to improper loading.]

Mr. Morton, for libelants.

Mr. Sauxay, for respondents.

This was an action brought [by the Hoboken Land & Improvement Company against the lighter Sunswick and John Reed, master] to recover the value of some railroad iron, alleged to have been shipped on the lighter at Brooklyn, to be carried to Hackensack, N. J., and lost on the passage. The respondents set up as a defence that one Lemmon, the agent of the libelants, hired the lighter of her owner for the purpose of themselves carrying the iron, and they alone were responsible for the loss.

Before SHIPMAN, District Judge.

HELD BY THE COURT: That on the evidence the contract on which the libel is founded, was one which bound the respondents to carry the iron safely, limited only by the absence of any responsibility for any difficulty that might arise in navigating the Hackensack river. That the libelants' agent was not the sailing-master of the lighter, and took no responsibility about her sailing. Reed, her master, employed and paid a tug for towing the lighter up the stream. The boat turned over from having too much weight on deck, and this loading the libelants had nothing to do with; and she was overset not in the Hackensack, nor in consequence of any difficulty arising out of bad pilotage, but in New York harbor, and solely from the improper way in which she was laden. Decree for libelants, with a reference to compute the damages.

Case No. 6,553.

HOBSON v. JOHNSON.

[4 Biss. 505.] [1]

Circuit Court, N. D. Illinois. Oct., 1868.

JUSTIFICATION BY SURETY.

The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient; there must be independent evidence of his responsibility.

Defendant's attorney presented an appeal bond signed by himself and sureties, all resident in Lee county, Illinois.

DRUMMOND, District Judge. Where a bond is given by a person at a distance it should be accompanied by the certificate of an officer who has knowledge of the party. It is not sufficient to present the affidavit of the surety. If counsel will satisfy me of the responsibility of the parties by any one the court can examine as to their pecuniary condition, then I would accept the bond. I have never been in the habit of accepting a bond upon the affidavit of the surety, unless there is no objection. If there is objection made, there must be independent evidence—evi-

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

dence of a reliable person who is acquainted with the pecuniary circumstances and condition of the parties.

Case No. 6,554.

HOBSON v. McARTHUR et al.

[3 McLean, 241.] [1]

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

DEMURRER—PLEADING—OYER OF DEED.

1. A demurrer to the declaration raises the question of law, whether the plaintiff, from the facts stated, is entitled to recover.

2. In pleading, it is not necessary to state what is merely matter of evidence.

3. If a party partially states a deed, which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, and then demur.

[Cited in State v. Peck, 58 Me. 128.]

At law.

Mr. Stanbury, for plaintiff.

Mr. Vinton, for defendants.

LEAVITT, District Judge (McLEAN, Circuit Justice, Absent). The declaration in this case is in covenant, and a question as to its sufficiency is presented to the court by a special demurrer. Three several causes of demurrer are set forth; but they may all be considered as substantially presenting but one inquiry, namely, whether any cause of action appears in the declaration, entitling the plaintiff on the face of it, to a recovery in this action. The declaration sets forth a contract between the plaintiff and D. McArthur, dated the 25th of September, 1830, reciting a previous contract between said parties and one John Hobson, (who subsequently assigned his interest to McArthur,) dated in November, 1810, respecting the withdrawal and relocation of certain land warrants, in which they were jointly interested; and further, that in May, 1830, by an act of congress, the parties were permitted to relinquish their entries to the United States, and were to be compensated for them, according to a valuation provided for in the act; and also, that the parties having disagreed as to their rights, under the contract of 1810, a suit in chancery was instituted by McArthur against the plaintiff, and an injunction obtained restraining him from receiving any money from the United States, under said act, till a further hearing; that the parties, being desirous that the money appropriated should not remain inactive during the pendency of the chancery suit, agreed that the plaintiff should assign all his interest in the land warrants to McArthur, to enable the latter to obtain the money from the treasury of the United States; the said McArthur paying to plaintiff the sum of eleven thousand five hundred dollars, and retaining the balance in his hands. Here follows a covenant by McArthur, that if in the chancery suit it should be decreed, that the plaintiff, directly or indirectly, should be entitled to any greater proportion of the money, it was to be paid to him, with interest, at the Bank of Chillicothe; and it was stipulated, that this covenant should be held to embrace "any judgment, order or decree, which might produce this result." It is then averred, that the plaintiff performed this part of his covenant, and that the sum of fifty-seven thousand six hundred and eight dollars was received by McArthur from the United States. It is then further averred, that such proceedings were had in the chancery suit, as that a decree, dismissing the bill, was entered in the supreme court of the United States, at January term, 1842 [16 Pet. (41 U. S.) 182]. There is then a further averment, that in virtue of said decree, the plaintiff is entitled to recover of the defendants the sum of three thousand two hundred and one dollars, with interest. The declaration concludes with the usual averment of notice to defendants, and of the non-payment of said sum, at the Bank of Chillicothe.

It is a well established rule in pleading, that on a demurrer, all the facts set forth, in the pleading demurred to, which are properly pleaded, are to be taken as admitted. In deciding on the sufficiency of this declaration, the court is therefore to be governed by what appears on its face, and cannot go into matters that are extrinsic. With this principle in view, we are called upon to say, whether the plaintiff has made out such a case, as will entitle him to a recovery. The principal inquiry arising on this demurrer, is, whether the plaintiff has shown with sufficient fulness and certainty, that he is entitled to the sum claimed, by the operation of the decree in the chancery proceeding. It is insisted by the counsel for the defendants, that the rights of these parties are not definitively settled by this decree, and that the declaration shows nothing from which the deduction can be made, that the decree establishes a liability on the part of the defendants, to pay the sum claimed, or any other sum. The covenant between these parties, as set forth in the declaration, is, substantially, that McArthur shall pay the plaintiff such sum, in addition to the eleven thousand five hundred dollars, as, under the operation of the decree, shall appear to be due to him. It is considered clear, that in the covenant, as set out in the declaration, in which reference is had to the final disposition of the chancery suit, a decree for money alone was not within their contemplation. It looks to any decree which, in its results, shall show that McArthur is liable to the payment of any further sum to this plaintiff. And it is very clear, that the plaintiff cannot recover, in this action, without proof establishing this

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

liability. But, is not the averment, that, under the decree, the defendants are liable to pay the sum claimed, sufficient, in connection with the other matters set out in the declaration, to show a good cause of action, and put them to their plea, and to an issue of fact? In pleading, it is not necessary to state what is merely matter of evidence. Steph. Pl. 388. It was not necessary, therefore, that the plaintiff should set out the facts or process by which the liability of the defendants was to be established under the decree. This would lead to great prolixity, and is a mode of pleading condemned by all writers on that branch of the law. Id. 400.

It was contended in the argument on this demurrer, that the contracts set forth in the declaration were to be regarded as before the court for construction; and, that if the court were satisfied from their examination of the contracts, that the plaintiff has no cause of action, the demurrer must be sustained. This position is no doubt tenable, where the pleader sets out the contract in haec verba. 1 Chit. Pl. (8th Am. Ed.) 306. But, where he professes only to set it out in part, or according to its legal effect, the court will not give a construction to the contract, on a demurrer. If a party "partially states a deed, which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, thereby making it a part of the declaration, and then demur, either in respect to the defect in the deed, or the improper manner in which the plaintiff has stated it." Id. 665. The defendant has not pursued this course in this case; and, confining our inquiry to the face of the declaration, we can perceive no sufficient ground for declaring it defective. The demurrer is therefore overruled.

Case No. 6,555.

HOBSON et al. v. MARKSON et al.

[1 Dill. 421.] [1]

Circuit Court, D. Kansas. 1871.

BANKRUPT ACT — GENERAL ASSIGNMENTS UNDER STATE LAW—ADJUDICATION OF BANKRUPTCY—COLLATERAL ATTACK.

1. A previous voluntary general assignment for the benefit of creditors, made in good faith, and valid under the law of the state where made, will not be sustained against a valid adjudication of bankruptcy.

2. An adjudication made after the return day, but upon petition and appearance, will be sustained in a collateral inquiry.

[Cited in Re Bush, Case No. 2,222.]

In bankruptcy.

Wallace, Pratt, Williams & Wagstaff, for plaintiffs.

Britton, Rogers, Hoag & Wheat, for defendants.

PER CURIAM (DILLON, Circuit Judge, and DELAHAY, District Judge, concurring). In sustaining a demurrer to the bill (filed by assignees under a voluntary general assignment against assignees in bankruptcy and the petitioning creditors), the court delivered a written opinion, ruling the following points:

1. A valid adjudication of bankruptcy against a debtor, has the effect to subject him and his property to the operation of the bankrupt act, notwithstanding a previous voluntary general assignment for the benefit of creditors; and the assignee in bankruptcy as against the assignee under the state law, is entitled to the possession and control of the estate. In re Burt [Case No. 2,210].

[See, also, Cragin v. Thompson, Id. 3,320.]

2. An order of the district court, adjudicating a debtor a bankrupt, made after the return day, but upon a petition of a creditor, and after notice to, and appearance by, the debtor, though it may be irregular, is not void, and cannot be collaterally assailed by his assignees under a previous voluntary assignment.

[Cited in Re Bush, Case No. 2,222.]

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

HOBSON (MARKSON v.). See Case No. 9,099.

HOBSON (SCAMMON v.). See Case No. 12,434.

Case No. 6,556.

HOCKHOLZER et al. v. EAGER et al.

[2 Sawy. 361.] [1]

Circuit Court, D. Nevada. March 17, 1873.

INJUNCTION IN PATENT CASES—LACHES—INCONVENIENCE TO PARTIES.

1. If there has been no trial of the right at law, plaintiff must show an exclusive possession and exercise of the right before an injunction will be granted.

2. A delay of eighteen months, after knowledge of an infringement, in applying, is of itself good ground for refusing an interlocutory injunction.

3. Where plaintiff will suffer little, and defendant great inconvenience and expense, an interlocutory injunction ought to be denied.

[Cited in Hurlburt v. Carter & Co., 39 Fed. 803; Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896.]

[This was a bill in equity by Hockholzer and others against Thomas Eager and others.]

Clarke & Wells, for plaintiffs.

Mesick & Wood, for defendants.

HILLYER, District Judge. Suit to enjoin the defendants from infringing a patent granted to the complainants for an improved

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

machine for framing timbers. The case is before the court upon a motion for an interlocutory injunction, and was heard upon bill, answer and affidavits.

By the application of a few well-settled principles, it will appear that the motion cannot be granted. There has never been any trial at law of the validity of the patent, and while there may be a right to an injunction without such trial, the facts which must be shown to establish that right are clearly pointed out by the authorities. Some of the necessary facts are: a patent, long possession, and infringement; and these, when proved, give a prima facie right to an injunction. Curt. Pat. § 414. Something more than a grant of letters patent must be shown; something which, in the absence of a trial at law, may take its place in establishing, or presumptively establishing, the validity of the patent. This may be done by showing an exclusive possession and exercise of the right granted. In proof of such possession it must appear that the patentee after the grant of his exclusive right has proceeded to exercise that right for some years without being disturbed. Orr v. Littlefield [Case No. 10,590]. This he may prove by showing that he has manufactured and sold machines repeatedly, or has sold to others the right to make, vend and use the thing patented, and if the public acquiesce in this exclusive exercise of his right, it affords some ground for presuming that the patent is valid. The complainants have established nothing of this kind. Neither in their bill nor in their affidavits is it shown that, since the grant of their letters patent, they have in any manner exercised the right granted. They have, so far as appears, never since that time made, neither sold nor used a single machine, nor sold the right to do so to others. All that they show is the making and putting in operation of one machine, not in all respects like the one patented, more than a year before the date of their patent; and since that date the use of this machine by the Savage Mining Company. This raises no higher presumption that the patent is valid than that instrument itself furnishes; it does not make even a prima facie case for the patentees on this motion before a trial at law.

Another reason for denying the motion may be found in the length of time the complainants have slept upon their rights, if any, under the patent. The defendant Eager, for more than eighteen months, had been using the machine alleged to be an infringement with complainants' knowledge, and at the very door of one of them, before suit was brought. An interlocutory injunction has been refused for far less laches than this. Curt. Pat. § 417.

In addition to these considerations, it is the duty of the court to regard the comparative expense and inconvenience to which the parties will be subjected in case of granting the injunction on the one hand, or withholding it on the other. The defendants have made and are using but one machine, so that they are neither forestalling the market nor multiplying suits for infringement in the event that the patent is ultimately declared valid. They are now framing with their machinery nearly all of the vast quantity of timber used in the principal mines of Virginia City and Gold Hill. These mines cannot be supplied with framed timber by any other means than their machine, except at greatly increased prices and after much delay. The effect of an injunction would be to close up suddenly the defendants' business, and cause them great damage; and not only this, but would be productive of great expense and inconvenience to third parties. On the other hand, the complainants have no machine in operation; are neither manufacturing nor using any, and practically all they are deprived of is the value of a license to use one machine. Curt. Pat. § 450. Granting or withholding an injunction at this time being very much a matter of discretion, this view of the very injurious effect granting one would have, and the comparatively slight inconvenience to which a refusal will subject the complainants, ought of itself to be decisive against this motion. Having found other satisfactory grounds for a decision, it is unnecessary to construe the patent or notice the question of infringement. The motion is denied, with costs.

Case No. 6,557.

HODGE ads. BEMIS.

[2 Am. Law J. (N. S.) 337; 12 Law Rep. 470.]

District Court, N. D. New York. Nov. 16, 1849.

ADMIRALTY PRACTICE—PROCESS OF ARREST.

The libellants in an admiralty suit in personam, are entitled, under the rules prescribed by the supreme court of the United States regulating the practice in causes of admiralty and maritime jurisdiction, to process of arrest against the person of the defendant, notwithstanding imprisonment for debt has been abolished by law in the state where the suit is brought.

[This was a libel in admiralty by Elijah St. John Bemis and Asaph S. Bemis against Philander Hodge.]

CONKLING, District Judge. The defendant having been arrested on mesne process, issued at the suit of the libellants, a motion is now made, in his behalf, to discharge him from arrest, on the ground that the process was not warranted by law. In January, 1845, in pursuance of the act of congress of August 23, 1842, c. 188 [5 Stat. 516], the supreme court of the United States prescribed a code of rules to regulate the practice of the courts of the United States, in cases of admiralty and maritime jurisdiction. Among these rules are the following: "In

suits in personam the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for, in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect." "In all cases when the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a capias, and of a fieri facias, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant; and for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court." At the date of these rules, process of arrest, both mesne and final, had, at all times, been in familiar use in courts of admiralty of this country as well as of other countries. In thus openly sanctioning this form of process the two rules above recited were but simply declaratory of the antecedent general law. But imprisonment for debt had been previously abolished in the state of New York, and in several other states; and by the act of congress of February 28, 1839, c. 355 [5 Stat. 321], and the supplemental act of January 14th, 1841 [Id. 410], these state laws, and any others for the like purpose which might by any of the states be subsequently enacted, were expressly adopted and declared obligatory upon the courts of the United States, sitting in the states where they should exist. The language of these rules, purporting to have been framed under a power conferred by a subsequent act of congress, is nevertheless explicit and unlimited. On what ground then can the courts for whose guidance they were prescribed, lawfully refuse to carry them into effect?

It has been suggested that the above cited acts of congress, adopting the state laws, may have been inadvertently overlooked by the supreme court. But until the inferior courts shall have been informed by that court, it would be neither decorous nor proper for them to act upon this assumption; and besides, even conceding it to be well founded, the rules would still be valid and obligatory, if the supreme court had power to prescribe them. It has been intimated, also, that congress had no authority to delegate to the supreme court a power so important as that of restoring the right to imprisonment for debt, after it had been abolished by law. But there are not wanting many instances of the delegation, by congress, of powers in their nature legislative, and which have nevertheless been adjudged to be valid, or been acquiesced in as such. Thus, for example, authority has been given by law to the secretary of war to prescribe regulations relative to the granting of pensions, in pursuance of which he has directed certain oaths to be taken, and has designated certain officers by whom they are to be administered; and it has been judicially held that false swearing, under these regulations, constitutes the crime of perjury. It has, moreover, been argued that the rules in question were not warranted by the language of the act, in pursuance of which they were framed. It is readily conceded that to justify the engrafting of even so limited an exception, upon a statute designed to secure the personal liberty of the citizen, the authority ought to be clear. On referring to the act of 1842, it will, however, be seen that it does, in terms, invest the supreme court with plenary power and authority to regulate the forms of process and the whole practice of the courts of the United States. But, even admitting the power to be doubtful, it cannot reasonably be expected of this court, that it should assume to sit in judgment upon the acts of the supreme court, on a charge of usurpation.

In regard to all these objections, it is to be farther observed, that they severally assume as unquestionable that the above cited acts of 1839 and 1841 were intended by congress, to embrace suits in admiralty, as well as those at common law. But the supreme court may have thought otherwise. The acts of congress abolish imprisonment for debt on process issuing from a court of the United States, where it is forbidden by the state law. But there are no state courts of admiralty, and no admiralty process, therefore, to which the state laws, proprio vigore, apply. Perhaps, however, the most probable supposition is, that the supreme court, whatever it might suppose to be the true construction of the acts of 1839 and 1841, believing itself fully warranted by the subsequent act of 1842, even to restore to suitors in the admiralty, if in truth it had been abrogated, the right to all the customary and long established forms of process, was of opinion that the abolition of the process of arrest, and along with it, of those securities exacted and enforced by means of it, so conducive to the effectual and speedy enforcement of justice, would be unwise and inadmissible. But whatever views of the subject may have governed the supreme court, in the adoption and promulgation of the rules in question, I consider it to be my duty to give effect to them, until I shall be otherwise instructed by that court. The motion for the discharge of the defendant is, therefore, denied.

HODGE (COMBS v.). See Case No. 3,048.

Case No. 6,558.

HODGE v. HIGGS.

[2 Cranch, C. C. 552.] [1]

Circuit Court, District of Columbia. April Term, 1825.

EVIDENCE—ORIGINAL ENTRIES.

If the clerk who made the original entries in the testator's books, be made executor, those entries are competent evidence in an action by the executor for goods sold and delivered by the testator to the defendant.

Assumpsit by the plaintiff, as executor of Hodge, for goods sold and delivered to the defendant in the testator's lifetime. The original entries in the testator's books had been made by the plaintiff while he was the clerk of the testator, and having proved them to be in his handwriting, and made in the testator's lifetime, and that he was then his clerk, he now offered them as evidence of the sale and delivery of the goods.

Mr. Mason, for defendant, objected that it was his voluntary act to qualify as executor; he might have refused to act.

THE COURT, however (nem. con.), was inclined to the opinion that the original entries, under those circumstances, were competent evidence for the plaintiff, and permitted them to be read to the jury, saying that they would grant a new trial if satisfied that the opinion was wrong.

Case No. 6,559.

HODGE et al. v. HUDSON RIVER R. CO.

SAME v. NEW YORK & H. R. CO.

[3 Fish. Pat. Cas. 410; 6 Blatchf. 85; 1 Am. Law T. Rep. U. S. Cts. 40.] [2]

Circuit Court, S. D. New York. April 8, 1868.

PATENTS—INFRINGEMENT—WHAT COURT HAS JURISDICTION—LICENSE—DURATION—USE OF BRAKE ON CARS OF ANOTHER ROAD.

1. Where the alleged infringement occurred within the Northern district of New York, *held*, that under the provisions of section 6 of the act of April 3, 1818 [3 Stat. 415], the circuit court for the Southern district of New York had no original jurisdiction.

2. Where a railroad company was licensed under letters patent to use the patented improvement upon their cars, and the alleged infringement consisted in the use of said improvement upon the cars of other roads running over their tracks, *held*, that it was for the complainants to show, affirmatively, that the cars in question did not belong to the licensed road.

3. A provision in a license that a privilege is to continue during the term for which said letters patent are or may be granted is satisfied by holding it to apply exclusively to a reissue of the patent. There is nothing in the language which makes it exclusively or even necessarily applicable to an extension.

4. The presumption of the law in regard to every license under a patent is, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest.

5. The term for which "said" letters patent (that is, the original letters patent), were granted or might be granted, was a term ending fourteen years from the date thereof. It is impossible on any fair construction of language, and in view of the adjudged cases, to hold that the license was intended by the parties to cover an extended term of the patent.

6. As the thing patented in the present case is a machine, the law is entirely settled that the only right which the company, as a lawful licensee under the patent for the first term of the right to use the thing patented, acquires under the extended term, by virtue of section 18 of the act of 1836 [5 Stat. 124], is the right to continue to use, until they are worn out, or as long as they can be required, such brakes as they had lawfully in use under said license when the original patent expired.

7. The license granted to the New York and Harlem Railroad Company, June 1, 1864, extends only to cars owned by that company. It does not therefore authorize the use on its road of the brakes which are on the cars belonging to the Hudson River Railroad Company.

[Cited in Jenkins v. Nicolson Pavement Co., Case No. 7,273.]

8. A license to the New Haven Railroad Company, authorizing them to run their cars with the patented improvements, on and over any and all other railroads wherever their business leads them, authorized said company to run their cars upon the New York and Harlem Railroad, under an agreement between the two companies, giving to the former company the privilege of running its cars on the track of the latter company, and will protect the latter company against a suit for an infringement of the patent.

[Bill in equity by Amelia S. Hodge and Zelia C. Hodge, as administratrixes, etc., of Nehemiah Hodge, against the Hudson River Railroad Company and the New York and Harlem Railroad Company.]

[3][This was a motion for a provisional injunction, made in each one of two suits, to restrain the infringement of letters patent for an "improvement in the mode of operating brakes for cars," issued to Nehemiah Hodge, October 2d, 1849 [No. 6,762], reissued to him March 1st, 1853 [No. 231], and extended to him September 16th, 1863, for seven years from October 2d, 1863.][3]

Samuel D. Cozzens and M. M. Livingston, for plaintiffs.

Charles A. Rapallo and F. Loomis, for defendants.

BLATCHFORD, District Judge. The motion in the suit against the Hudson River Railroad Company will be first considered. The several acts of infringement alleged in

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

[2] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 3 Fish. Pat. Cas. 410, and the statement is from 6 Blatchf. 85. 1 Am. Law T. Rep. U. S. Cts. 40, contains only a partial report.]

[3] [From 6 Blatchf. 85.]

that suit are: (1) The running, by the Hudson River Railroad Company, between East Albany and Troy, of cars belonging to the New York and Harlem Railroad Company, provided with infringing brakes; (2) the running, by the Hudson River Railroad Company, across the bridge of the Hudson River Bridge Company, at Albany, of cars belonging to the Hudson River Railroad Company, containing infringing brakes; (3) the running, by the Hudson River Railroad Company, upon their own railroad, at or near Peekskill, in the Southern district of New York, of cars marked "New York, Sus. Bridge & Buffalo," and of cars known as "sleeping cars" and "drawing-room cars," containing infringing brakes, which cars are alleged not to have belonged to the Hudson River Railroad Company; (4) the running, by the Hudson River Railroad Company, on the tracks of the Troy and Greenbush Railroad Company, and on the tracks of the Troy Union Railroad Company, of cars belonging to the Hudson River Railroad Company, containing infringing brakes; (5) the running, by the Hudson River Railroad Company, on their railroad, of freight cars, not belonging to themselves, known as the "White Line," containing infringing brakes (it being assumed that such running was within this district); (6) the operating, by the Hudson River Railroad Company, of cars of the "Blue Line," not belonging to themselves (it being assumed that such operating was on the railroad of said company, and within this district.)

The first, second and fourth alleged infringements occurred within the Northern district of New York. The causes of action growing therefrom arose, therefore, within that district, and, under the provisions of the sixth section of the act of April 3, 1818 (3 Stat. 415), this court has no original jurisdiction of such causes of action.

In regard to so much of the third alleged infringement as relates to cars marked "New York Sus. Bridge & Buffalo," and in regard to the fifth and sixth alleged infringements, the Hudson River Railroad Company show that they own, and run upon their road, cars marked "New York, Sus. Bridge & Buffalo," and also freight cars known as "White Line" cars, and "Blue Line" cars, and that they cannot say whether the cars so marked, referred to in the affidavit on the part of the plaintiffs, were the cars of the Hudson River Railroad Company or not. If the cars referred to did not belong to the Hudson River Railroad Company, it is for the plaintiffs to show the fact affirmatively, or else, on the evidence, it must be assumed that such cars did belong to that company. The plaintiffs have not shown that such cars did not belong to that company. They should have designated the particular cars by numbers, or other sufficient description, so as to have required and enabled the defendants to show whether such cars were or were not their property. In regard to so much of the third alleged infringement as relates to cars known as "sleeping cars" and "drawing-room cars," the Hudson River Railroad Company show that the trucks and running gear, including the brakes, of such cars, belong to that company.

The only question for consideration, therefore, is, whether the company, by using the patented brake, within this district, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge & Buffalo," and on cars belonging to them known as "White Line" cars, and on cars belonging to them known as "Blue Line" cars, and by using the patented brake, within this district, on their own railroad, on sleeping cars and drawing-room cars, the brakes, trucks, and running-gear of which cars belonged to them, have infringed the patent in question, as extended. It is understood, that all the alleged infringements set up occurred in November, 1867, and therefore since the extension of the patent. The company justify such use, under a license granted to them by the patentee, April 8th, 1862, whereby he licenses them "to construct and use said improvement on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, extending from the city of New York, in the state of New York, to the city of Troy, in said state, for and during the term for which said letters patent are or may be granted." Brakes belonging to the company, attached to trucks and running-gear belonging to them, and so used, are, undoubtedly, within the meaning of the license, used on cars belonging to the company, even though the superstructures which are borne upon the trucks do not belong to the company. The license, therefore, covers all that has been thus done by the company, that is, the use of the patented improvement on cars belonging to the company, on their own railroad, so far as the extent of their acts is concerned. As to the duration of the license, nothing is said, in the license, about an extension of the patent. The license is to continue "for and during the term for which said letters patent are or may be granted." The first question that arises is, as to the meaning of these words, "may be," and whether they refer to or can be construed to include an extended term of the patent. I do not think there is any thing in the license to indicate that the parties to it had at all in view a continuance of the license during any extended term of the patent. The provision that the license is to continue "during the term for which said letters patent are or may be granted," is satisfied by holding it to apply exclusively to a reissue of the patent. There is nothing in the language which makes it exclusively or even necessarily applicable to an extension. The presumption of law in regard to every license under a patent is, that the parties deal in regard only

to the term existing when the license is given, unless an express provision is inserted looking to a further interest. Wilson v. Rousseau, 4 How. [45 U. S.] 646, 685, 686. Unless there be such a stipulation, showing that the parties contemplated an extension, the court is bound to construe the instrument, in each and all of its provisions, as relating to the then existing term only. Gibson v. Cook [Case No. 5,393]. The language of the license in the present case is very different from the language of the instrument in the case of Phelps v. Comstock [Id. 11,075]. In that case, the language was, "to the full end of the term or terms for which letters patent are or may be granted for said improvements." The court held that that language embraced any subsequent extension of the patent. So, also, in Case v. Redfield [Id. 2,494], where the court held that the language of the instrument embraced an extention, the language was, "all the right, title, and interest * * * in said invention and improvement, as secured * * * by said letters patent, for the whole of the United States, * * * for which letters patent were or may be granted for said improvements." In Clum v. Brewer [Id. 2,909], where the court held that the parties intended to cover an interest in any extension, the language was, "one undivided fourth part of my said invention, and of all my rights and property therein, secured by my said caveat or otherwise, that I have or may have from any letters patent for the same, granted by the government of the United States and within the limits thereof." In Pitts v. Hall [Id. 11,193], where the court held that there was no doubt that the parties intended, by the language used, to refer to and provide for an extension, the language to that effect was clear and unambiguous. In all four of the cases referred to, the instrument under consideration was one purporting to convey, by assignment or grant, an interest in the invention patented, and an interest in the entire right granted by the existing patent to make and use and vend to others to be used the invention patented. As Mr. Justice Curtis says, in Clum v. Brewer [supra]: "Where the invention is the subject sold, it would be natural to expect to find, in the instrument of sale, something showing an intention that the purchaser should be interested, not merely in the original letters patent, but in any extension thereof, securing the exclusive right to the same invention which was the subject of the sale." In the present case, neither the invention, nor any interest in it, nor any interest in the entire right covered by the patent, was granted, but merely a license to use the invention, and to construct brakes containing it for such use, on certain cars, on a certain railroad, and such license is to continue "during the term for which said letters patent are or may be granted." "The term" for which "said" letters patent, that is, the letters patent granted October 2d, 1849, and reissued March 1st, 1853, were granted, or might be granted, was a term ending October 2d, 1863. It is impossible, on any fair construction of the language, and in view of the adjudged cases, to hold that the license was intended by the parties to cover an extended term of the patent.

There being, then, in this case, no express stipulation carrying the license into the extended term, the only right which the Hudson River Railroad Company possesses, under the extended term, is that which is given to it by the clause of the 18th section of the act of July 4th, 1836 (5 Stat. 125), which provides that the benefit of the extension of a patent shall "extend to assignees and grantees of the right to use the thing patented to the extent of their respective interest therein." As the thing patented in the present case is a machine, the law is entirely settled, that the only right which the company, as a lawful licensee under the patent, for the first term, of the right to use the thing patented, acquired under the extended term, by virtue of that clause in the 18th section, is the right to continue to use, until they are worn out, or as long as they can be repaired, such brakes as they had lawfully in use, under said license, on the 2d of October, 1863. Wilson v. Rousseau, 4 How. [45 U. S.] 646; Bloomer v. McQuewan, 14 How. [55 U. S.] 539; Chaffee v. Boston Belting Co., 22 How. [63 U. S.] 217; Bloomer v. Millinger, 1 Wall. [68 U. S.] 340. As it is not shown in the papers whether the particular brakes used by the company since the 2d of October, 1863, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge & Buffalo," and on cars belonging to them known as "White Line" cars, and on cars belonging to them known as "Blue Line" cars, and on sleeping cars and drawing-room cars, the brakes, trucks, and running gear of which cars belonged to them, were, or were not, lawfully in use under said license on the 2d of October, 1863, it is impossible for this court to decide whether the plaintiffs are, or are not, entitled to an injunction, as respects those particular brakes. The decision of the motion, as regards the Hudson River Railroad Company is, therefore, suspended, to allow the plaintiffs to supply evidence on this point, and with leave to them to do so on notice to the company.

The several acts of infringement set forth in the suit against the New York and Harlem Railroad Company are: (1) The running, by the New York and Harlem Railroad Company, upon their own railroad, at or near Bedford, in the Southern district of New York, of freight cars belonging to the Hudson River Railroad Company, containing infringing brakes; (2) the running on the tracks of the New York and Harlem Railroad Company, of cars belonging to the New York and New Haven Railroad Company, containing infringing brakes, (it being as-

sumed that such running was within this district.) The alleged infringement occurred in November, 1867, and January, 1868. The New York and Harlem Railroad Company set up, in defence, that no freight cars of the Hudson River Railroad Company have been used by the New York and Harlem Railroad Company, except such cars as were caused by the former company to be run over the railroad of the latter company, and in which running and use both of the companies were interested, and from which running and use both of the companies derived pecuniary profit; and that the cars of the New York and New Haven Railroad Company have been run by that company over a portion of the track of the New York and Harlem Railroad Company, under an agreement between the two companies, giving to the former company the privilege of running its cars on the track of the latter company, and that the cars in question were run by the former company under that agreement. To justify such use, the New York and Harlem Railroad Company set up three licenses under the patent, granted by the patentee, one to the New York and Harlem Railroad Company, one to the Hudson River Railroad Company, and one to the New York and New Haven Railroad Company.

The license to the New York and Harlem Railroad Company was granted on the 1st of June, 1864, after the extension. It recites the fact that the patent had been extended, and that the company "desire the right and license to construct and use said improvement anew and subsequent to the date of, and during the term of, said extension, as well on cars which may be built or purchased by said company subsequent to the date of said extension, as upon cars not fitted up with said improvement before the date of said extension," and then licenses "said company, and any and all other parties that may hereafter own or operate the said New York and Harlem Railroad, to construct and use said improvement anew on any and all cars now, or hereafter, owned by said company, or by parties that may hereafter own or operate said New York and Harlem Railroad, all such construction and use to extend to and over the said New York and Harlem Railroad, and on, to, and over, the roads where said cars may be employed or run on joint business." This license extends only to cars owned by the New York and Harlem Railroad Company. It does not extend to cars belonging to the Hudson River Railroad Company, or to cars belonging to the New York and New Haven Railroad Company. The New York and New Haven Railroad Company cannot properly be considered, within the meaning of the license, as operating the New York and Harlem Railroad, in running their own cars on that road, under a permission to that effect. Therefore, the license to the New York and Harlem Railroad Company does not authorize the use on its road of the brakes which are on the freight cars in question belonging to the Hudson River Railroad Company.

The license to the Hudson River Railroad Company, which is set up to justify the use, since the 2d of October, 1863, by the New York and Harlem Railroad Company, on its own road, of freight cars which belong to the Hudson River Railroad Company, and which the latter company causes to be run over the road of the former company, and in the running and use of which both of the companies are interested, and from the running and use of which both of the companies derive pecuniary profit, is the same license to the Hudson River Railroad Company, dated April 8th, 1862, which has been before referred to, and the provisions of which have been considered in reference to the motion for an injunction against that company. In addition to the clauses before mentioned, the following provision is contained in the license: "I also further authorize and license said company to run, or cause to be run, their said cars, with said improvement thereon, on and over other roads, on joint business, during the term above stated." This provision, while it is broad enough to cover the use in question of the cars of the Hudson River Railroad Company, on the road of the New York and Harlem Railroad Company, during the first term of the patent, is limited to that term, and does not run into the extended term. There is nothing in this license to justify the use complained of since the extension. Such use must be upheld, if at all, by showing that the brakes on the cars belonging to the Hudson River Railroad Company, which that company have caused to be run on the road of the New York and Harlem Railroad Company, on joint business, since the extension, were brakes lawfully in use on the 2d of October, 1863. No evidence is furnished on which the court can decide this point as to those brakes, and the motion in that respect is suspended, to allow the evidence to be supplied.

The license to the New York and New Haven Railroad Company, which is set up to justify the running by that company of its own cars on the tracks of the New York and Harlem Railroad Company, by the permission of the latter company, is dated April 22d, 1864. It recites the extension, and the fact that the company "desire the right and license to construct and use said improvement anew and subsequent to the date of, and during the term of, said extension, as well on new cars which may be built or purchased by said company subsequent to the date of such extension, as upon cars not fitted up with said improvement before the date of such extension," and then licenses the company "to construct and use said improvement anew, on any cars belonging to them, and during the term of said extension, and not included by law in the former license given by me to said company." The license

was then signed by the patentee and witnessed, and had the proper internal revenue stamp affixed. The following clause was then added, and signed by the patentee, and witnessed and stamped, bearing the same date with the license which preceded it—April 22d, 1864: "And it is hereby further agreed and understood, that said New York and New Haven Railroad Company are authorized, under the foregoing license, to run their said cars, with said improvements in use thereon, on and over any and all other railroads, wherever their business leads them, and to receive upon and use on their own road the cars of any other railroad company, with said improvement in use thereon, without any further claim for compensation from me, or from any person under me, whatsoever, all of which privileges are to extend through the term of said extension, and any subsequent extension, and furthermore through all future time." This additional clause manifestly gives to the New York and New Haven Railroad Company the right, during the extension, to run their own cars, with the patented brake on them, on and over the road of the New York and Harlem Railroad Company, provided the legitimate business of the former company leads them to do so. It is shown, on the part of the defendants, that the cars of the New York and New Haven Railroad Company which are complained of as having been run on the tracks of the New York and Harlem Railroad Company, have been so run by the former company under an agreement between the two companies, giving to the former company the privilege of running its cars on the track of the latter company; and it is not denied by the plaintiffs, that the legitimate business of the former company led them to so run the particular cars in question. The motion for an injunction is, therefore, denied, so far as regards the cars of the New York and New Haven Railroad Company which have been so run on the tracks of the New York and Harlem Railroad Company.

[For other cases involving this patent, see note to Hodge v. North Missouri R. R., Case No. 6,561.]

Case No. 6,560.

HODGE et al. v. HUDSON RIVER R. CO.

[6 Blatchf. 165.] [1]

Circuit Court, S. D. New York. July 1, 1868.

PATENTS—LICENSE—DURATION — INFRINGEMENT—RIGHT TO INJUNCTION—PAYMENT OF LICENSE FEE BY DEFENDANT.

1. Where a license under a patent does not, on its face, cover the extended term of the patent, if it be claimed that, in fact, the parties to the license had in view at the time an arrangement covering such extended term, such fact must be shown by evidence.

2. The presumption of law in regard to every license under a patent is, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest; and, unless there be such a stipulation, showing that the parties contemplated an extension, the provisions of the license will be construed as relating to the then existing term only.

3. Where the validity of a patent is fully established, and its infringement is clear, the patentee has a right to protection by injunction, although great injury may thereby be caused to the infringer.

[Cited in Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,132.]

4. Where the question of the right to the injunction depends only on the interpretation to be given to a license, it is the duty of the court to interpret the license, on a motion for the injunction, and to grant or refuse the injunction, according to the result of such interpretation.

5. It appearing that the defendant was willing to pay a reasonable sum for the use of the patented invention, and that the plaintiff had a fixed license fee for its use, and exercised the franchise solely by licensing, for fees, the use of the invention, the court *held*, that the defendant ought to be enjoined only in case he should elect to be enjoined in preference to paying a reasonable license fee for the use of the invention, to such extent as he might desire to use it during the unexpired term of the patent, such fee to be no greater than the regular fee, if any, established in like cases, and to be ascertained as of the time of the filing of the bill, by a reference to a master, on testimony to be produced before him.

In equity. This was a renewal of the motion for a provisional injunction, reported [Case No. 6,559], and which was suspended to allow the plaintiffs [Amelia S. Hodge and Zelia C. Hodge, as administratrices of Nehemiah Hodge] to supply evidence on certain points.

Samuel D. Cozzens, for plaintiffs.
Charles A. Rapallo, for defendants.

BLATCHFORD, District Judge. This motion is founded on letters patent [No. 6,762] granted to Nehemiah Hodge, in his lifetime, October 2d, 1849, for an improvement "in the mode of operating brakes for cars," and reissued to him March 1st, 1853 [No. 231], and extended to him September 16th, 1863, for seven years from October 2d, 1863. In the opinion delivered by the court, when this case was before it on a former occasion, it was stated, that the only question for consideration was, whether the defendants, by using the patented brake within this district, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge and Buffalo," and on cars belonging to them, known as "White Line" cars, and on cars belonging to them, known as "Blue Line" cars, and by using the patented brake within this district, on their own railroad, on sleeping cars and drawing-room cars, the brakes, trucks, and running gears of which cars belonged to them, had infringed the patent, as extended. The defendants justified their use of the brake under a license granted to them

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

by the patentee, April 8th, 1862, before the extension, which, after reciting the granting and the reissue of the patent, and that "the Hudson River Railroad Company have used, and are desirous of continuing to use, the said improvement, upon their cars," goes on to say, that the patentee, for the consideration of six hundred and twenty-five dollars, paid to him by the company, authorizes and licenses them "to construct and use the said improvement on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, extending from the city of New York, in the state of New York, to the city of Troy, in said state, for and during the term for which said letters patent are or may be granted," and also, "to run or cause to be run their said cars, with said improvements, on and over other roads, on joint business, during the term above stated." The court held, that the license covered all that had been shown to have been done by the defendants—that is, the use of the patented improvement on cars belonging to the company, on their own railroad, so far as the extent of their acts was concerned; that the license did not, by its terms, cover the extended term of the patent; that, therefore, the only right which the defendants possessed, under the extended term, was that which was given to them by the clause of the 18th section of the act of July 4, 1836 (5 Stat. 125), which provides that the benefit of the extension of a patent shall "extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein"; that, as the thing patented in the present case was a machine, the law was entirely settled, that the only right which the defendants, as lawful licensees under the patent, for the first term, of the right to use the thing patented, acquired, under the extended term, by virtue of that clause in the 18th section, was the right to continue to use, until they should be worn out, or as long as they could be repaired, such brakes as they had lawfully in use under said license, on the 2d of October, 1863; that, as it was not shown in the papers whether the particular brakes used by the defendants since the 2d of October, 1863, on their own railroad, on the cars before-named, were or were not lawfully in use under said license on the 2d of October, 1863, it was impossible for the court to decide whether the plaintiffs were or were not entitled to an injunction as respected those particular brakes; and that the motion must, therefore, be suspended, to allow the plaintiffs to supply evidence on that point.

Since that opinion was delivered, the defendants have filed their answer in the suit. The only defence set up in the answer is, in substance, the license aforesaid, with the averment, on information and belief, that the patentee, at the time of executing and delivering to the defendants the license, informed them that he had applied for, or was about to apply for, an extension of the patent, and desired to sell to them the right to make and use the improvement, not only during the then unexpired term of the patent, but during the extension thereof which he represented he should obtain, that he demanded for such right the sum of six hundred and twenty-five dollars, that it was thereupon agreed between him and the defendants, that, upon the payment to him of that sum, he would sell and grant to the defendants such right, and that thereupon they paid him that sum, and he executed and delivered to them the license, claiming to and advising them that the same covered and contained the right to use and make the improvement for, and during, said unexpired term, and the said extension to be by him obtained. This averment is not sustained by the affidavit of a single witness who pretends to any knowledge of the facts covered by the averment. The averment is made in the answer on information and belief. The answer is sworn to by an officer of the company who had no connection with the company at the time the license was given, or with the giving of the license. The name of the person who furnishes the information is not disclosed. The facts set up are contradicted by the terms of the license. The license is witnessed by a member of the legal profession, who was at the time the secretary of and the counsel for the company, and it is shown on this motion that the patentee was also a lawyer. In view of all these facts, and of the settled presumption of law, in regard to every license under a patent, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted, looking to a further interest, and of the further rule, that, unless there be such a stipulation showing that the parties contemplated an extension, the instrument, and each and all of its provisions, will be construed as relating to the then existing term only, there is no reason to suppose that the parties concerned in negotiating, drawing, executing, delivering, and accepting the license in question, had at all in view any arrangement covering any extended term of the patent. At all events, if any such defence is to be available as against the language of the instrument, it is for the defendants to maintain it by evidence, which they have wholly failed to do.

The new proofs now presented on the part of the plaintiffs show, that, since October, 1863, the defendants have put new infringing brakes upon new cars constructed by them since that date, and have run upon their road cars belonging to parties other than themselves, containing such brakes; and that other cars with such brakes have been built for the defendants since October, 1863, and run by them upon their road.

The counsel for the defendants has stren-

uously urged, on this renewal of the motion, the right of the defendants, under the license, to continue to use the patented invention, during the extended term, to the same extent as during the original term, and also its right to do so under the provision of the 18th section of the act of 1836 [5 Stat. 124], and has insisted that such right extends not merely to brakes lawfully in use at the expiration of the first term, but also to new brakes constructed since the expiration of the first term. But I adhere to my views on this subject expressed in my opinion on the former motion.

The only other grounds urged against the granting of the injunction asked for, are, that the defendants are common carriers of persons and property; that they carry the mails of the United States; that their business is large and extensive, and is carried on by means of connections with other railroads; that any prolonged interruption of such business would do great and irreparable injury to them, and cause great detriment and inconvenience to the public; that it is necessary that the cars of the defendant should, for their proper and safe management, be supplied with such a double-acting brake as the infringing brake complained of in this case; that, to run passenger trains without such brakes, would be an act endangering the safety of passengers, and one of gross and criminal negligence; that the plaintiffs' patent covers all forms of double-acting brakes now in use or known to the public; that the defendants do not sell or make for sale any brakes, but only make them for use upon their cars; that the defendants are responsible to an amount far exceeding any possible recovery of the plaintiffs against them for the use of the brake; that the patentee, after the expiration of the original term of the patent, made no claim of infringement against the defendants; that the plaintiffs made no such claim until some time in 1867; that the defendants, in good faith, and confiding in their rights under the license, continued, after the expiration of the original term of the patent, to make, and attach to their cars, and use, the brake in question; that the plaintiffs have heretofore made known to the defendants, that their terms for a license for the use of the invention were not more than ten dollars per mile of the roadway; and that, after this court announced its decision on the first hearing of this motion, the solicitor for the defendants repeatedly applied to the solicitor for the plaintiffs to know the terms upon which the plaintiffs would give to the defendants a license, but could not learn such terms, and was informed, in reply, that the plaintiffs intended to obtain an injunction against the defendants, but would not serve or use it unless compelled to do so.

In this case, the validity of the plaintiffs' patent has been fully established. There have been five trials by a jury, in suits brought on the patent, one in Maine in September, 1855, one in Rhode Island in November, 1856, one in Massachusetts in May, 1858, one in the Northern district of New York in June, 1859, and one in the same district in October, 1859. These trials all of them resulted in verdicts and judgments in favor of the patent. Three of them involved the novelty of the invention and the validity of the patent. Besides these recoveries, there have been four other judgments at law in favor of the patent, one by default, and three by confession after plea and notice of defence. So, too, the infringement in this case is clear. Under such circumstances, the rule, as established by this court is, that a plaintiff has a right to protection by injunction, although great injury may thereby be caused to the infringer. Potter v. Fuller [Case No. 11,327]. In the case of Sickels v. Mitchell [Id. 12,835], where it was represented, on the part of the defendant, that the steamer on whose engine the patented improvement, a cut-off, was used, was one of a line, that her being laid up by an injunction would be a great public calamity, that it would be impossible to substitute another device without enormous expense and the consumption of several months of time, that the injunction would cause irreparable and unnecessary injury, and that the defendant was able to respond in any amount of damages which the plaintiff might recover for the use of the invention, this court held, that those allegations were not sufficient to stop the issuing of the injunction, and said: "It is too much for a defendant, in a clear case, to insist upon having the privilege of using a patented invention, for the reason that he is able to pay the damages which may be awarded against him at the end of a protracted litigation to ascertain their amount. The plaintiff may not be as able to prosecute a suit as the defendant is to defend. And, if the evils which the defendant sets forth, are to follow by the granting of an injunction, he could easily have avoided them. The ground of complaint in the bill is, that the defendant is using the invention without paying a reasonable sum therefor. There would have been no cause of complaint if the defendant had paid a reasonable sum for the use of the invention. This he has not done, and he has refused to pay any thing unless compelled to pay by the judgment of a court. The plaintiff has a right to demand of the defendant, if he wishes to use the invention, to first pay for such use. And, if he will not pay, and if the evils follow which he predicts, by his being compelled to desist, he has no one to blame but himself. As the case is now presented, the right of the plaintiff is clear, and the violation of right on the part of the defendant is equally clear." An injunction was ordered to issue in the case.

In the present case, the only defence of substance set up in the answer is the license, and, whether that is or is not a protection

against an injunction, depends on the interpretation given to it. The plaintiffs' title to an injunction does not depend upon any controverted or doubtful facts, but upon the interpretation to be put by the court upon the license. In such a case, it is the duty of the court to interpret the instrument on the motion for the injunction, and to grant or refuse the injunction according to the result of such interpretation. Clum v. Brewer [Case No. 2,909]. In regard to the construction to be put upon the license in this case, this court has no doubt that such license does not cover the extended term of the patent.

In view of all the facts of this case, and of the settled practice in regard to injunctions, I should have no hesitation in granting the injunction asked for, but for one circumstance. It does not appear, as in Sickels v. Mitchell, before cited, that the defendants are unwilling to pay a reasonable sum for the use of the invention during the extended term. Where the right of the plaintiff is manifest, and the violation of right on the part of the defendant is clear, and the defendant refuses to make any compensation for such violation, this court has held—Sickels v. Tileston [Case No. 12,837]—that the consideration of either public or private convenience should have little weight. In this last case, the bill alleged that the defendant refused to pay the plaintiff for the use of the patented improvement, or to desist from using it. In Sickels v. Mitchell [supra] the ground of complaint in the bill was not that the defendant was using the invention, but that he was using it without paying a reasonable sum for its use. In the present case, the bill proceeds against, and seeks to enjoin, the use of the patented invention at all by the defendants. It does not aver or proceed on the idea that the defendants, if using the invention now without right, are unwilling to pay a reasonable sum for its future use. The defendants show that they must use the plaintiffs' brake, that they heard nothing of any claim of infringement from October, 1863, when the first term of the patent expired, until sometime in 1867, that they went on in good faith, during that time, to construct new brakes according to the patent, that the plaintiffs have a fixed license fee for the use of the invention, and exercise the franchise of the patent not by making or using the brake themselves, but solely by licensing others to make and use it for license fees, and that the defendants have, during the pendency of this motion, unsuccessfully endeavored to learn from the plaintiffs their terms for a license, in respect of the use of the patented invention complained of in this suit. In acting on applications for temporary injunctions to restrain the infringement of patents, there is much latitude of discretion, and the application may be granted or refused unconditionally, or terms may be imposed on either of the parties, as conditions for granting or refusing the injunction. Forbush v. Bradford [Case No. 4,930]. I think this case is a proper one in which to impose such terms. The defendants ought not, under the circumstances, to be enjoined absolutely, but only in case they elect to be so enjoined in preference to paying a reasonable license fee for the use of the invention to such extent as they may desire to use it, during the portion of the extended term which remains unexpired, such fee to be no greater than the regular fee, if any, established by the patentee or the plaintiffs in like cases, and to be ascertained, as of the time when the bill in this suit was filed, by a reference to a master, on testimony to be produced before him. The injunction asked for is to go absolutely, unless the defendants, within ten days after the confirmation of the master's report, pay to the plaintiffs the fee reported, provided the plaintiffs, at the time of such payment, deliver to the defendants a license, duly executed, covering the use of the invention to such extent as the defendants may desire to use it, (the extent to be defined in the master's report) during the portion of the extended term so remaining unexpired. In regard to the unauthorized use of the invention before the filing of the bill, the suit will in any event proceed.

[For other cases involving this patent, see note to Hodge v. North Missouri R. R., Case No. 6,561.]

HODGE v. IRON MOUNTAIN RAILROAD. See Case No. 6,561.

HODGE v. NEW YORK & HARLEM R. CO. See Cases Nos. 6,559 and 6,560.

HODGE (NICHOLLS v.). See Case No. 10,231.

Case No. 6,561.

HODGE et al. v. NORTH MISSOURI R. R.

SAME v. IRON MOUNTAIN R. R.

[1 Dill. 104; 4 Fish. Pat. Cas. 161; 5 West. Jur. 121.] [1]

Circuit Court, E. D. Missouri. Nov., 1869.

PARTIES—MISJOINDER—EQUITY PRACTICE—PATENT—TITLE IN PERSONAL REPRESENTATIVES OF DECEDENT.

1. If one who has no interest in the subject-matter of the suit, or in the relief prayed, be joined as party plaintiff, the defect may be reached by a general demurrer for want of equity.

2. The next of kin of a patentee cannot be united as parties plaintiff with the personal representative, in a bill to enjoin the infringement of the rights secured by the patent, and for an accounting.

3. Upon the death of the inventor, the title to the patent issued passes to the personal representative at the domicile of the patentee, who may sue for an infringement in any of the courts of the United States having jurisdiction.

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Dill. 104, and the statement is from 4 Fish. Pat. Cas. 161.]

It is not necessary that letters should be taken out in the state in which the suit is brought.

[These were bills in equity to restrain the infringement of letters patent for "improvement in the mode of operating brakes for cars," granted to Nehemiah Hodge, October 2, 1849 [No. 6,762], reissued March 1, 1853 [No. 231], and extended to him for seven years from October 2, 1863. Abbott L. Hodge claimed as heir at law of Nehemiah Hodge, and as assignee of Zelia C. Hodge, another heir, and Amelia S. Hodge claimed as administratrix of Nehemiah Hodge, and also as heir. In the suit against the North Missouri Railroad, the defendant interposed a general demurrer for want of equity. In the suit against the Iron Mountain Railroad, a plea was filed, alleging that no letters of administration had been granted in the state of Missouri, and denying the title of the foreign administratrix.][2]

Hendershott & Adams, for complainants.

Moss & Sherzer and Dryden & Lindley, for defendants.

Before TREAT and KREKEL, District Judges.

TREAT, District Judge. The question presented in the first case is, can the addition of a party, as plaintiff to a bill in equity, who has no interest in the suit, and who is not a necessary or proper party upon the record, be taken advantage of by a demurrer, for want of equity, or a general demurrer? I hold the affirmative to be established by the decisions both in England, and in this country. Story, Eq. Pl. § 509; King of Spain v. Machado, 4 Russ. 225; Cuff v. Platell, Id. 242; Makepeace v. Haythorne, Id. 244; Clarkson v. De Peyster, 3 Paige, 336. The reasoning in the case in 4 Russ. 225, seems conclusive on this point.

Is there any misjoinder of plaintiffs in this case? Under the patent laws, the interest of the patentee passes to the personal representative, who may apply for an extension or reissue of the patent, and it so remains until properly assigned. Until assigned all suits must be brought in the name of the administratrix; and the next of kin or heirs have no title in the patent. There is therefore in these cases, a party plaintiff upon the record, who has no right to any relief or discovery, and the defendants are not to be harassed by exceptions, taken by one who has no interest in the suit, nor can they be compelled to submit to him an inspection of their books and papers. The demurrer in the case of the North Missouri Railroad must be sustained.

We next notice the plea, that no letters have been granted in this state. The titles to patents for inventions is regulated by acts of congress. By those acts the interest of the patentee passes to the personal representative in the state of the domicil, and remains in him until assignment to the parties beneficially interested therein, or to the vendee thereof in case of sale in course of administration. Plea overruled.

[For other cases involving this patent, see Hodge v. Hudson River R. Co., Cases Nos. 6,559 and 6,560; Wood v. Michigan South. & N. I. R. Co. Id. 17,957.]

[2] [From 4 Fish. Pat. Cas. 161.]

Case No. 6,561a.

HODGE v. PLOTT.

[Hempst. 14.][1]

Superior Court, Territory of Arkansas. April, 1822.

SECURITY ON APPEAL BOND—LIABILITY.

1. In an appeal from a justice under the act of 1818 [Acts Ark. 1818, p. 27], the security in the appeal bond is equally subject to judgment with the appellant when the judgment is affirmed, or on a trial de novo a judgment is rendered against the appellant; but if the adverse party takes judgment against the principal only, it is irregular to sue out a scire facias against the security with a view to obtain an execution against him, for there must be a judgment for the scire facias to rest on.

2. The security is not bound to pay until it legally appears that the principal is unable to pay.

Appeal determined before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. Daniel Plott recovered a judgment against William Harris, before a justice of the peace, for the sum of sixty-eight dollars and twelve cents debt, and one dollar and twelve cents costs, from which judgment Harris appealed to the court below, and entered into a bond with Arch Hodge, security, conditioned in substance that Harris should prosecute his appeal, and if Plott should recover more than the amount of the judgment of the justice, that said Harris, defendant, should pay the amount of such judgment and costs of suit. The court below rendered a judgment against Harris for sixty-six dollars and twelve cents debt, and seven dollars and thirty-seven cents damages, but no judgment was taken against Hodge as security. Upon this judgment, execution was issued against Harris, and at the same time a scire facias was sued out against Harris and Hodge to show cause why execution should not issue against them on the above-mentioned bond, and a judgment was rendered by the court below against Hodge for the above debt, and four dollars and ninety-five cents damages, with costs, from which Hodge appealed to this court. We are of opinion that the scire facias was improvidently issued as to Hodge, inasmuch as there was no judgment against him whereon it could rest, as by the statute there must have been, in order to entitle the plaintiff to execution. The law is, that in "all cases of appeals or certiorari from justices of the peace, by virtue of existing laws on those subjects, if the

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

judgment of the justice be affirmed, or judgment given on a trial upon the merits de novo in the circuit court, judgments shall be given and execution issue, not only against the original defendant or defendants in the suit before such justice, but also against his or their security or securities in the appeal bond or bonds to prosecute such certiorari." Acts 1818, p. 27. Now, although the law is that judgment shall be entered against the security as well as the principal, yet it is plain that this provision being for the benefit of the plaintiff, he may waive it, and may make his election and take judgment against the principal only. This was done in this case, and afterwards an execution could not be obtained against the security in a summary manner by scire facias. It is a different suit and between different parties, and does not come within the purview of the statute. Besides, if there had been a joint judgment in the first instance, still the security would not be bound to pay until it legally appeared that the principal was unable and could not pay, and nothing of this kind has been shown. Reversed.

Case No. 6,562.

In re HODGES.

[11 N. B. R. 369.] [1]

District Court, D. Minnesota. 1875.

BANKRUPTCY — SERVICE OF ORDER OUT OF JURISDICTION—POWER TO ISSUE ATTACHMENT.

The defendant was adjudged a bankrupt upon his own petition, and some months thereafter an order of examination was obtained, requiring him to appear before the register having charge of the case, at his office in St. Paul, Minnesota. The order was served on the bankrupt at the city of Chicago, Illinois. He failed to appear, and a motion was made for an attachment and warrant of arrest to bring him before the court to answer for a contempt. *Held*, that where there is a willful absence from the district, the court has no power to institute criminal proceedings by issuing an attachment, unless the personal service of the order for the examination is made within its jurisdiction.

The defendant [Joseph Hodges] was adjudged a bankrupt on the 13th day of February, 1874, upon his own petition. On the 2d day of November, 1874, the assignee of his estate obtained an order, in pursuance of section 26 of the bankrupt act [of 1867 (14 Stat. 529)], for an examination of the bankrupt, which required his appearance before Albert Edgerton, Esq., register in bankruptcy, at his office in the city of St. Paul, November 19, 1874. This order was served on the bankrupt personally on November 7th, at the city of Chicago, in the state of Illinois. The bankrupt failed to appear as required by the order, and a motion is made for an attachment and warrant of arrest to bring the bankrupt before the court to answer for a contempt. Notice was given the bankrupt's solicitors.

[1] [Reprinted by permission.]

W. E. Hale, assignee, in person.
Lochren, McNair & Gilfillan, for bankrupt.

NELSON, District Judge. The first clause of section 26 of the bankrupt act authorizes the examination of the bankrupt, under oath, at all times, upon reasonable notice; a subsequent clause of the section makes an exception in regard to the manner of taking this examination in cases where the bankrupt may be imprisoned, absent, or disabled from attendance. When such disability exists, the court may direct the examination to be taken at such time and place as it may deem proper. In all cases, however, the bankrupt must obey the order for an examination, as made by the court; that is, if he is within the district, and under none of the disabilities above specified, he must appear before the court (or a register); and where, for the reasons above stated, he cannot so appear, his examination must be taken at the time and place, and in the manner designated by the court. The order for such examination is prescribed in form No. 45, and is a summons, or subpoena. There must be reasonable notice given the bankrupt in all cases; and as no mention is made of the manner of giving this notice in this section, I see no reason for departing from the usual practice in like cases in civil actions. The service should be personal, and if it is made within the jurisdiction of the court, and the bankrupt fails to appear and testify, he can be punished for a contempt of court. The law is imperative that the bankrupt shall, at all times, until his discharge, be subject to the order of the court; but if there is a willful absence from the district, the court has no power to institute criminal proceedings by issuing an attachment, unless, perhaps, the personal service of the order for the examination is made within its jurisdiction.

Whether in a case where the order was personally served within the district, and the bankrupt departed therefrom, and willfully defaulted, an attachment could be served upon him, and a legal arrest for contempt be made beyond the district, it is not necessary to decide. In this case the order to appear and testify was not served within this district, and this court has no authority to arrest the bankrupt in the district of Illinois for contempt in not appearing to answer such process. The 26th section does not expressly authorize the summons to run into another district so as to give the court jurisdiction of the person of the bankrupt, and no other law of congress has been invoked which confers upon this court such authority in cases of this character. The district court, in the exercise of its common law, equity, and admiralty jurisdiction, has no such authority, unless in cases where it may have been expressly granted (Ex parte Graham [Case No. 5,657]), and there are no provisions in the bankrupt law by which it is conferred. The court, however, can refuse to

grant a discharge to the bankrupt for the failure to obey the order for examination: and inasmuch as the chief motive of the debtor who files his petition in bankruptcy is to obtain a discharge from his present indebtedness, he will ordinarily conform to all the orders made by the court. It is intimated by the bankrupt's counsel that he has no disposition to evade an examination, and is willing to submit to one; but residing at present in the city of Chicago, he cannot without great pecuniary loss return to this district for that purpose. Should the assignee desire his examination in Chicago, I will modify the original order, and designate a register before whom it may be taken. The motion, however, to declare the bankrupt in contempt, and for an attachment and warrant of arrest, is denied.

HODGES (CORCORAN v.). See Case No. 3,228.

HODGES (EASTON v.). See Case No. 4,258.

HODGES (JONES v.). See Case No. 7,469.

HODGES (UNITED STATES v.). See Case No. 15,374.

HODGKIN v. The HIGHLANDER. See Case No. 6,476.

HODGKIN (UNITED STATES v.). See Case No. 15,375.

Case No. 6,563.

HODGSON v. BUTTS.

[1 Cranch, C. C. 447.] [1]

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

WITNESS—SUBPOENA—ATTACHMENT.

The court will grant a rule on a witness residing in Baltimore, to show cause why he should not be attached for not attending according to summons.

The deposition of James Hamilton had been taken de bene esse, by the defendant with notice, and the plaintiff's attorney appeared under protest, that is, reserving all objections, &c., and cross-examined the witness; the defendant had a subpoena served on Hamilton, who resides in Baltimore, and who by letter acknowledged service, but stated that he was a clerk in the collector's office and could not attend without detriment to the public.

The defendant's counsel, Mr. Jones, prayed for a continuance unless the plaintiff would permit the deposition to be read in evidence.

THE COURT (DUCKETT, Circuit Judge, absent) continued the cause and directed a rule on the witness to show cause on Saturday, the 12th instant, why an attachment of contempt should not issue against him for not obeying the summons.

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

Case No. 6,564.

HODGSON v. BUTTS.

[1 Cranch, C. C. 488.] [1]

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

PAYMENT UNDER MISTAKE—REIMBURSEMENT.

The purchaser of a vessel, who has paid the expenses and disbursements of a previous voyage upon the order of the master, cannot recover them from the master, although he paid them under a mistaken expectation that he was to be reimbursed out of the freight.

Assumpsit to recover the expenses and disbursements of the schooner Mississippi, which the plaintiff (who was the owner, by virtue of an absolute bill of sale made by R. & J. Hamilton to him, after the end of the voyage,) had paid on the orders of the defendant, who had been master of the schooner during the voyage, and who had received the freight, and applied it according to the directions of the former owners, R. & J. Hamilton.

Mr. Jones, for defendant, prayed the court to instruct the jury, in effect, that the defendant was not liable, although the plaintiff had paid those expenses and disbursements, under a mistaken expectation that he was to be reimbursed out of the freight which the vessel had earned, whether he paid them before or after he obtained possession of the vessel.

The defendant, the master, was not liable to the seamen for their wages, unless he had shipped them, and had personally made agreement with them. But if he had paid them, he would have a lien on the vessel therefor, which would have followed the vessel into the hands of the plaintiff, so that he could not have obtained a clear title until he had refunded them. Abb. Shipp. 106.

Mr. Swann and E. J. Lee, for plaintiff, prayed the court to instruct the jury, in effect, that if the plaintiff was not the owner of the vessel, and the orders were drawn up on the personal credit of the defendant; or, if at the time of drawing it was understood by the plaintiff and defendant, that the plaintiff was to be reimbursed out of the freight already earned, the defendant is liable.

THE COURT (DUCKETT, Circuit Judge, absent) gave the instruction prayed by Mr. Jones, and refused to give that prayed by Mr. Swann and Mr. Lee, because the evidence did not justify an inference by the jury, that the plaintiff was not the owner of the vessel at the time of paying the defendant's drafts, nor that the orders were drawn on the personal credit of the defendant; nor that there was any understanding by the plaintiff and defendant that the plaintiff was to be reimbursed out of the freight.

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

Verdict for the defendant. The plaintiff took a bill of exceptions, but did not prosecute a writ of error.

Case No. 6,565.

HODGSON v. DEXTER.

[1 Cranch, C. C. 109.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.[2]

INEVITABLE CASUALTY — PERSONAL LIABILITY OF PUBLIC AGENT CONTRACTING FOR GOVERNMENT.

1. A casualty happening against the will, and without the negligence or other default of the party, is, as to him, an inevitable casualty.

2. A public agent of the government, contracting for the use of government is not personally liable, although the contract be under his seal.

[See note at end of case.]

Covenant on a lease. See a statement of the pleadings in this cause, 1 Cranch [5 U. S.] 345. The questions brought into view by the pleadings, were: (1) Whether the defendant was individually bound. (2) Whether the destruction of the building was an inevitable casualty, within the meaning of the covenant.

Mr. Woodward, and P. B. Key, for plaintiff, cited 2 Mallory, Ent. 118; 1 Rolle, Abr. 450; Dyer, 33; Shulbrick v. Salmond, 3 Burrows, 1637; Monk v. Cooper, 2 Ld. Raym. 1477; Forward v. Pittard, 1 Term R. 27; Macbeath v. Haldimand, Id. 172; Unwin v. Wolseley, Id. 674; 1 Bac. Abr. tit. "Covenant," 535, 536.

Mr. Dexter, C. Lee and Mr. Mason, for defendant, cited 1 Rolle, Abr. 808; Dyer 66(b); Forward v. Pittard, 1 Term R. 27; Com. 631; Jones, Bailm. 90 (49), 93 (51), 97 (53), 135 (73), 142 (78), 146 (79, 80), 149 (81, 82), 32 (18); Act Cong. April 24, 1800, authorizing the president of the United States to remove the public offices of the government from Philadelphia to Washington (2 Stat. 55); 1 Bl. Comm. 503; Jones v. Le Tombe, 3 Dall. [3 U. S.] 384; Syme v. Butler, 1 Call, 105; Bingham v. Cabbot, 3 Dall. [3 U. S.] 32, 39; 1 Salk. 364; Com. Dig. tit. "Pleader," 62; 8 Coke, 120.

(THE COURT was of opinion for the defendant upon both points, and that opinion, so far as it respected the first point, was affirmed by the supreme court upon writ of error, at February term, 1803. 1 Cranch [5 U. S.] 345. But that court gave no opinion upon the question of inevitable casualty.)

CRANCH, Circuit Judge. This question arises upon the demurrer to the first plea, which alleges that before the expiration of the lease the demised premises, "against the will, and without the negligence, or other default of the defendant, were burned and consumed by fire, happening from some cause to him then and yet wholly unknown;" "and that saving and excepting the damage occasioned by the said burning and consuming, he hath at all times kept in good and sufficient repair the said demised premises, and that he hath, at the end of the term, delivered up the same to the plaintiff, so well and sufficiently kept in repair, excepting," &c. To this plea there is a general demurrer; and the question arising is, whether the facts stated in the plea bring the defendant's case within the exception of inevitable casualties. It is admitted that a casualty may be inevitable without happening by the act of God, or by the public enemies of the country. In the present case the expression seems to me to mean only such casualties as are inevitable by the defendant, and not such as might not be avoided by the united efforts of the whole society. But it was contended, on the part of the plaintiff, that the plea obliges the plaintiff to prove more than ordinary negligence on the part of the defendant, and that such is the meaning of the expression in the plea, "negligence or other default." I confess I do not so understand the plea, nor do I know where the plaintiff's counsel will find an authority for their definition of the term. I consider negligence and default as synonymous words. Negligence is the want of care and diligence, and the degree of one is in inverse proportion to the degree of the other. The slightest degree of negligence is the omission of the greatest degree of care and diligence. Where there has been no negligence or default, there the greatest degree of care and diligence has been used. When, therefore, the plea avers that the house was burned without the negligence or default of the defendant, it is tantamount to saying that it was burnt notwithstanding the greatest degree of care and diligence on his part. The question then occurs, whether a casualty which happens notwithstanding the use of the greatest degree of care and diligence on the part of the defendant to prevent it, is not, as to him, an inevitable casualty. It is unnecessary for us to inquire what degree of negligence is sufficient to charge the defendant, because the plea denies all negligence whatever. If issue had been joined on the plea, it might have become a question what degree of negligence the plaintiff must prove in order to maintain the issue on his part. The term negligence cannot be appropriated exclusively to the omission of any given degree of care and diligence. Its degrees are infinitely variable, from the omission of the greatest possible care, to the very boundary of fraud. I have no hesitation, therefore, in saying, that an accident which happens without the slightest degree of negligence or default of the defendant, is as to him, an inevitable casualty.

Thus far the argument is grounded on the words of the plea, which I consider as a more advantageous plea for the plaintiff than any

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

[2] [Affirmed in 1 Cranch (5 U. S.) 345.]

other which the defendant could have pleaded, because the issue might strictly have been maintained on the part of the plaintiff, by proving the slightest possible degree of negligence in the defendant. But if the defendant had pleaded, in the words of the lease, that the house was destroyed by an "inevitable casualty," then the authorities cited by the defendant would have applied with great weight. The case of Forward v. Pittard, 1 Term R. 27, is a very strong one, to show that an accident happening by fire, without the negligence of the carrier, is an inevitable casualty; and the frequent use of the expression when applied to fire, by Sir William Jones, derives great force from his acknowledged accuracy of language, and profound knowledge of the law. Some of the old cases go so far as to call fire the act of God. There are three modes of ascertaining the meaning of doubtful expressions in a contract: by common acceptation, by technical definition, and by a reference to the subject of the contract and the general usage in the like kind of contracts. By common acceptation, unavoidable accident means, a casualty which happens when all the means which common prudence suggests have been used to prevent it. The technical meaning has been explained by the authorities cited, in which the expression has been used by learned judges and by eminent lawyers. When we consider the subject of this contract, that it was the lease of a house for eight months only, we can hardly suppose that the lessee would take pains to insert a clause to guard himself from accidents whch might arise from the unusual casualties of earthquakes, tempests, lightning, or public enemies, and entirely overlook the common accident of fire, or that he meant to make himself or the United States insurer against fire. It is not usual for lessees, for short terms, to become the insurers of the premises against accidental fire, and I shall not presume a contract of that kind, unless it was in very express terms. For these reasons I think this demurrer must be overruled.

[NOTE. The plaintiff then sued out a writ of error, and the supreme court affirmed the judgment so far as the personal liability of defendant was concerned, in an opinion by Mr. Chief Justice Marshall. No opinion was, however, given on the question of inevitable casualty. 1 Cranch (5 U. S.) 345.]

Case No. 6,566.

HODGSON v. MARINE INS. CO.

[1 Cranch, C. C. 569.] [1]

Circuit Court, District of Columbia. July Term, 1809.

TENDER OF ISSUE—PREVIOUS DEMURRER.

The court will not permit a defendant to tender an issue which he had refused to join, and to which he had demurred when tendered by the plaintiff; there having been judgment rendered against him by the supreme court on the demurrer.

THE COURT refused the ninth plea now offered by the defendants, because the substance of it was tendered as an issue, by the plaintiff in a former stage of the suit, and rejected by the defendants, who chose to demur; and having had judgment against them in the supreme court on the demurrer, ought not now to be permitted to amend.

[See Case No. 6,567.]

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

Case No. 6,567.

HODGSON v. MARINE INS. CO. OF ALEXANDRIA.

[1 Cranch, C. C. 460.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.[2]

MARINE INSURANCE—WHAT IS COVERED THEREBY—MISREPRESENTATION—PREMIUM.

1. If there be no warranty of neutrality in the policy, it covers belligerent risks.

2. Upon a valued policy, a misrepresentation as to the size and age of the vessel is no defence; although averred to be material as to the contract.

3. It is no defence to an action of covenant on a policy, that the premium has been perpetually enjoined.

This was an action of covenant on the same policy as that in Straas v. Marine Ins. Co. [Case No. 13,518].

The first count avers the interest to be in Straas & Leeds. The second avers it to be in Leeds alone. The loss is stated to be by capture. Issue was joined upon the three first pleas.

The fourth plea was, that the vessel insured was the property of enemies of Great Britain, and was captured and condemned as such by the British, whereas the insurance was made only upon the property of American citizens in which no belligerent was interested. To this plea the plaintiff demurred; and THE COURT adjudged the plea bad, because, inasmuch as there was no warranty of neutrality, the policy covered war-risks.

The fifth plea averred the rule and practice of the insurance company to be, never to insure beyond the reasonable and just value according to the representation. That the plaintiff proposed that the value should be agreed to be ten thousand dollars; and that to induce the defendants to execute the policy he represented the vessel to be about

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

[2] [Reversed in part and affirmed in part in 5 Cranch (9 U. S.) 100.]

two hundred and fifty tons burden, and between six and seven years old; in consequence whereof, the defendants executed the policy. That this representation was not true, the vessel being less than one hundred and sixty-five tons, and more than eight years old, and not worth eight thousand dollars, (the sum insured,) being worth only three thousand dollars. That the misrepresentation induced the defendants to execute the policy stating the value to be ten thousand dollars, and insuring eight thousand; and so the policy is void as to them.

THE COURT, also, upon demurrer, decided this plea to be bad, because the misrepresentation did not appear, and was not averred to be material or fraudulent.

The sixth plea averred the same misrepresentation, and that it was "material in regard to the said contract of insurance, and so they said the said contract is void as to them." The replication averred, that the misrepresentation was not material in regard to the ability of the vessel to perform the voyage insured. The rejoinder reiterated the averments of the plea. To this there was a demurrer.

Mr. Swann, for plaintiff, cited Thoroughgood's Case, 2 Coke, 9; Bright v. Eynon, 1 Burrows, 390; 1 Fonbl. 106, 111, 112; Collins v. Blantern, 2 Wils. 341, 344; Duffield v. Scott, 3 Term R. 374; Heyward v. Rodgers, J. P. Smith (Eng.) 289.

But THE COURT (DUCKETT, Circuit Judge, absent) were of opinion that the defendants' sixth plea and rejoinder were good, and that the plaintiff's replication was bad, being of opinion that a material misrepresentation of the subject of insurance might be pleaded in bar of a sealed policy, and that the misrepresentation was material to the contract.

The seventh plea was, that the vessel insured was the property of a citizen of France, and not of a citizen of the United States. That there was war between France and England at the time of the insurance and at the time of capture. That the United States were neutral. That Richmond is the capital of one of the United States.

THE COURT, upon demurrer, adjudged the plea to be bad, because the policy covered war-risks.

The eighth plea was that the plaintiff had not paid the premium, and that the note given therefor was perpetually enjoined by the high court of chancery in Virginia.

THE COURT, upon demurrer, adjudged this plea also to be bad.

Judgment for the defendants on the demurrer to the sixth plea, and for the plaintiff on the others.

This judgment was reversed by the supreme court as to the sixth plea, and affirmed as to others. See 5 Cranch [9 U. S.] 100.

[See Case No. 6,566.]

Case No. 6,568.

HODGSON v. MILLWARD et al.

[20 Leg. Int. 348; 5 Phila. 302; 3 Grant, Cas. 418.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 30, 1863.

REMOVAL OF CAUSES TO UNITED STATES COURT—COLOR OF AUTHORITY.

1. When a defence depends wholly on the construction of the constitution of the United States and acts of congress, the courts of the United States have jurisdiction of the subject-matter, without regard to the citizenship of the parties.

2. An officer acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under "color of authority," whether the superior transgresses his power, or the warrant be irregular or not.

3. This case (after verdict and before judgment) was properly certified into the circuit court, and must be tried in the same manner as if brought here by "or as if it had been brought in said court by original process."

[This was an action at law by William H. Hodgson against William Millward and others.]

GRIER, Circuit Justice. This case has been removed into this court under the provisions of the fifth section of the act of 3d March, 1863 (12 Stat. 756). It is now moved to remit the record on the allegation that the case is not within the provisions of that act. Although the certificate of the judge who ordered the removal of the case may not be conclusive on this court, if we should be of opinion that we cannot entertain jurisdiction of the parties or of the cause, yet it lies on the party who alleges that fact to make it clearly appear. We see no reason to doubt the correctness of the decision of the learned judge who has certified this case, and fully concur in the opinion delivered by him in this case. It would be superfluous to repeat the argument so well stated by that learned judge. It is clear that the defence of the defendants (if they have any) depends wholly on the construction of the constitution of the United States and of acts of congress. The courts of the United States have, therefore, jurisdiction of the subject matter, without regard to the citizenship of the parties. The act of congress already mentioned, which authorizes the removal of such cases to this court, is not alleged to be unconstitutional, nor that the party has not pursued the mode pointed out by the act, in a case where there has not been a final judgment, and which of course was still "pending" in that court. The objection that the record shows that the trespass with which the defendants are charged was not committed by virtue of any order of the president, or under his authority, or under color of any act of con-

[1] [Reprinted from 20 Leg. Int. 348, by permission. Syllabus from 3 Grant, Cas. 418.]

gress, cannot now be urged, as it constitutes the very question to be tried and determined by the court when the case shall be heard before a jury. Assuming the allegation to be true, that the president may have had no authority conferred on him to issue such order, and that the order issued by the United States attorney was irregular or void, yet these are the very questions which the defendants have a privilege conferred by the statute of a trial and decision in the courts of the United States. The order or warrant under which the defendants justify purported to have been issued by virtue of an authority derived from the president. This was "color of authority," whether the substance existed or not. The argument that "color" being an accident, cannot exist without substance, may be metaphysically correct, but has too much subtlety for practical application in the construction of statutes. We do not think it necessary to give a definition of "color of authority" to suit all cases. For the purposes of this case it is enough to say, that an officer, acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under "color of authority," whether his superior transgresses his power, or the warrant be irregular or not. This is the question to be tried under proper pleadings and evidence before a jury. If the state court should assume to refuse to certify the case into this court, because in their opinion the superior officer had not authority, or the warrant was irregular and void, they would deny the party the privilege conferred on him by the act, and treat its provisions with contempt. This case was therefore properly certified into this court, and must be tried in the same manner as if brought here by appeal, or "as if it had been brought in said court by original process." Motion denied.

[This case was ordered to be removed by the state supreme court at nisi prius (3 Grant. Cas. 412), and is cited in Braun v. Sauerwein, 10 Wall. (77 U. S.) 224.]

Case No. 6,569.

HODGSON et al. v. MOUNTZ et al.

[1 Cranch. C. C. 366.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

AUTHORITY OF MAYOR OF GEORGETOWN—CONFESSION OF JUDGMENT—STAY—HOW RECKONED.

1. The mayor of Georgetown may, in that town, do any act which a justice of the peace of the county can do.

2. A judgment against two, may be superseded by one of the defendants, and the new confession will bind him and his sureties; and the other defendant need not be named in the supersedeas.

[Cited in Chesapeake & O. Canal Co. v. Barcroft, Case No. 2,644.]

3. The six months' stay is reckoned from the day of the confession of the new judgment.

4. The sum confessed need not be repeated and specially set forth in the blank at the end of the supersedeas.

5. Parol evidence may be given that the confession was made at a place within the jurisdiction of the magistrates before whom it was made.

[This was an action at law by Hodgson & Thompson against Mountz, Knowles, and another.]

Upon the return of a ca. sa. issued upon a supersedeas,—

Mr. Morsell and F. S. Key, for defendants, moved the court to quash the execution. 1. Because the law of Maryland of 1791 (chapter 67, § 1) requires that the confession of judgment shall be made before two justices of the peace of the county, but this confession was made before the mayor of Georgetown, and one justice of the peace of the county only. 2. The original judgment was against Jacob Mountz and George Reintzel; and it is superseded by Mountz only. 3. The original judgment is misrecited in the supersedeas, the original judgment being against both and the supersedeas stating that it was a judgment against one. 4. That the six months' stay is to be reckoned from the day of the original judgment, but the supersedeas reckons it from the day of the date of the supersedeas, that is, the day of confession of the new judgment. 5. That the blank, at the end of the supersedeas, ought to be filled up with the actual sum to be paid. 6. That it does not appear, upon the supersedeas, that the judgment was confessed in Georgetown, so as to be within the jurisdiction of the mayor, and that parol evidence cannot be now given of that fact.

Mr. Jones, for plaintiffs.

But THE COURT, after argument, overruled all these objections, and refused to quash the execution.

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

HODGSON (PAYEN v.). See Case No. 10,853.

HODGSON (REID v.). See Case No. 11,667.

Case No. 6,570.

HODGSON v. TURNER.

[1 Cranch, C. C. 74.] [1]

Circuit Court, District of Columbia. March Term, 1802.

FOREIGN BILL OF EXCHANGE—ACTION AGAINST INDORSER—PROTEST—JUDGMENT AGAINST DRAWER—WHETHER A BAR.

1. In an action against the indorser of a foreign bill of exchange, for non-payment, it is not necessary to produce a protest for non-acceptance.

2. A judgment and execution by the plaintiff, against the drawer of a bill, is no bar to a

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

judgment against the indorser, although that execution be levied on the drawer's goods, which are not sold for want of buyers.

The defendant was indorser of a foreign bill of exchange, protested for non-payment as well as for non-acceptance.

Mr. Gantt, for defendant, prayed the court to instruct the jury that it was necessary for the plaintiff to prove that the defendant had reasonable notice of the protest for non-acceptance; and cited Kyd, Bills, 109, 117–119, 137; Milford v. Mayor, 1 Doug. 55; Bull. N. P. 271; Rogers v. Stephens, 2 Term R. 713; Goodall v. Dolley, 1 Term R. 712; Burrows, 2,670; and the case of Oates & Co. v. McCurdy, in the general court of Maryland.

Mr. Mason, for plaintiff, cited Brown v. Barry, 3 Dall. [3 U. S.] 365, and Clerk v. Russel, Id. 420, 424.

THE COURT, on the authority of Brown v. Barry and Clarke v. Russel [supra], refused to give the instruction as prayed.

Mr. Gantt, for defendant, then produced a fieri facias, issued last term and returnable to this, on a judgment obtained by the plaintiff against Bowie, the drawer of this bill; on which execution he stated the marshal had seized the goods of Bowie, but that they were not sold for want of buyers; and prayed the court to instruct the jury that this execution so levied, was a discharge of the indorser. Seld. Prac. 564.

THE COURT refused to give the instruction.

Case No. 6,571.

HODGSON v. WOODHOUSE.

[1 Cranch, C. C. 549.] [1]

Circuit Court, District of Columbia. July Term, 1809.

TROVER AGAINST MASTER OF VESSEL—WHEN IT LIES.

Trover will not lie against the master of a vessel for the cargo, unless the freight is paid, or tendered, or the payment waived; nor if the goods were lost so that they did not come to the use of the defendant.

Trover against the master of a vessel for cheese and porter.

Mr. Taylor, for defendant, prayed the court to instruct the jury, that the plaintiff could not recover, unless he had paid or tendered the freight;—which instruction THE COURT gave with a proviso that the jury should not be satisfied by the evidence that the defendant had waived the precedent condition of payment. Ross v. Johnson, 5 Burrows, 2825.

THE COURT, also, at the prayer of the defendant, instructed the jury, that if they should be of opinion that the cheese was eaten by the rats, or otherwise lost, so that it did not come to the use of the defendant, the plaintiff cannot recover in this form.

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

Case No. 6,571a.

HODSON v. LAKE SHORE & M. R. CO.

SAME v. PORTER.

[12 Reporter, 41.] [1]

Circuit Court, N. D. Ohio. June 13, 1881.

REMOVAL OF CAUSES TO FEDERAL COURTS—BEFORE ISSUE JOINED—SUBMISSION OF PARTIES DEFENDANT.

A cause may be removed to the federal court before an answer is made, in an action in which bailees have moved for a substitution of the real parties in interest, and the order of substitution has been entered.

The plaintiffs in these two cases brought suit in replevin for wheat in the common pleas court of Fulton county, Ohio, against the defendant railway company; the railway company disclaimed any ownership in the wheat except as bailees for carriage, but alleged that the other defendants, citizens of New York, claimed the wheat, and prayed that they be substituted as parties defendant in its place, which was done by order of the court under section 5016 of the Code of Ohio (Rev. St. 1880), and the defendants appeared voluntarily and before any answer or other pleading filed petitions and bonds for removal to the circuit court of the United States, under the act of congress of March 3, 1875 [18 Stat. 470]. Plaintiffs filed motions to remand the same in the circuit court, on the ground that no "controversy" existed at the time of removal, there being no answer or other pleading contesting the right of the plaintiffs to the wheat; that the statement that a controversy existed in the petition for removal was not sufficient, that it must appear from the pleadings that there was a controversy.

Gilbert Harmon, for plaintiffs.

George Haynes and Smith & Geddes, for defendants.

WELKER, District Judge. Though there are no decisions in the federal courts directly upon this point, yet many cases are to be found in the reports where the removals were had before any answer on the part of the defendants had been made; and the failure of the several judges to notice such a defect is equivalent to an opinion that it is not fatal to the removal and subsequent jurisdiction of the court. Motion overruled.

HODSON (UNITED STATES v.). See Case No. 15,376.

Case No. 6,572.

HOE et al. v. COLE et al.

[The case reported under above title in 13 O. G. 500, is the same as Case No. 6,573.]

HOE v. SIMPSON. See Case No. 17,500.

[1] [Reprinted by permission.]

Case No. 6,573.

HOE et al. v. TUTHILL et al.

[3 Ban. & A. 206; [1] 13 O. G. 500.]

Circuit Court, S. D. New York. Feb., 1878.

PATENTS—IMPROVEMENT IN PRINTERS' GALLEYS—INFRINGEMENT.

The first claim of reissued letters patent No. 6,326, granted to complainants March 9, 1875, for an improvement in printers' galleys, namely: "The combination of the edge-rail and its metallic facing or lining by means which secure their union, and leave the metallic facing or lining smooth or free from perforations or similar interruptions, substantially as and for the purpose set forth:" *Held* valid, and to be infringed by the use of an L-angle metal facing for ledges with smooth unperforated face, supported by a wooden rail attached to it by screws through the bed-plate and the bottom part of the L.

[This was a bill in equity by Richard Hoe and others against Theodore Tuthill and others for infringement of plaintiffs' patent.]

Munson & Philipp, for complainants.
Daily & Perry, for defendants.

WHEELER, District Judge. This cause has been heard on pleadings, proofs and argument. The orators own a patent originally issued to Alexander T. De Puy, in letters No. 60,151, dated December 4th, 1866, and reissued to them in letters No. 6,326, dated March 9th, 1875, for an improvement in printers' galleys for holding type set up in them for use, which they claim the defendants infringe, and they pray appropriate relief for infringement.

Among other defences, the defendants allege that De Puy was not the original and first inventor of the device described in the patent, and that they do not infringe upon the patent. The issue made upon the pleadings and proofs, the decision of which is decisive of the case, is well stated in the concluding paragraph of the defendants' brief to be "Whether Alexander T. Du Puy was the original and first inventor of improvements in printers' galleys, which were and are being made and sold by these defendants."

It appears that such galleys are oblong, of various sizes, with metal bottoms, and with ledges on each side and at one end, high enough to hold upright and in place set-up type. That it is necessary to make them strong, desirable to have them light, and essential to their convenient use that the inner surfaces of the ledges next to the type be smooth.

The earliest style shown was made with wooden ledges having metal facings, with screws or nails through the facings extending into the wood. This afforded lightness and strength, but the nail or screw heads and their sockets made the faces of the ledges rough and troublesome.

The next style was a ledge of metal without wood. This obviated the roughness, but made them heavy. In 1859 De Puy invented the style, described in his patent, of galleys with wooden ledges faced with metal, secured by fastenings back of, and not interfering with, the smooth faces of the ledges. This afforded permanently smooth faces to the ledges combined with lightness and strength as far as has been shown to be practicable. This is the first, so far as has been made to appear, that any one has accomplished these combined results. In the specification of the patent he described the mode of applying his invention and its advantages, and in doing so he stated: "It is obvious that this invention may be embodied in various forms without departing from the gist or spirit of it." Then he described a particular method of fastening the metal face of the ledges to the wood by extending the metal back at the top and bottom, and turning flanges on the extensions to be forced into corresponding grooves in the wooden rail; and added: "The ledges may be attached to the bed-plate in any well-known manner."

The first claim in the patent is for: "The combination of the edge-rail and its metallic facing or lining by means which secure their union and leave the metallic facing or lining smooth or free from perforations or similar interruptions, substantially as and for the purpose set forth."

The defendants use an L-angle metal facing for ledges, with smooth unperforated face, supported by a wooden rail attached to it by screws through the bed-plate and the bottom part of the L. This is a mode of fastening the metal face to the wooden rail different in form from that which De Puy specifically described in his patent, but his leading idea, as set forth in the patent, of fastening the face-plate to the rail by an attachment back of the plate without perforating the face, is followed. The screws through the L into the wood take the place of the lower flange, and the upper one is dispensed with. The screws were well-known substitutes for flanges in such fastenings, and that change was one of form and not of substance.

According to the rules of law relating to this subject, De Puy was the original and first inventor of the invention described in the patent, and of the device made use of by the defendants, and the question stated as being decisive of the case must be answered in the affirmative. This makes it unnecessary to make any decision upon the questions made by the orator's counsel with reference to evidence bearing upon the question.

Let a decree be entered for a reference and accounting, and an injunction, according to the prayer of the bill.

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

HOEFNER (BENNETT v.). See Case No. 1,320.

HOELLER (HOELTGE v.). See Case No. 6,574.

Case No. 6,574.

HOELTGE v. HOELLER et al.

[2 Bond, 386.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1870.

PATENTS—IMPEACHMENT COLLATERALLY—DECISION OF COURT ON PENDING APPLICATION.

1. A court will not exercise jurisdiction, by granting an injunction or otherwise upon the allegation in a bill in equity, that the defendant has surreptitiously procured a patent right for an improvement of which the complainant avers he was the first and original inventor, and for which he had made his application for a patent right, which, at time of filing his bill, had not been passed upon by the commissioner of patents.

2. The defendants having a patent, all the presumptions of law are in favor of its validity, and its validity can not be collaterally impeached.

3. The complainant, by his own showing, has only an inchoate right to a patent for the invention in question; and, in this proceeding, the court can not anticipate the decision of the commissioner of patents upon his application, or decide, in this indirect way, on the validity of the patent of the defendants.

4. If the complainant succeeds in obtaining a patent, he will be in a position to contest the validity of the defendants' patent by a suit against them for an infringement.

[This was a bill in equity by Frederick Hoeltge against C. and H. S. Hoeller.]

John W. Okey and S. A. Miller, for complainant.

Oliver & Moore, for defendants.

OPINION OF THE COURT. This is a demurrer to the bill of the complainant, on the ground that this court has no jurisdiction. The bill, in substance, avers that the complainant is the inventor of a valuable improvement in making elbows for stove-pipes and other similar uses; and that the defendants, having obtained a knowledge of the invention, and of the machinery by which it is made practical, applied for and fraudulently obtained from the patent office a patent therefor, and are now using it for their own profit. The bill also alleges, that the complainant filed an application for a patent for his invention, which is still pending before the commissioner of patents. The prayer of the bill is, that the defendants may be enjoined from selling or disposing of their patent, or any interest in it; and that, if the complainant is successful in obtaining his patent, the patent to the defendants may be declared to be fraudulent and void.

It is clear, that on the case made in the bill, the court has no jurisdiction to make the decree prayed for, or grant relief to the complainant. I will state, very briefly, the reasons for this conclusion. The bill alleges that there is an application by the complainant, for a patent for the invention which has been patented by the defendants, now pending, and without any action thereon, in the patent office. The complainant, in effect, prays the court, in advance of the decision of the commissioner of patents on his application, to decree that he is the first and original inventor of the improvement patented to the defendants, and to decide that their patent was surreptitiously obtained and is a nullity.

There are two insuperable objections to the exercise of the jurisdiction of this court, as invoked by the complainant:

First. By his showing, in his bill, his application for a patent is still pending in the patent office, the result of which is not known and may be regarded as uncertain. The action of the commissioner will depend on the question, who was the first and original inventor of the improvement. As the case is now presented to the court, the defendants, having duly and legally procured a patent from the proper authorities, must be presumed to be the first and original inventors. The court is now asked to repel that legal presumption, by decreeing that the patent to the defendants is a nullity, and that the complainant is entitled to a patent. This the court has no power to do. It would involve the exercise of an authority vested exclusively by law in another department of the government, and would be an act of usurpation by this court. It is made, by law, the official duty of the commissioner of patents to pass upon all applications for patents, and a court can not anticipate his action by taking jurisdiction of the question, whether a pending application for a patent will or will not be granted.

Secondly. To grant the prayer of this bill would be to prejudge the defendants' patent, and thus collaterally to decide that it is fraudulent and void. The law is well settled that a patent can not be impeached and set aside in this way. If the complainant succeeds in his application for a patent, he will be in a position to contest the validity of the defendants' patent by a suit for an infringement in the use of their improvement. This will present, in a legal and orderly manner, the questions who were, in fact, the first and original inventors of the improvements and whether the defendants' patent is void on the ground of fraud.

In the present aspect of the case the complainants have but an inchoate right, even conceding that they were the true inventors of the improvement, and are not in a position to ask for the interposition of the court, by injunction or otherwise, as against these defendants, whose exclusive right in law, under their patent, can only be drawn in question by a direct proceeding for that purpose. It would be strange, indeed, if this

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

court should interpose, as sought for by the complainant, upon the contingency of his procuring the patent for which he has applied. If the injunction prayed for should be allowed, and the complainant should fail in his application for a patent, this court would be placed in the position of entertaining jurisdiction and granting relief in a case in which the complainant had not the shadow of either legal or equitable right.

The demurrer is sustained and the bill dismissed.

HOELZLE (MANHATTAN LIFE INS. CO. v.). See Case No. 9,025.

Case No. 6,575.

HOFFHEINS et al. v. BRANDT.

[3 Fish. Pat. Cas. 218.] [1]

Circuit Court, D. Maryland. July, 1867.

PATENTS—JURISDICTION IN EQUITY—FRAUD—REISSUE—UTILITY—PATENT IS PRIMA FACIE EVIDENCE OF ITS LAWFUL ISSUE.

1. The current of decisions of the last few years, has been, that the grant of jurisdiction in patent cases, is as full in equity as it is at law.

[Cited in Vaughan v. East Tennessee, V. & G. R. Co., Case No. 16,898; Atwood v. Portland Co., 10 Fed. 285.]

2. If in any case fraud is maintained, no court will grant relief to the party on whom the fraud is proven. Fraud contaminates and vitiates every transaction, and to the guilty party completely closes the door of redress.

3. A reissue can be obtained only for that which was the original and true invention of the patentee, but which he failed to claim or describe in the original claim and specification.

4. The invention must be shown in some part of the patent, specification, drawings, and model, or it can not be covered by the reissued patent.

5. All that the law requires, as to utility, is that the invention shall not be frivolous or dangerous. It does not require any degree of utility; it does not exact that the subject of the patent shall be better than anything invented before, or that shall come after. If the invention is useful at all, that suffices.

[Cited in Cook v. Ernest, Case No. 3,155; Converse v. Cannon, Id. 3,144.]

6. The patent itself is prima facie evidence that it was lawfully issued, and that the party who claims it is the original inventor; and if it be assailed, the proof must come from the party calling the validity in question.

7. The reissued patent, unless fraud upon the patent office be proved (and it must be proved, never inferred), is prima facie evidence that there has been no abandonment of the invention to the public, and the burden of proof is on the defendant to show that any surrender to the public has taken place.

8. The reissue furnishes prima facie evidence that everything necessary to justify the commissioner in granting the reissue had been produced before the grant was made.

This was a bill in equity, filed [by Reuben Hoffheins, Joseph H. Shireman, and others], to restrain the defendant [George W. Brandt] from infringing letters patent [No. 7,813] for an "improvement in horse-rakes," granted to Harvey W. Sabin, December 3, 1850, extended for seven years from December 3, 1864, to Calesta E. Sabin, administratrix of Harvey W. Sabin, deceased; by her assigned to Charles Mason, Robert W. Fenwick, and De Witt C. Lawrence; reissued to said assignees, March 28, 1865, in four divisions, numbered respectively 1912, 1913, 1914, and 1915, and by them assigned to complainants. The bill charged the infringement of reissues 1914 and 1915. The claims of the original and the reissued patents in controversy were as follows: Original patent, December 3, 1850: "What I claim as my invention and desire to secure by letters patent in my improved horse-rake, is the device for raising the teeth simultaneously to clear them of the hay, and dropping them again, by means of the apparatus, substantially as described, being worked by the draught of the team when thrown into gear, at the will of the operator." Reissue No. 1914: "First, the application of pressure, at the will of the operator, to metallic spring rake-teeth, which are so constructed as to have a spring action within themselves from their gathering ends to the point, or forward thereof, where the pressure is applied to hold them down to their work, substantially as herein described. Second, the combination of independently articulating rake teeth, which are springs within themselves, and a pressure contrivance which is under the control of the operator, substantially as and for the purpose herein described." Reissue No. 1915: "Arranging rake teeth on articulating, tubular laterally-bracing and vertically-supporting eye-bearings, so that the attaching end of each tooth shall cross or intersect a vertical plane passing longitudinally through the axis of the bearings, substantially as described."

John H. B. Latrobe, for complainants.

William J. Waterman and William Schley, for defendant.

GILES, District Judge. This case presents some interesting questions. They have been argued with that ability which is universally recognized as belonging to the counsel engaged in the cause; and I have tried to do justice to the arguments by a patient review of the authorities to which I was referred, and by a thorough examination of the evidence. The suggestion was made, at the commencement of the hearing, that possibly the case ought to go to a jury, as it involved the question of the originality and usefulness of the invention; but an examination of the pleadings and evidence showed, that the case had been prepared to be submitted, on final argument, here, for trial; and the grant of jurisdiction, by the act of 1836 [5 Stat. 117], seems to the court to be as full in equity as at law. There at one time prevailed, in the circuit courts of the United States, the idea

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

that the court, as a court of equity, would interfere in aid of a patentee only where his patent was sanctioned by general acquiescence for many years, or had been maintained at law, by the verdict of a jury, who had passed upon the novelty and utility of the invention, when called in question. But I think that the current of decisions of the last few years has been otherwise; and that courts of several of the circuits have held (and these decisions, too, have been made by the presiding judges of those circuits, who are members of the supreme court) that the grant of jurisdiction is as full in equity as it is at law. To sustain that view, I refer to Allen v. Blunt [Case No. 215]; Nevins v. Johnson [Id. 10,136]; Sanders v. Logan [Id. 12,295].

I proceed, then, to the discussion of the case at bar. This is a bill filed on the equity side of the circuit court of the United States for the district of Maryland, praying an injunction to restrain the infringement of the complainants' patent for a horse-rake, and asking for an account. I would here incidentally remark, that while the jurisdiction is full and ample, that remedy only can be granted in equity which a court of equity is competent to give. A party can sue at law for damages for an infringement, but in equity he can obtain no such damages. His right may be maintained and protected for the future, and an account may be required. I recite the bill as it should have been framed. A slight mistake occurs in its statements. I read it as corrected by the counsel at bar. It states that:

"Harvey W. Sabin, who was at the time the original and first inventor of a new and useful improvement in horse-rakes, and a citizen of the United States, made application, in writing, to the commissioner of patents of the United States for letters patent for said improvement, and having then and thereafter fully complied with all the requisitions of the acts of congress in such case made and provided, did thereupon obtain letters patent of the United States in due form of law, bearing date on the third day of December, in the year 1850, granting to the said Harvey W. Sabin, his heirs, administrators, or assigns, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in horse-rakes, for the term of fourteen years from the said third day of December, in the year 1850. That the said Harvey W. Sabin having departed this life, letters testamentary were duly granted to Calesta E. Sabin, by the prothonotary of Niagara county, in the state of New York; and that the term of fourteen years being about to expire, the said Calesta E. Sabin, administratrix as aforesaid, made application to the commissioner of patents to have the said letters patent extended for the further term of seven years; and the said Calesta E. Sabin having brought herself within the scope of the provisions of the act of congress authorizing the extension of letters patent, and complied with all the requisitions of the acts aforesaid, the said letters patent were extended by the said commissioner of patents seven years from December 3, 1854." That subsequently to said extension: "The said Calesta E. Sabin, by an assignment duly executed and recorded, conveyed all the interest of the said Harvey W. Sabin, his heirs, administrators, or assigns, in the said letters patent, extended as aforesaid, to Charles Mason, Robert W. Fenwick, and De Witt C. Lawrence, of the city of Washington." The bill further states: "That the said assignees having surrendered the said letters patent, the same were canceled and new letters were ordered to be issued to the said assignees on four amended specifications, which were accordingly issued, bearing date on the twenty-eighth day of March in the year 1865, and numbered, respectively, Nos. 1912, 1913, 1914, and No. 1915, as will appear by reference to copies of the said reissues duly authenticated. * * * That the said Mason, Fenwick & Lawrence, did, on the nineteenth day of May, 1865, by an instrument duly recorded, assign to" the complainants "all their right, title, and interest in and to the letters patent, so as aforesaid reissued on four amended specifications, by which said assignment" the complainants "became and now are entitled to all benefit and advantage from said letters patent, the extension and reissues aforesaid. That ever since the said nineteenth day of May aforesaid, the defendant, well knowing the premises, and fully aware of the rights of" the complainants, "but contriving to injure them and deprive them of the benefits and advantages which they otherwise would have derived, and without the license of" the complainants, "and wholly without any authority whatsoever, has unlawfully made, constructed, and used, as well as vended to others to be used, the new and useful improvements in those rakes, which are particularly specified and described in reissues No. 1914 and No. 1915, aforesaid. * * * That the defendant continues to manufacture and sell said rakes, though warned and requested to desist therefrom." And the complainants therefore pray for an account, and a perpetual injunction, etc.

The answer of George W. Brandt sets up several defenses. First and principally, fraud in procuring the extension of said letters patent, and in surrendering the same and obtaining the four reissued patents for the invention made, or alleged to be made, by Harvey W. Sabin. The circumstances on which this charge of fraud is based are set forth in the answer as follows:

"That said Messrs. Mason, Fenwick & Lawrence are a firm who have been engaged for some years in business in the city of Washington, in the District of Columbia, as solicitors for patents, and in practice generally, as patent lawyers; and that the re-

spondent having occasion for legal advice in relation to his rights and interest, as assignee of a certain patent previously granted to one Randall Pratt, consulted and retained said firm as his legal advisers in that behalf; and that the relation of attorney and client was thus created between said Messrs. Mason, Fenwick & Lawrence and the respondent, and said relation was subsisting at the time of the alleged granting of letters of administration on the estate of the said Harvey W. Sabin, and at the alleged assignment to the said Messrs. Mason, Fenwick & Lawrence, and at the time of the alleged surrender of the patent so granted to the said Harvey W. Sabin, and at the time of the said reissues, marked as stated in said bill, No. 1912, No. 1913, No. 1914, and No. 1915. That during the time aforesaid, and after the retainer by the respondent of the said Mason, Fenwick & Lawrence, and the payment to them of a large retaining fee, and whilst they were possessed of the said patent so granted as aforesaid, to the said Randall Pratt, and whilst employed and occupied on behalf of this respondent to procure reissues of said patent so granted to said Randall Pratt, and assigned as aforesaid to the respondent, and whilst reporting to the respondent, as the respondent avers they did report, that there was nothing to interfere with the right of the respondent as assignee as aforesaid, and nothing to invalidate in any degree the said patent so granted to the said Randall Pratt, the said Messrs. Mason, Fenwick & Lawrence, in utter disregard of their obligations to this respondent as their client and employer, and with the intention to procure to themselves some rights, actual or semblable, adverse to the respondent, sought out the representatives of said Harvey W. Sabin, and procured in some way (but whether in due form of law the respondent does not know) letters of administration to be issued on his estate, and procured, for some trifling consideration, an assignment to be made to them of said letters patent granted to said Sabin by the person who claimed to be the personal representative of the said Harvey W. Sabin; and afterward, and whilst acting as attorneys for the respondent as such assignee of the said patent granted to said Sabin, surrendered said patent (just previously extended by their procurement, and whilst acting as attorneys for the respondent as aforesaid), and procured said reissues marked, as alleged, No. 1912, No. 1913, No. 1914, and No. 1915; and still continuing to act as attorneys for the respondent, procured for the respondent, as assignee of the patent of the said Pratt, the several reissues to the respondent as assignee on the surrender of the said letters patent granted to said Pratt (save one which has since been granted to the respondent by the patent office); and when asked by the respondent whether there was anything discovered which could interfere in any way with the rights of the respondent, he was by them assured that they had made a very thorough examination, and nothing had been found which at all interfered with the reissued letters of the respondent. That he cheerfully paid to them all charges, expenses, and their fees incurred in the procurement of the said reissues of the said letters patent of the said Randall Pratt. That the said complainants had knowledge of all these facts, and he avers that they were not bona fide purchasers without notice, from the said Mason, Fenwick, & Lawrence, but had, in fact, at the time they purchased, and before payment of the purchase-money, full and actual notice of all the facts aforesaid. He avers that no better title vests in complainants than vested in said Mason, Fenwick & Lawrence." The fraud charged is fraud upon the defendant. It is further charged that the complainants had knowledge of all these facts, when they purchased said reissued patents. The second defense denies that Sabin's original patent was for a new and useful improvement in horse-rakes, or one that could be put into practical operation. The third defense is a denial of any infringement of such patents, even if they be good and valid. The fourth is that Sabin's patent had been surrendered to the public, by Sabin's failure to make or sell any rakes, as set forth and described in said letters patent, etc. Fifth, that the assignment made by Mrs. Sabin to Mason, Fenwick & Lawrence, when they were acting as the defendant's attorneys, inured to his benefit.

I shall examine these defenses in the order in which they have been taken.

The first is the charge of fraud. This, of course, is entirely a question of fact. If, in any case, fraud is maintained, no court will grant relief to the party on whom the fraud is proven. Fraud contaminates and vitiates every transaction, and to the guilty party completely closes the door of redress. This charge has in the argument been pressed with a great deal of ardor. I have read and re-read the testimony upon this point. Now, it will be borne in mind that these charges are not responsive to any allegations in the bill. They have not, therefore, the force of evidence, and require separate and independent proof.

And, first, were Mason, Fenwick & Lawrence, attorneys of defendant in all matters relating to his patent, or were they employed for a specific purpose, which they accomplished, and for which, and for which alone, they were paid? Let us examine the evidence on this subject. Brandt's own testimony will be found on pages 45, 46, and 47 of the printed record. He says, in answer to the sixth interrogatory: "For what purpose did you visit them, and what then and there occurred? State particularly. Answer. I visited them for the purpose of ascertaining whether reissues could be pro-

cured on the patent. I showed them my title papers. Mr. Fenwick took me to an adjoining room, and introduced me to a gentleman whom he called Judge Mason, and stated, 'Here is the owner or assignee of the Pratt patent, which interfered so much in obtaining patents on other rights.' The judge replied that he thought the owner of the Pratt patent would wake up to his interests some day. Mr. Fenwick said that we would walk over to the patent office, and examine the patents. On the way, as we were going there, Mr. Fenwick stated that if I had told him the name of the patent when I had seen him before, he would then have told me all about it. At the patent office, he called on a gentleman who came and opened the cases where the models were. We got the Pratt model and looked at it, and Mr. Fenwick took notes from the model." In another part of his testimony he says: "I asked him what the charge would be, and Judge Mason said it would depend on the number of divisions; the more divisions, the more would be the cost. I remarked that I wanted the reissue in the most secure manner, and that as I considered them my counsel, I would leave it to them. Mr. Fenwick said that he would not have less than four divisions. Judge Mason then said that if it were in four divisions, it would cost two hundred and ninety dollars," etc. Now, if the question stood alone upon the testimony of Mr. Brandt, it is perfectly patent, to me, that these gentlemen were employed by him for a specific purpose. He says expressly, that he went to them to get a reissue of the Pratt patent. But did he dream, or did any other man dream, that, getting a reissue of the Pratt patent, he could incorporate with it any other improvement or invention than the Pratt patent itself contained? He says he went to them to procure reissues on the Pratt patent; that is, to procure reissues on the Pratt patent for what was invented by Pratt and shown by the Pratt model or drawings, but which the specification failed to claim. That is all. It can be nothing more.

It is to be remarked, here, upon his testimony and that of Smedley—and this is the only testimony produced by the defendant to sustain the grave charge of fraud, which is not only to defeat the complainants in this suit, but to assail the character of men of high reputation, engaged in the business of patents, and whose success in business depends upon the maintenance of that high character, not only for skill, but for integrity—it is to be remarked, here, that Mr. Brandt himself, either in the correspondence or in the evidence, is nowhere shown, at the time when these parties notified him that they were the owners of the Sabin patent, ever to have claimed its ownership. Mr. Mason, whose testimony on the subject appears upon page 12 of the printed record, states that his firm was employed by Hoffheins & Co., and also by the defendant. It appears from all the testimony, that these gentlemen, as patent agents in Washington, were employed by Brandt, the defendant, to procure four reissues on amended specifications of the Pratt patent; and that in the course of an investigation for another party, it was discovered that one matter claimed in his fourth specification had been covered by the original Sabin model. What is his complaint to-day? It is that, with this knowledge, Mason, Fenwick & Lawrence did not go on and practice deceit and fraud upon the patent office, by concealing this fact—which might have escaped the eyes of the examiners in the office—and have this claim embraced in the fourth branch of the reissued patent. That is the respondent's defense. Well might he have charged them with fraud if they had taken part in such a transaction! But as soon as they discovered the fact, they told him they could not procure for him all he wanted in these four reissues, because the patent of Sabin was found to interfere. "We can not do it," they said in substance; "if you do not think it proper to go on, if you think your other reissues will be valueless, we will hand you back the money you have paid us so far, and stop the business." He thought otherwise, and proceeded to obtain the grants covered by the other reissues of the patent. The whole correspondence, which I have not now time to read, shows this state of facts. It shows that these parties were employed for a specific purpose, which they accomplished, in procuring for Mr. Brandt reissues of all he had a right to claim, as covered by the original patent, models, and drawings of Pratt. I can find, therefore, in the whole of this evidence, from beginning to end, nothing whatever to sustain the charge of fraud so gravely made and so strongly pressed in this case against these gentlemen.

We come to the second defense, the want of originality and usefulness in the Sabin patent. In the discussion of this branch of the case, we must first settle what was the invention of Harvey W. Sabin in 1850. In order to ascertain that, where are we to look? Are we to look at the specification of the patent alone? or have we not a right to look also to the drawings which accompany those specifications, and are referred to in them, and to the model which is placed in the patent office? I hold that we clearly have a right to look to any of these. For, under the true construction of the patent act of 1836 [supra], a reissue can be obtained only for that which was the original and true invention of the patentee, but which he failed to claim or describe in the original claim and specification, in such a manner that a person skilled in the art could, from that specification, construct the machine, or the subject of the patent, whatever it might be. The invention must be shown in some part of the patent, specification, drawings, and mod-

el, or it can not be covered by the reissued patent. As authority for this canon of construction, see Hogg v. Emerson, 6 How. [47 U. S.] 485, and the case of Stephens v. Salisbury [Case No. 13,369].

We look, first, then, at the claim in the Sabin patent. Many of the distinctive features as claimed in reissues Nos. 1914 and 1915, are not set forth in that original claim, nor are they set forth in the specifications of the original patent. But do they not appear by the drawings? What are the claims in reissues Nos. 1914 and 1915? That of No. 1914 comprises the elastic or springy teeth, having a spring action within themselves, from their gathering ends to their point of juncture with the axis, combined with the pressure-bar, and that combined with separate articulation, upon the axis. In No. 1915 is claimed the arrangement of these teeth on tubular, lateral, as well as direct supports, and the tangential connection of the tooth with the axis. Look at the drawings attached to the original Sabin model. What mean those flat metallic teeth? The teeth must be metallic, and they must be springy from their gathering points to their tangential bearings upon the axis. A pressure-bar is certainly sown; but what mean the flat metallic teeth? Look at the testimony on page 61 of the printed record, that of Mr. Octavius Knight, the expert of the defendant: "Thirty-Third Cross-Interrogatory. Looking at the model, as an expert, does the flatness of the teeth indicate the purpose of the inventor to make them operate as springs? Answer. In my opinion it does." These specifications and drawings are not for the eye of the crowd; they are for the eye of an expert, of a skilled mechanic. An expert, or a skilled mechanic, will say: "Of course, if I am to make a machine upon that specification, I will make it with a spring tooth, for the inventor has intimated that to me, by making the teeth metallic, and placing them flatwise."

We must look at the model, which is as much a part of the patent as the specifications and drawings, and which the patent laws require to be preserved, to illustrate anything that may be doubtful to the mechanic who undertakes to make the machine from the patent after the patent has expired. For the great object of the patent law is to give activity to the ingenuity of the country, granting an exclusive privilege for seventeen years (as the law now stands), but leaving evidence of the process to all who may thereafter desire to copy it, and leaving that evidence not only to the mind, but to the eye, in the model, for the benefit of the mechanic who comes in after years to make a machine from its pattern. Here is the model before us. Here is a pressure-bar; here is a separate articulation to the eye-bearings; here is a tooth that is springy from its gathering end to its tangential connection with its axis.

Now what says Mr. Edward S. Renwick, the expert examined by the complainants, upon this subject? "Third Interrogatory. Have you examined letters patent of the United States, granted originally to Harvey W. Sabin for an improvement in horse-rakes, which was reissued in four parts, numbered respectively Nos. 1912, 1913, 1914, and 1915, and especially Nos. 1914 and 1915? And if yea, do you understand the principle and mode of operation as described in said Nos. 1914 and 1915, as the description is addressed to an expert in such matters? Answer. I have examined printed copies of the four divisions or reissued patents referred to in the question. I have also examined the reissued letters patent Nos. 1914 and 1915, referred to in the question. I believe that I understand the construction and operation of the machines described in the last two reissued patents referred to in the question. Fourth Interrogatory. Look at the model now shown you, with the certificate of the patent office attached thereto, and marked 'Frederick Pinkney, Commissioner, No. 1,' and say whether it does or does not exhibit the inventions described in Nos. 1914 and 1915, respectively, in their principle and mode of operation. Answer. I have carefully examined the model referred to in the question, and find that it correctly represents the inventions described in the reissued patents Nos. 1914 and 1915."

It being perfectly apparent, then, that we have evidence, full and satisfactory, that the reissued patents Nos. 1914 and 1915 were reissues of inventions shown by the drawings and model of the original Sabin patent, and were therefore properly reissued by the commissioner of patents, we now come, in the discussion of this defense, to inquire whether that invention was original with Sabin in 1850. Was the combination of these features, the springy metallic tooth, the pressure bar, the separate articulation of the teeth, and the lateral bracing, new, in the year 1850, and was Sabin the first inventor of that combination? It will be borne in mind, in the examination of this question, that neither of these claims are for a particular specific invention of any one thing. For instance, the separate articulation, or the independent eye-bearings, were not new; but it is the combination of the pressure-bar with the metallic spring teeth, and their final combination with a separate articulation and with lateral bracings, that is claimed.

I would here remark of the grant of this reissued patent, as of that of all other patents, that they are prima facie supposed to be correct. Whatever might have been the rule under the patent act of 1793 [1 Stat. 318], since 1836, before a patent can issue, the drawings and the model have to be filed with it, and it has to be examined by a board, before it can be granted (and the reissues go through the same process). The patent itself is prima facie evidence that it was lawfully issued, and that the party who claims it is

the original inventor; and if it be assailed, the proof must come from the party calling the validity in question. Corning v. Burden, 15 How. [56 U. S.] 270; Allen v. Hunter [Case No. 225]; Philadelphia & Trenton R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458. "But," says the counsel for the defendants, "the burden of proof being upon us to assail the originality of the Sabin patent, we deny its originality; and we have accordingly offered in evidence six patents, or applications for patents, and four models, all of which we hold to have anticipated Sabin's claim." The patents are Smith's English patent; the Delano patent of February 27, 1849; Milligan's patent, August 7, 1848; Carlisle's, May 15, 1847; Eli Saunders', October 24, 1848; and Reed's application, January 7, 1850. We have the Landreth machine, as it is called, the full-sized iron machine, which is said to be made after Smith's patent; and we have three models besides. I have looked through all these patents very carefully, and have with the same care examined the models. Now, I do not want any expert to illustrate a model to me. I feel myself competent to form my opinion when I see a model. I do feel the great benefit of the testimony of experts when we come to examine and construe the specifications and drawings of patents; for I do not profess to be skilled in the technical language of machinists, but of the models I can judge. I can, after patient observation of these models, find none of them that has metallic teeth having a spring action in themselves from their gathering ends to their bearing upon the axis. I can not find any that has the combination of the pressure-bar with the metallic teeth.

Saunders' patent is for an improved racket or shaft, to lift up the rake. It rests on the axle, and is so arranged as to relieve the horse of its weight. Carlisle's patent is for a combination box, with shafts, for the purpose of keeping the rake down to its work. Reed's application exhibits no elastic teeth. It does not pretend to possess metallic teeth springy throughout their entire length. Delano's patent has an independent action of each tooth, and nothing else; it has no pressure-bar. The English patent of Smith has none of these elements whatever, no elastic tooth and no pressure-bar. In Milligan's model, the only pressure-bar is the head of the rake.

I look in vain among these models for this invention. I find in one the pressure-bar, in another the separate, independent articulation of the tooth; I find the tooth made in different forms, but all rigid, with no elasticity, except that in one of the models I find a metal elastic spring, about one-eighth the length of the tooth, put upon the top of it; but in none of the models or specifications do I find anything that approaches the Sabin invention of 1850, which consisted of the combination of the pressure-bar acting at the will of the operator, the metallic elastic tooth, springy from its gathering end to the point of connection with the axis, and these combined with such a separate articulation upon the axis as to give a lateral as well as vertical support where the teeth are connected with the axis. These are the elements of the combination claimed, and I can not find them combined in any of the patents offered in evidence by the defendant.

What says the testimony of the experts? We will look first at that offered by the defendant, because he is bound to make out the existence, in some of these machines, of the features of the invention. Mr. Knight was the defendant's only expert, and Mr. Renwick the only one called on behalf of the complainants. Mr. Knight's testimony commences on page 54: "Interrogatory. Look at the first claim in No. 1914, and say if you know of any machine earlier than Sabin's, answering said claim; if yea, what is it? State what you know. Answer. I find in the model, which is certified under the seal of the patent office to be a true copy of that pertaining to the application of G. M. Milligan, filed in the patent office, of 7th August, 1848, and rejected on the 21st of September, 1848, metallic spring rake-teeth, and handles attached to a bar which constitutes the head of the rake, and is hinged to the frame of the implement. I find that these handles are adapted, and manifestly designed to enable the operator, at will, to exert a downward pressure on the teeth to hold them to their work." That is not the contrivance of the Sabin model. That of the Sabin model is an independent pressure-bar. "I further find that the metallic spring teeth, in this model, have a spring action within themselves from their gathering points to the points at which the downward pressure is applied to them at the will of the operator. I therefore regard this Milligan model as illustrating all the points covered by the first claim in No. 1914. I also find, in the certified copies of letters patent granted to Charles Carlisle, on 15th May, 1847, a representation of a rake having metallic spring teeth, and a means of applying downward pressure to the teeth at the will of the operator, and that these teeth have an elasticity or spring action within themselves from their gathering points to the points at which the downward pressure is applied, except"—here is an exception that kills the whole: "except that their gathering points are made of short pieces of wood, to admit of ready repair when worn or otherwise injured." That needs no comment; that destroys itself. "I also find, in the certified copy of letters patent granted to Eli Saunders, on the 24th October, 1848, a representation and description of means for applying downward pressure, at the will of the operator, to metallic spring rake-teeth, to hold them to their work; and that the metallic rake-teeth here represented have a spring action within themselves from the gathering points to the points at which the pressure is applied.

I am, therefore, of the opinion that the said patent of Eli Saunders is a full anticipation of the invention covered by the first claim in No. 1914." Then, as regards Reed's machine: "I hold in my hands a certified duplicate of model of T. B. Reed's application, filed with the patent office on January 1, 1850, and rejected March 6, 1850, and also certified copies of the drawings and specifications. The said model has rake-teeth which are springs within themselves, and are hinged or articulated upon a common axis; it also has a pressure contrivance, under the control of the operator, by which the said teeth are held down to their work. Inasmuch as the second claim of No. 1914 does not require that the elasticity of the teeth shall extend to the point where the downward pressure is applied, I regard the invention shown and described by Reed as a substantial anticipation of that covered by the second claim in No. 1914."

Let us see, now, what this gentleman says upon the cross-examination: "Fifteenth Cross-Interrogatory. Are not the teeth in the Milligan rake attached to a bar or block, as teeth are attached to a common rake, save in the particular mode of attachment and the shape of the teeth? Answer. I decline to answer the question, because I think that the mode of attaching and the form of the teeth are of the essence of the question. * * * Seventeenth Cross-Interrogatory. Does not Milligan's model, therefore, represent, save in the mode of attaching the teeth, and their shape, and the handles, a common rake-head attached by hinges to the carriage represented? Answer. I think it does. Eighteenth Cross-Interrogatory. Is not the Milligan machine without an axle-tree or wheels, and supposed to go on runners? Answer. It is. Nineteenth Cross-Interrogatory. Is there any pressure applied on the teeth, between their insertion in the rake-head and their gathering points, in the Milligan machine? Answer. Yes; the insertion of the teeth is at the forward edge, and the downward pressure is applied through the rear edge of the flat rake-head." The difference clearly appears, there. There is no independent pressure-bar. The pressure is applied through the head of the rake. "Twentieth Cross-Interrogatory. Is not the entire pressure applied, due to the movement of the rake-head? Answer. It is. Twenty-First Interrogatory. Look at the drawing of the Carlisle patent, and say whether the teeth are not attached firmly to a head G, figure 1, and whether the handles, by which downward pressure is given to said teeth, are not also attached to said rake-head; and whether the pressure on the teeth is not due to the action of the handles on the rake-head. Answer. I answer in the affirmative. * * * Thirty-Fourth Cross-Interrogatory. Look, now, at the Landreth model, and say whether the metallic teeth there represented are not placed edgewise, and not flatwise of the metal. Answer. They are; but their form is such as to give them considerable elasticity, and meet the requirements of flexibility and strength with the greatest economy of materials. Thirty-Fifth Cross-Interrogatory. Are you aware of any hay-rakes that have ever been built upon the Landreth model? Answer. I am not. Thirty-Sixth Cross-Interrogatory. Have you ever seen Landreth's machine in operation? Answer. I have not." Now what says the witness, Mr. Renwick? He says, in his testimony: "For the greater part of the last seventeen years I have been engaged in my present occupation" (that is, the procurement of patents), "and during that period have made numerous investigations into the history of the useful arts, as found in books and patents." He very fully describes the invention of Sabin, as set forth in the reissued patents, and is then asked, page 6: "Interrogatory. Have you examined the specification of an English patent, copied from the records of English patents, in the patent office at Washington, granted to Henry Smith, July 3, 1844, for hand and horse-rakes, and machinery for cutting vegetable substances, No. 10,241? And do you, or not, find described therein the inventions, or either of them, described and claimed in the reissued patents, or either of them, Nos. 1914 and 1915, already referred to? State particularly. Answer. I have examined what purports to be a certified patent office copy of the specification and drawing of the patent granted to Henry Smith, July 3, 1844, No. 10,241. I do not find therein the inventions described and claimed in the reissued letters patent, Nos. 1914 and 1915, nor either of said inventions." The witness goes on to state the claim and description of the Smith patent.

The conclusion to which I am led by the examination of these models, and a thorough reading of these patents, is, that none of them embrace Sabin's invention of 1850; that is, the combination shown and claimed in the reissue.

But another point made in the second defense is the want of utility. Now all that the law requires is, that the invention shall not be frivolous or dangerous. It does not require any degree of utility; it does not exact that the subject of the patent shall be better than anything invented before, or that shall come after. The invention shall not be frivolous; if it is useful at all, that suffices. Whiting v. Emmett [Case No. 17,585]; Wilbur v. Beecher [Id. 17,634]; McCormick v. Manny [Id. 8,724]; Earle v. Sawyer [Id. 4,247].

The third defense is the denial of infringement. The defendant says, in his answer, that, admitting that the invention of Sabin, in 1850, was new, original and useful, he, the defendant, has not infringed it.

To judge of that question I think it only requires an inspection of the model. Here

(in the model, "No. 3," representing the machine sold by defendant) are the pressure-bar and an elastic metallic tooth; and there are separate articulation and eye-bearings. Here, then, is the combination. The only point in which the model differs from that of Sabin's machine ("No. 2,") is that the pressure in the Sabin machine is produced by the hand of the operator, which causes the movement of the pressure-bar; whereas in the defendant's the effect is produced by the pressure of the driver's foot, or by raising the lever. But the same combination exists; the combination of the pressure-bar, the metallic spring teeth, and the separate articulation on the axis. What is the difference? Only that in the defendant's machine, the teeth articulate upon an axis placed over the axle of the moving hay-rake, the machinery to which the horse is attached, and that instead of the operator pressing the bar down or up, as the case may be, by his hand, he does it by his foot. Is that a substantial difference? What is the rule of law upon the subject?

The supreme court in Burr v. Duryee, 1 Wall. [68 U. S.] 573, lay down the rule, as it had been before declared, adopting the language of Curtis on Patents (page 333): "If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way." The effect here to be produced is the pressure to keep the teeth down to their work, and the separately articulating action by which the teeth, when meeting an obstruction presented to one alone, or to two, are enabled independently to rise over the obstacle without lifting up the rest of the teeth.

There is also a difference in another particular, viz: that in the defendant's machine the tooth, after being lifted to a certain height, strikes an obstruction, above which it can only go by all the other teeth being taken up. The teeth are thus confined; but up to that limit they play in exactly the same manner. Each tooth can rise over an obstacle, meeting it separately in the same way as in the complainant's model; and the pressure-bar is applied to the tooth in the same way—in one case by the hand of the operator, in the other by the driver; in the Sabin machine the operator walks behind and the horse is driven in front; in Pratt's model he sits on a carriage and drives and works the pressure contrivance by his foot or by his right hand, whenever he wishes to lift up the rake and drop the hay accumulated. There are two bars, one raising up the rake and the other pressing it down. But here exists the same combination, that of the metallic spring rake-tooth, having a spring in itself, from its gathering end to its connection with the axis, with a pressure-bar and separate articulation of the teeth upon the axis, by means of which each individual tooth is lifted to meet an obstruction, and is enabled thus to take care of itself. Mr. Renwick's testimony on the subject is found on page 3: "Interrogatory. Look at the model now shown you, marked 'Frederick Pinkney, No. 3,' and say whether it exhibits, in principle and mode of operation, the invention described in Nos. 1914 and 1915 respectively, or either of them; and if yea, please describe particularly wherein the correspondence with or diversity consists. Answer. In my opinion it does. The model, 'Exhibit No. 3,' corresponds substantially with the improvement recited in the first claim of reissued letters patent No 1914, in the respect that the said model contains a pressure-frame so constructed and arranged that the operator can, by means of it, apply pressure to metallic spring rake-teeth; also, in the respect that the said model contains spring rake-teeth so constructed as to have a spring action within themselves from their gathering ends to the point where the pressure is applied, for the purpose of holding them down to their work. * * * The said model is also substantially like the improvement recited in the second claim of the said patent No. 1914, in the respect that, in addition to having a pressure-frame and spring rake-teeth, which have the peculiarities above mentioned, the rake-teeth are also jointed or articulated, independently of each other, to the frame work of the machine, so that any one rake-tooth can rise or descend by moving upon its joint, independently of and without affecting the remaining rake-teeth. The model, No. 3, contains, substantially, the improvements recited in the claim of the reissued patent, No. 1915, because it has a series of rake-teeth which are fixed in a secure manner to tubular laterally bracing and vertically supporting bearings, in such manner that the forward parts of the teeth are attached tangentially to the bearings, and are sustained directly upon the axial rod of said bearings; so that each tooth, from the point of attachment to the tubular bearings to its gathering end, is a spring." I need only refer, further, to the testimony of Mr. Knight, the defendant's expert, as found on page 58: "Thirteenth Cross-Interrogatory. Look, now, at the model of the defendant's rake, and say whether it does not comply with the claim of No. 1915 in all particulars. Answer. It does." I do not consider, upon an examination of the models and the testimony, that there exists any substantial difference between these two models; in other words, the model of the defendant, while it embraces something more, does substantially embrace, so far as it goes, the combination which was patented in reissues Nos. 1914 and 1915. I have, therefore, no doubt as to the question of infringement. I found no difficulty in arriving at this conclusion.

The fourth defense is, that Sabin's patent

had been surrendered to the public by the inventor never having made any machines or sold any rights under it. For the law upon this subject, I refer to Wyeth v. Stone [Case No. 18,107]; Stimpson v. Westchester R. Co., 4 How. [45 U. S.] 380; Battin v. Taggart, 17 How. [58 U. S.] 84. The defense charges an abandonment of the original patent. The reissued patents, unless fraud upon the patent office be proved (and it must be proved, never inferred), are prima facie evidence that there was no such abandonment. Says Judge McLean, in Battin v. Taggart, at the close of his remarks, page 85: "The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiffs, or whether they have been constructed and act on the same principle."

The reissued patents standing as prima facie evidence of every fact necessary to bring them within the provisions of the statute, the burden of proof is on the defendant to show an abandonment, or that any surrender to the public of the patent had taken place. There is no evidence in this case to show such surrender. There is no evidence to show that the inventor ever stood by and permitted others to make hay-rakes according to his patent without any claim or opposition. But, on the other hand, the evidence is that within two years after Mr. Sabin obtained his patent he died. That is all set forth in the application for the renewal, as is shown by the file-wrapper. Sabin was a poor man, and probably had not the means to start his invention into practical operation and set it before the public; and before he could perfect any of his machines the man died, and died, too, in indigent circumstances, as is shown by the testimony upon his widow's application. There is, therefore, nothing to show a surrender to the public of the original patent, no abandonment. An entire abandonment must be shown.

The fifth defense is that which denies that reissue No. 1915 contains any patentable novelty. I have already disposed of that question. I have no doubt that it is not open here. See Law Dig. 617; O'Reilly v. Morse. 15 How. [56 U. S.] 112; Battin v. Taggert, 17 How. [58 U. S.] 82, 83, which is a case I have before referred to as showing that that question is concluded by the action of the commissioner, after an examination.

The sixth and last defense is, that the assignment by Mrs. Sabin to Mason, Fenwick & Lawrence, when they were acting as the defendant's attorneys, inures to his benefit. I think I have disposed of that point by the examination of the question of fraud, the first defense taken. If Mason, Fenwick & Lawrence were not the defendant's general counsel, but were acting for him only for a specific purpose, and procured for him, as the evidence on both sides shows they did, all that he had a right to claim, that defense is disposed of.

A good deal has been said in the argument, and it is referred to in the answer, also, as to the course pursued by the firm of Mason, Fenwick & Lawrence, in obtaining an assignment of the rights of Mrs. Sabin, before she applied for a renewal. There is nobody here to complain of that, that has any right to complain. Mrs. Sabin is not here complaining that fraud was practiced upon her, and that she was induced to sell out her husband's right for much less than its value. The government is not here complaining that a fraud was committed upon it. It is every day's practice for a party to sell his right before he obtains his patent; and contracts of that kind have been enforced, and will be enforced. A party can sell his inchoate right to a patent; this party can, therefore, sell her inchoate right to a renewal. And in looking at the circumstances of the case, to the fact that Mr. Sabin had obtained so long ago as 1850 a patent containing a valuable principle, the value of which was discovered by these gentlemen, in Washington, and that it had lain idle and unprofitable to the widow, during all the interval, I think she ought, instead of complaining, to be very grateful that she had the expenses of the extension paid, and received five hundred dollars beside. These gentlemen had to take the risk of putting this patent in operation. They saw that the original patent was defective, that they would have to apply for reissue so that they might have granted to them, specially, what was shown by the model and drawings of Sabin, but not by his claim; and then, after obtaining the extension, and their reissued patents, they had to go through such an ordeal as we have witnessed here, where they have been assailed by ingenious counsel fully bent upon showing that their reissue was worthless, and that they got nothing by their bargain. I do not think, therefore, that Mrs. Sabin had any right to complain. But whether she had or not, she is not here to complain. The transaction, so far as the court judges from the evidence, was fair. She accepted what these gentlemen gave her, and was willing, as it appears, to take anything at all, and certainly to release, for five hundred dollars, what she did not know to be of any value whatever.

Mr. Schley. The last point, to which your honor did not refer, was that there was no assignment from Mrs. Sabin to these gentlemen.

The Court. That question is concluded and closed by the reissued patents.

Mr. Schley. The file-wrapper shows there was no assignment there.

The Court. The reissued patents recite that the patent was assigned, and therefore conclude the question, leaving open only those of fraud, and of the identity of the reissued patents with the original invention. I have examined that question. These reissued patents are prima facie evidence that they were lawfully granted, and that these parties had the right to the reissue. They furnish prima facie evidence that everything necessary to justify the commissioner in granting the reissue had been produced before the grant was made. Taking the view that I have of the case, I will issue an injunction; and if the parties ask it, I will order an account to be taken. A perpetual injunction will be granted.

Case No. 6,576.

HOFFMAN v. ARONSON et al.

[8 Blatchf. 324; 4 Fish. Pat. Cas. 456; 4 Am. Law T. Rep. U. S. Cts. 110.][1]

Circuit Court, S. D. New York. April 24, 1871.

PATENTS—TURN-DOWN ENAMELED PAPER COLLARS—REISSUE—SPECIFICATION—INFRINGEMENT.

1. The reissued letters patent granted to James H. Hoffman, July 25th, 1865, on the surrender of original letters patent granted to him January 24th, 1865, for an "improvement in turn-down enameled paper collars," are valid.

2. The claim of such reissued patent, namely: "The new article of manufacture consisting of a turn-down or folded enameled paper collar, substantially as described," is not a claim covering any and every turned down or folded collar made of enameled paper, without reference to the structure of such paper as enameled paper. It is a claim to the collar made of paper enameled by the use substantially of such composition, composed of such ingredients and applied in such way, as the specification of the patent describes.

3. The patentee having been the first who succeeded in making the proper enameled paper out of which to make a folded collar having the qualities which such a collar must have if made of enameled paper, he made a patentable invention which was not the mere substitution of one material for another, in the manufacture of an old article, although folded collars had before been made of linen, muslin and non-enameled paper.

4. Circumstances stated which characterize as an abortive experiment a prior attempt to make a successful folded enameled paper collar.

5. The specification stated that the coating of enamel must be very thin, and the paper of long fibre and uniformly flexible, and the pores of the paper open to the degree required to receive the enameling composition, the result being that the composition was absorbed by the paper, and the coating of enamel was so thin, and the union between it and the paper was so complete, that the fold could be made without breaking or crumbling the enamel. The specification stated the preferred ingredients of the composition to be blanc fix and white wax, with a trace of ultramarine, for tint. The defendant used one enamel made of blanc fix, glue, wax and soap, and another made of satin white, glue, stearine and alum. The satin white produced the same effect, in the same way, as the blanc fix, and the stearine produced the same effect, in the same way, as the wax. The defendant's paper was of sufficient length of fibre and flexibility to answer the purpose and admit of the fold in the collar, and, in the defendant's collars, the coating of enamel was very thin, and was incorporated with the fibres of the paper. The defendant's paper was made with its pores sufficiently open, so as not to require to be steamed, to open the pores, while the specification of the patent directed the paper to be steamed, so as to open its pores to the degree required. The specification did not speak of using glue in the composition, but it was shown that the use of glue was a matter of judgment in the skilled workman, depending on the quantity of sizing in the paper as made at the mill: *Held*, that the defendant had infringed the patent.

[This was a bill in equity, filed [by James H. Hoffman] to restrain the defendants [Albert Aronson and Joseph N. Aronson] from infringing letters patent [No. 45,998], for an "improvement in turn-down enameled paper collars," granted to complainant January 24, 1865, and reissued [No. 2,034] July 25, 1865, and more particularly referred to in the report of the case of Hoffman v. Stiefel [Case No. 6,578]. The nature of the invention and claim is sufficiently stated in the opinion of the court.][2]

E. Wetmore and Kesller & Blake, for complainant.

Anthon & Leeas and Geo. T. Curtis, for defendants.

BLATCHFORD, District Judge. This suit is founded on reissued letters patent of the United States, granted to the plaintiff, July 25, 1865, on the surrender of original letters patent granted to him January 24, 1865, for an "improvement in turn-down enameled paper collars." The specification of the patent says: "Ever since the first introduction of turned-down paper collars as an article of usual wear, it has been attempted by many persons to make them with an enameled surface, but until my invention such attempts have failed. All such prior attempts, like my own early efforts, failed, for the reason that they attempted to make collars from paper which was enameled for, or prepared as if intended for, the uses for which enameled paper was usually employed; and from this it always resulted that the enamel, and sometimes both the enamel and paper, was cracked or broken in making the fold. The error which led to all such failures was in attempting to use for a new purpose, a material suitably prepared for an entirely different purpose. In the course of my experiments, I discovered that it was in vain to attempt to make the required fold for a turned-down collar, in paper enameled for other purposes which do not require the making of folds. No amount of care in folding, and no appliances could be devised, that could prevent the enameled surface from breaking at the fold. After making many unsuccessful efforts, and the trial of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 324, and the statement is from 4 Fish. Pat. Cas. 456.]

[2] [From 4 Fish. Pat. Cas. 456.]

various compositions for producing the enameled surface, none of which would stretch sufficiently to admit of making the required fold, I finally discovered that the desired result would be obtained by making the coating of enamel very thin, and much thinner than had ever before been applied in making enameled paper, and making or selecting for the purpose paper made of pulp having a very long fibre, and by preference, obtained from linen rags. In the manufacture of the paper from which I make my improved collars, I am careful not to reduce the linen stock to a finer pulp than is absolutely necessary for paper of the thickness required, that the fibres may remain long and the body of the paper be uniformly flexible; or, I am careful to purchase, for my manufacture, linen paper having these characteristics—a long fibre and uniform flexibility. Taking paper so made, I moisten and steam it until all its pores or spaces between its fibres are opened to the degree required to receive the composition which constitutes the enamel of the collar when finished. The composition I prefer for this purpose consists of about four parts of blanc fix, one part of white wax, and a trace of ultramarine, to give the required tint. The blanc fix being digested (like the ultramarine) in hot water, and the white wax being melted, are mixed in about these proportions, and stirred thoroughly together, until the wax is intimately incorporated with the other materials, and the whole reduced to a thin homogeneous paste, which is now applied warm to the surface of the steamed paper by a brush, or by coating a warm metal plate, and then laying the paper, sheet by sheet, upon the plate, and then letting the composition be taken up by absorption from the surface of the plate. Great care must be observed to put on the coating of composition so thin that it will simply cover the surface of the paper, and, for that reason, I prefer to apply the thin coat of composition with a brush to the surface of the metal plate, from which it is then absorbed by the paper, although it may be applied directly to the paper with a brush. After the paper has been thus coated, it is passed between polished heated rollers, under considerable pressure, by which the composition is caused to adhere firmly to the paper and the outer surface highly polished. From paper thus prepared, the collars are cut to the required form, for ladies or gentlemen, and then folded or turned down. The union of the composition and the paper is so complete, and the coating of composition so thin, that the fold can be made without breaking or crumbling the enamel—a result never obtained before my said invention. The collars can be embossed, or punched, or printed, as desired, as the surface so enameled will receive without injury any desired style of ornament or finish. The claim is: "The new article of manufacture, consisting of a turn-down or folded enameled paper collar, substantially as desired."

The bill charges, as an infringement, that the defendants have made and sold collars made and manufactured upon the plan described and claimed in the patent. The answer denies that the patent is valid, or that it secures to the plaintiff any right to prevent the defendants from making or selling the particular kind of paper collars made and sold by them, for these reasons: 1. That, as matter of fact, a turn-down collar, made of linen, muslin, or paper, was an old article before the date of the plaintiff's invention; and that, if the plaintiff was the first person who ever made turn-down or folded collars of enameled paper, such substitution of one material for another, in the manufacture of an old article, will not support a patent for a new article of manufacture, as claimed in the plaintiff's patent. 2. That the patent contains a false suggestion in a matter of fact, namely, that the state of the art of making enameled paper prior to the plaintiff's invention was such, that none of the previously known processes of preparing enameled paper would admit of making an enameled surface that would not break in folding, whereas, prior to the plaintiff's invention, the art of making enameled paper embraced many known processes of manufacture, whereby, without an invention, in fact or in law, and by methods well-known and practiced by those skilled in the art, an enameled paper could be prepared fit to be used in the manufacture of turn-down or folded paper collars, and capable of folding without breaking the enameled surface at the fold. The answer avers, therefore, as matter of law, that the patent can not be supported as covering a new article of manufacture, because the material of which such new article is, in the patent, described to be made, namely, an enameled paper capable of folding without breaking the enameled surface at the fold, could be made without invention, by the application of processes well known in the previous art of enameling papers.

The answer also sets up, that one Lindley M. Crane, in 1863, at Ballston Spa, New York, and at Troy, New York, practiced the same process of manufacturing turn-down enameled collars that is described and claimed in the plaintiff's patent, and made and exhibited to others turn-down enameled paper collars of enameled paper, that did not break at the fold, when folded in the process of forming the collar.

The answer avers, that the defendants are manufacturers and venders of turn-down paper collars by a process of manufacture known as the linen finish, and essentially unlike the plan of manufacture described and claimed in the plaintiff's patent, and that they have not infringed that patent.

The specification sets forth, as the essence of the plaintiff's invention, that he has discovered the method of producing a properly enameled paper out of which to make a turn-down paper collar wholly of enameled

paper, by putting the proper enamel on the proper paper, in the proper way, so as to enable the fold to be made without cracking or breaking the enamel or the paper. The specification speaks of paper collars as old, and of turn-down paper collars as old, but the new thing is a turn-down paper collar practically and successfully made of enameled paper. The reason why the prior attempts to make such a collar failed is pointed out. The enameled paper used was not proper enameled paper for the purpose, and, therefore, the enamel always cracked or broke in making the fold, and sometimes the paper also did so. The enameled paper used was not suitable for the new purpose, but was suitable only for the purpose had in view when such enameled paper was used, which was not the purpose of making therefrom turn-down collars which required to be folded in the manner in which such collars are folded. The specification then states, that the plaintiff made many unsuccessful experiments to produce the enameled surface required, and at length discovered that the coating of enamel must be very thin and much thinner than had ever before been applied in making enameled paper; that the paper must be paper of long fibre, and, therefore, uniformly flexible in its body; and that the pores of the paper must be open to the degree required to receive the composition constituting the enamel. The composition is absorbed by the paper, and the union between it and the paper is so complete, and the coating of composition is so thin, that the fold can be made without breaking or crumbling the enamel. This result, the specification avers, was not obtained before the plaintiff's invention. The constitution of the enameling composition which the patentee says he prefers is given. It consists of about four parts of blanc fix and one part of white wax, and a trace of ultramarine, to give the required tint. They are to be mixed into a paste, which is to be applied to the surface of the paper and made to adhere firmly to it.

The defendant's enameled paper, out of which their collars have been made, was at first made by using a composition of blanc fix, glue, wax, and soap. More recently the composition has been made of satin white, glue, stearine, and alum.

Much discussion was had, on the argument, as to the proper construction of the claim of the plaintiff's patent. This patent came before me for consideration in the case of Hoffman v. Stiefel [Case No. 6,578]. I then said: "The evidence shows that the plaintiff was the first person who successfully made a turn-down or folded collar wholly of paper with an enameled surface. The enameled paper known prior to the making by him of the invention covered by his reissued patent was unsuitable for the making of a turned-down or folded collar wholly of paper. The fact that such a collar was not known as a practical thing before the plaintiff made it, would naturally lead to the conclusion that the proper enameled paper was not made until the plaintiff made it, because, if the paper had been known, the use of it for the collar was sufficiently obvious. Finding no proper enameled paper ready to his hand, the plaintiff experimented for some time to produce it, and at length succeeded, and the making of the collar followed. As the plaintiff invented the proper mode of enameling the proper quality of paper to enable a turned-down or folded collar to be made wholly of paper, without any danger of crumbling or breaking the enamel by the operation of folding, the collar made from such enameled paper was a new article of manufacture, and the claim to the new article of manufacture consisting of a turned-down or folded enameled paper collar, substantially as described, is valid." In that case, the infringement of the patent was not disputed. The views I then expressed have only been confirmed by the evidence developed in this case. But there is nothing in those views which countenances the idea that the patent is to be construed as claiming any and every turned-down or folded collar made of enameled paper, without reference to the structure of such paper as enameled paper. The claim is to the collar made of such enameled paper—that is, such paper and so enameled, enameled by the use substantially of such a composition, composed of such ingredients and applied in such way, as the plaintiff describes. On this construction of the claim, the patent must be tested as to its novelty and validity, and the question of its infringement must be decided.

In this view, there is no force in the objection taken in the answer, that the patent can not be sustained because the plaintiff has done nothing except to substitute, in making a turn-down or folded collar, enameled paper, as a material, in place of linen, muslin, or non-enameled paper. The evidence is very full and clear, that the plaintiff was the first person who succeeded in making the proper enameled paper out of which to make a folded collar having the qualities which such a collar must have if made of enameled paper. He experimented for some time to produce such a paper. Other persons experimented to produce it and failed. It did not before exist. He created what is, in the eye of the patent law, a new material. It is shown to be the only material suitable for making a folded collar of enameled paper. It is true that paper existed before, and enamel existed before, and enameled paper existed before, and every ingredient the plaintiff used in his composition existed before, and a composition composed of the ingredients he used in his composition existed before, and paper had before been enameled by coating its surface with an enameling adhesive composition. Yet the plaintiff made an invention, and a highly useful one, and he

clearly describes it in his specification. That invention was not the mere substitution of one material for another, in the manufacture of an old article. In view of the evidence as to the state of the art, it required invention, and involved the exercise of invention, to make an enameled paper suitable for a folded collar.

The evidence as to what Crane did shows, at most, an abortive experiment. The collars he made and had made have disappeared, the enameled paper used to make them has disappeared, the name of its enameler is unknown, the process by which it was made is not stated, its structure is not described, and the circumstances attending the making of the collars, according to the evidence of Crane and Frisbie, were such that, in view of the recognized importance at the time, as shown, of the production by paper collar manufacturers of a successful folded enameled paper collar, if Crane had produced one, the persons to whom he refers as having seen the collars he made, and the enameled paper he had, would never have suffered so valuable an invention to be lost. It was not followed up and the world was no wiser because of it. Crane himself afterward became a licensee under the plaintiff's patent.

It is claimed that the defendants have not infringed the patent of the plaintiff. But the defense on this point fails. The enameled paper they have used to make their collars is substantially the same article as that described in the patent, whether made with a composition of blanc fix, glue, wax, and soap, or with a composition of satin white, glue, stearine, and alum. It is shown that the satin white was substituted for the blanc fix; that blanc fix and satin white are both used for the same purpose and produce the same effect, in the same way, in the composition, namely, to give color and body to the coating, and are equivalents for each other in the composition; and that wax and stearine are both used for the same purpose and produce the same effect, in the same way, in the composition, namely, to give a gloss to the coating, and are equivalents for each other in the composition.

The paper used by the defendants is of sufficient length of fibre, and consequent flexibility, to answer the purpose and admit of the fold in the collar. Johnston, one of the witnesses for the defendants, says that, in order to prevent the paper or enamel from breaking at the fold, it is the most desirable point of all, as a requisite, to have the paper of a sufficient length of fibre, and to have the mixture applied in a sufficiently dilute condition.

The testimony shows, in accordance with the language of the specification, that, in order to enable a suitable paper to be enameled with any composition, so as to make a successful turned-down enameled paper collar, the enamel must be applied thin, and must be so applied as to be incorporated with the fibres of the paper. These features are made prominent in the specification. The thinness of the coat is spoken of at four places. The incorporation of the enamel with the fibres of the paper is insisted on, in the direction that the spaces between the fibres shall be open to the degree required to receive the composition, and in the statement that there is a complete union of the composition and the paper, and that the composition is absorbed by the paper. It is shown by the evidence, that the paper used to make turned-down enameled paper collars is much heavier and thicker, than the enameled paper used for other purposes before the plaintiff's invention; that an enamel of a given thickness on a light paper will not break in folding the paper, when an enamel of the same thickness on a heavier and thicker paper will break in folding the paper, unless the enamel be incorporated, according to the plaintiff's invention, with the fibres of the paper, and the external coating of it left very thin; and that, by such mode of enameling, there is no more liability to have the enamel crack with a thick paper, such as is required for a folded collar, than with a thin paper, whereas, in the former mode of enameling, of simply coating the surface of the paper, the enamel would break the more easily in folding as the paper used was the thicker. The proof shows that, in the defendants' collars, the coating of enamel is very thin, and is incorporated with the fibres of the paper. Such fibres were, before the enamel was applied, open, in the language of the specification, to the degree required to receive the composition.

Much stress is laid by the defendants on the suggestion, that they do not steam their paper; that the plaintiff, in his specification, states that he moistens and steams his paper "until all its pores, or spaces between its fibres, are opened to the degree required to receive the composition;" and that, therefore, there is no infringement of the patent. It would naturally occur to any one, that if, in the defendants' collar paper, the composition is incorporated with the fibres of the paper, such composition must have reached the spaces between the fibres because such spaces were open to receive it; that, in making paper for collar paper, where the pores are required to be open to receive such composition, it would be easier and more economical to leave the pores open in manufacturing the paper, than to fill them up only to have them opened again by steaming the paper; that, if the patent directs steaming to be done to open the pores, setting forth the opening of the pores to be necessary, and setting forth why it is necessary, it is because it assumes the paper to be paper with its pores closed; that it is probable that all the paper "of the thickness required," as the specification says, for folded collars, known at the time the patentee made his specification, was made with its pores closed; that it

is also probable, that, since his invention, paper of the thickness required is made with its pores open; and that, therefore, the question of steaming the paper has relation, properly, only to the question of whether the pores of the paper are sufficiently open without going through the process of steaming the paper. And such is the result of the evidence.

It is also urged, for the defendants, that they do not infringe because they use glue in their composition, and the patent does not speak of glue. Much testimony was taken, on the part of the defendants, to show that enameled paper for folded collars could not be successfully and practically made according to the description in the plaintiff's specification, without the use of glue. But this testimony was met and overthrown, and the counsel for the defendants admitted, on the hearing, that the plaintiff had proved with very great precision and beyond a peradventure, that his method of preparing enameled paper, as laid down in his specification, could be and was carried on successfully without the use of glue in the enameling composition. This subject of the use of glue in the composition has a connection with the question of the openness of the pores of the paper, and with the question of the sizing put into the paper at the paper mill in making it. Broadbent, one of the witnesses for the defendants, says, that, in enameling the paper for folded collars, the enameling composition must be exactly prepared to meet the condition of the paper; that paper may be slack-sized at the mill and may not have any sizing in it at all; and that, in that case, it will require glue, or some such substance, in the enameling composition, to supply the want of sizing, and in proper proportions to meet the condition. Walther, a witness for the plaintiff, says, that where the collar paper has in it the proper quantity of sizing, it is steamed to open the pores, and no glue is used in the composition; that, if the paper is deficient in sizing, it is either sized by the enameler or sizing is put into the enameling composition; that, if the paper is well sized, as all collar paper, if properly made, should be, the use of glue is not necessary to incorporate the composition with the open pores of the paper; that, prior to the plaintiff's invention, it was part of the state of the art, to put glue or some other glutinous substance into the enameling composition, when the paper was deficient in sizing, and that, when the enameled paper for the folded collars was first made, it used to be made with sufficient sizing. The use of the glue or sizing is to insure the firm adhesion of the coating of composition to the paper. The plaintiff testifies, that, at the time he made his invention, in the latter part of 1864, the collar paper, as furnished by the paper mills, was generally much better sized and more highly calendered than it has been more recently and is now; that, as a general thing, it is not now as well made in either of those respects; that any enameler would know how to correct the absence of sufficient sizing in the paper, by adding it to the composition; and that that was part of the knowledge of the enameler when the plaintiff's invention was made. This testimony is not contradicted. It disposes of the objection that the plaintiff's specification does not prescribe the use of glue, and of the further objection that it does not direct that the paper shall have any particular degree of sizing. Those are matters of judgment in the skilled workman, to whom the specification is addressed. It speaks as of its date, the end of 1864, or January, 1865, and in reference to the collar paper as then in the market, in regard to sizing. When such collar paper is used, it has sufficient sizing, without the use of glue in the composition, to make the composition adhere firmly. But, because it is so sized, its pores are closed by the sizing and require to be artificially opened. If the paper is made with deficient sizing, so as to leave its pores open, and make steaming unnecessary, glue must be added to the composition. The plaintiff, using the sized paper which, on the evidence, must be held to be the paper to which his specification refers, found that, if he opened the pores, the composition would do its work without glue. He, therefore, said nothing about glue. But every enameler knew that a deficiency of sizing in the paper was to be supplied by putting glue into the enameling composition. The defendants create such deficiency of sizing, so as to get open pores in the paper without steaming it, and then supply the want of sizing by adding glue to the composition. This is an invasion of the patent under a guise of evading it.

That the plaintiff applies his composition warm, and presses the coated paper between heated rollers, as stated in his specification, are minor matters, not shown to be of the essence of the invention. They do not affect the question of infringement.

The fact that the defendants emboss their paper collars with what is called the linen finish, is outside of the subject involved in the controversy. The plaintiff's specification says, that the surface enameled by his process will receive, without injury, any desired style of ornament or finish, and that the collars can be embossed as desired.

It results, that there must be a decree for the plaintiff, for a perpetual injunction and an account of profits, in the usual form, with costs.

[For another case involving this patent, see Hoffman v. Stiefel, Case No. 6,578.]

HOFFMAN (CATLIN v.). See Case No. 2,521.

Case No. 6,576a.

HOFFMAN et al. v. McLEAN.

[See Case No. 13,665.]

Case No. 6,577.

HOFFMAN v. PORTER.

[2 Brock. 156.] [1]

Circuit Court, D. Virginia.[2] Nov. Term, 1824.

DISMISSAL OF SUIT — RETRAXIT — CONVEYANCE — SUFFICIENT DESCRIPTION OF GRANTEE.

1. The dismission of a suit agreed does not amount to a retraxit, and is no bar to a future suit for the same cause of action.

[Cited in Hoover v. Mitchell, 25 Grat. 390; Rolfe v. Burlington, C. R. & N. Ry. Co., 39 Minn. 400, 40 N. W. 267.]

2. A conveyance to "P. H. & Son," a mercantile firm, it seems, is a sufficient description of the son to enable him to take under the deed.

[Cited in Seymour v. Western R. Co., 106 U. S. 321, 1 Sup. Ct. 124.]

At law.

MARSHALL, Circuit Justice. This suit is brought by John Hoffman, surviving partner of "Peter Hoffman & Son," against William Porter, to recover damages for the breach of covenants contained in a deed conveying land to "Peter Hoffman & Son." The declaration states, that by a certain indenture, made the 10th day of April, in the year 1800, between William Porter the younger, and Polly his wife, of the one part, and Peter Hoffman & Son of the other part, which son is the said John, the plaintiff, they, the said William Porter the younger, and Polly his wife, in consideration of the sum of £1002 10s. current money of Virginia, conveyed to the said Peter Hoffman & Son, merchants and partners, a certain tract of land in the deed mentioned; and the said William Porter the younger, for himself and his heirs, covenanted to and with the said Peter Hoffman & Son, that they, the said William Porter the younger, and Polly his wife, had a good title to the premises, and that the said Peter Hoffman & Son might quietly enjoy the same; that the said Peter Hoffman had departed this life, and all his rights in the land and covenant survived to the plaintiff. The averment is, that the said William Porter, and Polly his wife, were not, at the date of the said deed, possessed of a good title to the said land, nor did the said Peter Hoffman & Son, in the lifetime of the said Peter, nor had the plaintiff since his death, enjoyed the same quietly; but in consequence of the defective title of the said William Porter the younger, and Polly his wife, the plaintiff has been molested, &c. in the enjoyment thereof. The defendant craved oyer of the deed, which is spread on the record, and appears to be a conveyance from William Porter, Sr., and Margaret his wife, and William Porter, Jr., and Polly his wife, of the land in the declaration mentioned, to Peter Hoffman & Son, of Baltimore. The covenants for good title and quiet enjoyment are, that the said William Porter, Sr., and Margaret his wife, and William Porter, Jr., and Polly his wife, have good title, and that the said Peter Hoffman & Son may quietly enjoy the premises.

The defendant pleads: (1) That he was formerly impleaded for the same cause of action, which suit, by the judgment of the court, the same being agreed by the parties, was dismissed.[3] (2) That the covenants stated by the plaintiff in his declaration, were none of them made with the plaintiff. He also demurs to the declaration. The plaintiff demurs to the plaintiff's first plea, and the defendant joins in demurrer.

The validity of the plea depends on the question, whether the judgment rendered in the former action is a bar to a new suit? The practice in the English courts furnishes no exact precedent for the case. The books mention a retraxit, a judgment of nonsuit, or a discontinuance. A retraxit only is a bar to a new action. This, I think, is not a retraxit. In a retraxit, the plaintiff openly renounces his action. In this case, some agreement is made between the parties for the termination of the existing suit, and the entry is made by the clerk without any exercise of judgment on the part of the court. It is the mere act of this party, and, I believe, is not, in the common practice, considered as more than a dismission of his suit by the plaintiff. See Pinner v. Edwards, 6 Rand. 675, and Coffman v. Russell, 4 Munf. 207. But this demurrer to the plea, as well as the demurrer to the declaration, brings before the court the validity of the declaration, and, consequently, of the conveyance which it sets forth. The conveyance is to Peter Hoffman & Son, and this action is brought by John Hoffman, who states himself to have been the partner in trade of Peter Hoffman, and to have been the son intended in the conveyance. The question is, whether John Hoffman can take as a purchaser by this description? That the word "son," connected with other words which ascertain the son intended, is a word of purchase, has been very well settled. In all the conveyances in what is termed "strict settlement," a conveyance to A., remainder to the first, second, third, and fourth sons of B., has been considered as unquestionably valid. If these words are good to pass a remainder, I can perceive no reason why they might not pass a present estate. If, then, this conveyance had been to the "first son" of Peter Hoffman, the estate might have passed to the first son. So, if he had been an only "son." But it is admitted that a conveyance to the son of A., he having several sons, would be void for uncertainty, and that no averment could make it good. The question then is, whether there is any thing in this deed to ascertain the son who is the purchaser? Peter Hoffman was in partnership with his son John, and the firm was known by the name

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

[2] [District not given.]

[3] This suit was originally brought in a state court, and was dismissed agreed.

of "Peter Hoffman & Son." I am disposed to think that this circumstance may designate the son intended in the deed. I will not pretend that this question is free from doubt. But the justice of the case is clearly with the plaintiff, is clearly in favour of giving validity to the conveyance, and, I do not think that law ought to be separated from justice, where it is at most doubtful. The demurrer to the plea is sustained, and that to the declaration is overruled.

HOFFMAN (RINGGOLD v.). See Case No. 11,846.

HOFFMAN (SMITH v.). See Case No. 13,061.

Case No. 6,578.

HOFFMAN v. STIEFEL et al.

[3 Fish. Pat. Cas. 638; 7 Blatchf. 58.] [1]

Circuit Court, S. D. New York. Nov. 23, 1869.

PATENTS—TURN-DOWN ENAMELLED PAPER COLLARS.

[1. The reissued letters patent granted to James H. Hoffman, July 25, 1865, for a "turn-down or folded enamelled paper collar," are valid.]

[2. As the patentee invented the proper mode of enamelling the proper quality of paper to enable a turned down or folded collar to be made wholly of paper, without any danger of crumbling or breaking the enamel by the operation of folding, the collar made from such enamelled paper was a new article of manufacture, and entitled to be patented as such.] [1]

[Cited in Hoffman v. Aronson, Case No. 6,576.]

This was a bill in equity [by James H. Hoffman] to restrain the defendants [Edward Stiefel and Isaac Ney] from infringing two letters patent granted to complainant, one [No. 45,998] for "improvement in turn-down enameled paper collars," issued January 24, 1865, and reissued July 25, 1865 [No. 2,034], and the other [No. 47,107] for the "manufacture of sweat-proof paper collars," issued April 4, 1865. The invention described in the first patent consisted in a collar composed of paper made of pulp having a long fiber, enameled with a composition of blanc fix, white wax, and a trace of ultra-marine applied in a thin coat to the paper where the latter is steamed, so as to open the pores. The claim of the original patent was as follows: "The new article of manufacture herein described, constituting a turn-down or folded collar, made and finished substantially in the manner and the purpose set forth." The claim of the reissue was as follows: "The new article of manufacture, consisting of a turn-down or folded enameled paper collar, substantially as described." The invention described in the second patent consisted in passing the paper through a composition of blanc fix, isinglass and bleached wax, drying it, and coating it with a thin preparation of bleached shellac dissolved in alcohol. The claim was as follows: "The manufacture of sweat-proof paper shirt collars with the composition substantially as described, applied in the manner substantially set forth."

E. Wetmore and G. M. Keller, for complainant.

T. Darlington, for defendants.

BLATCHFORD, District Judge. In this case there must be a decree for the plaintiff in respect to the reissued letters patent granted to him July 25, 1865, as well as in respect to the letters patent granted to him April 4, 1865. Both of these patents are valid. The evidence shows that the plaintiff was the first person who successfully made a turn-down or folded collar wholly of paper with an enameled surface. The enameled paper known prior to the making by him of the invention covered by his reissued patent of July 25, 1865, was unsuitable for the making of a turned-down or folded collar wholly of paper. The fact that such a collar was not known as a practical thing before the plaintiff made it, would naturally lead to the conclusion that the proper enameled paper was not made until the plaintiff made it, because, if the paper had been known, the use of it for the collar was sufficiently obvious. Finding no proper enameled paper ready to his hand, the plaintiff experimented for some time to produce it, and at length succeeded, and the making of the collar followed. As the plaintiff invented the proper mode of enameling the proper quality of the paper to enable a turned-down or folded collar to be made wholly of paper without any danger of crumbling or breaking the enamel by the operation of folding, the claim for a collar made from such enameled paper as a new article of manufacture, consisting of a turn-down or folded enameled paper collar, substantially as described, is valid. In regard to the patent of April 4th, 1865, there is no evidence to show that the plaintiff was not the original and first inventor of what is claimed therein; namely, the manufacture of sweat-proof paper shirt collars, with the composition substantially as described therein, applied in the manner substantially set forth therein. The infringement of the patents is not disputed if they are valid, and there must be the usual decree for the plaintiff for an account and a perpetual injunction, with costs.

[For another case involving patent No. 45,998, see Hoffman v. Aronson, Case No. 6,576.]

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The statement and opinion are from 3 Fish. Pat. Cas. 638, and the syllabus is from 7 Blatchf. 58.]

Case No. 6,579.

HOFFMAN et al. v. WILLIAMS.

[Taney, 69.] [1]

Circuit Court, D. Maryland. Nov. Term, 1842.

CUSTOMS DUTIES—AD VALOREM—ESTIMATION OF VALUE—COST OF TRANSPORTATION.

The second clause of the second section of the tariff act of July 14, 1832 [4 Stat. 584], provides that the duty upon blankets, "the value whereof, at the place from whence exported, shall not exceed seventy-five cents each," shall be five per cent. ad valorem: *Held*, that in estimating the "value," under this clause, of blankets manufactured at Leeds, and sent to Liverpool for exportation, the cost of transporting them to Liverpoool, including the freight or carriage, must be taken into the account.

[This was a proceeding by George B. Hoffman and William H. Hoffman against Nathaniel F. Williams, collector.]

Wm. F. Frick, for plaintiffs.

Z. C. Lee, Dist. Atty., for defendant.

TANEY, Circuit Justice. This action is brought against the collector, to recover the amount of certain duties charged by him and disputed by the plaintiffs, but paid under protest. The case has been submitted to the court upon a case stated; but the statement is imperfect, and in order to enable the parties to bring the point in controversy before the court in such a form that judgment may be entered, we proceed to state the construction we give to the act of congress, and to point out wherein the statement submitted to the court is defective.

The case states that a parcel of blankets were imported by the plaintiffs, from Liverpool, into Baltimore, and that the value thereof, at the place of exportation, without including charges, did not exceed seventy-five cents each; but it is not stated what charges are excluded, nor what was the value of the goods, taking the charges into consideration. It was said at the bar, that the goods were purchased at Leeds, by the plaintiffs, for less than seventy-five cents each; that the charges for transporting them to Liverpool, added to the original price, would make the cost, at the place of shipment, greater than the sum above mentioned; and that the collector has added these charges to the original price, in order to determine the value at the place of exportation, and charged the duties accordingly; but the value as thus ascertained is not stated.

We understand it to be assumed on both sides, that the fifteenth section of the act of July 14, 1832, directing the mode of ascertaining the ad valorem duties, does not embrace this case, and that it depends solely upon that part of the second clause of the second section, which provides, that the duty upon blankets, "the value whereof, at the place from whence exported, shall not exceed seventy-five cents each," shall be five per centum ad valorem. Admitting this to be the true construction of the act of congress, and that the case is not embraced by the fifteenth section, yet, as these blankets were exported from Liverpool, the duties must be charged upon their value at that place, at the time of exportation; if they were worth there more than seventy-five cents each, the duty must be charged accordingly, although they may have been purchased for less, at Leeds; and the cost of transporting them to Liverpool, including the freight or carriage, must be taken into account in estimating their value at that place.

It has, however, been urged upon the part of the plaintiffs, that the word "value," in the clause in question, means the value independently of any charges incurred after they were purchased; and that the word "value" is so used in the fifteenth section, which directs the charges to be added to the actual value in the cases embraced by that section. And it is insisted, that the same word in the second section ought to be expounded in the same sense in which it is used by the legislature in the fifteenth, and that the charges of transportation, therefore, ought not to be taken into the account. Undoubtedly, the word "value" must receive the same construction in both clauses of the law. But the fifteenth section speaks of value at the place of purchase, and the clause in question speaks of the value at the place whence exported. In the fifteenth section, the legislature directs the charges to be added to the actual value at the place of purchase; and by this means the value at the place of exportation is ascertained. And the reason why the same provision is not contained in the second section is that these charges necessarily enter into the value of the goods, when they have been brought to the place of exportation. The value of these blankets, at Leeds, was the sum they were worth there, when deposited in the warehouse, ready for sale and delivery; and their value at Liverpool, was the sum they were worth at that place, when deposited in the warehouse there, ready for exportation.

But since the argument upon the case stated, we have carefully examined the provisions contained in the fifteenth section; and we see no sufficient reason for supposing that it does not extend to the case before the court. That section prescribes the mode of estimating the ad valorem duties, in all cases in which they are imposed by that act of congress. The duty in question is one of that description, and not a specific one upon each blanket; it is imposed upon the article according to its value, and is described as a duty ad valorem, in terms, in the clause by which it is imposed. We think it very clear that it is embraced in the fifteenth section, and that the rule there

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

prescribed must be followed, in estimating the duty upon these blankets, and ascertaining their value at the place of exportation.

If the facts are properly presented by a case stated, the court, as we have already said, orally, will proceed to give judgment upon the principles above stated; but if the facts are not admitted, the value must be determined by a jury, under the direction of the court, and the duties ascertained in the mode pointed out in the fifteenth section of the law. Judgment of non pros.

Case No. 6,580.

HOFFMAN et al. v. YARRINGTON.

[1 Lowell, 168.] [1]

District Court, D. Massachusetts. Oct., 1867.

SEAMEN—VESSEL UNFIT FOR SERVICE — CONDEMNATION IN FOREIGN PORT — EXTRA WAGES—EXPENSE OF PASSAGE HOME—COSTS.

1. Where an American vessel has been condemned in a foreign port as unfit for service, and sold, and it appears that the master has acted in good faith, and as a prudent owner would do if uninsured, and nothing more is shown, excepting that the ship had met with some rough weather and some injuries from perils of the seas: *Held*, the crew could not recover two months' extra wages; for they are within the proviso of section 26 of the act of August 18, 1856 (11 Stat. 62), denying extra wages when a ship is condemned as unfit for service.

[Cited in The Wenonah, Case No. 17,412; Gove v. Judson, 19 Fed. 524; Kelly v. Otis, 23 Fed. 905.]

2. Nor in such a case can the crew recover the expense of their return to the United States.

[Cited in Kelly v. Otis, 23 Fed. 905; The Frank & Willie, 45 Fed. 490.]

3. How far the act of 1856 is inconsistent with sections 12–15 of the act of July 20, 1840 (5 Stat. 396), which gives extra wages when inspectors find a ship to have been sent to sea unsuitably provided in any important or essential particular, quaere?

[Cited in Brown v. Chandler, Case No. 1,998.]

4. Whether the court could try the questions of which inspectors and consuls are made the judges by the act of 1840, §§ 12–15, quaere?

5. Where the master in settling with the crew paid each man thirty-seven dollars too little, by mistake, but afterwards, before suit brought, refused to correct the error, costs were given the crew, though the extra wages demanded by them were found not to be due.

Libel by the seamen of the brig Marshall for wages. The voyage was from Boston to the west coast of Africa, and the master [Richard H. Yarrington] intended to trade up and down the coast until the outward cargo of rum and tobacco should be bartered for palm oil and other products of the country to load the ship for home. The brig met with heavy weather on the passage out, and after being on the coast for some months lost an anchor and damaged her windlass, so that the master thought best to go to Lagos, about three hundred miles to the leeward of the place where this misfortune was encountered, for repairs. Arriving at that port, she was not repaired, but was condemned and sold. The master acted in good faith, and with a view to the best interests of the owners, although at a loss to them and him. The vessel was unseaworthy and unfit to keep the seas, and how far this result was due to decay and ordinary wear and tear, and how far to the perils of this voyage, were points in controversy, but not very fully explained by the testimony. The libellants [Augustus Hoffman and others] were paid what the master computed to be their full wages to the time of the sale of the brig, and their expenses to the nearest consular port, and they now claimed two months' extra wages, as for a sale of the vessel abroad; or their expenses home, as well as an alleged balance remaining unpaid of their wages at Lagos.

C. G. Thomas, for libellants.

This is a case for the payment of the two months' wages provided by the act of February 28, 1803, § 9 (2 Stat. 203). The Dawn [Case No. 3,665]; Pool v. Welsh [Id. 11,269]. Or, if not, then for the necessary expenses of the passage home. The Dawn [Id. 3,666], second opinion. Even a forced sale is within the statute.

T. H. Russell, for respondent.

We rely on the cases cited on the other side as showing that where there is in fact a sale by necessity, the statute does not require two months' wages to be paid beyond the amount actually due by the articles.

LOWELL, District Judge. The cases cited in argument decide that the statute of 1803, § 9, refers to voluntary sales; and that all sales will be treated as voluntary which are made from a mere consideration of the preponderance of advantage to the owners, without an overruling necessity. Judge Ware says that if the ship could be repaired within a reasonable time and at a reasonable expense, the seamen have a right to demand the extra wages, if the master, for reasons of his own, fails to repair; citing the case in Gilpin; and that the burden of proving necessity is on the owners. In Wells v. Meldrun [Case No. 17,402], Judge Betts decided that when a vessel was condemned and sold in a foreign port for unseaworthiness caused by natural decay and not by a casualty, it was such a sale as the statute contemplated, and the two months' pay could be recovered.

The evidence of an overruling necessity in this case is not very strong, and if the law of those decisions governed this, I ought perhaps to decree the two months' pay; but it seems to me that the proviso of section 26 of the act of August 18, 1856 (11 Stat. 62), passed long after those decisions were made,

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

must be my guide. It provides: "That in case of wrecked or stranded ships or vessels, or ships or vessels condemned as unfit for service, no payment of extra wages shall be required;" thus distinctly recognizing the very state of affairs which has occurred here. The language seems to include all vessels condemned as unfit for service, whether their unfitness has arisen from wreck or stranding or any other cause. Without saying that it would apply when a vessel has been sent to sea in such a condition that the owners ought to have known she was unfit, or even to a case where there has been no extraordinary peril, as to which I shall speak more at large hereafter, I hold that this statute denies the extra wages when the facts merely are that a vessel needing repairs from a sea peril has been condemned, and the master has acted in good faith, and his conduct has been such as a prudent owner would have adopted in like circumstances had he been uninsured, which is shown to be true of this sale.

It has been strenuously urged that the libellants are, at all events, entitled to the expenses of their return home, as decided by Judge Ware in his second opinion in The Dawn [supra]. Upon the rehearing of that case, it appeared that the vessel had met with such injuries as to be a wreck, and the decision was that the statute of 1803 did not cover such a case, and that by the maritime law the crew were entitled to receive out of the property a salvage compensation equal to the cost of their passage home, which was estimated at one month's wages. It would, perhaps, have been quite as consistent with the facts of the case to rest the decision upon the ground that on a forced breaking up of the voyage, by overruling necessity, without an actual total loss of the vessel, the crew are to have their passage home provided at the expense of the ship; for there was no evidence of any salvage service performed by the crew, or by any one, or of any thing resembling salvage in the case. But here again the statute of 1856, by taking away the two months' wages, deprives the crew of all damages, because those wages were given instead of damages, and fixed an arbitrary standard which might, as in the case of The Dawn, have been more than the expenses of return, but which in long voyages might be less. Judge Peters used to allow one month's pay for a voyage broken up in the West Indies, two months if in Europe, and three months if in India. Hindman v. Shaw [Case No. 6,514].

By the general maritime law the owners of a ship have a right to break up the voyage; that is to say, the crew have no power to enforce a specific performance of the contract, but they have a right to damages, depending upon the circumstances of each case. Curt. Merch. Seam. 296 et seq., and cases; The Elizabeth, 2 Dod. 403; The Atalanta [Case No. 1,819].

As early as the year 1792 congress regulated this matter, and declared that if an American vessel should be sold in a foreign port, the master, unless the crew were liable by their contract, or consented to be discharged there, should send them back to the state where they entered on board, and should furnish them with means sufficient for their return, to be ascertained by the consul at the port. 1 Stat. 256, § 8. This was repealed by the act of 1803, § 5 (2 Stat. 203), which established the unvarying rule, which is still the general rule, of three months' pay (two for the men and one for the United States) whenever a vessel is sold abroad and her crew discharged, or when a seaman is discharged abroad with his own consent. By the act of July 20, 1840, §§ 12–15 (5 Stat. 396), upon complaint in writing of an officer and a majority of the crew that a vessel is unfit to go to sea, because she is leaky, or insufficiently supplied or manned, the consul may appoint inspectors to examine into the causes of complaint and report thereon to the consul; and they shall further report whether the vessel was sent to sea unsuitably provided in any important or essential particular by neglect or design, or through mistake or accident; and if either of the former, the consul, if he approves the report, is to discharge such of the crew as require it, each of whom shall be entitled to three months' pay besides the wages due him; but if the defects resulted from mistake or accident, and could not in the exercise of ordinary care have been known and provided against, then if the master shall in a reasonable time remove the causes of complaint, the crew shall remain and discharge their duty; otherwise they shall be discharged with one month's additional pay. Then comes the act of August 18, 1856, § 26 (11 Stat. 62), with the proviso before cited concerning vessels condemned as unfit for service. This statute at section 33 expressly repeals certain parts of the act of 1840, but not sections 12–15, unless by the general repeal of acts and parts of acts inconsistent. How far they are inconsistent as applied to a vessel condemned and sold for defects in her hull or spars is not perfectly clear. It may be said that if the crew apply and obtain a report that the vessel was unfit for sea when she left the United States, they should be entitled to three months' or one month's pay, as the case may be, although the vessel should be condemned as unfit for service; and that the proviso of the later law applies only to cases where some casualty has caused, or at least contributed, to the unfitness. On the other hand, the argument may be that the act of 1840 is intended only for cases where some ordinary and proper equipment has been neglected, as of tackle, boats, provisions, &c., and not to the wearing out of a ship, which may be foreseen as likely to happen, but the precise time of which cannot be foreseen. I will not ex-

press an opinion upon this point, because in this case there was not only no inspection, nor a request for one, but neither party has cited or relied on either of these statutes, and the evidence has not been addressed to the issues either of law or fact which would arise under them. The case falls within the terms of the proviso, and it would be for the crew to show, that it was an exceptional case, properly calling for action under the act of 1840. Whether the court could exercise the duties of inspectors and consul in such a case as this, if the vessel had been condemned at a port where there was no consul, may likewise be reserved for consideration when it shall arise.

The master made a mistake in his computation, and owes each of the libellants thirty-three dollars, and I shall give them costs, because the error was pointed out to him and he refused to correct it. Decree accordingly.

HOGAN (BELL v.). See Case No. 1,253.

Case No. 6,581.

HOGAN v. BROWN.

[1 Cranch, C. C. 75.] [1]

Circuit Court, District of Columbia. March Term, 1802.

SLANDER—NAMING AUTHOR—RESPONSIBLE PERSON—PLEADING.

In an action for slander, if it appears, from the plaintiff's testimony, that at the time of speaking the words the defendant named his author, who was a responsible man, the defendant may avail himself of that testimony without pleading the matter as a special justification.

[Cited in Jarnigan v. Fleming, 43 Miss. 710.]

Slander. The words laid in the declaration were, "You stuck a pitchfork into a man in Ireland, and murdered him, and fled." The plaintiff's witness proved that the defendant said that he had heard one Tweedy say that Burke told him that the plaintiff had killed a man in Ireland, with a pitchfork, and had fled for it.

Mr. Mason, for defendant, in cross-examining the plaintiff's witness, asked him whether Burke was a responsible man; whether he lived in the city at that time, &c.

Mr. Peacock, for plaintiff, objected to the questions, contending that if the defendant meant to rely upon the fact of the defendant's having named his author at the time, he ought to have pleaded it, and cannot give testimony of that kind on the general issue.

Mr. Mason, in reply, was stopped by THE COURT, who said the objection was premature. The defendant's counsel were only cross-examining the plaintiff's witness. The plaintiff must make out his case; and although he is not bound to prove the words exactly as laid, yet he must prove words which were actionable and in substance as laid. But if the plaintiff's witness proves that the words spoken were substantially different from those laid, and the words proved are not actionable as spoken, there is no necessity for the defendant to plead those facts which come from the plaintiff's own witness.

Mr. Peacock then prayed the court to instruct the jury that the words proved were in substance the same as those charged in the declaration. But THE COURT refused, being of opinion that they were substantially different.

CRANCH, Circuit Judge. When the defendant means to prove other words spoken at the same time with those laid in the declaration and which make the words laid not actionable, then, in order to enable the defendant to bring testimony of those other words he must plead his justification specially. But if the plaintiff's evidence proves words which justify the defendant, or which show that the words charged are not actionable as spoken, there the defendant may take advantage of them without pleading specially. For the plaintiff must make a good cause of action, and if it appears from his own evidence that the words charged are not actionable as spoken, he fails to support his cause of action.

But KILTY, Chief Judge, and MARSHALL, Circuit Judge, were of a different opinion.

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

Case No. 6,582.

HOGAN v. DELAWARE INS. CO.

[1 Wash. C. C. 419.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

MARINE INSURANCE—PRIOR INSURANCE—INCONSISTENCY BETWEEN MEMORANDUM AND POLICY—RULE OF CONSTRUCTION.

1. Action on a policy of insurance, from the Cape of Good Hope to Philadelphia, with a clause in the policy, that if insurance on the property had been made previously, it should be void as to all property covered by a prior insurance; and so much of the premium as would be proper, should, under such circumstances, be returned. At the time the policy was signed, a memorandum was made by the president of the company, stating, that in case insurance on the property is made in England, where it had been ordered, it should supersede so much of the insurance covered by the policy; and one per cent. of the premium should be retained. Insurance on the same property was made in England, eight days after the policy was underwritten by the defendants. *Held*, that the terms of the memorandum do not alter the stipulations in the body of the policy: and that the whole loss is payable by the defendants.

[Cited in Huss v. Stephens, 51 Pa. St. 285.]

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

2. The rule is, that if by mistake a deed is drawn plainly different from the agreement upon which it is founded, a court of equity will consider the deed as if it had conformed to the agreement; or if the deed be ambiguously expressed, it may be explained by the agreement.

[Cited in Walden v. Skinner, 101 U. S. 584.]

3. If a deed be so expressed, as that a reasonable construction can be given to it, and when so given, it does not plainly appear to be at variance with the agreement, the latter is not to be regarded.

[Cited in Walden v. Skinner, 101 U. S. 584.]

[See note at end of case.]

This was an action on a policy of insurance, dated 15th May, 1804, on 390 bags of coffee, shipped by the plaintiff, on board the Surprise, at and from the Cape of Good Hope to Philadelphia; the coffee valued at 20 cents per pound; the ship being warranted American property. In the policy, is inserted a written clause, that the premium is after the rate of seven and a half per cent., to return six and a half, on so much as may be insured in England, previous to this insurance. By the printed forms of the policies of this company, it is stipulated; that if the assured has made any insurance elsewhere, prior in date to this policy, then the assurers to be answerable only for so much as the amount of such prior insurance may be deficient, towards fully covering the property insured; such amount being the whole sum underwritten, without any deduction for the insolvency of any of the prior underwriters; and this policy, so far as it has been previously insured, to be considered as void, and the company to return the premium upon so much of the sum, by them insured, as they shall, by such prior insurance, be exonerated from; and in case of any insurance on the same property, subsequent in date to this policy, the said company to be, nevertheless, answerable for the full sum insured, without right to claim contribution; and on the other hand, to retain the premium by them received. In all cases of return premium, one-half per cent. to be retained. A total loss happened by one of the perils insured against, and no objection as to noncompliance with warranty. On the 22d of February, 1804, the plaintiff being then resident at the Cape of Good Hope, and having shipped the coffee in question, on board the said vessel, wrote to his correspondent in London, ordering insurance thereon, at that place. On the 12th of May, 1804, the plaintiff, having arrived at New-York, wrote to his agents, Gurney & Smith, in Philadelphia, stating, that, as he found from their letter, that the Surprise, on which he had, previously to his leaving the Cape, written to London for insurance, had not arrived, and as the conveyance to London was uncertain, he was desirous of being covered, and requested them to get his coffee insured, as per invoice. He says, you will make it in such manner, as that it will be cancelled, in the event of its being made in London. On the 14th May, Gurney & Smith applied at the office of the Delaware Insurance Office, and showed the letter of the 12th May; and on the 15th, an order for insurance was made out by them, and handed to the president, who, in his own hand, added thereto the words following, viz: "Ship warranted American; insurance being ordered on this property, or part of it, in England, it is understood, that in case such insurance is made, it shall supersede the present, for so much as shall be effected, and one per cent. only of the premium retained;" which was signed by Gurney & Smith. The policy was filled up by the clerk, in the manner before mentioned. Policies are frequently left in the office, by the insured, till the vessel arrives, or a loss happens. On the 30th May, information was received of the loss. The policy in London, was effected eight days after the policy executed by the defendants. The above facts, being agreed between the parties, the question was submitted to the court, whether the plaintiff is entitled to recover; and it was further agreed, that the court should decide upon the same principles, and give the same relief, as if sitting in chancery, upon a bill filed by defendants, for relief suited to their cause. For the defendants, it was argued, that the policy was to be considered in the same manner, as if it had been filled up in the words of the order; which, if they differ from the policy, would control it at all events in a court of equity. Motteux v. London Assur. Co., 1 Atk. 545. If so, the policy was to be cancelled in the event of an insurance being effected in England, which has no reference to time, but to the fact of the expected insurance having been at all events effected. That this being, from the plaintiff's letter, his obvious meaning, the word "is," in the order, may be considered as being future, as well as present. On the other side, it was contended, that the policy must govern, unless clearly contradicted by the order. The former is clear of ambiguity. The latter may be explained both ways, though certainly the literal meaning of it must be present, and was the intention of the parties.

Rawle & Smith, for plaintiff.
Ingersoll & Condy, for defendants.

WASHINGTON, Circuit Justice. The question is, whether, by the terms of this policy, controlled, and explained so far, as, by the rules of law and equity they ought to be, by the letters of the plaintiff, and the order for insurance; the defendants were exonerated from the payment of this loss, in consequence of a policy having been effected, at a subsequent period, on the same property in England. Consider how it would stand upon the policy itself. If an insurance were effected, in any part of the world, England excepted, prior in date to this policy, the assurers were not to be liable, but

for so much as was not covered by such prior assurance; and would be bound, in that event, to return the premium, retaining only one half per cent.; but if such prior insurance should be made in England, the same consequence was to follow; but they were in that case to retain one per cent. If an insurance were effected in England, or elsewhere, subsequent in date to this policy; such insurance was not to affect these defendants, who would nevertheless be bound in case of loss, to pay the sum insured; and in case of safe arrival, to retain the premium. So far as the priority of date of the two policies, could be important; the subject was fully and clearly provided for, by the printed and written stipulations in the body of the policy. The introduction of the written stipulation did not dispense with any one of the printed provisions, which constitute the standing form of the policies of this company; neither did they embrace the same subject, intended to be expressed by this. The former is confined to a prior insurance in England; the latter extends to a prior insurance in any part of the world. By the former, the defendants were to retain one per cent. By the latter, only half as much.

We are then to consider, whether the order for insurance can be resorted to, for the purpose of giving a construction to this policy. Now, I take the rule to be, that if by mistake, a deed be drawn, plainly different from the agreement of the parties, a court of equity will grant relief, by considering the deed, as if it had conformed to the agreement. If the deed be ambiguously expressed, so that it is difficult to give it a construction; the agreement may be referred to, in order to explain such ambiguity. But, if the deed be so expressed, that a reasonable construction may be given to it, and when so given, it does not plainly appear to be at variance with the agreement of the parties, the latter is not to be regarded in the construction of the former.

Now, in this case, the policy, upon the face of it, can admit of but one construction, and the ambiguity arises out of the letter of the 12th of May, and the order for insurance, to which we are referred by the defendants, for an explanation of the policy. Can any person doubt of this, who has attended to the ingenious and learned criticisms of these papers, by the counsel on each side. After it has been so clearly proved, that the important word "is," may be construed past, present, or to come, and that even "shall be," may be taken in the past or future tense; where is the standard of certainty to which we are referred, or why leave the plain road in which the policy places us, to wander in the perplexed mazes of the letter and order? If in these we attempt to seek the intention of the parties, the counsel, who have endeavoured to enlighten the court, have demonstrated, that the pursuit must terminate in doubts. On one side, strong arguments are urged, to prove that the parties intended to make void the American policy, in the event of the plaintiff's having effected his insurance in England, without reference to the time when it was done; and the other has been little less successful, in proving that the American policy was to be preferred, if a prior insurance was not effected in England. If, upon this subject, I were compelled to give an opinion, which I should be, were the expressions of the order inverted in the policy, I should, I confess, rather incline to adopt the construction of the defendants' counsel. But since the policy admits of a satisfactory construction, and it is this paper alone which produces the ambiguity, the former must be considered as the only safe evidence of the intention of the parties; particularly after the loss has happened. Judgment for plaintiff.

[A bill in equity was then filed by the insurance company, which stated no new matter, except that defendant intended to insure according to the order, and called upon him to declare if that was not his intention. This the defendant denied. The bill was dismissed by Mr. Justice Washington for want of equity. Case No. 3,765.]

HOGAN (DELAWARE INS. CO. v.). See Case No. 3,765.

Case No. 6,583.

HOGAN v. INGLE.

[2 Cranch, C. C. 352.] [1]

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

DISTRESS FOR TAXES—STATUTE OF LIMITATIONS.

Distress for taxes due to the corporation of Washington, is not barred by the statute of limitations.

Replevin for goods taken by the defendant as a distress for taxes due to the corporation of Washington for the years 1812, 1813, 1814, 1817, and 1818, amounting to $55.53. The distress was laid November 3d, 1820. The plaintiff tendered $19.37, the amount of taxes due for the years 1817 and 1818, and on the 7th of November, 1820, replevied the goods, having first obtained an order or warrant therefor in these words: "To the clerk of the circuit court of the District of Columbia, for the county of Washington: Whereas, Thady Hogan, of the county aforesaid, bricklayer, has satisfied me, the undersigned justice of the peace for the county aforesaid, that it is necessary for the purposes of justice that a replevin should issue in the name of the said Thady Hogan, as plaintiff, against Joseph Ingle, collector of taxes, due the corporation of Washington, in the second ward,

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

for the following personal property taken in execution by the said collector for arrearages of taxes due to the said corporation; that is to say, one mahogany bureau, &c. Now, therefore, you are by these presents empowered and directed forthwith to issue a writ of replevin for the goods and chattels taken as aforesaid; provided, however, that the said plaintiff shall lodge with you, before the issuing of such writ, the sum of $19.37, which appears to be the sum really due from him for taxes; and for so doing, this shall be your sufficient warrant. Given under my hand and seal, this 4th day of November, 1820. Joseph Forrest. (L. S.)" The Maryland act of 1785 (chapter 34) enacts, "that in every case of money or other thing, due the public, for satisfaction of which there shall be any distress or execution of property by any officer or person authorized by law so to do, no writ of replevin shall issue, or be maintainable in law." By the act of 1786 (chapter 12) on a distress, the party may complain to the commissioners of the tax, who may hear and adjust such complaint, and suspend the sale of the property. By the act of 1790 (chapter 53), where personal property shall be taken in execution for public taxes by collectors of arrearages, the party may obtain a writ of replevin by satisfying a justice of the peace that it is necessary for purposes of justice that a replevin should issue, who will thereupon issue his warrant to the clerk, &c. Under these acts, the warrant in the present case was granted, and the writ of replevin issued. The defendant justified the taking of the goods as a distress for the taxes of which he was collector. The plaintiff relied on the plea of limitations, and at the trial of this cause at the last term, THE COURT (THRUSTON, Circuit Judge, contra) was of opinion, that the statute of limitations was a bar. The verdict being for the plaintiff, the defendant moved the court for a new trial, upon the ground of misdirection of the jury upon that point, which motion now came on to be argued.

Mr. Key, for defendant. The question is, can the plaintiff in replevin reply the statute of limitations to an avowry for taxes due to the corporation of Washington. The Maryland statute of 1715 (chapter 23) limits "all actions of debt for lending, or contract without specialty, and all actions of debt for arrearages of rent," but says nothing of distress, nor of any other kind of debt. It speaks only of actions. A distress is not an action. It is execution. The statute of limitations is in derogation of the common law, and must be construed strictly. An action of debt for escape is not within the statute; nor an action of debt on the 2 Eliz. 6, for not setting out tithes; nor for arrearages of rent, reserved on a lease by indenture; nor for money levied on a fieri facias; nor on a tally; nor on an award; nor any uncommon action of debt, or of detinue. Bac. Abr. tit. "Limitation," D; Jones v. Pope, 1 Saund. 37. No case has been found, in which it has been decided that a distress for rent was within the statute, although an action of debt for rent is.

Mr. Jones, contra. If the remedy be extinguished, the legal right is extinguished, although the moral obligation may remain. A debt is as much discharged by the statute of limitations, as by a discharge under a bankrupt law. Trueman v. Fenton, Cowp. 548; Hawkes v. Saunders, Id. 290; Barnes v. Hedley, 2 Taunt. 184; Hardy v. Cathcart, 5 Taunt. 14, 16. "Any construction of the statute to make it bar one form of suing, while others are open, was nugatory and contrary to its true intent." "The law, from the nature of it, ought to be taken liberally in favor of defendants." "The limitation of suits is founded in public convenience, and attended with so much utility, that courts of equity adopt this statute as a positive rule, and apply it by parity of reason, to cases not within it." Per Lord Mansfield, in the case of Johnson v. Smith, 2 Burrows, 961. There is a great difference between the English and the Maryland statute of limitations. The English statute enumerates the forms of action technically. The Maryland statute uses words of general and common import. It refers to the cause of action, rather than to the form of action. It speaks of actions founded on book-debt, and on account. It includes all actions of debt not founded on specialty. Thus, an action of debt qui tam is within the statute. There are many cases within the reason of the statute, though not within the letter, and where the party may avail himself of it, with or without special plea. It is said that a distress is an execution, not an action, and therefore not within the statute. But an avowant is an actor. His avowry is the declaration in an action commenced by the distress. The plaintiff pleads to it, an issue is joined, and the cause proceeds to trial and judgment. The statute is a bar to all actions upon contract, and all actions of debt not on specialty. If an action of debt had been brought for these taxes, it would have been within the statute; and if one remedy is barred, all remedies for the same cause of action are barred also. Under the charter of the Bank of Columbia, the first process is an execution, and the goods may be sold before the defendant can have any remedy. On the return of the execution, he may have an issue tried, whether the debt be due, and may plead the statute of limitations in the same manner as if the bank had brought suit in common form. So the statute is a bar to a libel for seamen's wages, as if the suit were at common law; and so in all cases when the courts of admiralty and courts of common law have concurrent jurisdiction. Ball. Lim. 94; Hyde v. Partridge, 3 Salk. 228. The taxes due to the corporation of Washington, are only debts, and are not entitled to greater privileges than debts due to banks and other cor-

porations, or even to individuals. They are called "taxes," but they are not taxes due to the sovereign authority of the country. They are entitled to no prerogative protection, no priority of payment, and no extraordinary mode of collection. They do not form an exception to the general principle, that if the right be barred in one form of action, it cannot be recovered in another. No presumption of purity in the corporation can give any sanctity to its claims. They are as much within the spirit of the law, as the claims of individuals. But it is said that this is a debt due by statute, and therefore not within the limitation, like the action of debt for an escape. But there were other reasons for that decision. The cause of action for escape arises ex maleficio, and was therefore not one of the forms of action barred by the statute. It was not an action of debt upon the statute, although the statute gave the remedy. So the remedy upon a promissory note is given by the statute of Anne, yet the action is not upon the statute. So the action for use and occupation is given by a statute, but is barred by the limitation. So the charter of Washington gives the corporation power to lay and collect taxes, (among many other powers,) and to contract, and to become creditor and debtor, but that does not exempt all their contracts from the act of limitation.

Mr. Key, in explanation. The tax is imposed by a by-law, which, being authorized by the charter, is equivalent to a specialty of the highest nature.

Mr. Jones, in continuation. The obligation to pay the tax arises from the joint act of the corporation and the party. He makes himself debtor by purchasing or holding property in the city. It is a contract. A corporation aggregate is only a collection of individuals, and has no other privileges than those expressly given by its charter.

Mr. Swann, in reply. This is a claim for taxes due to a corporation empowered by congress to lay and collect them. It is a debt, not by simple contract, but by record or by specialty, or by an act in the nature of a specialty, and therefore is not within the statute of limitations. It is like the case of taxes in Maryland. By the common law, replevin does not lie for distress for taxes. To lay and collect taxes is a sovereign prerogative; and so far as that power is delegated to the corporation of Washington, it is a sovereign, and is entitled to the benefit of the maxim, nullum tempus occurrit regi. When congress delegated this power to the corporation, it meant to give with it all the collateral powers and rights belonging to a state in relation to taxes. The plaintiff has considered these taxes as public dues, or he would not have applied to a justice of the peace for a warrant to the clerk to issue the replevin, under the act of 1790 (chapter 53). The statute of limitations is to be construed strictly as to the classes of actions to be barred, but liberally as to the individual cases in the several classes. If distress for taxes be within the statute, what is the period of limitation? One, two, or three years, or any other time? The remedy is expressly given by act of congress, and if it be an action, it is an action upon the statute. No case can be found of a plea of limitation to an avowry for rent. Distress and sale is an execution. No day is given to plead the act of limitations.

THE COURT (nem. con.) granted a new trial without costs, being of opinion that the statute of limitations was not a bar to distress for taxes due to the corporation of Washington.

Case No. 6,584.

HOGAN et al. v. MANSELLY.

[1 Betts, C. C. MS. 59.]

Circuit Court, S. D. New York. Dec. 15, 1842.

MARINE INSURANCE—BOTTOMRY BOND—SALVED FREIGHT.

[Insurers, having satisfied a bottomry claim where the vessel is lost, are entitled to the salved freight, as against a subsequent assignee of the master and owner, who advanced money on the freight for the benefit of the ship and cargo.]

The defendant, Manselly, was the holder of a bottomry bond executed to him at Antwerp by Trott, master and owner of the brig Harriet, on a voyage from Antwerp to New Castle and to the United States. The vessel, having deviated, and earned freight on the deviated voyage, was lost before arriving in the United States, a portion of her freight having been saved and remitted to New York. Robertson was mortgagee of the vessel, and was entitled to her earnings on the voyage. Trott and Robertson assigned the salved freight to the complainants [Hogan and Milne] to cover a draft made by the master on them at Cadiz for benefit of the ship and cargo. On a libel filed by the defendant in the district court, it was adjudged that the salved freight belonged to the bottomry creditor. This decree was affirmed, on appeal, in the circuit court. The bottomry bond was made at the request of Trott, the master, and the defendant applied funds belonging to the proceeds of the outward voyage, and coming to his hands after the execution of the bond, in payment of the premium, and indorsed the balance on the bond. Upon these facts, the bill seeks to have the freight fund aforesaid appropriated to the complainants, or, if the bottomry creditor has not received satisfaction of his debt from the insurers, that the plaintiffs may be subrogated to his rights and interests in the policy for the balance of the debt, after applying the above freight

moneys thereto. To this bill the defendant demurs.

BETTS, District Judge. The case must be taken to present these leading particulars: That the fund in court sought to be decreed the complainants was subject to the hypothecation of the bottomry bond. It is so expressly decreed by the district court, and affirmed on appeal by the circuit court, and this action cannot raise the inquiry whether those decisions are correct or not. That the bottomry debt was issued to the defendant, and that he has realized the amount of his loss from the policy, abetting the sum in court or entirely, leaving this fund to be disposed of according to the legal rights of parties. It is clear upon the statement of facts that the freight fund was the primary one for satisfaction of the bottomry debt; and that leaves only, as an open question, the consideration whether, if the insurers satisfied the policy in full, this sum belongs to them, or to the plaintiffs, under rights posterior, in law and equity, to the bottomry claim. We conceive it undeniably established in the law of insurance that the insurers are entitled to be placed in the equity of the insured in respect to all means primarily applicable to his indemnity or security. They stand only to cover his actual losses, and, instead of compelling him in the first instance to exhaust his remedies from other sources, the law permits him to come directly upon the insurers for indemnity, and then invests them with all his legal and equitable means of compensation. The cases are collected and stated in 2 Phil. Ins. (2d Ed.), and both the American and English decisions assume it as a fundamental principle of the contract of insurance that the insurer has a right to be subrogated to all the powers and privileges of the insured in respect to the subject insured, on satisfaction of his loss. It was urged on argument that in marine insurances this privilege of substitution takes place only in case of abandonment or salvage. But the cases point out no such distinction, nor is the principle discerned that should sanction its adoption. Interests accruing upon abandonment or salvage are those of most frequent occurrence as means of reimbursing insurers in cases of maritime loss, but they are only incidents elucidating the character and operation of the contract, and are not the rule or principle giving it vitality. Thus the ship or goods are abandoned to the insurer, on his acquiring right to salvage proceeds, not as the consideration enforcing his contract to indemnify, but as the consequence of having in the indemnity paid their value to the insured, and thus became, if not by common-law purchase, by equitable novation, empowered to stand as owner in respect to them.

HOGAN (O'NEIL v.). See Case No. 10,529.

Case No. 6,584a.

HOGAN v. TAYLOR.

[Hempst. 20.] [1]

Superior Court, Territory of Arkansas. Aug., 1822.

JUDGMENT—AMOUNT CLAIMED.

The judgment cannot exceed the amount claimed in the declaration.

[This was a suit by Edmund F. Hogan against Creed Taylor.]

PER CURIAM. The judgment in this case being rendered for fifty dollars more than the amount claimed in the declaration, is manifestly erroneous, and must be reversed; it being well established, that a greater amount cannot be given than claimed in the declaration. 1 Chit. Pl. 372; Yel. 45; 10 Coke, 117; 3 Com. Dig. tit. "Damages," E. 3. Reversed.

Case No. 6,585.

HOGE v. FISHER et al.

[Pet. C. C. 163.] [2]

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

CONVEYANCE—INSANITY OF GRANTOR—PRESUMPTION—BURDEN OF PROOF.

Ejectment for a tract of land, claimed by the plaintiff under a conveyance from his father. The defendants held the estate as heirs of the grantor, under the intestate laws of Pennsylvania, and contested the plaintiff's title, on the ground of incapacity in the grantor to convey, from mental derangement, at the time of the execution of the conveyance. The presumption is in favour of mental capacity; and in order to affect the validity of a deed or will, incapacity must be proved. If general derangement is proved at any time prior to the execution of the deed, the grantee must prove capacity in the grantor.

[Cited in Clark v. Fisher, 1 Paige, 174; Horden v. Hays, 9 Pa. St. 163; Potts v. House, 6 Ga. 324; State v. Pike, 49 N. H. 410; Fishburne v. Ferguson's Heirs (Va.) 4 S. E. 580.]

This was an ejectment for land lying in Cumberland county, Pennsylvania. The plaintiff claimed, under a conveyance from his father, David Hoge, dated the 12th of March, 1804. The defendants claimed under the intestate law of this state, as heirs of the grantor; and contested the validity of the deed to the lessor of the plaintiff, upon the ground of incapacity in the grantor, from mental derangement, to convey his property: and imposition and undue influence practised upon the grantor, by the grantee. Many witnesses were examined, and much contradictory evidence was given on both sides. Only so much of the charge of the court, as contained rules for the direction of the jury, in weighing the evidence, has been reported.

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

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

WASHINGTON, Circuit Justice. The point on which the cause turns, and which it is incumbent upon the defendants to prove to the satisfaction of the jury, is, that on the 12th of March, 1804, when the disputed deed was made, the grantor was not of sound mind and of disposing memory; that is, that he was deficient in those qualities of the mind, which could enable him to dispose of his property, with understanding and reason. The presumption is always in favour of mental capacity; and he who alleges the contrary, for the purpose of invalidating a deed or will, must prove it. But if a state of general derangement, or imbecility of mind, be proved at any time, prior to the act which is attempted to be invalidated, the burthen of proof is shifted; and the person, affirming the validity of the conveyance, must prove the mental capacity of the grantor or devisor, to do the act, at the time it was executed. It is not sufficient for him to show, that the grantor or devisor could return appropriate answers to plain or common questions; but he must prove, that he was of sound mind and disposing memory. If no actual derangement or mental imbecility be proved, it is not sufficient per se, to assign a cause of derangement which might or might not have produced that effect. Paralysis, for instances, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy, or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone, and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded, that it was simply a paralysis, affecting the body only. It is in this way that I understand the learned physician, who was examined to this particular point. Whether the grantor in this case was affected in one way or the other, may well be doubted. If the physician who saw him, and who has given testimony respecting his situation, had had an opportunity to examine his case, and to form a deliberate opinion upon it, that opinion, pronounced by a man of his acknowledged professional talents, would have been almost conclusive upon this point. But he saw him once only, and then for a very short time: there was little or no conversation between them; and this witness gave it as his opinion, that he was incapable of conversing. The jury must resort to the evidence given to them on both sides, to prove the real state of the grantor's mind, at, before, and after the time, when this deed was made; and in deciding this important fact, they will take into view, the state of his mind, whether, as it may have been affected by the paralytic stroke, or by old age, or by any undue influence, exercised over him by his son Jonathan, or by all these causes combined. In weighing the contradictory evidence upon which they have to decide, that which contains facts, upon which they may judge for themselves, and are given by witnesses, who, by frequently seeing and conversing with the grantor, had a full opportunity of forming a judgment as to his state of mind, ought to prevail with the jury, over general opinions upon the same subject, formed by persons who had fewer opportunities of judging. Verdict for plaintiff.

HOGE (GURNEY v.). See Case No. 5,875.

HOGE (LOCKETT v.). See Case No. 8,443.

HOGE (MOORMAN v.). See Case No. 9,783.

HOGG (AMERICAN SADDLE CO. v.). See Cases Nos. 315 and 316.

Case No. 6,586.

HOGG et al. v. EMERSON.

[Nowhere reported; opinion not now accessible.]

HOGG (EMERSON v.). See Cases Nos. 4,439 and 4,440.

HOGSHEAD OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of hogsheads; e. g. "Hogshead of Molasses. See Two Hundred and Sixty Hogshead of Molasses."]

HOGUET (KOHLSAAT v.). See Case No. 7,919.

Case No. 6,587.

HOLABIRD v. ATLANTIC MUT. LIFE INS. CO.

[2 Dill. 166, note;[1] 12 Am. Law Reg. (N. S.) 566; 2 Ins. Law J. 588; 5 Chi. Leg. News, 550; 4 Bigelow, Ins. Cas. 181.]

Circuit Court, E. D. Missouri. March Term, 1873.

COMMON LAW MARRIAGE—HOW CONTRACTED AND PROVED—LIFE INSURANCE—FALSE REPRESENTATIONS—BURDEN OF PROOF.

[1. Marriage, in Missouri, may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such marriage actually exists. But the distinction should be observed between the mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife.]

[2. Where the policy is conditioned to be void if any of the representations contained in the application are untrue in any respect, it is immaterial whether, if untrue, they were intentionally so, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death.]

[3. In an action on a policy purporting to be issued in favor of a wife upon the life of her husband, the burden is upon plaintiff to prove

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

the marriage, and thus show an insurable interest. But the burden is upon defendant to show that any of the representations in the application were untrue.]

[See note at end of case.]

[This was an action on a policy of insurance for $10,000, issued October 22, 1868, by the defendant to the plaintiff, Carrie Holabird, upon the life of O. F. Holabird, her husband, in consideration of the representations made in the application, and of the amount of the premiums paid by Carrie Holabird, the assured. The policy provided that, if within seven years from the date of the issue thereof, the declaration made by her, and upon the faith of which the policy was issued, should be found in any respect untrue, then, and in such case, the policy should be null and void. Before the death of O. F. Holabird, which occurred February 16, 1870, the company notified him and the plaintiff that the statements in the application were untrue, and that the policy had for that reason been canceled. The defendant claimed, on trial, that the policy was procured by fraud, and, among other things, that the plaintiff was not at the time the policy was issued the wife of the deceased, as stated in the declaration, and therefore had no insurable interest in his life, and that the statements in the declaration in regard to his health and freedom from disease were false.] [2]

Krum & Patrick and B. A. Hill, for plaintiff.

J. T. Tatum and W. H. Horner, for defendant.

TREAT, District Judge (charging jury). Under the issues in this case, the plaintiff must prove that at the date of the policy sued on she was the lawful wife of O. F. Holabird, the person on whose life the risk was taken. If, at the time of the marriage ceremony, in May, 1861, testified to by plaintiff, the said O. F. Holabird had a wife living, then said alleged marriage with plaintiff was void, and the plaintiff could not be, or become, the lawful wife of said O. F. Holabird during the lifetime of his former wife. By the statutes of Missouri, marriage is declared to be "a civil contract, to which the consent of the parties capable in law of contracting is essential." If subsequent to the death of the former wife, were there one, Mr. Holabird and the plaintiff, being over twenty-one years of age, were married, and that marriage was prior to the date of the policy, and they continued to live together as husband and wife until the policy was issued, then she, as his wife, had an insurable interest in his life. It is not necessary to the validity of a marriage in Missouri that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. And such is substantially the law in Tennessee and Illinois, so far as the same affects this case. Therefore, should the jury believe, from the evidence, that at the date of the marriage ceremony with the plaintiff, in May, 1861, Mr. Holabird had another wife living; yet should they further believe, from the evidence, that such former wife died in 1863; and if they further believe, from the evidence, that afterwards, in the state of Missouri, Tennessee, or Illinois, the plaintiff and Mr. Holabird agreed by mutual consent, given in good faith, to become husband and wife, and cohabited as such thereafter,—then, from the date of said mutual consent, she was his wife.

The attention of the jury is directed to the difference between the mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute, if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife, in good faith, and had cohabited thereafter as such. If at the date of the marriage ceremony between O. F. Holabird and the plaintiff in May, 1861, said O. F. Holabird did not have another wife living, then the plaintiff became his lawful wife at that time.

The defendant seeks to avoid the policy by showing that those declarations contained in the application which are specified in the answer filed in this case, were, or some one of them was, in some respects untrue, at the time when made. By the terms of the contract, if any one of the said declarations is found to have been in any respect untrue at the time when made, then the plaintiff cannot recover. It is immaterial whether, if untrue, those declarations were not intentionally untrue, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death. Contracts like that sued on are based for their validity upon the truthfulness of the declarations made by the applicant in the written application to the company. As the declarations are presumed to be true the burden of proving them untrue is upon the defendant, who controverts them.

Whether the representations were material to the risk or not is not open for inquiry in this case; for the defendant and plaintiff agreed, as it was competent for them to do, that if any of the declarations were in any respect untrue, the policy should be void. Hence it is for the jury to determine from

[2] [From 5 Chi. Leg. News, 550.]

the evidence whether the defendant has shown any one of the declarations to have been untrue in any respect, when made, and also whether the plaintiff has shown that at the date of the policy she was the lawful wife of said O. F. Holabird.

The jury should pass upon this case impartially, and free from all prejudice for or against either of the parties to the suit. The rights of corporations and of natural persons are to be decided by the same rules of justice, and should be affected by no considerations except such as the law and evidence require, when controversies arise between them for judicial investigation.

If the jury find for the plaintiff, they will assess her damages at $10,000, deducting therefrom the amount of notes for premiums on the policy unpaid at the time of Mr. Holabird's death, together with any balance of the year's premium remaining unpaid, and will add interest on said sum at the rate of six per cent. per year from the time proof of death was submitted to the defendant to the present time.

If the jury find for the plaintiff, and are further satisfied from the evidence that the defendant has vexatiously refused to pay the loss in this case, they may in their discretion, under the statute, add to the foregoing sum an amount not exceeding ten per centum of the amount of the loss. The law commits the question of vexatious refusal to the calm and deliberate consideration of the jury, to be determined in the light of all the facts and circumstances of the case. St. 1865, p. 402, § 1.

There was a verdict and judgment for the plaintiff.

[NOTE. As to burden of proof being on plaintiff, see Terry v. Life Ins. Co., Case No. 13,839, affirmed in supreme court in Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580. Compare, however, Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473), and Wilkins v. Germania F. Ins. Co., 57 Iowa, 529, 10 N. W. 916. See Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, which holds that a reputed wife, supported and treated as one, has an insurable interest in the life of the supposed husband.

[In 2 Dill. 166, this case is published as a note to Swick v. Home Ins. Co., Case No. 13,692.]

HOLBROOK, In re. See Case No. 2,534.

Case No. 6,588.

In re HOLBROOK et al.

Ex parte WINDHAM PROVIDENT INSTITUTION.

[2 Lowell, 259.] [1]

District Court, D. Massachusetts. May, 1873.

BANKRUPTCY—SECURED CREDITORS.

1. A joint and several note, signed H. & Co., A., B., C., was given for money borrowed by the firm of H. & Co., and the three last signers were sureties. *Held*, it could be proved against the joint assets of H. & Co. in bankruptcy.

[Cited in Ex parte Nason, 70 Me. 367.]

2. A joint and several note, signed by the three partners of H. & Co. in their individual names, and by A., B., and C., as sureties, is the joint note of all, and the several note of each of the signers, but not the joint note of the firm of H. & Co., and cannot be proved as against joint assets.

[Cited in Ex parte First Nat. Bank, 70 Me. 379.]

3. Where one partner gives security upon his separate property for a joint debt of the firm, the creditor may prove for the full amount against the joint estate of the firm in bankruptcy, without surrendering, selling, or valuing his security.

[Cited in Re May, Case No. 9,327; Re Thomas, Id. 13,886.]

[Cited in Re Fickett, 72 Me. 268.]

4. But where one partner gives such security to sureties, to indemnify them against liability for his separate debt, the separate creditor must procure the security to be applied, and prove only for the deficiency.

5. If the security was given by the bankrupt to a surety, the creditor must cause the security to be surrendered or applied before he proves his debt against the assets of the principal.

[Cited in Franklin Co. Bank v. Greenfield Nat. Bank, 138 Mass. 520.]

The Windham Provident Institution for Savings, of Battleboro', Vt., offered for proof, against the joint estate of the bankrupt firm, two notes of $5,000 each, payable to the order of the savings-bank, on demand, with interest payable semi-annually. One note was in this form: "We jointly and severally promise," and was signed, "F. F. Holbrook & Co., F. Goodhue, S. M. Waite." Goodhue and Waite were sureties only, though this did not appear on the note. The other note was, "I promise," and was signed by the three members of the firm, in their individual names, and by three sureties. The money was borrowed for the firm, and remitted in a check payable to their order; but there was nothing on the face of the promise to show that it was a firm undertaking, or that the three last signers were sureties. There was evidence that F. F. Holbrook owned certain patents, which the firm were to have the exclusive right to use during the continuance of the partnership, and to buy at a fixed price; but they did not buy them. Some time after the notes were given, F. F. Holbrook conveyed these patents to his father, who lived in Vermont, to hold as security for certain advances, and, among other things, to indemnify the sureties on the notes now offered for proof. The assignee resisted the proof, on the ground that the second note was not a firm debt, and that both notes were secured by the assignment of the patents.

H. H. Currier, for savings bank.

C. S. Lincoln, for assignee.

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

LOWELL, District Judge. Section 20 of the bankrupt act [of 1867 (14 Stat. 526)], which requires creditors who hold security upon any property of the bankrupt to procure it to be sold or valued, and its proceeds or value to be deducted from the debt before proof is made against the assets in bankruptcy, extends, I think, to a case in which an indorser, surety, or guarantor holds such security from the bankrupt, though there be no legal privity between the surety and the creditor. In equity, the creditor can compel the surety to apply the property towards the payment of the debt for which it is held; and, if both principal and surety become bankrupt, the general creditors of neither can have the property, but it must go to the benefit of the particular creditor or creditors for whose benefit it was equitably pledged. The rule is the same, though the pledge or mortgage should be, in form, merely to indemnify the surety and not to pay the debt, because it is only by the payment that there can be indemnity; in other words, equity implies the trust, if it is not adequately expressed. I am aware that the supreme court of Massachusetts, in very briefly reasoned cases, have admitted such debts to proof: Meed v. Nelson, 9 Gray, 55; Provident Inst. v. Stetson, 12 Gray, 27; but I do not at present see how these decisions are to be reconciled with those in which the same court have so fully and learnedly upheld the equitable doctrine above referred to: Eastman v. Foster, 8 Metc. [Mass.] 19; Rice v. Dewey, 13 Gray, 47; New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen, 175. These cases decide, in effect, that the surety is a sort of trustee for the creditor; and in the last case it was held that the proof of the debt by the creditor, even through ignorance, discharged the security, if the rights or position of the other creditors had been in any way affected thereby. It is quite inconsistent with this doctrine to hold that the creditor can prove his debt as if he had no security, and that the guarantor or indorser can go on and convert the security for his indemnity, as if nothing had happened. The practical effect of such a rule would be, that. whenever the security is insufficient, the creditor will prove his whole debt, and take his dividend, and the surety holding the security will then pay the remainder, and indemnify himself out of the property held for the purpose, and thus defeat the statute, which requires the property to be applied first, and the balance only to be proved. If the creditor has power in equity to force the surety to apply the security, there is no legal difficulty in requiring it to be applied before the debt is proved. See In re Jaycox [Case No. 7,242]. If a trustee holds security for a considerable body or class of creditors, it may not be in the power of any one or more of the creditors less than the whole number to govern the disposition of the property. In such a case, I have permitted proof to be made by any creditors who chose to disclaim in writing all interest in the security, and to notify the trustees to that effect.

But another consideration affects the case in hand. The patent-rights which were assigned for the indemnity of the sureties were not the property of the firm of F. F. Holbrook & Co., but of the senior partner only. The statute only requires the property to be renounced, sold, or valued, when it is the property of the bankrupt. If the goods or estate of any third person have been pledged for the bankrupt's debt, equity does not require that the general creditors of the bankrupt should have the advantage of this security; on the contrary, the equity is that the estate of the volunteer should be exonerated. If he pays a debt of the bankrupt, he has a right to full proof against the estate; and the creditor has the same right. It is the bankrupt's debt; and whether the creditor have security by indorsements, or in any other way that has not diminished the general assets, he has a right to prove it. This has always been the rule in England, and it has been adopted by Judge Fox, in an able opinion, to which I am happy to be able to refer: In re Cram [Cas. No. 3,343]. This rule applies to partnerships when the estate of one partner has been pledged or mortgaged for a debt of the firm, and for the same reason, that the full proof should be made against that estate which is the principal debtor: Story, Partn. § 389; Ex parte Parr, 1 Rose, 76; In re Plummer, 1 Phil. 56; Wilder v. Keeler, 3 Paige, 167; Besley v. Lawrence, 11 Paige, 581; Ex parte Peacock, 2 Glyn & J. 27.

The patents, being the property of Holbrook, may be disregarded by the bank in proving their debt, in so far as it is a joint or firm debt, which is a disputed question in respect to the second note. The first note is signed in the firm name, and is admitted to be the joint and several promise of the firm, considered as one legal entity, and of the three sureties; and it was agreed that a suit might be maintained against the firm only, or the firm and the three sureties, or against each surety, but probably not against each member of the firm separately. The second note is signed by six individuals, of whom three are the three members of the firm of F. F. Holbrook & Co. This is the note of all six of the signers, or of any one of them, but not of any two, three, four, or five. At law, no suit could be maintained against the firm upon this instrument. This consideration is not conclusive of the question whether it can be proved against the joint estate in bankruptcy, because the bankrupt court acts upon equitable rules. But I am not aware that in equity this note would bind the firm jointly. A learned author, in treating of the bankruptcy of partners, says: "Separate debts are those for which the cred-

itor can have his remedy at law, not against the whole firm, but against that partner only who contracted them; joint debts are those for which an action, if brought, must be brought against all the partners constituting the firm." Colly, Partn. (5th Am. Ed.) § 906. It is clear that the partners are severally liable; and if it happened, as it not seldom does happen in bankruptcy, that the separate promises turned out to be better than the joint promise, how could I refuse the bank leave to make their proof against the several estates which are bound by the very terms of the note? Certainly it cannot be denied that the bank has a right to the benefit of the separate promises, which they have taken pains to secure. Have they, then, an election to prove against the joint estate? I think not. A plausible argument may be made in favor of such a right, in this way: The three last signers of the note are sureties of the three first signers, and, if they had paid the debt, could have sued the three partners jointly; indeed, must have sued them jointly; and, if the partners afterwards became bankrupt, could prove against their joint estate. It usually makes no difference in what order proof is made; and, to avoid circuity, the creditor may prove in the same mode and with the same effect as the surety might. I am much inclined to think that the rights of the sureties are correctly stated in this argument. Still it may admit of question whether the bankruptcy of the principals does not qualify the right of the sureties. By section 19 of the statute, a surety paying the debt is entitled to prove it, or, if the creditor has proved it, to stand in his place in respect to the dividends. It seems, therefore, that the surety is subrogated to the rights of the creditor, and not vice versa; and I should doubt whether, by paying after the bankruptcy, the surety acquires any thing more than the right of proof that the creditor had at the date of the bankruptcy. But I have not satisfied my mind on this point, which can be left until it comes up for judgment. If the sureties would have the right to prove against the joint estate, this would arise out of a contract which these creditors are no parties to, namely, the contract of suretyship; the implied undertaking which arises out of the relations of the principals and sureties to each other, and on which no action arises until the creditor has been paid. It is not, therefore, like the case we were first considering, of property of the bankrupt pledged to the surety, which in equity inures to the benefit of the creditor, but of an incident to the relations of the bankrupt and surety between themselves, with which the creditor has no connection.

My decision, therefore, is, that the first note is to be admitted as a debt against the joint estate for the amount of $5,160, and the second note in full against the separate estates of Thomas B. Everett and J. B. Small; but not against the separate estate of Holbrook, until the security has been valued or disposed of. Order accordingly.

Case No. 6,589.

HOLBROOK et al. v. AMERICAN INS. CO.

[1 Curt. 193;[1] 1 Am. Law Reg. 18.]

Circuit Court, D. Rhode Island. June Term, 1852.

FIRE POLICY—SUBSEQUENT INSURANCE—"ASSIGNS"—INTEREST OF ASSURED.

1. Construction of clauses in fire policy respecting subsequent insurance, and termination of interest.

2. Meaning of the word "assigns."

3. A conveyance, which equity will treat as a mortgage, does not terminate the interest of the assured.

[Cited in Judge v. Connecticut Fire Ins. Co., 132 Mass. 524; Commercial Union Assur. Co. v. Scammon, 126 Ill. 359, 18 N. E. 562.]

4. Insurance, made by a mortgagee at the expense of the mortgagor, is subsequent insurance by the mortgagor.

[Cited in The Sidney, 23 Fed. 94.]

[Cited in Wood v. North Western Ins. Co., 46 N. Y. 424.]

This was an action on a policy of insurance against fire, underwritten by the defendants in the sum of seventy-five hundred dollars, on movable machinery, and stock, in a cotton-mill. The destruction of the property by fire being admitted, and the preliminary proof of loss required by the policy having been proved, the defence turned on two clauses in the policy; which were in the following words: "And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not forthwith give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." . . . "The interest of the assured, in this policy, is not assignable, unless by consent of this corporation, manifested in writing, and in case of any transfer or termination of the interest of the insured in this policy, either by sale, or otherwise, without such consent, this policy shall, from thenceforth, be void and of no effect." It appeared that on the 25th of April, 1850, while the policy was in force, and before the loss, the plaintiffs made a bill of sale of a large part of the property mentioned in the policy, to Shepherd, Wright & Ripley, of New York, who were the plaintiffs' factors, and to whom the plaintiffs were indebted, for a balance of account, in the sum of $20,910, and at the same time and as part of the same transaction, Shepherd, Wright & Ripley executed an instrument in the following words: —"This indenture, made this twenty-fifth

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

day of April, in the year of our Lord one thousand eight hundred and fifty, by and between Messrs. Shepherd, Wright & Ripley, of the city, county, and state of New York, commission merchants, of the one part, and Sylvanus Holbrook & Company, of Northbridge, county of Worcester, and state of Massachusetts, of the other part, witnesseth, that the said Shepherd, Wright & Ripley do hereby lease, demise, and let unto the said Holbrook & Company, all that portion of cotton machinery which the said Holbrook & Company have sold to said Shepherd, Wright & Ripley, by bill of even date, amounting to the sum of twenty thousand nine hundred and ten dollars, all now in good running order, placed in the mill now occupied by the said Holbrook & Company—to hold for the term of five years from date, the said lessees yielding and paying therefor at the office of Messrs. Shepherd, Wright & Ripley, New York, the sum of two thousand one hundred dollars annually; and whenever the said Holbrook & Company, or their representatives, have or do pay the sum of twenty thousand nine hundred and ten dollars, and interest upon that amount at the rate of seven per cent. per annum, the said lessors agree to sell it to them, and the said lessors do promise that while the lessees and their representatives pay the rent, taxes, and insurance, and keep the same in good repair, they shall peaceably enjoy the same. The said lessees promising to pay the rent at the time aforesaid, and to quit and deliver up the same at the end of the term in as good order as the same now are. In witness whereof, the said parties have hereunto set their hands and seals the day and year above written. Shepherd, Wright & Ripley, (L. S.) Sylvanus Holbrook & Co. (L. S.) Signed, sealed, and delivered in presence of Philander Hale." Ripley, one of the firm, testified that the object of the parties was to give and take security for their balance of account; that there was no consideration paid by them, and no change was made in their accounts, or the mode of keeping them, in consequence of the conveyance. That his firm instructed their agents at Worcester, Massachusetts, to obtain insurance on their interest in the property, and a policy was obtained at the Howard office, in Lowell, for $5,000, and another for the same sum at another office in Rome, N. Y.; that the plaintiffs did not know of the existence of either of these policies, so far as the witness knew or believed. That the amounts of these policies had been paid to his firm, and carried into a special account, the name of which he could not recollect, but it contained nothing but the premiums and the two sums of $5,000 each; and that when they should settle with the plaintiffs, the balance of this account would be passed to their credit. The policy at the Howard office was produced, and it appeared to have originally described the insured as mortgagees, but the word had been erased. In their representation, claim, and proof of loss, Shepherd, Wright & Ripley did not treat theirs as a mortgage interest, but as being the whole property, subject to a prior mortgage to a third person.

Carpenter and Jenckes, for plaintiffs.
Ames and Bradley, for defendants.

CURTIS, Circuit Justice. The clause in the policy, which declares the interest of the insured therein not to be assignable, has no application to this case, unless the insured, by making such a transfer of the property as deprived them of their insurable interest therein, have worked "a termination of the interest of the insured in this policy" within the meaning of this clause; and the inquiry is, has there been such a termination? The first reason why their interest in the policy is not terminated, is found in the fact, that only a part of the property insured was conveyed to Shepherd, Wright & Ripley. The policy continued to cover so much as remained. But at the same time, if a part of the property insured was sold, it ceased thereby to be at the risk of the underwriters; and in adjusting the loss on the residue, the amount thus sold must be treated as if not put at risk, and the sum insured reduced proportionably; and as these plaintiffs claim to recover the whole amount insured in this policy, it becomes necessary to consider the effect of the conveyance they made. It was not a legal mortgage, for that requires a defeasance, which, on performance of the condition, would revest the legal title in the grantors. The indenture contains no such defeasance. But in equity, a conveyance of property, by way of security for a debt, is treated as a mortgage, whatever form the parties may have adopted to effect that object. In this case they have described, in words, a conditional sale, with a right of repurchase; but as it clearly appears that the sole consideration was a debt due from the grantors to the grantees, that the debt was not extinguished, and that the only object the parties had in view was to give and take security for that debt, and the interest which should accrue thereon, the conveyance could not be allowed to operate otherwise than as a mortgage between the parties. Russell v. Southard, 12 How. [53 U. S.] 139. There remained, therefore, in the plaintiffs the same insurable interest as before; for the property standing as security only for their debt, the loss to them by its destruction would be the same as if no such mortgage interest had been created. Higginson v. Dall, 13 Mass. 96; Bartlet v. Walter, Id. 267; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 249; Lazarus v. Commonwealth Ins. Co., 5 Pick. 76, 19 Pick. 81; Gilbert v. North American Fire Ins. Co., 23 Wend. 43; Swift v. Vermont Mut. Fire Ins. Co., 18 Vt. 305; Tittemore v. Vermont Mut. Fire Ins. Co., 20 Vt. 546. Independent of this clause in the policy,

and of other facts presently to be mentioned, it might have been necessary to submit to the jury the question, whether this change in the title was material to, and did work a change in the risk. In the case of Columbian Ins. Co. v. Lawrence, 2 Pet. [27 U. S.] 25, the supreme court held, that the difference between absolute legal title and a conditional equitable title might be material to the risk, and that it could not be declared, as a legal result, that one was in substance the same as the other, as a subject of insurance. But in this case the underwriters inquired, before making the insurance, whether the property was under mortgage, and for how much, and to whom, and whether the mortgagee had insurance; to these inquiries the insured replied, in writing, that "the property is mortgaged, and the mortgagee has no insurance, to our knowledge." Having been satisfied with this answer, and content to effect the policy without knowing the amount of the incumbrance, it would be difficult for them now to complain of the creation of an incumbrance on the property, the possession, and custody, and substantial interest of the insured remaining the same. But however this might be, I consider this express clause in the policy as governing the rights of both the parties in this particular. It provides only for a termination of the interest of the insured. Nothing short of that is to avoid the policy; and I do not think it is open to the insurer to say, that though less than this has occurred, the policy is void. If it was intended to have a change in the legal title, which worked no change in the insurable interest, affect the policy, they should not have declared that a termination of the interest of the assured should have that effect, and been silent as to all other changes of interest. I am of opinion that there is no defence to any part of the claim, under this clause of the policy.

Under the other clause of the policy it has been argued that the word "assigns" means any one who takes an interest in the property from the insured, and that as Shepherd, Wright & Ripley did take such an interest, and procured insurance on the property, and no notice was given to the defendants, this policy ceased and became void. I do not think this is the meaning of the word assigns, in this connection. This policy may be assigned to a purchaser of the property, with the assent of the underwriters. Being thus owner of the property and the policy, such purchaser would stand in place of the insured, and ought to be subjected to the same restraint as to subsequent insurance, intended to be placed on the latter by this clause. Yet it may well be doubted whether he would have been within the restriction, if not expressly named; and for this reason only, I consider, he was named. The word does not apply to an absolute purchaser of the property, who does not become the assignee of the policy with the assent of the office, for such a purchase, of itself, puts an end to the policy. It does not apply to one who acquires merely a lien, or other interest by way of mortgage, because he is not properly the assign of the insured, whose interest and property have not passed to him, but who, by virtue of his general property, has created a qualified and special interest only, and conveyed that. Moreover, unless the mortgagee insures for the account of the mortgagor, a case which will be presently noticed, insurance by him is not within the mischief intended to be guarded against, which is, such further insurance as would lessen the interest of the insured in the preservation of the property. If the insured can have no benefit from the subsequent insurance it can have no such effect, and he can have no benefit from it, if procured by the mortgagee for his own account and at his own expense. We must, therefore, consider whether the insurance effected by Shepherd, Wright & Ripley was subsequent insurance effected "by the insured in this policy." And there are two events in which I am of opinion it is to be so treated. In the first place, Shepherd, Wright & Ripley held the legal title. It was competent for them to cover, by insurance, not merely their own special interest in the property, but the property itself. Viewed as trustees, or as mortgagees, they might do so. Lucena v. Craufurd, 2 Bos. & P. (N. R.) 324; Irving v. Richardson, 2 Barn. & Adol. 193, 1 Moody & R. 153; Carruthers v. Sheddon, 6 Taunt. 17. If, in point of fact, they did cover the whole property, and were in any manner authorized by the plaintiffs to do so, then, in my judgment, there was subsequent insurance made by the plaintiffs; for it is wholly immaterial in whose name it was done. It is the thing, and not any particular form of doing it, which this clause was intended to guard against, and that thing is such subsequent insurance on the property as would lessen the interest of the insured in its preservation; and this includes all subsequent insurance, which, when recovered, will go to the benefit of the insured in the first policy. And so if the mortgagees did, in fact, cover their own special interest as mortgagees, and the mortgagors agreed to pay the expense of obtaining the insurance, then, although the mortgagees would have a lien on the insurance money, as security for their debt, yet the mortgagors could compel its application to the payment of the debt, and any surplus would belong to themselves. In these cases the subsequent insurance, being effected by the authority of the insured, for their benefit, and at their expense, must be deemed to be effected by them, within the meaning of this clause in the policy.

Whether this case comes within the interpretation of the policy, is a question of fact for the jury. There is nothing decisive in the instrument executed by the plaintiffs, and Shepherd, Wright & Ripley. What is there said concerning the payment for in-

surance; is introduced as a qualification of the covenant of the lessors. It may be evidence that there was some understanding between the parties on that subject, but in itself it only qualifies the lessors' covenant. So the testimony of Ripley, though it proves the insurance money is now intended to be credited hereafter to the plaintiffs, does not enable the court to say that the insurance effected by them was for account of the plaintiffs. I shall submit to the jury the questions of fact, in substance as follows:—If the insurance obtained by Shepherd, Wright & Ripley nominally covered the whole property, and not merely their interest in it, and they were in any manner authorized by the plaintiffs so to insure, or if there was any agreement between the plaintiffs and Shepherd, Wright & Ripley, that the former would pay the cost of insuring the special interest of Shepherd, Wright & Ripley, or any part of it, then there was subsequent insurance within the meaning of the policy, and the plaintiffs cannot recover.

Case No. 6,590.

HOLBROOK v. BLACK.

[Brunner, Col. Cas. 588; [1] 18 Law Rep. 89.]

Circuit Court, D. Massachusetts. 1854.

EQUITY PRACTICE—DEFENDANT'S RIGHT TO ANSWER UNDER OATH.

A defendant in chancery has a right to make his answer under oath, although an answer under oath is waived by the bill.

In this case the plaintiff [William Holbrook] filed his bill in the usual form, requiring an answer from the defendant [John Black] under oath. Afterwards, and before the filing of the answer, the plaintiff's counsel moved that the defendant be ordered to make his answer without oath.

R. Choate and R. F. Fuller, for plaintiff.

R. Fletcher and C. E. Pike, for defendant.

SPRAGUE, District Judge. This question is one which must be determined by precedent, and the usual course of chancery proceedings. Some of the text books seem to favor the idea that the motion should be granted; but their statements are carelessly and loosely made; and on examination they are not found to be supported by the authority of decided cases. Codner v. Hersey, 18 Ves. 468, and Curling v. Townshend, 19 Ves. 628, are the most important English authorities bearing upon the case. But they go no further than to show that, under certain circumstances, the defendant may have permission to file his answer without his oath. The cases of the Union Bank of Georgetown v. Geary, 5 Pet. [30 U. S.] 99, and Patterson v. Gaines, 6 How. [47 U. S.] 588, contain no direct decisions upon the point under consideration. But the case of Pierpont v. Fowle [Case No. 11,152], cited for the defendant, which was heard before Mr. Justice Story in this district, is directly in point. It seems in that case Judge Story decided that it was the defendant's right to make his answer under oath, although the plaintiff's bill waived the oath; and the plaintiff was in that case directed to amend his bill in order to make it conform to the common practice in which the bill requires the defendant to make answer under oath. Moreover, the book of precedents contains no form, so far as I have been able to learn, for such an order as is here asked for; and this is a circumstance of some importance in a matter of practice. I must therefore regard it as a right of the defendant to make oath to his answer; and the motion must be refused.

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

Case No. 6,591.

HOLBROOK v. FAUQUIER & A. TURNPIKE CO. et al.

[3 Cranch, C. C. 425.] [1]

Circuit Court, District of Columbia. April Term, 1829.

CORPORATIONS—POWER OF EXECUTIVE OFFICER TO ISSUE STOCK — PURCHASER WITHOUT NOTICE — PROTECTION TO LEGAL TITLE AGAINST AN EQUITY.

1. The president of the Fauquier and Alexandria Turnpike Company, without the directors, had no power to issue certificates of stock.

2. No certificate could be lawfully issued to a non-subscriber.

3. The company is not bound by the acts of its agents, unless acting within the scope of their authority; and a special agency must be strictly pursued.

4. The president had only a special authority, and having exceeded it, by issuing certificates of stock without the authority of the directors, and without consideration, his act did not bind the company.

5. The plaintiff, not having a legal title, is not protected by the rule applicable to a purchaser without notice, which is a protection only to a legal title against an equity; not to an equity against an equity; especially when the plaintiff, by ordinary diligence, might have avoided the imposition.

Bill in equity to compel the defendants [the Fauquier & Alexandria Turnpike Company and others] to admit the plaintiff as a stockholder, and to permit certain shares of stock to be transferred to him on the books of the company. The cause was set for hearing on the bill, answer, replication, depositions, and exhibits. The bill stated, in substance, that the company being indebted to C. J. Love, did, to satisfy the claim, by John Love, their president, agree to let him

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

have stock at par to the amount of his claim; that the president and directors issued, in due form of law, two certificates for ten shares each, to the said C. J. Love, duly signed by their president, and countersigned by their treasurer, as required by their charter. That another certificate was issued in favor of John Love for six shares, which he transferred to the said C. J. Love also in payment of the debt due to him by the company, but only three of them had been paid up. That the said C. J. Love, being indebted to R. B. Lee in a larger sum, directed them to be transferred to E. J. Lee, in trust for R. B. Lee. That the president certified on the back of the certificates, that the shares were so transferred. That R. B. Lee, being indebted to the plaintiff, ordered the certificates to be delivered to him, in payment, which was done. But the company refuses to suffer them to be transferred on their books; alleging that no such shares appear by their books to have been issued, and no consideration paid for them. But the plaintiff avers that they were duly and fairly issued; and that he is a purchaser for valuable consideration without notice, &c. The answer of the company denies all the material allegations of the bill; but admits the handwriting of the president and treasurer to the certificates, which were in the usual form, and to the indorsements.

Mr. Hodgson, for plaintiff, cited Paley, Ag. 229, 230, 325, 326; Hern v. Nichols, 1 Salk. 289; 1 Com. Dig. 240; Baring v. Corrie, 2 Barn. & Ald. 137; Hooe v. Oxley, 1 Wash. [Va.] 19.

Mr. Taylor, for defendants.

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

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The whole evidence in this cause is contained in the answer, the depositions of E. J. Lee, and H. Peake, and in the certificates of stock exhibited. From the evidence the facts appear to be, that the certificates of stock in question, were signed by the president and countersigned by the treasurer, in the form required by the sixth section of the charter, and were delivered to the said C. J. Love, by the president, without consideration; and from the circumstance that the books of the company contain no evidence of the issue of such certificates, it may be inferred that they were issued without the order of the directors. That the shares never were transferred by C. J. Love, upon the books of the company. That neither the said C. J. Love nor John Love ever subscribed for the said shares, or any of them, and never paid any consideration therefor. That the said certificates were received by Mr. E. J. Lee, as agent for Mr. R. B. Lee, from the said C. J. Love for a full and valuable consideration, and with a belief that they had been issued for a full and valuable consideration paid by him to the company; that the shares had been duly transferred to the said E. J. Lee, in trust for the said R. B. Lee, and that the plaintiff received the certificate with the same belief, and for a full and valuable consideration paid by him to the said R. B. Lee. By the 6th section of the charter of the company it is enacted, "that the president and directors shall cause a written or printed certificate to be given to each subscriber for every share by him subscribed, signed by the president and directors, and countersigned by the treasurer; which certificates shall be transferable by an assignment made thereof, on the books of the company, by the owner in person, or by an attorney in fact." The president of the company, without the directors, has no power by the charter, to do any act, except to sign the certificate, and to render to the courts of Fauquier, Prince William, and Fairfax, an account of the cost of the road, and of the expenses of repairs, &c. He does not appear to have had authority to make any contract for stock, nor to issue certificates of stock, nor to certify transfers; much less could he issue a valid certificate of stock not subscribed for, and without consideration. These certificates are therefore void.

But the plaintiff has been induced to part with his money by a false certificate of the president of the company. Is not the company bound to make it good? In general, the principal is not bound by the act of his agent, unless it be within the scope of his authority; and if it be a special agency, the authority must be strictly pursued. Here the president certainly had not more power to issue certificates of stock than the president and directors had; yet, by the 6th section of the charter, they could only cause certificates of stock to be issued to subscribers. The president, therefore, was not acting within the scope of his authority, in issuing a certificate to a non-subscriber. The authority of the president to sign certificates, was a special authority to sign certificates to subscribers, by order of the president and directors. In signing a certificate to a person who was not a subscriber, and without the authority of the directors, the president did not pursue his special authority strictly. Upon both grounds, therefore, namely, that he was not acting within the scope of his authority, and that he did not strictly pursue his special authority, the company is not responsible for his act.

Besides, the plaintiff cannot complain of a deception which he might have avoided by ordinary diligence. The president had no authority to certify a transfer, if it had been made upon the books; much less, one not so made. But he did not certify that the transfer was made upon the books; and the plaintiff was bound to know that such only could be a legal transfer. If the certificate of the president was equivocal, it was negligence

in the plaintiff not to insist on a satisfactory explanation before he took the paper. There having been no legal transfer of the stock, the plaintiff cannot avail himself of the principle that he is a purchaser for valuable consideration without notice; for that is a plea only in defence of a legal title against a prior equity; not a substantial ground of relief for a plaintiff in equity against an equity. Whatever legal or equitable defence the company would have had against C. J. Love or J. Love, in regard to these certificates, they have against the plaintiff. The equity follows the certificates into the hands of every one who cannot, at law, avail himself of them.

I am, therefore, of opinion that the bill should be dismissed, with costs. If the bill be dismissed as against the company, it cannot be continued against C. J. Love, and John Love, because, being non-residents, the court has no jurisdiction as to them. Bill dismissed with costs.

HOLBROOK (LANG v.). See Case No. 8,057.

HOLBROOK v. MATTHEWS. See Cases Nos. 6,594–6,596.

Case No. 6,592.

HOLBROOK v. ROSS et al.

[Cited in Smith v. Bank of Columbia, Case No. 13,011. Nowhere reported; opinion not now accessible.]

Case No. 6,593.

HOLBROOK v. SEAGRAVES.

[1 Story, 546; [1] 4 Law Rep. 143.]

Circuit Court, D. Rhode Island. June Term, 1841.

REMOVAL OF CAUSES TO FEDERAL COURT—SPECIAL BAIL—SURRENDER OF PRINCIPAL.

Where a cause is removed from a state court to the circuit court of the United States under the judiciary act of 1789, c. 20, § 12 [1 Stat. 79], and special bail is given, if the bail afterwards seek to surrender the principal, it should be in open court, and not by a commitment to gaol according to the local law of the state. But, if the party is so committed, the circuit court will, upon the petition of the bail, grant a writ of habeas corpus to bring the party into court, to be surrendered in discharge of his bail.

This was the case of a scire facias against the defendant [Jacob P. Seagraves,] as special bail for Willard Holbrook. The suit was commenced against the original defendant in the state court of common pleas. Upon the removal of the cause into this court, the bail on the original writ became discharged, and Seagraves became special bail for the defendant, in conformity with the provisions of the act of congress in relation to such cases. Since the taking out of this scire facias, the present defendant has committed his principal to the Providence county jail, and now moved the court, that he be discharged upon payment of costs on the scire facias. The motion being objected to, the court decided, that the commitment of the principal did not in this case discharge the bail. Cases of special bail entered for the defendant upon a removal of his cause from a state court into this court, are not governed by the Rhode Island statute, but by the common law and the acts of congress. This bail, therefore, could only be discharged by surrendering his principal into court to be taken in execution, as at common law. The defendant then took leave to answer the cause, and prayed a writ of habeas corpus, in order to bring the principal into court. Upon a subsequent day in the term, the defendant was brought into court upon the writ of habeas corpus, and surrendered in discharge of his bail, and thereupon was committed to the custody of the marshal for twenty days, in order that he might be charged in execution upon an alias execution.

Pratt & Atwell, for plaintiff.

Mr. Robinson and R. W. Greene, for defendant.

STORY, Circuit Justice. The case does not fall within the provisions of the statute of Rhode Island respecting the commitment of the principal to gaol by his bail; but it must be governed by the judiciary act of 1789, c. 20, § 12, and the doctrine of the common law applicable to bail. We shall, therefore, order the party into the custody of the marshal, to remain in gaol under his custody for thirty days, that the plaintiff may sue out an alias writ of execution, and charge him thereon, if he shall be so advised.

[1] [Reported by William W. Story, Esq.]

Case No. 6,594.

HOLBROOK v. SMALL.

[Cited in Star Salt Caster Co. v. Crossman, Case No. 13,320. Nowhere reported; opinion not now accessible.]

Case No. 6,595.

HOLBROOK et al. v. SMALL.

SAME v. MATTHEWS.

[2 Ban. & A. 396; 10 O. G. 508; Merw. Pat. Inv. 521.] [1]

Circuit Court, D. Massachusetts. Sept. 1, 1876.

CHANGE OF MATERIAL FROM WOOD TO IRON — WHETHER PATENTABLE—INFRINGEMENT.

1. A claim of the complainants' patent was for "a frame made of malleable iron or other metal, in combination with the handles and seedbox." The defendants proved that similar frames were before made of wood: *Held*, that

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 521, contains only a partial report.]

the alleged invention described in the claim was not patentable.

2. Where the defendants make and use a machine, which operates, or may operate, if the owner is disposed to use it so, in the manner pointed out by the patent, it is infringement.

[These bills were brought by Frederic Holbrook, trustee, and others, against Josiah B. Small and Elbridge G. Matthews, to restrain infringement of certain patents.]

John Hillis, for complainants.
T. L. Livermore, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. Elbridge G. Matthews, the defendant in one of these suits, is the patentee of the improvements in controversy, for which he took out two patents, which are now the property of the plaintiffs. The defendants in the other suit are the manufacturers who employ him. The machines which the defendants make and sell are intended to rival and supersede those of the plaintiffs and to avoid their patent, and the only question is whether it has been successfully avoided. Both patents relate to machines for sowing seed, and are admitted to be valid. Infringement only is denied.

The patent of April 13, 1869, No. 88,971, has three claims in controversy, which, without following the exact words of what are technically called the claims, are these: (1) A frame made of malleable iron or other metal, in combination with the handles and seed-box. (5) The use, in the combination, of a white or light-colored lining for the inner surface of an open seed-tube or conductor, to enable the workman to distinguish readily the operation of the machine in sowing seeds. (7) The arrangement of the dial-plate and dial in the device for holding the latter in place, substantially as described, whereby the dial can be adjusted without tipping or turning over the machine.

In the patent of June 8, 1869 [No. 91,144], two claims are in controversy: (1) The combination, with the marker, J. and arms, I, I, of the pins, e and f, for the purposes set forth, which are to retain the markers in an elevated position when not in use for marking the place for the furrow. (4) A seed dial-plate constructed as described in the patent.

Much evidence has been introduced upon the state of the art before 1869, and we think the defendants have proved that the first claim of the first patent is merely for making in iron a frame which had before been made in wood; and, therefore, as matter of law, that this as a distinct claim cannot be supported, and that the infringement of that claim by itself is no sufficient ground of action. Upon the fifth claim the question is one of fact, whether the defendants use an open conductor with a white or light-colored lining. The evidence is conflicting, though it turns on the very simple inquiry whether the sower, in using the defendants' machines, can see the seed fall: in other words, whether their conductor is an open conductor in the sense of the patent, or is closed from the view of the operator by a gauge, which is introduced for another purpose. We find the preponderance of the evidence to be, that the defendants do make and use such an open conductor, which operates, or may operate if the farmer is disposed to use it so, in the manner pointed out by the patent.

We think the seventh claim of the first patent is infringed. This is a point of construction of language and intent in the description, which, though not very clear, is, on the whole, sufficient to indicate that the figures should be on the upper side of the dial, so that they can be read and adjusted without turning or tipping the machine over.

The fourth claim of the second patent appears to us to be infringed. It is for a dial which has some advantages over the earlier forms, and these are adopted by the defendants with a change which is only formal.

The connection of the marking arms with the pins is somewhat improved in the defendants' machine, but for the purposes of this combination we regard it as substantially similar.

Decree for complainants for an injunction and an account.

[See Case No. 6,596.]

Case No. 6,596.

HOLBROOK et al. v. SMALL.

SAME v. MATTHEWS et al.

[3 Ban. & A. 625;[1] 17 O. G. 55.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—INFRINGEMENT—ACCOUNTING—EXPENSES OF LITIGATION—INTEREST ON PROFITS.

1. In an accounting, no part of the expenses of the litigation should be assessed as damages, nor is interest to be added to the profits, except under peculiar circumstances.

2. The power conferred upon a court of equity, by section 4921 of the Revised Statutes, to treble the "damages" in a suit for infringement, does not authorize the court to treble the amount of "profits."

3. Where the clerk of the court taxed the costs in an equitable mode and by consent of both parties, neither party should be permitted to withdraw his consent upon the coming in of the master's report.

[Bills by Frederic Holbrook, trustee, and others, against Josiah B. Small, and against Elbridge G. Matthews and others, for infringement.]

John Hillis, for complainants.
Thomas L. Livermore, for defendants.

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

LOWELL, District Judge. In each of these cases the first decree of the court found that one claim of one of the two patents relied on by the plaintiffs was void for want of novelty, and sustained certain other claims, and found infringement of these claims on the part of the defendants. [Case No. 6,595.]

The master, in each case, has assessed the profits made by the defendants by the use of the inventions held to be valid, but has found no damages as distinct from profits.

The complainants object that some part of the expenses of the litigation should be assessed as damages, and that interest should be assessed on the profits. Expenses of suit are never allowed. Philp v. Nock, 17 Wall. [84 U. S.] 460. Interest may sometimes be added to the profits, but only under peculiar circumstances, which the master does not find in this case. Mowry v. Whitney, 14 Wall. [81 U. S.] 620; Littlefield v. Perry, 21 Wall. [88 U. S.] 205.

The complainants ask that the court will treble the damages, under the power given in section 55 of the statute of 1870 [16 Stat. 206], now Rev. St. § 4921; but it seems clear that the law contrasts profits and damages throughout that and the preceding sections and that the power to treble the damages does not extend to profits in a suit in equity. It is true that under some circumstances a jury may consider the profits in ascertaining the damages when no better means are at hand, and so it may incidentally happen that in increasing the damages the court is adding to the profits; but profits are never, of themselves, the measure of damages at law. And in the section cited the court may increase damages as distinguished from profits. The increase is never to exceed three times the amount of the verdict (Rev. St. § 4919), and the verdict is to be for the actual damages. The master finds that there were no actual damages in either of these cases; and it is impossible for the court to make a substantial verdict by multiplying nothing by three or less.

In respect to costs, the law is that, if by mistake the patentee claims to have invented some substantial part of the thing patented, of which he was not the original and first inventor, and that part is distinguishable from the rest, and the good part has been infringed, he may recover damages for such infringement, but no costs. Rev. St. § 4922. In each of these cases the clerk, by consent of parties, taxed costs for the plaintiffs and deducted from the gross taxation so much of the expense as he found had been caused by taking evidence on the claim afterward declared by the court to be void. The plaintiffs contend that the above-cited section of the statute does not apply to these cases because they have prevailed on two patents, one of which was wholly valid. The defendants contend that, by appealing to the court, the plaintiffs have renounced the agreement, and that the law deprives them of costs altogether. The clerk has taxed the costs in an equitable mode, and by consent; and I see no reason for permitting either party to withdraw the consent. Master's report and clerk's taxation, in each case, affirmed.

Case No. 6,597.

HOLBROOK v. WORCESTER BANK.

[2 Curt. 244.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

EQUITY—ADMISSION IN ANSWER—ESTOPPEL—CERTIFICATE OF ACKNOWLEDGMENT AND REGISTRATION OF DEED—WHETHER CONCLUSIVE—GRANTOR AS WITNESS TO IMPEACH DEED—REDEMPTION OF MORTGAGE.

1. An admission, in an answer to a bill in equity, that a deed bears a certain date, does not estop the defendant from showing the deed was not then delivered, and was fraudulently antedated.

2. In Massachusetts, the certificate of acknowledgment and the registration of a deed, do not estop a third person from proving that both the deed and the certificate were fraudulently antedated; and the grantor is a competent witness to prove this. It is not necessary to call a subscribing witness.

3. If a mortgagor induces a third person to purchase a mortgage by promising in writing to pay with interest the whole sum advanced, the assignee of the equity of redemption will be allowed to redeem only, by paying what the assignor must have paid.

[Bill by Wilder Holbrook against the president, directors, and company of the Worcester Bank.]

Mr. Robb, for complainant.

R. Newton, contra.

CURTIS, Circuit Justice. This is a suit in equity to redeem a mortgage, and now comes before the court upon exceptions to the report of a master to whom it was referred, to take an account of what is due on the mortgage. The substance of all the exceptions, urged at the hearing, is that the master has applied certain moneys, received by the respondents, under a policy of insurance against fire, to the payment of a second mortgage on the property, so far as they were necessary to pay the same, and the residue only of the insurance money towards the satisfaction of the mortgage, which the complainant is seeking to redeem; whereas the complainant insists that the whole of the insurance money, or, at all events, a pro rata part, should be applied to the last-mentioned mortgage. If both mortgages were valid, inasmuch as the complainant would be obliged to redeem both, to enjoy the land, the question would not be material. It becomes so, because the complainant seeks to redeem one of the mortgages, and denies the validity of the other. To make the opinion of the court intelligible, it is necessary to state that, in 1839, Sylvanus Holbrook

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

made the first mortgage, which the bill seeks to redeem, to Henry M. Holbrook, and that in 1847 the respondents, at the request of Sylvanus Holbrook, paid to Henry M. the amount of the mortgage debt, and took an assignment of the mortgage. At the same time, Sylvanus Holbrook made to the respondents the other mortgage, to secure the sum of five thousand dollars, the validity of which is questioned. The ground for questioning its validity is, that in 1841 Sylvanus Holbrook became insolvent under the laws of Massachusetts, and all his property was transferred to one Pitts, as his assignee; and that Pitts on the 24th day of June, 1844, conveyed Sylvanus Holbrook's title to this property, which was then subject to the first mortgage only, to the complainant. The respondents' reply to this is, that on the 24th day of June, 1844, Pitts, the assignee, conveyed that title to Sylvanus Holbrook. That though he did not record the deed, he actually held it, and had the title in 1847, when he made the second mortgage to the respondents. That several years afterwards, by a fraudulent concert between Sylvanus Holbrook, Stephen B. Holbrook, and the complainant, the deed from Pitts to Sylvanus Holbrook was destroyed, and Pitts, who was ignorant of any fraudulent design, was induced to execute another deed to the complainant, which was antedated, so as to appear to have been made on the 24th of June, 1844, and that Stephen B. Holbrook, who was a justice of the peace, fraudulently and falsely antedated Pitts' acknowledgment of the deed, so as to correspond with the apparent date of the deed. The master has found the fraud to have been perpetrated as alleged by the respondents, and the complainant, under his exceptions, now objects to that finding, on several grounds.

The first is, that the answer does not deny that the deed from Pitts to the complainant was given at its date. I think the view taken by the master of this point is correct. The bill does not allege that this deed was delivered at the time it bears date, but only that it bears a certain date. This the answer admits, and the respondents do not now seek to deny it. I do not think them estopped by their answer from proving the fraud.

It is further objected, that it was not competent to examine Pitts, to prove the invalidity of the second deed made by him; first, because Stephen B. Holbrook, the subscribing witness to that deed, was present, and was alone competent; second, because Pitts could not lawfully testify to avoid his own deed. Neither of these objections is tenable. The execution or delivery of the deed was not in question. The facts to be proved were dehors the deed, and one witness was as competent, in point of law, to prove them, as another.

The rule that a party to an instrument shall not be heard as a witness to impeach it, is confined to negotiable instruments. In U. S. v. Leffler, 11 Pet. [36 U. S.] 86, it was held not to be applicable to a bond, and in Taylor v. Luther [Case No. 13,796], to a deed.

It is also insisted that the certificate of the justice of the peace cannot be contradicted. But this cannot be maintained. His certificate is not a record by which any one is estopped; and, so far as I know, the utmost effect which has ever been claimed for such a certificate is, that it is prima facie evidence. It has been so held by the supreme court of the United States in several cases,—[Carver v. Jackson] 4 Pet. [29 U. S.] 1; [Crane v. Morris] 6 Pet. [31 U. S.] 598,—under the laws of different states. But in Massachusetts, I apprehend that the only effect of an acknowledgment of a deed is to authorize the register to record it, and that it has no operation whatever beyond this. Certainly it has never been understood to dispense with the production of evidence of the execution of the deed, when that was in question, and still less that it rendered all other evidence inadmissible. Wilder Holbrook did not act personally in obtaining the deed from Pitts; he was represented by Stephen B. Holbrook. That the latter had actual knowledge of the existence of the former deed is clearly proved. Pitts testified that Stephen B. Holbrook handed it to him to be destroyed at the time the second deed was made. Notice to an agent in the course of the same transaction in which he acts for his principal, is notice to the principal. It was competent to prove this notice by Pitts, though S. B. Holbrook was present. In respect to the insurance money in question, it was received under a policy made to Sylvanus Holbrook, and by him assigned to the respondents. The assignment declares that, "having mortgaged the property to President, Directors, & Co. of the Worcester Bank, I hereby assign and transfer the within policy to them." The master has found that this policy was specifically assigned to the bank on account of, and as further security for, the sum of five thousand dollars, secured by the second mortgage, and has applied the moneys received under the policy to repay that loan. As the assignment itself declares as its purpose and inducement the existence of a mortgage made by the assignor to the bank, and as this mortgage for five thousand dollars was the only one made by the assignor to the bank, it seems to be a just, not to say necessary inference that the instrument of assignment does make the specific appropriation reported by the master. But the complainant insists that the mortgage which the assignor made to Henry M. Holbrook, and which the latter assigned to the bank, may also be embraced in the terms of the assignment, and that the answer of the bank admits that this policy was assigned as security for both mortgage debts, and that

the bank has so treated it in an account which is produced, taken from their books. The answer, speaking of this and another policy of insurance, and not distinguishing between them, does say they were delivered as security for "this and another mortgage debt." But that it was not intended to admit that this policy was justly applicable to both, pro rata, is clear; for, in plain terms, the answer insists on the right to appropriate the proceeds of this policy to the payment of the five thousand dollars mortgage. What was probably meant was, that both policies were taken as security for these debts, but that the answer does not undertake in this place to declare to which particular debt each was first to be appropriated. I think the master came to the correct conclusion, that the account referred to does not show any appropriation. The respondents, undoubtedly, believed both mortgages valid, and kept on their books only one account concerning them; but I do not see satisfactory evidence that they intentionally made an appropriation of the insurance moneys by the entries on this account; and the paper produced by Stephen B. Holbrook, as having been furnished to him by the cashier of the bank, shows no appropriation whatever. It merely states the amounts and dates of the two loans, and what had been received for rent and insurance, but does not appropriate these receipts to the payment of one, or the other, or both debts.

The remaining objection is, that the master treated the principal and interest paid by the bank to Henry M. Holbrook as principal, and allowed interest on the whole amount. This was precisely what the mortgagor agreed to, when the bank, at his request, paid the money. He gave a bond to the bank to repay what was thus advanced, with interest. It is his equity of redemption which the complainant is seeking to enforce. The complainant can be in no better condition than his assignor. He took the right subject to all equities which bound his assignor, and cannot have relief without satisfying those equities.

The exceptions to the master's report are overruled, and a decree is to be entered accepting the report, and allowing a redemption upon payment of the sum and interest therein declared to be due.

I have forborne to make any observations upon what would have been the rights of this complainant, against whom I think the second mortgage valid, if the bank had not made good its right to apply the insurance money to the payment of the second mortgage. In that case, the question would have been, whether the complainant could redeem the first mortgage without the second. But as the second is paid, no such question now exists.

HOLBROOK, The JOHN E. See Case No. 7,339.

Case No. 6,598.

Ex parte HOLCOMB.

[2 Dill. 392.] [1]

Circuit Court, D. Minnesota. 1871.

CRIMINAL LAW—COUNTERFEITING—PHOTOGRAPHING UNITED STATES SECURITIES.

1. It is a criminal act under the legislation of congress (13 Stat. 222, § 11), to photograph or execute likenesses of United States treasury notes, although the similarity between the photograph and the original be not such that it is calculated to deceive the public.

2. Manufacture of coins of original design (see note).

Holcomb, having been held to bail by a commissioner for having in his possession miniature photographs of United States treasury notes, about the size of a twenty-five cent issue of fractional currency, applied to Mr. District Judge NELSON for his discharge on habeas corpus.

Mr. Head, for relator.

Mr. Davis, Dist. Atty., for the United States.

NELSON, District Judge. The prisoner has been committed, charged with executing a photograph in the likeness of a United States treasury note. The act of congress (13 Stat. 222, § 11), enacts "that if any person shall photograph or execute * * any impression * * in the likeness * * of any obligation of the United States, or any part thereof, * * every person so offending * * shall be punished, etc."

Before the commissioner the government's counsel introduced several photographs in miniature of United States treasury notes, which were found in the prisoner's possession, with blank spaces for the signatures of the register of the treasury and the treasurer of the United States.

The prisoner's counsel insists that this being all the evidence in the case, no crime has been committed, and a discharge should be granted. He urges that the degree of similarity between the photograph and the original treasury note must be such that it is calculated to impose upon mankind in general, which can not be claimed for these photographs.

I agree that in cases of counterfeiting and forgery, where the intent to deceive or defraud enters into and forms a part of the offence, the counsel has stated the true rule. But the offence created by the statute above cited, and with which the prisoner is charged, is the execution of a photograph impression in the likeness of a United States obligation. The making the picture is the unlawful act, and the intent, whether to use, or deceive, or defraud, has nothing to do with the crime.

There is no pretence that the miniature

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

photographs would, in their present form, deceive, but the likeness, that is, the picture, is accurate. Congress has seen fit to enact many stringent laws in regard to the manufacture of the United States obligations, and has affixed penalties for printing, engraving, and photographing likenesses of any government securities, wrongfully using the plates upon which the originals are printed, and for having the custody and possession of any plate or die which could be used for manufacturing them. These statutory prohibitions are in addition to those punishing the altering and counterfeiting and forging of all United States securities.

I think these laws have been wisely enacted, for in this case, although the miniature notes may not resemble the originals sufficiently to deceive persons of ordinary intelligence, still they purport on their face to be treasury notes unsigned, and from them impressions could be made, equal in size to the original notes. In this way would they facilitate counterfeiting. I remand the prisoner to the custody of the marshal, unless he gives bail in the sum of $500. Ordered accordingly.

NOTE. Manufacture of Coins. The making of coins by individuals, adapted to be used as current money, is prohibited by the legislation of congress. Under the act of June 8, 1864 [13 Stat. 120], prohibiting the making of coins of original designs for use as money, it is not necessary that the coins should be of the denomination or resemble the coins authorized to be made by law. On the subject of the manufacture of coins of original design, the circuit judge gave to the grand jury of the circuit court for the district of Kansas the following special charge, at the June term, 1872:

"Gentlemen of the Grand Jury: For many years prior to 1864 there had been in force an act of congress prohibiting 'the false making or counterfeiting of any coin in resemblance or similitude of the gold and silver coins coined at any mint in the United States.' Act March 3, 1825, § 20 [4 Stat. 121]. Similar provision was made respecting foreign coin current here.

"In 1864, congress passed a further act, providing that 'If any person, except as authorized by law, shall make or pass any coins of gold or silver, or other metal, or alloys of metals, intended for the use and purpose of current money, whether in resemblance of the coins of the United States, or of foreign countries, or of original design, he shall be punished by fine not exceeding three thousand dollars, or by imprisonment not exceeding five years, or both.' Act June 8, 1864.

"The first statute prohibited only the making or counterfeiting of coin in the resemblance or similitude of the regular coin of the United States, or foreign coin current therein. The statute of 1864 is much broader in its terms, and declares it unlawful for any unauthorized person 'to make or pass any coins intended for the use and purpose of current money, whether in resemblance of the coins of the United States, or of foreign countries, or of original design.'

"The meaning of this provision is too plain for controversy. In all countries the subject of coinage is one of governmental regulation. It is so in this country. It is not lawful for private individuals to make coin in the similitude of the government's coin, or of foreign coin current here, even though it should be as pure or worth as much; nor under the act of 1864 is it lawful for private persons to make any coins, whether resembling the government's coin or not, intended for the use and purpose of current money.

"To make any coins of a character that they are adapted to be used for the purpose of current money is absolutely prohibited by the legislation of 1864. If coins, made without authority of the government, are in shape, size, and appearance of a character that they are adapted to be thus used, the intention that they should be so used will and should be inferred from the fact of making and disposing of them in a condition that they may be used for the purpose of current money. Under the statute of 1864, prohibiting the making of coins of original designs for use as money, it is not necessary the coins should be of the denomination or resemble the coins authorized to be made and issued by law.

"I have been shown by the district attorney some coins of the character of the one I here exhibit to you, and have felt it to be my duty to express my views respecting the meaning of the foregoing statutes of the United States. The sample here shown you bears on the obverse side a female head, with thirteen stars, and date, 1871; on the reverse a wreath with the words, 'Half Dollar, Cal.' This coin appears to be gold, and is doubtless made of an alloy of that metal, and is intrinsically worth very much less than a half dollar. All of the gold and silver coin of the United States of the present time are nine hundred thousandths fine; that is, nine hundred parts fine metal, and one hundred parts alloy.

"A sample of coin like that shown you was recently assayed at the mint of the United States, and found to contain only five hundred and twenty parts in a thousand of pure gold, and although purporting on its face to be worth a half dollar to be in fact of the value of just seventeen cents in gold. This coin is made in imitation of the gold dollar, which is the smallest gold coin issued by law, and is calculated, in my opinion, to deceive and defraud the public, since it professes to be a half dollar in money, coined in California, and is adapted to be used and circulated as money; and it is illegal to make and issue it in this shape, or even to pass it as money.

"It is known to the court that you have ignored bills at this term, charging the offences of making and passing such coin in this state, and the court is bound to suppose that in so doing you were justified by the evidence before you. I do not allude to the subject for the purpose of questioning your action as an independent tribunal; but mainly to prevent the unwarranted inference being drawn by the public that coins of the character I have mentioned can be lawfully made or passed as money. I have felt bound to say this in order that it may be known that whoever engages in business of this kind, whatever the motives or purposes, or however otherwise respectable, violates the law of the land, and incurs the risk of prosecution and punishment. It is the duty of the district attorney to bring before grand juries all violations of law of this character, and it is one which he will doubtless perform; and after this explicit declaration of what the law on the subject is, offences against it ought not to be viewed by juries with favor or indulgence."

Subsequently indictments were found, and the manufacture of the coins alluded to in the foregoing charge suppressed.

HOLCOMBE (STORY v.). See Case No. 13,497.

Case No. 6,599.

HOLDEN v. COLLINS.

[5 McLean, 189.] [1]

Circuit Court, D. Illinois. Dec. Term, 1850.

STATUTE OF LIMITATIONS—ACTUAL POSSESSION OF LAND.

1. Certain statutes of limitation protected all persons who were in the actual possession of land under claim and color of title made in good faith, and who, continuing in such possession for seven successive years, paid all taxes on the same during that time; and also protected all persons who were in possession for seven years, by actual residence on the land, and who had a connected title in law or equity, deducible of record from the state or from the United States, or from any public officer or other person authorised to sell the land for the non-payment of taxes, or under any order, judgment, or decree of a court of record. A person purchased a tract of land at a tax sale in 1839. The defendant claimed, by mense conveyances executed in 1839 and in 1840, from the purchaser, and had been in actual possession, and had paid taxes for seven successive years prior to the commencement of the suit. But, though the purchaser at the tax sale was entitled to a deed in 1841, none was actually made by the officer till the first day of June, 1850, after this suit was brought: *Held*, that the defendant was not within the purview of the statutes, and was not protected by them.

2. The title deducible of record, and the claim and color of title contemplated by the statutes, was the deed of June, 1850, and that having been made under a sale which the supreme court of Illinois has decided to be illegal, it could not relate back so as to protect the possession of the defendant.

3. It seems that the rule would have been different, if the deed had been made in 1841 to the purchaser at the tax sale, and the defendant had obtained the purchaser's title, and had been, for seven years, in actual possession of the land, made and held in good faith under that title, though in point of law the sale was illegal.

[Action at law by William Holden against William Collins.]

E. N. Powell, for plaintiff.

H. O. Merriman, for defendant.

DRUMMOND, District Judge. This is an action of ejectment, which has been submitted upon an agreement as to the facts, and a written argument has been filed by the counsel. The plaintiff claims title to the land in controversy through a patent from the United States, dated Dec. 2, 1818. The possession of the defendant at the commencement of the suit is admitted. The defendant claims title to one hundred and twenty acres, parcel of the premises described in the declaration under a sale made March 4, 1839, for the taxes of 1838, at which sale one A. H. Fash was the purchaser. It is conceded that this sale comes within the rule laid down by the supreme court of Illinois in the cases of Graves v. Bruen, 11 Ill. 431, and Tibbetts v. Job, Id. 453, the land not having been listed in conformity with law.

A. H. Fash, the purchaser, conveyed the land to a third person on the 18th of May, 1839, who conveyed it to the defendant, March 16, 1840. But there was no deed made to the purchaser at the tax sale till the first day of June, 1850. It is not stated, but it may be presumed, that the claim of the defendant was of that kind, that the after acquired title of the original purchaser would enure to his benefit,—if of any validity. The defendant had been in possession of the land by actual residence, and had paid the taxes, for seven successive years prior to the commencement of the suit.

The question is, whether the defendant was in possession and had paid taxes under claim and color of title, or had a connected title in law or equity, deducible of record, or from any public officer of this state, as contemplated by the acts of 1839 and 1835. Rev. St. 1845, pp. 104, 349, 350. When the defendant went into possession, his title was a conveyance by deed from the purchaser at the tax sale, and by mesne conveyance to himself, but there was no deed from the proper officer to the original purchaser. It is clear, therefore, when he took possession, he had no title deducible of record from this state or the United States, nor from any officer or other person apparently authorized to sell the land for taxes, nor from any sheriff or other person authorized to sell the land on execution. That title did not vest in him by operation of law until the deed was made to the original purchaser on the 1st of June, 1850, long after this suit was brought. And besides, the language of the law of 1835 (Rev. St. 1845, p. 349, §§ 8, 11) is express, that when the possessor shall acquire title after the time of taking such possession, the limitation shall begin to run, not from the time of taking possession, but from the time of acquiring title. Neither had the defendant claim or color of title as was required by the law of 1839. A construction of this statute, and of the meaning of these words, has been given by the supreme court of this state, and that is a rule of decision for this court. In Irving v. Brownell, 11 Ill. 402, the court say, by "claim and color of title made in good faith," is meant a title which, tested by itself, would be good; such a one as would authorize the recovery of the land when unattacked —that is, a prima facie title. [See Moore v. Brown, 11 How. (52 U. S.) 414.] If we apply this rule to the facts of this case, it will be manifest that the defendant had not such a claim or color of title. If he had sought to recover the land, his sole title was by a deed from the purchaser at the tax sale, and, prima facie, he had no title whatever; he had at most a right or claim to call for a title.

But it is contended that this deed, though not executed till 1850, operates back by relation to the time when it was demandable, March 4, 1841, and by connecting it with the possession and payment of taxes for seven

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

years, a claim and color of title, and a title deducible from a person authorized to sell the land for taxes, are made out. It is said that when the land is unredeemed at the expiration of two years, the deed was demandable of right, and that was the inception of the claim, the deed itself being the mere evidence of title. In a case decided at the last June term of the court, this point was discussed, and it was held that the doctrine of relation did not apply to such a case as the present. When an attachment is levied on real estate, and is followed up by judgment, execution and deed of the sheriff, the title relates back to the levy so as to supersede all claims subsequent to the levy, because the levy, if duly made, becomes a lien upon the property. If a judgment is rendered which becomes a lien upon real property from the last day of the term, and execution is issued within a year, though no sale may take place, or even levy, and other subsequent judgments may be rendered which also become liens upon the land, still, if the first judgment creditor makes his levy, and sells and obtains his deed, it relates back so as to cut off all intervening judgments. If a mortgage is given on a tract of land, and is duly recorded, though other mortgages and judgments may afterwards bind the land, if the first mortgagee forecloses his mortgage, sells the land, and takes a deed, it relates back to the time of the mortgage. But in none of these familiar cases can it be said that they relate in such a manner as that the statute of limitations will begin to run, so that if the original title fails, a party can plead that as a defense to an action brought against him, unless, indeed, the original title is that prima facie title contemplated by the statute. So in this case, a purchase at a tax sale, and a deed by the officer, may relate back so as to override certain intervening claims upon the land sold; but it has not the magic power of making the statute of limitation run by relation. Suppose a man is a purchaser at a sale upon an ordinary execution, of real property. He pays the purchase money, his name is indorsed upon the execution, the fifteen months expire, he is entitled to his deed, but without it he brings his action of ejectment for the recovery of possession of the property. Can he recover it in a court of law? The mere statement of the case is an answer. It is the deed that conveys the property under our law. That is the title deducible of record which our courts recognize. If the doctrine contended for in this case were to prevail, deeds at tax and other sales would be of no further use than as a convenient and satisfactory method of showing that a title had vested. And if it should happen, in a given case, that none had ever been executed, the omission might be readily supplied in various ways; or it might be executed even after the trial was begun, and the doctrine of relation would cure all defects. It is easy to see that to adopt such principles as these would be attended with the most serious consequences. It is a refinement which is not sanctioned by our statutes of limitation; they do not recognize the subtle distinction between the title and the evidence of title; they follow, in this respect, the ancient highways of the law, and when title is referred to, something evidenced by a written instrument is intended, or, at least, something recognized as title by the courts of the country.

It is unnecessary to advert to the question as to what would be the effect of the deed of 1850, if objected to on the ground of its being executed after suit brought, because, even admitting it, the result would be the same, and it being conceded that it is invalid and illegal, in no possible way can it avail the defendant in this action.

HOLENSHADE (SCHWARZEL v.). See Case No. 12,506.

Case No. 6,600.

The HOLDER BORDEN.

[1 Spr. 144;[1] 10 Law Rep. 193.]

District Court, D. Massachusetts. April, 1847.

CREW OF WRECKED SHIP AS SALVORS—CONSTRUCTION OF SHIP OUT OF REMNANTS—WHO ARE OWNERS.

1. Where a whale ship, owned in Fall River, was wrecked near to a very small and low sand island, in the Pacific Ocean, uninhabited, and at a great distance from any other land, and the crew, with great labor, rescued a part of the oil from the water, and placed it upon the island, and it afterwards came to a place of safety; *held*, that the crew were not salvors.

[Cited in The Antelope, Case No. 484.]

2. The master and crew, as the only means of escaping from the island, and saving property, built a schooner of thirty seven tons burden, and for this purpose used remnants of the wrecked ship, which were of no value to her owners; *held*, that the remnants were rightfully so used, and that the schooner was the property of the master and crew who built her.

3. In this schooner they conveyed the cables and anchors of the wrecked ship, and a part of her oil, to Oahu; *held*, that the master and crew were entitled, as owners of the schooner, to compensation for such transportation.

[Cited in Strout v. The Cuba, Case No. 13,549; The Aguan, 48 Fed. 322.]

4. At Oahu, the master, in order to rescue a part of the crew left on the island, and a quantity of oil which had also been left there, purchased a brig, and in payment gave a draft on Nathan Durfee, one of the owners of the wrecked ship, who accepted and paid the draft; *held*, that Durfee then became sole owner of the brig.

5. With this brig, the master of the lost ship, proceeded to the island, and with much risk took on board the part of the crew, and oil, which had been left there, and brought them safely to Fall River; *held*, that the owner was entitled to recover compensation for the service, over and above his expenses and risk, and had a lien therefor.

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[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

This was a suit against certain remnants, and oil, of the whale ship Holder Borden, promoted by her master and crew, and Nathan Durfee. The Holder Borden, of four hundred and forty-two tons, sailed from Fall River in November, 1842, on a whaling voyage to the South Seas and the Pacific Ocean, J. J. Pell, master, with thirty-six officers and men. Her cost, when fitted for the voyage, was $40,000. Having been out seventeen months, during which time she had been successful in taking oil, on the night of the 12th of April, 1844, in lat. 26° 1′ N., lon. 174° 51′ W., she struck on the weather side of a coral reef, near an island, not down on the chart. She was soon got off, but in ten minutes afterwards struck again, and went upon the weather side of a rock that lay up to the surface. In two hours more she had knocked off her rudder, broke her pintles, and sustained other damage; and had four feet of water in her hold. The officers, fearing that with the full tide, heavy rollers might come in and open the ship, ordered the boats to be made ready, and provided with bread and water. At daylight, the lower hold was filled with water. Land was seen about four miles distant, and the captain at once proceeded on shore, to ascertain its character. It was a low sand island, rising but a few feet from the water, about three miles in circumference, without a tree or shrub upon its whole surface, and surrounded by shoals, rocks, and coral reefs, extending on one side to the distance of twenty-five miles. On returning to the ship, the captain ordered the masts to be cut away, and water to be got from the hold. The chronometer, charts, and other instruments of navigation, together with some bedding, were obtained, and placed in a boat. All that day the ship remained on an even keel, and the crew were diligently employed in getting everything possible from between decks, in anticipation of her falling over. Among other things, they had got upon deck about a thousand feet of pitch-pine plank, at the order of the master, who already contemplated the construction of another vessel, as the only means of escape from the island. At sundown, all hands went on shore to pass the night. On landing, they turned to look at the ship, and to their bitter disappointment, saw her fall over seaward, and the fruit of their day's toil thrown overboard. On their return to the vessel, the next morning, they found that she had rested upon a shelving rock, and in falling over, had slid into deep water, so that all but about three feet of her larboard shear plank was under water. By nailing battens to the deck, however, they secured a foothold, and succeeded in obtaining from between decks three or four light spars, a coil or two of rigging, and one or two sails. The spars were landed that evening. The mate and a seaman, who were left on shore that day, to search for water, after much labor discovered it, of a tolerable quality, by digging, near the centre of the island. All the next day was spent in breaking up the outside of the ship, to obtain timbers, and in clearing away the rigging, in order to tow ashore the masts, which had been cut away. As they had saved very little provisions, it became necessary to begin to work in the lower hold, which was deep under water, to obtain them. Among the crew were two divers, natives of the South Sea Islands. By offering them increased wages, and other additional inducements, the master prevailed upon them to go into the hold, and hook on to whatever they could reach. They first went down the after-hatch, and fastened successively on a number of casks. Each time, the full crew hoisted away, but could start nothing. During three days, they tried everything accessible in the three hatchways, and were unable to move one cask a single inch, though they straightened their hooks, and broke the falls, with their efforts. The master states, in his testimony, "everything was Jacksoned, chocked, and we could not start it." They then resolved to cut a hole through both decks, and thus reach the provisions, although the lower deck was four feet under water. For this purpose, their only instrument was a single whaling-spade. This was kept in constant activity for thirty-six hours, being passed from hand to hand, when it was found that a hole had been cut, just large enough to admit the passage of a cask. The labor of the next five days secured to them three barrels of bread, thirty of salted provisions, and 200 casks of oil. Subsequently, with the same instrument, and the same persevering toil, they cut four other holes through both decks, through which they raised 600 barrels of oil, and left them floating between decks for safety. When they reached the provisions, they hoisted them upon deck, and having becketed them, to keep them from floating off, threw them overboard. From six to twelve barrels, only, a day, could be taken to the shore in pleasant weather. The beach was soft, like quicksand, and they were obliged to cover it with planks for a hundred feet, and roll the casks, up this floor, to the solid land. They were then placed in tiers, and covered with grass, to protect them from the sun. In this toilsome way, 1400 barrels of oil, and a quantity of provisions, were landed. Six days after the wreck of the Holder Borden, the captain set the carpenter and three men at work, to construct a schooner, out of the materials which had been obtained from her. It involved much sagacity, and patience, and toil. They were entirely without tools, and almost without resources for producing them. They manufactured two saws, out of iron hoops, about eight feet long. With these rude implements, they sawed out the larger timbers, splitting some of them, their entire length, three times, and converted the

ship's spars and knees, into plank and flooring, with the most patient assiduity. They took the ship's try-pot, fitted a cover to it, and to this secured a steam-box, for steaming the plank to be fitted to the new vessel. A half-cask of sea-coal, and the ship's bellows, were the only appliances for blacksmithing which they had saved. They burnt several coal-pits, using wood rescued from the wreck. Having set up a forge, they manufactured their own axes, adzes, and augers. "I never saw anything like the augers," said the captain, "but they answered our purpose." Having got their vessel built, at last, they made oakum, manufactured caulking tools, caulked the schooner inside and out, and painted and pitched her, from materials preserved from the ship. They had reduced the ship's spars; and for standing rigging, they used the unlaid strands of a stream cable. For sails, they made over the ship's canvas. The schooner was of thirty-seven tons, and thirteen feet beam. The labor of launching remained, and the soft beach rendered it almost an impossibility. The work was commenced early in the morning; and though the most extraordinary efforts were used, it was late in the afternoon, before they were able to float their little craft, which they very appropriately named "The Hope." Immediately on being launched, she went over plank shear to the water. Here was a new difficulty, which was to be conquered only by the same persistent exertion, which had marked every step in their undertaking. At last, having got on board provisions, water, and thirty barrels of oil, with whatever ballast of a heavier sort they could obtain, the schooner was found to be sufficiently stiff for her voyage; and the captain, leaving eleven men upon the island, to take care of the oil, with a promise of his speedy return, set sail, the next morning, with the remainder of his crew, after nearly five months spent in incessant toil, under a torrid sun, upon this desolate island. In twenty-three days, they reached Oahu in safety. Being unable to charter a vessel, at a reasonable rate, to run back to the island, the master purchased the brig Delaware, for $6000, for, and in the name of Nathan Durfee, one of the owners of the Holder Borden, and drew on him for the amount. Having made necessary preparations for his return, he set sail, and in eleven days made the island. Large quantities of the oil had been lost by leakage, through the negligence of the men, who had allowed the casks to become uncovered, and exposed to the sun. Twenty-six days of exhausting and perilous effort, were spent in placing the remaining oil on board. Having been wind-bound for eight days, during which time they were exposed to great perils from storms and reefs, they set sail for Oahu, on the 14th of December, and arrived at that port, January 8th, after a hard passage, and with their vessel in an extremely leaky condition. Indeed, it was found, on examination, that her sheathing was all that had kept her afloat, the oakum being all out of her seams. At Oahu, the Delaware was repaired and refitted, and sailed thence for home, on the 9th of February. She arrived at Fall River, July 8th, 1845, having again encountered, in her home passage, very severe weather, bringing the oil and some remnants of the Holder Borden. A libel was filed in admiralty, by the master and seamen, and process in rem issued, against all that was saved from the Holder Borden. The underwriters upon the Holder Borden and catchings, intervened as claimants, having paid as for a total loss. Some of the questions of fact at issue, were referred to T. D. Eliot, Esq., of New Bedford, as assessor, who made his report thereon.

T. G. Coffin, for libelants.
J. H. Clifford, for claimants.

SPRAGUE, District Judge. 1. Are the officers and crew of the Holder Borden, to be deemed salvors, in rescuing from the waves, and placing upon the island, the oil and fragments of the vessel? In the case of The Neptune, 1 Hagg. Adm. 227; The Massasoit [Case No. 9,260]; and the recently reported case of The Reliance, 2 W. Rob. Adm. 119,—it is decidgd that, in case of shipwreck, and part of the vessel being saved by the exertions of the crew, they are entitled to wages; but cannot be deemed salvors, unless under very extraordinary circumstances. It is insisted, that this case comes within that exception. Immediately upon the disaster, the captain resolved upon building a schooner, as the only means of escaping from the island. He put upon this service as many men as could be employed to advantage, and it took nearly five months to complete her for sea, during which time the residue of the crew had no other employment than that of saving the oil. The weather was fine, the sea was smooth, and although the service was laborious, it was not attended with danger, or any particular suffering. We should keep in mind, that this was a whaling voyage, in which the great principle of maritime policy, of uniting the interest of the mariner with that of the owner, is adopted, in its greatest force. By express contract, the compensation of a mariner is to be only a share of the net proceeds, which shall be brought to the hands of the owner. In taking the oil from the wreck, therefore, they were laboring to secure the proceeds of the voyage, upon which their compensation depended, which was enhanced by every barrel ultimately saved. I do not think that the circumstances were such as to entitle them to be considered as salvors, for merely placing the remnants of the ship, and the oil, out of the reach of the waves.

The men worked only during the day, not being pressed for time, subsisted upon the

provisions of the ship, and acted under the direction of her officers. The captain exhibited great ability, promptness and energy, in the trying and novel circumstances in which he was placed; and all parties concur in paying a deserved tribute to his merit. But the crew had no responsibility, except that of obedience to his commands.

2. The next question is, what are the rights of the officers and crew, with respect to the schooner Hope, and the property transported in her to Oahu? The remnants of the ship belonged to her owners; but, under the circumstances, were rightfully used by the officers and crew, in building the schooner. None of the old materials could be made use of, in the form in which they were found. All had to be re-fashioned, with very great labor. The mariners were under no obligation, by virtue of their original contract, to build this vessel; and the owners of the ship acquired no right from the building of her, their materials used in her construction, being found, by the assessor's report, to have been of no value to them. In a whaling voyage, the owners are to furnish the ship, and the mariners to perform the labor. If the captain had hired a vessel, to transport the property from this island, he would have been entitled to remuneration of the expense thus incurred. If the captain and mariners employ their own vessel, they, also, are entitled to compensation.

3. The brig Delaware, purchased at Oahu, is to be deemed the property of Dr. Durfee. The purchase was made in his name; the bill of sale given to him alone. He has paid the purchase-money, and although the captain states, that he purchased her for the owners of the Holder Borden, whoever they might be, it does not appear that any of the other owners have, in any manner, ratified his acts, or participated in the purchase. For going from Oahu to the island, which I shall call "Pell's Island," and taking from thence the oil, and the few remnants of the ship, the brig was entitled to compensation, and has a lien, therefor, on the property taken on board and brought to the United States. It appears, that the officers and crew of the Delaware, have been paid by her owner, for their services in going from Oahu to Pell's Island, and taking and conveying her cargo thence to the United States, and are not now to be compensated for that service.

It is found, by the assessor, that the actual expenses incurred by the owner of the Delaware, in saving this property, including the purchase of the brig, and deducting her value at Fall River, was $11,303.12; and he has reported, that five per cent. will be a fair rate of insurance. This, I am satisfied from the evidence, is a moderate estimate. Beside the amount of expenses and insurance, the owner ought to be allowed such further compensation, as would have been an adequate inducement to him, if he had been present, to allow his vessel to be employed in this extraordinary enterprize.

For this, including the risk of the brig, I shall allow the sum of $1650, which, added to the expenses above stated, makes an aggregate of $12,953.12. The assessor has reported, that one-third of the net proceeds would be a fair compensation to the owners of the Hope, for taking, and carrying to Oahu, the oil and remnants, which were conveyed in that vessel, and that sum, being $755.60, will be allowed to them accordingly; and as Captain Pell has not been adequately rewarded, for his peculiar and meritorious services, in the extraordinary circumstances in which he was placed, I shall award to him the further sum of $200.

The net proceeds of the oil and remnants of the ship, taken by the brig Delaware from Pell's Island, amounted to $17,628.57; deduct $12,953.12; leaves $4,675.45. The net proceeds of the oil and remnants, conveyed by the Hope, was $2266.80; deduct $755.60, and $200, leaves $1311.20; from the above sums of $4675.45, and $1311.20, will be deducted the costs of the libellants; and the residue will remain to the owners of the Holder Borden, and her officers and crew. So far as this fund is the proceeds of the remnants of the ship, it belongs exclusively to her owners. So far as it is the proceeds of the oil, it belongs to the owners, officers, and crew of the ship, in the proportions prescribed by the shipping articles. Decree accordingly.

NOTE. In The Neptune, 1 Hagg. Adm. 237, Lord Stowell, giving judgment in favor of seamen's claim for wages, in a case of wreck, where materials had been saved by them, said, as to their being considered salvors: "I will not say, that in the infinite range of possible events, that may happen in the intercourse of men, circumstances might not present themselves, that might induce the court to open itself to their claim of a persona standi in judicio. But they must be very extraordinary circumstances indeed." In The Florence [16 Jur. (pt. 1) 572], nearly thirty years afterwards, Dr. Lushington speaks of such a claim, as of novel impression in an English court; and he sustained it, on the ground, that the seaman's contract had been vacated, by an abandonment of the ship at sea, on account of damage received and the state of the elements, for the purpose of saving life, without hope of return, in good faith, and by the master's order; and so the libellants, not being seamen, might be salvors of the ship. The case of The Holder Borden [Case No. 6,600], and the American authorities cited below, do not seem to enlarge this doctrine, nor to sustain the claim of seamen to salvage reward for services rendered during the existence of the contract. Mesner v. Suffolk Bank [Id. 9,493]; Miller v. Kelley [Id. 9,577]; The Star, 14 Law Rep. 487; The Robert & Anne, Stu. Adm. 254; Nickerson v. The John Perkins [Case No. 10,252]; The Acorn [Id. 30]; The John Perkins [Id. 7,360]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; The Wave [Case No. 17,300]. The case of The Mary Hale [Id. 9,213] seems to go farther in favor of the seaman than the case in the text, or the cases cited. The numerous cases, already cited in The Massasoit [Id. 9,260], in which wages have been allowed, out of wreck, as salvage, or

quasi salvage, can hardly be considered, in view of subsequent decisions, as an authority for the exception.

Case No. 6,601.

In re HOLGATE.

[8 Ben. 355.] [1]

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

COSTS IN PROCEEDINGS TO ANNUL DISCHARGE.

Costs may be awarded to the prevailing party in a proceeding to annul the discharge of a bankrupt, brought under section 5120, Rev. St.

[In bankruptcy. In the matter of John W. Holgate.]

T. Saunders, for creditor.

J. W. Lawton, for bankrupt.

BLATCHFORD, District Judge. In this case, a creditor, after the discharge of the bankrupt, applied to the court, under section 5120 of the Revised Statutes, to annul the discharge. Proofs were taken and the court dismissed the application. The bankrupt now asks that the creditor may be charged with the costs of the application. The creditor contends that there is no statute under which costs can be awarded by the court against a creditor on the dismissal of such an application, and that the court has no power in such a case to award costs against a creditor.

The proceeding provided for by section 5120 is, in form, a contestation in a separate and independent equitable suit, to which there are adversary parties. The application of the creditor is required to be in writing, and to set forth and specify particularly enumerated matters. The bankrupt is required to answer the application. There is to be a hearing. The court is to take proofs, and to make a finding on the issues, and is then to give judgment either in favor of the creditor, or in favor of the bankrupt. Here are all the elements of a formal suit. There is no section of any statute, and no general order in bankruptcy, which specifically declares that, on rendering such judgment, the court either shall or may award costs to either of the two parties against the other. The same remark is true in reference to a judgment or decree granting or refusing a discharge.

But it is well settled that the right of the prevailing party to recover costs generally, in all cases at law and in equity, in the courts of the United States, is given by acts of congress, either expressly or by necessary implication. Opinion on "Costs in Civil Cases" [Fed. Cas. Append.]; Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. [59 U. S.] 460. The power of a court of the United States to render a decree or judgment, in a case of equitable cognizance, includes the power possessed and exercised by all courts of equity, to use its discretion to award or refuse costs, as its judgment of the right of the case, in that particular, may require. This doctrine was recognized as applicable to proceedings for a discharge, under the bankruptcy act of 1841 [5 Stat. 440], in Re Guild [Case No. 5,860]; and, in reference to proceedings under the present bankruptcy act, it is said by Judge Lowell, in Re George [Id. 5,326], that it is "clear that the district court, sitting in bankruptcy, has the discretion, like other courts of equitable jurisdiction, to give or withhold costs, in whole or in part, as it may deem just, in all proceedings not specially regulated by statute." There is no statutory provision, which either expressly or by implication forbids the awarding of costs in a case like the present.

I think this is a case in which it is proper to award costs to the bankrupt against the creditor.

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

HOLGATE, The ELLEN, v. The ILLINOIS. See Case No. 4,376.

Case No. 6,602.

HOLIDAY v. MATTHESON.

[Cited in Holiday v. Mattheson, 24 Fed. 185. Nowhere reported; opinion not now accessible.]

HOLLADAY (HELLMAN v.). See Case No. 6,340.

HOLLADAY (SAMUEL v.). See Case No. 12,288.

Case No. 6,603.

In re HOLLAND.

[2 Hask. 90.] [1]

District Court, D. Maine. Sept., 1876.

MORTGAGES—USUAL COURSE OF BUSINESS—FRAUD—INSOLVENCY—EVIDENCE.

1. A mortgage of a mill covers machinery afterwards purchased and put into the mill.

2. A mortgage to secure prior advances is not in the usual course of business, and in bankruptcy, is prima facie fraudulent and evidence of an intended fraud.

3. Insolvency is the inability to pay debts in the usual course of business.

4. A mortgage, of present and future stock by an insolvent, to secure promised future advances, is not in the usual course of business and is prima facie fraudulent, and cogent evidence of a design to delay, defraud and hinder creditors; and when so given, it is an act of bankruptcy under section 504, Rev. St., even though it be a valid security.

Petition by creditors to have their debtor [Thomas A. Holland] adjudged a bankrupt for giving fraudulent preferences and making conveyances of his property with

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

intent to delay, defraud and hinder his creditors. The debtor, by answer, averred that the conveyances given by him were given in good faith, to raise money with which to increase and prosecute his business, and without fraudulent design or purpose. Proofs were taken.

Byron D. Verrill, for petitioners.
John O. Winship, for respondent.

FOX, District Judge. The requisite number of creditors having become parties to this petition, and a trial by jury having been waived, the question for my determination is, whether the alleged acts of bankruptcy are established. The respondent is the only witness, and is called by the petitioners. His business has been that of manufacturing blankets at Windham in this district. He is charged with having in violation of the bankrupt act [of 1867 (14 Stat. 517)] made two mortgages to Swett & Leavitt, one April 12, 1876, the other May 4th, the same year. The first mortgage covered "all the tools and machinery in his woolen mill at Mallison Falls, on the Presumpscot river in Windham, and the water wheel and all stock manufactured and in process of manufacture," and was to secure the payment to the mortgagees of his note for $10,000 in three months with interest at ten per cent. The second mortgage was to the same parties to secure the payment of Holland's two notes, each for $5,000, payable in thirty and sixty days from May 4th with interest at twelve per cent., and included all the woolen and shoddy stock, also oils and dye stuffs and fittings contained in the woolen mill situated at Mallison Falls, and all stock in any outbuilding in said Windham and Gorham belonging to him; "also all woolen stock which may be purchased by me and stored in said mill and outbuildings to be there manufactured, unmanufactured and in process of manufacture." These mortgages were duly recorded. Both of them are charged to have been made with an intent to give the mortgagees a preference, and also with a purpose and design on the part of Holland to delay, defraud, and hinder his creditors. It appears that in the fall of 1874, Holland purchased the mill and power at Mallison Falls for $12,200, paying but $500, and securing the balance by mortgage of the property, on which but $200 has since been paid by him. He repaired the dam, sold some of the old machinery and substituted new at an expense, as he says, of from $2,000 to $3,000. Under the decisions in this state, this machinery became a part of the realty, and is held by the mortgage now in process of foreclosure. The rights of Swett & Leavitt are not involved in the question I am now to determine, and I have purposely refrained from allowing my mind to arrive at any conclusion upon them; neither is it requisite that I should decide whether I can depend on the statement of Holland that $8,000 was stolen from him on the 4th of July. The single question here at issue is the purpose and object of Holland in making these conveyances. The mortgages may be perfectly valid security to the mortgagees, and yet the mortgagor may, by their execution, have subjected himself to the liability of being adjudged a bankrupt. Section 5021, Rev. St., declares that any person "who makes any assignment, gift, sale, conveyance or transfer of his estate, etc., with intent to delay, defraud, or hinder his creditors, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt."

Holland, in answer to his counsel, swears that, in making these mortgages, he had no such purpose or intent; that his object was to sustain his credit, so as to make large purchases of material to manufacture, as he was advised that in all probability they were then at the lowest rate and would undoubtedly advance, and if so, the goods manufactured would also advance, and he would thereby derive a large profit in his business; and that to carry out this purpose, it was necessary to obtain large credit; and to meet his liabilities and to accomplish his purpose, he effected the mortgage of May 4th. It is with regret that I am compelled to the conclusion that such was not the object and design of Holland in giving this mortgage. This mortgage, as well as the previous one of April 12th, was not in the regular course of his business, and they were, therefore, prima facie fraudulent, as is expressly declared by the bankrupt act. Holland denies that he was insolvent on the 4th of May. I have but little doubt that he was in that condition in January; and I am satisfied that he was constantly falling behind hand, until he found himself owing more than $20,000, and with little or no assets to meet it. It is now demonstrated that in May he was utterly insolvent; and from the condition of the business in which he was employed, and the failure of his consignees to make sales of his goods, I think he could not but conclude and believe that he was then unable to pay all that he owed. He substantially admits that, at the time he executed certain bills of sale in February, to secure loans included in the first mortgage, he was then insolvent within the meaning of the bankrupt law, as he says, he could not then have met his liabilities, unless he had raised these sums by means of these conveyances, two of which were of stock purchased by him on credit, and conveyed by him before it had come to his possession and while in transit on the cars, to raise money to pay his old liabilities, a circumstance, that the court cannot but remark is strongly indicative of a fraudulent design. Whenever a party is found purchasing goods on credit, and, before he has received them into his possession, conveying

them in this manner to raise money to pay old debts, his conduct is so openly and clearly fraudulent, and manifests such fraudulent purpose on the part of the vendor, that a court would be fully justified in finding that he intended to accomplish a fraud by such proceedings, without further evidence; and it is most conclusive evidence that Holland's pecuniary condition was such that he could not fairly and honestly meet his liabilities as they fell due.

Confining my attention to the mortgage of May 4th, I am clearly of opinion that instead of sustaining his credit thereby, this conveyance, when it should become known to his creditors, would have an effect directly the contrary. As I have had occasion repeatedly to remark in cases of this nature, nothing is so surely fatal to a debtor's credit, as a heavy mortgage encumbering his stock. No one will even resort to such a device to continue his business, unless compelled so to do by pressing necessities; and creditors who may receive the money realized by the mortgage, at once become distrustful, and will no longer afford credit to the party, as they will understand his situation, and that no security remains in the debtor's hands for the payment of his future indebtments; and more especially is such the case, when there is found contained in the conveyance a provision, such as is met with in the mortgage of May the 4th, including "all the stock which I may afterwards purchase." If a seller was aware of such a clause, and understood that the goods he was about to dispose of were, the moment the sale was completed, to pass beyond the control of the purchaser without payment therefor, it cannot be believed that any one could be found who would be willing to sell his goods on credit under such circumstances; on the other hand, if Holland was willing and ready thus to buy goods on credit, which the mortgagees by such a conveyance would acquire a title to and hold as security for prior advances, it is to my mind cogent proof of a wicked, fraudulent purpose on his part, which should subject him to be adjudged a bankrupt. According to Holland's statement, there was on the 4th of May due to him from Swett & Leavitt $2,000 on the prior mortgage; this had been due to him ever since the giving of the mortgage April 12th, and still remains unpaid. If Holland on the 4th of May was in need of money to meet his liabilities, why did he not call upon the mortgagees for this sum, and apply it to the most pressing claims against him, instead of giving them a new mortgage for $10,000, from which not a dollar was received by him, as he admits, until after the first note of $5,000 secured thereby had become due and payable? Why should he then encumber his property for this large amount, giving security payable in thirty and sixty days for further advances, when there was still this balance of $2,000 due and unpaid? Such conduct, to my mind, speaks louder and more clearly as to his purpose, than any explanation which he may now give as a witness. By this mortgage, he was on May 4th encumbering his stock for its full value, apparently holding forth to his creditors that he was the debtor of Swett & Leavitt for this amount, that they had advanced him the $10,000 and were entitled to this security therefor, when in fact, on that day, he was not the debtor of Swett & Leavitt for a single dollar for this mortgage, but they were indebted to him $2,000 on the prior mortgage. There was falsehood and deception practiced by the very instrument now under consideration; and this continued from day to day until a moiety of the mortgage debt had become due and payable. Was not his object, by this conveyance, to misrepresent the condition of his affairs, to deceive and defraud his creditors, and prevent their resorting to this property for the payment of their claims against him? Such certainly was the result which one would ordinarily anticipate from such conduct, and the court cannot but believe such was his purpose and object. Upon the face of the mortgage it bore an absolute lie, daily repeated for a month, by declaring that Holland was indebted to Swett & Leavitt for the sum of $10,000, when, as is shown, nothing was due to them thereon.

As evidence, not without weight, is the further fact that Swett & Leavitt never gave to Holland any note or memorandum to manifest their liability to him for this large amount. The payment by them to him of this large sum was left wholly dependent on the memory of the parties, while the rights of Swett & Leavitt were protected by the most formal instrument. Holland's dealings after May 4th with some of his creditors throw much light on his intentions; but without commenting further on the testimony in this case, I am, by the facts and circumstances in evidence before me, notwithstanding the positive evidence of Holland to the contrary, forced to believe that his purpose and design in executing the mortgage of May 4th, was to hinder, delay and defeat his creditors; and I am therefore compelled to adjudge him a bankrupt for so doing.

Case No. 6,604.

In re HOLLAND.

[8 N. B. R. 190.] [1]

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

BANKRUPTCY—FRAUDULENT PREFERENCE—PROOF OF DEBTS.

1. Where a debt or claim, on account of which an illegal preference is received, is sin-

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gle or entire, or where such claim consists of disconnected debts, and a preference is received on account of them all, the preferred creditor must surrender all he has received before he will be allowed to prove any portion of his debt.

2. Where a creditor has several disconnected claims or debts and receives a preference as to a part only of such debts, he may prove without surrender as to the debts on which he has received no preference; following In re Richter [Case No. 11,803].

[Cited in Re Aspinwall, 11 Fed. 138; Re McVay, 13 Fed. 445.]

3. Where a creditor has separate and distinct debts, on which he receives separate and distinct preferences, he may surrender as to some without surrendering as to all, and will be entitled to prove on the debts so surrendered.

[In bankruptcy. In the matter of D. G. Holland.] On an issue certified by the register, Benjamin J. Brown, Esq., formed under general order 34, upon the application of the assignee to expunge the claims of William Final, a creditor of said estate, on the ground of a fraudulent preference.

LONGYEAR, District Judge. Final was endorser for the bankrupt upon four promissory notes, as follows: One for three thousand dollars, dated February 22d, 1869; one for one thousand dollars, dated February 28th, 1869; one for two thousand dollars, dated March 25th, 1869, and one for the thousand dollars, dated February 2d, 1869. Within four months before the commencement of proceedings in bankruptcy, the bankrupt transferred to Final a quantity of pine lands, and a note against one Alexander English, for one thousand dollars, out of which Final was to indemnify himself, and under circumstances that leave no doubt of the transfers constituting a fraudulent preference under the bankrupt act [of 1867; 14 Stat. 517], as to both debtor and creditor. After the appointment of the assignee Final surrendered the lands so transferred to him, and has proven the first three notes above specified against the bankrupt's estate. Final used the English note for one thousand dollars to take up the remaining note of the same amount so endorsed by him, and has neither surrendered the English note or the avails or value thereof, nor has he sought to prove the note so taken up by it. The application now is to expunge the claims proven because of the non-surrender of the English note or the avails or value thereof. Where a debt or claim, on account of which an illegal preference is received, is single and entire, or where such claim consists of two or more separate and disconnected debts, and such preference is received on account of them all, no portion can be proved without a previous surrender (section 23), and if proven, it will, on application, be expunged. But when a creditor has two or more separate and disconnected debts, receiving a fraudulent preference as to some one or more only will not affect his right to prove those as to which no preference has been received and to receive dividends thereon. In re Richter [Case No. 11,803]. So, where a creditor has separate and disconnected debts as to which he has received separate and distinct fraudulent preferences, he may surrender as to some and prove and receive dividends as to them without surrendering as to the others. In this case the proofs are clear and pointed, and all agreed that the English note, in regard to which this controversy arises, was transferred to Final for the express and sole purpose of being used as it was used by him, to take up the note before mentioned. It was, therefore, a preference as to the one note only, and can in no manner affect Final's right to prove as to the other three, and receive dividends thereon, he having surrendered the pine lands, the only preference he had received on their account. Whatever remedy the assignee may have in regard to the English note it does not lie in this direction. Let an order be made and certified to the register, Benjamin J. Brown, Esq., denying the application of the assignee to expunge the claim of William Final against the said estate.

Case No. 6,605.

In re HOLLAND.

[12 N. B. R. (1875) 403; 1 N. Y. Wkly Dig. 126.] [1]

District Court, W. D. Texas.

JURISDICTION IN BANKRUPTCY—PROVISIONAL WARRANTS—SEIZURE OF PROPERTY—INJUNCTION.

1. The district court, in an involuntary case, has no authority under a provisional warrant to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition.

2. The district court, in an involuntary case, may issue an injunction to prevent the disposal of property by a person to whom the debtor has transferred it.

In bankruptcy.

DUVAL, District Judge. On the 20th day of December, 1873, certain creditors of George B. Holland, Jr., filed their petition in this court, seeking to have him adjudged a bankrupt, which proceeding is still pending and undetermined. Among other things, the said creditors charged that a certain stock of goods, wares, and merchandise had been fraudulently transferred by said George B. Holland, Jr., to his father, George B. Holland, Sr., and a writ of seizure was thereupon issued out of said court, commanding the marshal to seize and take the same into his possession. By authority of this war-

[1] [Reprinted from 12 N. B. R. 403, by permission. 1 N. Y. Wkly. Dig. 126, contains only a partial report.]

rant, the marshal accordingly seized the goods on the 26th day of December last, and took them out of the possession of Holland, Sr., and now holds them subject to the order of the court. The said George B. Holland, Sr., now files a petition representing to the court that he purchased said goods from his son on the 27th day of October last—that the purchase was made in good faith, for a fair and valuable consideration, without intention to defraud creditors, and without any knowledge on his part that his son owed anything on said stock of goods; and he prays that so much of said warrant as specially directed the seizure thereof, be annulled and set aside, and the marshal ordered to restore the same to his possession. I do not think the 40th section of the bankrupt act [of 1867 (14 Stat. 536)] confers authority upon the court, on the filing of a petition by a creditor, to order the seizure of any property or effects, except such as belong to, and are in possession of the debtor. No authority is conferred for ordering the seizure of property from the possession of a person to whom the debtor had transferred it prior to the filing of the creditor's petition. George B. Holland, Sr., was no party to the proceedings when the warrant of seizure was issued, and the goods appear to have been purchased by, and conveyed to him, some two months previously. The question of the bona fides of the sale and transfer by Holland, Jr., to his father, and whether it was in fraud of the rights of creditors, etc., is one which can only be raised and determined by a proper judicial proceeding. Until this is done, Holland, Sr., is entitled to the possession of the property. If Holland, Jr., is adjudicated a bankrupt, suit may be brought by his assignee to subject the property or its proceeds, to the claims of creditors, and in such action Holland, Sr., must be a defendant, with the right of being heard. While it is my opinion that the writ of seizure was improvidently issued in this case, so far as it authorized the marshal to take the goods from the possession of Holland, Sr., the section of the bankrupt act, above referred to, clearly authorizes a writ enjoining and restraining Holland, Sr., from making any disposition thereof, until the further order of the court, and this would have been the process proper to be used. It is, therefore, ordered, that so much of the warrant aforesaid, as authorized the seizure of said goods in possession of Holland, Sr., be annulled and vacated, and that the same be restored by the marshal to his possession. It is further ordered, that a writ of injunction do issue at the same time, restraining the said Holland, Sr., from selling or otherwise disposing of said goods, until the assignee of Holland, Jr. (in case the latter be adjudged bankrupt), has a reasonable time for asserting his rights thereto, if he has any, by a suit for that purpose, or until the further order of the court in the premises.

Case No. 6,606.

HOLLAND v. CRANSTON.

[1 Curt. 497.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1853.

MUNICIPAL CORPORATIONS — RHODE ISLAND STATUTES—DEFECTIVE HIGHWAY—DAMAGES.

The thirteenth section of the act of Rhode Island "concerning towns," &c. (Dig. 299), requires notice to the inhabitants before an action on the case is brought against the treasurer, for damages suffered by reason of a defect in a highway, which the town was bound to keep in repair.

This was an action on the case [brought by John Holland against the town treasurer of Cranston] to recover damages for an injury received by the plaintiff through a defect in a highway, which the town was bound to keep in repair. The defendant pleaded that no notice was given to the electors of the town, pursuant to the thirteenth section of the act concerning towns (Dig. 299). The plaintiff demurred.

Blake and Rivers, in support of demurrer.
Mr. Carpenter, contra.

CURTIS, Circuit Justice. The question raised by this plea is, whether a demand against a town, for damages suffered through its neglect to keep one of its highways in repair, is within the thirteenth section of the act concerning towns, found in the Digest (page 299). This is so purely a question of local law, that I had hoped it might be found to have been settled, if not by any decision of the state courts, at least by a practice, so long continued, that it ought not to be departed from. But it appears, from the statement of gentlemen of the bar of much experience, that the practice itself has not been uniform; and the question being raised, I must determine it. The general purposes of this section may be stated to be, to provide remedy for persons having demands upon towns, by enabling them to recover judgments thereon, against the town treasurers personally; and to afford means to such treasurers, to obtain reimbursement of what they may pay upon such judgments. The terms of the act are sufficiently broad to embrace this claim. Those terms are: "Every person who shall have any money due to him from any town, or any demand against any town, for any matter, cause, or thing whatsoever, shall take the following method to obtain the same," viz.: and then follows the description of the method. But it is argued, that what follows, as well as the nature of the case shows, that the act was limited to claims arising from contract, and does not include those arising from torts. In describing the method of proceeding, it requires the claimant to pre-

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

sent "a particular account of his debt or demand, and how contracted." These last words certainly tend to show that the debts or demands referred to were such as arose from contract. In the absence of any words manifesting a contrary intent, they would be sufficient to show that. But there are such words, occurring, not in the description of the mode of proceeding, but inserted for the very purpose of describing and identifying the claims intended to be included. Any money due, or any demand, for any matter, cause, or thing whatever, do not admit of being narrowed down to claims ex contractu, without doing some violence to those terms. It is true they may have been intended to be thus restricted, and this intention may appear in other parts of the section, or from the nature and objects of the provision. But so the words, "and how contracted," admit of the interpretation, that they were intended to refer to cases of contracts, and to require a statement of how it was contracted, if a debt was claimed, but were not designed to import that no demand should be made, unless it was shown how it was founded on a contract. In other words, that this clause should be read, "and how contracted, if founded on contract."

It has been urged, also, that torts are not included, because it is not practicable to present "a particular account" of such a demand. Certainly a claim for unliquidated damages for a tort is not a subject of account; but neither is a claim for unliquidated damages for breach of contract. And to include them, it is necessary to understand the word account, not in its strict sense, but more popularly, as equivalent to statement. It was further argued, that claims like this were not within the mischief intended to be provided against. That mischief appears to have been, that towns might be involved in litigation, without the knowledge or consent of a majority of the inhabitants; and the act was designed to secure to such majority an opportunity to determine whether the town would engage in a lawsuit, before it should be begun, or any expenses incurred. I do not perceive why such a case as this is not within that mischief, as clearly as any other. But the principal argument relied on by the plaintiff's counsel, was, that the thirteenth section of the act concerning highways (Dig. 326), has given an action on the case against the treasurer of the town, for damages suffered by reason of a defective way, which the town was bound to repair. And it was urged that this right is here given absolutely, and that a condition, drawn from the other act, cannot be appended to it. This argument would be conclusive, if it were any part of the purpose of that act, concerning towns, to create rights, or define what should be legal causes of action. But it is not. It assumes that the claimant has a valid demand against the town, founded on some other law, and then proceeds to direct how it shall be treated. It says, "Every person who shall have any money due to him from any town, or any demand against any town, &c., shall take the following method to obtain the same." It is only the method of obtaining payment of a just demand, which this law has in view, and therefore, to say that another law has made the town liable, is only to say he has a just demand; if so, the question still remains whether he must not take that prescribed method of obtaining the same. It is true the law concerning highways not only makes the town liable, but in express terms gives an action on the case against the treasurer. But was it not intended that the action thus given should be subject to the same general rules as all other similar actions against town treasurers? To answer this question, it seems to me sufficient to observe that while this act gives the action against the treasurer, it points out no mode in which he can reimburse himself. It surely could not have been the intention of the legislature that the treasurer should be made personally liable for such a claim against his town, and then left with no sufficient remedy. This would not only be contrary to natural justice, but to the sense of it which the legislature have shown it entertained; for in the section of the act concerning towns, a remedy is carefully provided. I cannot doubt, therefore, that, so far as respects the mode of reimbursing the treasurer, a judgment recovered in this action would be within the thirteenth section of the act concerning towns; and if so, I do not perceive how the conclusion can be avoided, that the right of the plaintiff is also regulated by that section. Because the protection extended to the treasurer is expressly limited to the cases included in the first part of the section respecting the mode of proceeding to recover claims.

To state my view more generally, I should say that the act concerning towns requires all persons, before bringing any action against a town treasurer for any demand against a town, to present to the electors, when legally assembled in town-meeting, a particular statement of his demand; and it enables the town treasurer to reimburse himself for what he may be obliged to pay on any judgment so recovered against him. And when the law concerning highways gave an action on the case against the treasurer, it subjected that action to the requirements of the act concerning towns, just as it subjected it to the laws concerning the service and return of writs, and the rules of pleading and proceeding prescribed by other statutes. That when the legislature say an action on the case may be brought, they mean, by complying with the requirements of the law concerning actions on the case; and when they say it may be brought against the treasurer of the town, for a de-

mand against the town, they mean, by complying with the requirements of the law concerning such actions; and one of those requirements is, previous notice.

I have been referred to the case of Hull v. Richmond [Case No. 6,861]; but it is manifest that, though the point was there taken, it was not decided. A doubt is expressed, which I felt quite as strongly as it is there expressed, until more mature consideration satisfied me it was not well founded. The demurrer must be overruled, and the plea adjudged a good bar.

HOLLAND (HAVEN v.). See Case No. 6,229.

HOLLAND (KNOWLTON v.). See Case No. 7,904.

HOLLAND (POTTER v.). See Cases Nos. 11,329 and 11,330.

HOLLAND (SWAIN v.). See Case No. 13,661.

HOLLAND (UNITED STATES v.). See Cases Nos. 15,377 and 15,378.

Case No. 6,607.

HOLLEMAN v. DEWEY.

[2 Hughes, 341;[1] 7 N. B. R. 269.]

District Court, D. North Carolina. 1872.

PAYMENT—PROOF OF DEBTS — ILLEGAL CONTRACT —CONFEDERATE BONDS.

The plaintiff, at various times prior to and on the 16th day of June, 1862, had made deposits with the Bank of North Carolina. On the 30th day of March, 1864, his account with the bank was made up, and the sum of $5253.69 ascertained to be due to him. On that day Holleman drew and delivered to the bank his check, in the usual form, for the full sum due to him, and accepted in part payment for the check five coupon bonds, issued by the state of North Carolina, on the 1st day of January, 1863, which were issued in aid of the Rebellion. *Held*, that such bonds, when accepted by a creditor in payment of his debt, and while they are of value as a medium in the money markets, constitute a valid medium for the payment of a debt, provided the contract or engagement in which they are used was not a contract made in aid of the Rebellion.

[See Bailey v. Milner, Case No. 740.]

Petition to expunge proof of debt.

BROOKS, District Judge. From the deposition of William H. Holleman, filed under the 11th section of the bankrupt act [of 1867 (14 Stat. 521)], the application of Charles Dewey, assignee of the Bank of North Carolina, filed under the provisions of the same section, and the answer of the said Holleman to the allegations contained in the application of the assignee, it sufficiently appears that said Holleman was a creditor of said bank by a deposit account, commencing on the 31st day of October, 1859; that the last deposit made by Holleman was on the 16th day of June, 1862; that on the 30th day of March, 1864, the accounts were made up, and there was ascertained to be due from the bank to Holleman the sum of $5253.69, and on that day Holleman drew his check, payable to himself, for that sum, which was delivered to the bank, and which, being charged, balanced his account with the bank. It further appears that for the check mentioned five North Carolina state coupon bonds for $1000 each, issued on the 1st day of January, 1863, were transferred and delivered by the bank to Holleman. The bonds so delivered are filed, and it appears that each bears the words "Confederate States of America" at its head, and are made redeemable at the treasury of the state of North Carolina, in good and lawful money of the Confederate States, on the 1st day of January, 1893. These bonds are payable to the Bank of North Carolina or bearer, and on each appears the following indorsements:

"Treasury Department, North Carolina, September 3d, 1863. This bond is the property of the Bank of North Carolina, and is transferable only at this office by written indorsement on the bond, witnessed by the public treasurer. (Signed), Jno. Worth, Pub. Treasurer. December 11th, 1863.

"I hereby assign and transfer the within bond to bearer. (Signed), C. Dewey, Cashier, Bank of North Carolina."

"Treasury Department of North Carolina, March 3d, 1865. This bond is the property of W. H. Holleman, and is transferable only at this office by written indorsement on the bond witnessed by the public treasurer or his chief clerk. (Signed), P. A. Wiley, Chief Clerk."

The coupons representing the accrued interest from the 1st day of January, 1863, to the 1st day of January, 1864, were detached, and the bonds, with the remaining coupons, as the evidence shows, were delivered to Holleman, at the estimated value of $1000 each, at the same time that he executed and delivered to the bank his check. It is not shown in what way the balance, say two hundred and fifty-three dollars and sixty-nine cents, was paid, and as to that sum there is no controversy between the parties. These bonds purport, on their face, to have been issued under the authority of an act of the general assembly, entitled "An act to provide ways and means for supplying the treasury," passed 20th December, 1862. On the application of the assignee, and under the order of this court, several witnesses have been examined, all of whom were officers of the bank at the time these bonds were transferred, and of whom, if it were not otherwise known that they are gentlemen of the first order of respectability and intelligence, these depositions on file in this case would clearly indicate such to be their character. Much of the evidence of these witnesses has been excepted to by the counsel for Holleman;

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

but, in the opinion of this court, it is not necessary to notice these exceptions, further than to say that, in arriving at the conclusions which I have upon the questions presented, I have attached no importance whatever to the portions of those depositions to which these exceptions relate.

Upon this statement of facts the counsel for Mr. Holleman insists that the deposition filed by him should be held to be proof of his debt against the estate of the bank in the hands of the assignee, to the extent of five thousand dollars and the coupons attached, and which were due at the time of the filing the deposition, and for the following reasons: First. They say that Holleman did not receive the bonds in payment of his debt, but only as a security for the future payment of the same. Second. That it being established that there was, on the 30th day of March, 1864, and long before that day, a bona fide debt due from the bank to him, equal to the sum now claimed; that such debt could not be liquidated and discharged by the payment or delivery of the bonds described; that, being issued in aid of the Rebellion, they were void, and could not constitute a valid medium or consideration for the discharge of a debt. Thirdly. That, if the bonds were in fact delivered and accepted in payment of the deposit account due to him, and though they constituted a valid medium for the payment of such a debt, he still had a right to prove these bonds, with the matured coupons attached, as a debt against the bank, which that corporation had become bound in law to pay to him, by reason of the indorsement placed upon these bonds by the cashier; that, by the indorsement referred to, the same liabilities were incurred on the part of the bank, and the same rights accrued to him, or any subsequent holder, as would have arisen out of any indorsement for value of any commercial paper or ordinary bond, without the use of any qualifying word.

I will examine these objections in the order in which they are stated.

It is true Holleman avers in his deposition which he filed as a proof of debt, and also in his answer filed to the petition of the assignee in this case, that the bonds were not delivered to him nor received by him in payment of his debt, but only as security for the payment of that debt. Without adverting to the depositions of any of the witnesses examined, there are two facts, established beyond all doubt, which renders this question not even doubtful or difficult of settlement. The first of these is the fact that at the time he received the bonds from the bank he executed his check, covering the full amount of the debt due to him—not more or less—without any word qualifying or restricting it, thereby allowing to the check the full effect of an unconditional receipt. Then I conclude that he was a man of ordinary business capacity at least, which was quite sufficient to enable him to understand the effect of his unqualified receipt. It would be going too far to say that he trusted to some unwritten promise made to him, or, indeed, to say that there was any such promise made to him, for he was well aware that his dealings were with "a soulless corporation," whose officers of to-day (though they may be men of the highest character and worthy of all confidence) may yet not be officers to-morrow, and then any promise or agreement would be worth its legal effect only. Then, as if to leave no room for doubt, Holleman took these bonds to the treasury office, nearly twelve months after he had received them—on the 3d of March 1865—and caused to be indorsed thereon by the treasurer an acknowledgment that the bonds were his property, and this indorsement is also without condition or qualification. The results of this transaction show that Mr. Holleman exchanged the lesser for the greater risk, but in this he only followed in the footsteps of thousands of those who were regarded the best financiers in the Southern states. It is unquestionably true, I think, that he accepted the bonds in payment of his claim, and he did so believing that they were more valuable than his debt, or that he could realize for them more advantageously than he could for his claim.

The second objection taken by counsel against the application of the assignee is one which I regard as having been well settled by the supreme court of North Carolina as well as by the courts of the United States. In the case of Kingsbury v. Lyon, 64 N. C. 128, the supreme court of North Carolina say: "In ordinary dealings, during the late war, without design to aid the Rebellion, Confederate treasury notes were a sufficient consideration to support a contract." In the later case of Haughton v. Merony, 65 N. C. 124, the same court goes a step farther, and declares that a bond given in March, 1864, for Confederate money borrowed and payable in Confederate bonds or Confederate currency, is not illegal or void, and a recovery may be had upon it. Referring to the first case in that court in which the question was presented, we find this language: "The question whether a contract in which Confederate treasury notes or currency was the consideration, would be enforced, came before this court at June term, 1867, in the case of Phillips v. Hooker, Phil. Eq. 193. The case was considered with great care, and it was held, upon reasons which appear to us solid, that such a contract was not illegal. The principle of this case has since then been repeatedly approved, and we consider that it is not now an open question." The federal authorities are to the same effect—that Confederate money during the Rebellion was a valuable consideration, and sufficient to uphold a contract, when the contract was not in aid of the Rebellion; and it has been repeatedly decided that Confed-

erate money was a valid medium for the payment and satisfaction of a bona fide debt, when accepted by the creditor as such. But it may be suggested that there is a distinction between Confederate currency or money and Confederate bonds, or the bonds of a state issued while such state was in rebellion, and in aid of the Rebellion. I think it might be conceded that these bonds were issued for the purpose of aiding the state of North Carolina in her resistance to the laws and authority of the United States, and yet a payment in such bonds would not be more within the principles governing contracts, contra bonos mores, than if the payment had been in Confederate States money. In the case of Haughton v. Merony, before referred to, that was relied on to distinguish that case from those previously decided by that court. The defendant, Merony, had on the 3d of March, 1864, for Confederate treasury notes received from the plaintiff, Haughton, engaged to pay to Haughton, on demand, the like sum in four per cent. Confederate bonds or certificates, or in Confederate currency, to be issued after the 1st day of April, 1864. Mr. Justice Rodman, in delivering the opinion of the court, says: "We cannot perceive any substantial distinction. The only difference between the treasury notes and the bonds was that the latter bear interest and the former did not. Both were payable on the ratification of a treaty of peace between the United States and the Confederate States. Both were issued by the Confederate government for the purpose of aiding it to carry on the war, and they must stand on the same footing as subjects of traffic." If the learned judge was correct in his opinion delivered in that case, it will scarcely be insisted that the bonds in question were more void or of less value at any time after they were issued than either Confederate money or Confederate bonds. But, on the contrary, it is well known that North Carolina bonds of the character of these possessed a value in the markets for some months after Confederate securities, both money and bonds, were entirely valueless, and if, in law, Confederate money or bonds can be held to be a sufficient consideration to support a contract, it must of necessity follow that either will be sufficient to liquidate and discharge a contract or debt, while they retain a value in the business transactions of the country, and when either has been accepted in payment by a creditor.

Then it remains to be considered whether there was incurred by the bank, by the indorsement or transfer made by its cashier on these bonds, an obligation to pay the same, or make them good to the holder in case of failure or inability on the part of the state to pay them. Now, it may be that these bonds could have been indorsed or transferred by the bank in such form as to have made the bank responsible directly as indorser or guarantor upon the contingencies mentioned. But it is quite clear, I think, that no such obligation was incurred by the bank, by reason of the indorsement made upon these bonds, and no such liability was understood to be incurred either by the bank or Mr. Holleman. In the first place, the bonds transferred were such as are termed "public securities," and ordinarily are sold and delivered in the markets, and the title to which passes by delivery—they are ordinarily payable to bearer—and such was the character of the first bonds issued by North Carolina, while there were some advantages to the holders of these bonds, arising from the facility with which they could be sold and their value realized. Yet there were losses to which the owners were subjected, by accident to the bonds; and to protect the bona fide holder against such loss by accident, it was provided, by an act of the general assembly of North Carolina, passed the 8th day of January, 1857 [Acts N. C. 1856, 1857, p. 17]: "That holders of coupon bonds of the state may bring them to the public treasurer, who, in such case, shall be required to register the name of the said holders in a book kept for that purpose, together with the number, amount, and date of the bonds, and shall also indorse on such bonds that they are transferable only at his office, by written indorsements on the bonds, witnessed by him." By the second section of that act the treasurer is required: "To witness such indorsements, and to register the names of the persons to whom indorsed, and the date of the indorsement." And by the third section it is further provided: "That the registry of said bonds shall be received as evidence of their existence, amounts, and when due and payable, in all cases when the original is lost or destroyed." We then find that the bonds in question had been issued and were made payable to the Bank of North Carolina; that the indorsements authorized to be made by that act were made by the treasurer; so that in no way could the property in these bonds have been transferred to Mr. Holleman but by conforming to the plain requirements of the act. It is, moreover, seen that the transfer made by Mr. Dewey, as cashier, was not made at the time the bonds were delivered to Mr. Holleman, if the transfers were truly dated, for these are dated 11th December, 1863, and are made "to bearer."

It is well known that, when a government or a corporation undertakes to effect a loan upon securities of the character of these, it is always a leading purpose on the part of such government or corporation to render such obligations transferable from holder to holder, with the least inconvenience consistent with the safety of the holder, from loss by accident, and without any responsibility on the part of the party transferring, respecting the ultimate payment of the same; and this, because it tends in the highest degree to appreciate their value in the mar-

kets, and in large transactions bonds are often made to answer the purposes of money. What, then, would more surely defeat that desirable object than to forbid the sale or transfer of such bonds, unless upon such terms as would hold the party transferring as security against the ultimate insolvency of the makers? I regard it as entirely clear that by the transfer made on these bonds it was only intended to pass the title in the same to such persons as they might be delivered to, and that this was its only legal effect. This is the view entertained by this court on this point, and without reference to the deposition of either of the three former officers of the bank who were examined, but on the case as disclosed by the application filed by the assignee, the answer of Mr. Holleman, and the bonds and other exhibits filed in the case.

Upon the last question presented in this case, I have examined the elaborate argument submitted by Mr. Haywood, and the numerous authorities cited by him, with even more than my usual care, but have now to confess that I have arrived at a different conclusion from that so ably presented by him.

And now, at Raleigh, in said district, on the —— day of ——, 1872, upon the pleadings and evidence submitted to the court upon the claim of William H. Holleman against the estate of the Bank of North Carolina, it is ordered that said claim be disallowed and expunged from the list of claims upon the assignee's record in said case. Let this be certified to A. W. Shaffer, register.

Case No. 6,608.

The HOLLEN.

[1 Mason, 431.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1818.

JURISDICTION IN ADMIRALTY — CIRCUIT COURTS — DECREES OF CONDEMNATION.

1. The circuit court has no jurisdiction in causes of admiralty and maritime jurisdiction, except over the final decrees of the district court. If such final decree be not appealed from, no appeal lies upon any subsequent proceedings upon the summary judgment rendered on a bond for the appraised value, or upon an admiralty stipulation taken in the cause, to enforce the decree. The proceedings in such cases, and the awarding of execution, are incidents exclusively belonging to the court in possession of the principal cause.

[Distinguished in Westcot v. Bradford, Case No. 17,429. Cited in The Elmira, 16 Fed. 138.]

[Cited in Bartlett v. Spicer, 75 N. Y. 533.]

2. After a final decree of condemnation unappealed from, in a cause of seizure by a collector for a breach of the revenue laws, the secretary of the treasury has no authority to remit the collector's share of the forfeiture. It is a vested and absolute right.

[Cited in U. S. v. Collier, Case No. 14,833; U. S. v. Harris, Id. 15,312.]

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

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

An information upon a seizure, by the collector of Portland, was filed in the district court of Maine, on the 6th day of July, 1813, against the brig Hollen and certain parcels of goods on board, for an alleged importation of the same goods into the United States, contrary to the non-importation acts then in force. The cause was duly entered at the succeeding September term of the court, and was continued from term to term until May term, 1817, upon the application of Mr. Ogden and others, the claimants, to enable them to apply to the secretary of the treasury for a remission of the forfeiture. In the intermediate time, to wit, on the 13th day of June, 1814, the district judge transmitted a statement of facts to the secretary of the treasury. But no remission having been actually obtained, the district court at the said May term, 1817, due proclamation having been made, and no person appearing to claim the brig or the goods, proceeded to decree the same forfeited; and, farther, ordered the appraised value of the property (which had been delivered on bail) to wit, $22361.75 to be paid into the court within twenty days, with the costs of prosecution. This sum not having been paid into court pursuant to the decree, it was, at September term, 1817, decreed by the court, that judgment be rendered on the bond, which had been given for the appraised value by Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler, and that execution issue against them accordingly. Afterwards, to wit, on the 9th day of February, 1818, the secretary of the treasury granted a remission of "all the right, claim, and demand of the United States, and of all others whomsoever to the said forfeiture," upon the payment of the duties, costs, and charges, and of five hundred dollars to be distributed among the custom-house officers, in the proportion prescribed by law. The execution having been returned unsatisfied, an alias execution issued, which was also returned unsatisfied. Messrs. Ogden and others, the parties to the bond, at the February term, 1818, applied by petition to the district court, stating the preceding facts with a profert of the remission, and alleging their willingness to comply with the terms of said remission, and praying, among other things, that the execution heretofore issued in the premises might be superseded, and that execution might thereafter be stayed on the bond and judgment aforesaid. To this petition the district attorney appeared, and, reserving the rights of the collector and other officers of the customs in the premises, made no objection, so far as respected the United States to the prayer of the petition. The collector and surveyor of the customs of Portland also appeared and filed an allegation, stating the condemnation, and denying, that any remission had been made by the secretary of the treasury until after the condemnation; deny-

ing also, that at the time of the condemnation any proceedings were pending before him for a remission; and alleging, that the proceedings, on which the remission was had, were not transmitted to the secretary of the treasury until after the condemnation. The allegation farther stated, that by the condemnation a moiety of the forfeited property became absolutely vested in them; and no appeal ever having been interposed, the decree of condemnation remained in full force, and the secretary of the treasury had not, by law, any authority whatsoever to remit the said moiety. It further appeared in evidence, that copies of the original papers for a remission were, in fact, transmitted to the secretary of the treasury by the district judge, in June, 1814; and that afterwards, about the latter part of July, 1816, the then secretary of the treasury (Mr. Dallas) returned said proceedings to the district court, among several others, with this memorandum on the wrapper:—"I think the petitioners had better apply to congress. A. J. D. 29th June, 1816." The original proceedings thus returned, remained in the district clerk's office until some time in July or August, 1817, when the attorney of Mr. Ogden applied to him for the copy of Mr. Ogden's petition and statement thereon, and obtained it; but no copy of the original petition and statement, or either of them, was ever, after said proceedings were returned as above stated, transmitted by the district clerk to the secretary of the treasury, or ever directed by the district judge to be transmitted.

The district judge, after a summary hearing upon the petition and defensive allegation, continued the cause for advisement; and at September term, 1818, decreed, that the petitioners should take nothing by their petition, and that they should pay the costs of the application, taxed at $33.18. [Case unreported.] From this decision an appeal was claimed and allowed to the circuit court.

Mr. Prescott, for appellants.
W. P. Preble, for respondents.

STORY, Circuit Justice. If this cause were regularly before this court, I do not perceive, how we could grant the petitioners any relief. The case is not distinguishable, in principle, from that of The Margaretta [Case No. 9,072], and I see not the least reason to change the opinion, which was then expressed. There are some circumstances also in this case, which bear more unfavorably, in point of law, upon the claimants than in that. The principal question is, whether, after a final decree of condemnation, the secretary of the treasury has authority to remit the collector's share in the forfeited goods? I understand the doctrine of the supreme court to be, that the right of the collector to forfeitures in rem attaches on the seizure, and is consummated by the condemnation. Jones v. Shore's Ex'rs, 1 Wheat. [14 U. S.] 462. If this be true, then, by the condemnation, it becomes an absolutely vested right; and the secretary of the treasury has no more power to divest this absolute right before, than he has after the forfeited property is distributed. It would be a monstrous proposition to assert, that the secretary of the treasury might, at any time, and even years after the forfeiture was distributed, by his remission, recall the whole property from those, to whom the law had absolutely given it. Such a doctrine might, perhaps, well suit the character of an arbitrary despotism; but in a government, like ours, it could not be established, but upon the ruins of all the principles, which regulate civil rights. The notion, that the receipt or non-receipt of the money under the decree of condemnation could make any difference in the collector's right, has been expressly repudiated by the supreme court.

But it is unnecessary to entertain these questions, for I am very clear, that this court has no jurisdiction upon this appeal. The judicial act of 1789, c. 20, § 21 [1 Stat. 83], enacts, that "from all final decrees in a district court, in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars (now altered to fifty dollars) exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district; provided, nevertheless, that all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court next to be holden after each appeal in the district court of Massachusetts." The final decree of condemnation, in this case, was rendered at the May term of the district court of 1817, and for want of a claim; and no appeal was made, or indeed could under such circumstances be made to the next circuit court. That decree, then, is not subject to our revision. The subsequent proceedings upon the bond for the appraised value, and the issuing of the execution, were but incidents to the original cause to enforce the decree of condemnation. And it has been long since settled, that this court has no jurisdiction over the proceedings on the bond, which is but an admiralty stipulation, unless it has possession of the cause, to which it belongs. McLellan v. U. S. [Case No. 8,895].

But even if an appeal would lie upon the summary judgment on the bond, when no appeal had been interposed from the decree of condemnation (which, in point of law, cannot be admitted); yet this would not help the present case; for the judgment was rendered at September term, 1817, and no appeal was then taken to the next, which was the only circuit court, which could take cognizance of such an appeal. Then, as to the present petition, it is but an application to the discretion of the court to stay execution, and we have no legal right to control the exercise of that discretion. Was it ever

heard of in a court of admiralty, that it was a matter of appeal, that the court refused to stay its own process to enforce its own decrees? We have by law no control, except over the final decrees of the district court, as to acquittal or condemnation. It has the sole power over its own process to execute its own decrees; and it would be a strange anomaly in our law, if one court had rightfully the sole possession of the cause, and another court, having no authority to inquire into the merits of the cause, could arrest the process, by which it was to be enforced. Nor is there any more inconvenience in this case than in every other, where a court, having final jurisdiction, awards process to enforce its own judgment. It may always happen, that a possible injustice may arise; but the true remedy is in an application to the court, which has control over the process. I confess, that I do not perceive, how the district court could have properly acted otherwise, than it has. That, however, is no concern of ours. For the defect of jurisdiction, let the appeal be dismissed.

Appeal dismissed.

Case No. 6,609.

HOLLENBACK v. MILLER et ux.

[3 Cranch, C. C. 176.] [1]

Circuit Court, District of Columbia. May Term, 1827.

TROVER AND CONVERSION — HUSBAND AND WIFE.

Trover will not lie against husband and wife for a conversion to her use only.

[Action of trover by William Hollenback against Michael Miller and wife.] The declaration stated that the defendants converted the goods "to her own use."

J. Dunlop, moved in arrest of judgment, that there cannot be a conversion to the use of the wife during the coverture. 2 Saund. 47, note; Rhemes v. Humphreys, Cro. Car. 254; Perry v. Diggs, Cro. Car. 494.

Judgment arrested (nem. con.) for that reason.

Case No. 6,610.

In re HOLLENSHADE.

[2 Bond, 210; [2] 2 N. B. R. 651.]

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

DISCHARGE IN BANKRUPTCY — FRAUDULENT PREFERENCE—DUTY OF ASSIGNEE.

1. Payments of money to preferred creditors, or transfers or conveyances of property, by one adjudicated a bankrupt on his own petition, made before the passage of the bankrupt act of March 2, 1867 [14 Stat. 517], though fraudulent, are not a bar to the discharge of the bankrupt.

2. Section 29 of the act, specifying what shall be a bar to a discharge, clearly distinguishes between fraudulent acts committed before and after the passage of the act.

3. As to fraudulent transfers prior to the passage of the act, section 35 shows it was not the intention of congress they should, with one exception, constitute a bar to a discharge. That section provides that all fraudulent transfers, etc., shall be void, and makes it the duty of the assignee to sue for and recover, for the benefit of creditors, all property of the bankrupt fraudulently assigned or conveyed.

In bankruptcy.

Henry Snow and Wm. B. Caldwell, for bankrupt.

Thomas Bartley and R. M. Corwine, for creditors.

OPINION OF THE COURT. Jacob W. Hollenshade has been adjudged a bankrupt, on his own petition, and has filed his application with the register for his discharge. Notice of this application has been given to his creditors, and a portion of them have filed objections to his discharge. John W. Sibbett, one of the creditors, has set out, at great length and with great particularity, the grounds of his opposition to the discharge of the bankrupt. Sylvester W. Bard, and several other creditors, have joined, in a separate paper, in a statement of their objections to his discharge. As both these papers contain the same grounds of opposition, it will be unnecessary to note them separately. Both set forth nine reasons against a discharge. To seven of these Hollenshade has filed exceptions in the nature of a demurrer. And the question, therefore, for the decision of the court is, whether the seven exceptions, or any portion of them, if the facts stated are true, are a legal bar to the discharge of the bankrupt.

For the purposes of a decision of the question before the court, it will not be necessary to notice, in detail, the facts set out in the objections on file. Those excepted to aver sundry transfers and conveyances of property, and payments, by Hollenshade, in the early part of February, 1867, with the knowledge of his insolvency and in contemplation of bankruptcy, to certain favored creditors, and with intent fraudulently to prefer them to other creditors. There is also an averment that, at the same time, and with the same fraudulent intent, the said Hollenshade conveyed to his wife large amounts of property, real and personal. These, it is alleged by the objecting creditors, are in contravention of the spirit and intent of the bankrupt act of March 2, 1867, and sufficient, in law, to prevent the discharge of the bankrupt. The single question to be decided is, whether payments, or transfers and conveyances of property, made prior to the passage of the bankrupt act by one in insolvent circumstances, and with the unconcealed purpose of preferring a part of his creditors, constitute a legal objection to his dis-

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

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

charge. The decision of this question depends wholly on the provisions of the statute. If they are plain and intelligible, nothing is left to the decision of the court, whatever may be its views of the policy of the statutory enactments.

Section 29 of the bankrupt act sets forth, at great length, and with studied regard to detail, the grounds or reasons which shall prevent a bankrupt from obtaining a final discharge. There are no less than seventeen acts enumerated in that section, any one of which will bar a discharge. The section is too long to be quoted at length, nor is it necessary to a decision of the question before the court. With a single exception, the acts enumerated must have transpired since the passage of the bankrupt act. That exception is found in the following clause: "Or if within four months before the commencement of such proceedings (that is, filing his petition in bankruptcy), he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution." The section then proceeds, "or if, since the passage of this act," he has been guilty of any of the acts specified, he shall not receive a discharge. Among these acts, the following, relating to the transfer, or conveyance of his property, is found: "Or if he has given any fraudulent preference, contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property;" . . . "or if he has, in contemplation of becoming a bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or from being distributed under this act, in satisfaction of his debts." Now, it is obvious that these fraudulent acts, thus enumerated as acts that will bar a discharge, with the exception before stated, must have been committed after the bankrupt act passed. The words before quoted, "since the passage of this act," apply to and limit the meaning of all the subsequent enumerations. There was certainly no necessity for incumbering the section with the useless prefix of these words to each specific act subsequently designated as bar to a discharge. Section 35 of the act shows clearly that it was not the intention of congress that fraudulent acts, committed prior to the passage of the law, should prevent the bankrupt's discharge. It declares that any fraudulent disposition of property by an insolvent, in contemplation of insolvency, shall be absolutely void; and the assignee of the bankrupt is authorized to sue for and recover any property fraudulently assigned or conveyed, or the value thereof, as assets of the bankrupt. And, if it be true that Hollenshade has disposed of his property in the fraudulent manner asserted in the objections filed to his discharge, it would be the duty of the assignee, by a proper judicial proceeding, to have the facts investigated; and it would be the obvious duty of the court, if the fraud was substantiated, to declare the transfers and conveyances void, and adjudge the property to be vested in the assignee, for the benefit of creditors. That it was the intention of congress, that frauds committed prior to the passage of the act should be thus investigated, and the rights of creditors thus protected, is most obvious. It certainly was not contemplated nor intended that these questions of fraud should be tried and decided on objections made to the discharge of the bankrupt, in which the transferees or grantees of the property are not parties and have no opportunity of asserting and vindicating their rights.

But the pressure of other duties will not permit a more thorough investigation of this question; and I am relieved from the necessity of doing so by a very learned judicial decision, in which this point is elaborately considered and decided. I refer to a decision of Judge Field. In re Rosenfield [Case No. 12,058]. After a critical analysis of section 29 of the bankrupt act, the learned judge reaches the conclusion that "a fraudulent conveyance made, or a fraudulent preference given, before the passage of the bankrupt act, are, neither of them, good grounds on which to oppose a discharge." And again: "By the term 'fraudulent preference,' used in item 9 of section 29, is meant only a preference in fraud of the bankrupt act; that is, contrary to its provisions." Receiving Judge Field's argument on this point as altogether conclusive, I can not hesitate to adopt it and follow his decision. I am sustained, in this view of the bankrupt act, by the published works of the learned commentators upon it. James, Bankr. Law, 129; Avery & H. Bankr. 214.

The first six grounds of opposition to the discharge are therefore overruled. The seventh, eighth, and ninth objections seem to be within the enumeration of section 29, of the grounds which will be a bar to a discharge. These are therefore referred to Register E. P. Cranch, who will take the testimony and report the same to this court.

I may state, that after the foregoing was written, I noticed, among the papers, a further objection to the discharge of the bankrupt, by J. M. V. Lee, asserting that he is a creditor, and setting forth a ground of opposition arising from a transaction occurring since the passage of the bankrupt law. It is not indorsed as filed, and the court is not advised when it was filed. The counsel for the bankrupt not having seen this paper,

I have declined including it in the order for the reference to the register. If counsel consent that it should be referred, with the other objections, it may be included in the order. If they wish to except to it, they can be heard hereafter.

HOLLEY (AULTMAN v.). See Case No. 656.

HOLLEY (UNITED STATES v.). See Case No. 15,379.

HOLLIDAY (GORDON v.). See Case No. 5,610.

HOLLIDAY (MOORE v.). See Case No. 9,765.

HOLLINGS (ASHCROFT v.). See Case No. 579.

HOLLINGSHEAD (KURTZ v.). See Cases Nos. 7,952 and 7,953.

Case No. 6,611.

HOLLINGSWORTH v. ADAMS.

[2 Dall. 396.] [1]

Circuit Court, D. Pennsylvania. 1798.

JURISDICTION OF FEDERAL COURTS—FOREIGN ATTACHMENTS.

No civil suit can be brought before a United States circuit or district court in any other district than that whereof defendant is an inhabitant, or in which he shall be found.

[Cited in Picquet v. Swan, Case No. 11,134; Atkins v. Fibre Disintegrating Co., Id. 602.]

Foreign attachment returnable to the present term. The defendant was stated to be a citizen of Delaware, in the process which had issued; and M. Levy, having produced an affidavit in proof of that fact, moved to quash the writ, on the ground, that the federal courts had no jurisdiction, in cases of foreign attachment. By the 11th section of the judicial act,—1 Swift, Laws, 55 [1 Stat. 78],—it is expressly provided, that "no person shall be arrested in one district for trial in another, in any civil action before a circuit, or district, court: And no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Now, this is a civil suit, brought here by original process against the defendant, who is an inhabitant of another district, and was not found in Pennsylvania at the time of serving the writ.

Thomas & Hallowell, on behalf of plaintiff, wished for time to enquire into the practice; but not being able on the next day to assign any satisfactory reason in maintenance of the action,

THE COURT directed the writ to be quashed with costs.

[1] [Reported by A. J. Dallas, Esq.]

Case No. 6,612.

HOLLINGSWORTH et al. v. The BETSEY.

[2 Pet. Adm. 330.] [1]

District Court, D. Pennsylvania. April 7, 1795.

TORTS IN ADMIRALTY—SEIZURE OF NEUTRAL VESSEL—DAMAGES.

The Betsey, belonging to the libellants, citizens of the United States, bound from St. Bartholomews to Amsterdam, with a neutral cargo on board, was taken by a French privateer, and brought into the port of Philadelphia. The district court ordered her to be restored and awarded damages to the libellants and the owners of the cargo.

Jehu Hollingsworth, the younger, and John Shallcross, of the city of Philadelphia, merchants, by their bill and libel, in all humble manner shew, that they the said Jehu and John are citizens of the United States of America, and real and true owners of a brigantine called the Betsey, commanded by William Clark, and in due form of law registered by the government of the United States. That the said brigantine being at the island of St. Bartholomews, in the West Indies, belonging to the king of Sweden, he the said William Clark did, on or about the seventh day of May last, enter into a charter-party with P. H. and Abraham Runnals, burghers of the said island of St. Bartholomews and subjects of the king of Sweden, and by the said charter-party the said William Clark did grant and to freight let unto the said P. H. and Abraham Runnals, the whole tonnage of the hold of the said brigantine, deck, half-deck and cabin, from the port of Gustavia in the said island, on a voyage to be made by the said Clark, with the said brig with the goods and merchandizes of the said P. H. and A. Runnals, to either of the ports of Amsterdam or Hamburgh, as should be assigned or concluded upon by the consignee, A. Runnals, on their entrance in the British channel; and if need was, to put into any one of the safe ports, harbours or bays on the coast of Great Britain, the danger of the seas excepted. That the said P. H. and A. Runnals did cause the said brigantine to be loaded with a cargo of sugar, coffee and other articles, the property of the said P. H. and A. Runnals, and the said William Clark did on the twenty-eighth day of May last, sail from the said island of St. Bartholomews, and proceeded on the voyage in the said charter-party mentioned, but on or about the fifteenth of June last, the said brigantine Betsey being in the prosecution of the said voyage, was forcibly, violently, tortiously and unlawfully, in the latitude of 36 deg. north, and longitude 45 deg. west from London, on the high seas and within the jurisdiction of this court, attacked and taken by a certain armed vessel of Marseilles, called the Sans Culottes, commanded by a certain Joseph Moulinary, and

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

by the said Joseph Moulinary and the crew of the said Sans Culottes, was forcibly and against the will of the said William Clark and to the great damage of the said Hollingsworth and Shallcross, from the defeating the said voyage and rendering them unable to comply with the said charter-party, tortiously, violently and unlawfully brought into the port of Philadelphia on the third day of July last, where the said brigantine Betsey and the cargo so laden on board her as aforesaid, have been ever since and still are detained by the said Joseph Moulinary from the said Hollingsworth and Shallcross and the said William Clark, although repeatedly demanded.

To the end that the said brigantine Betsey, with her cargo, tackle, apparel and furniture may be restored to the said Hollingsworth and Shallcross—that they may be compensated for all damages, and that justice may be done in the premises as to your honour shall seem meet, may it please your honour to cause process to be issued for the seizing the said brigantine Betsey with her cargo, tackle, apparel and furniture—for the seizing the said vessel called the Sans Culottes, and the apprehension of the said Joseph Moulinary, so that he be and appear at the next court to answer to your libellants.

Wm. Lewis, for Libellants.

The plea of Joseph Moulinary, a citizen of the French republic, on behalf of himself and all concerned in the capture of the brigantine called the Betsey and her cargo, to the libel and petition exhibited to this honourable court by Jehu Hollingsworth and John Shallcross, the said Joseph Moulinary by protestation not confessing or acknowledging any of the matters and things in the libellants' said petition and libel contained, to be true, in such manner and form as the same are therein and thereby alleged for plea to the said libel and petition, says that he was at the time of his attacking in an hostile manner and making prize of the said brigantine, her cargo and people, and now is duly commissioned by the French republic as captain on board the armed vessel Sans Culottes, fitted out by and belonging to the citizens of the said republic, to attack all the enemies of the said republic, wherever he might find them, and take them prisoners with their ships and property, which commission he is ready to shew unto your honour—that he the said Moulinary, with his officers, seamen and mariners on board the said armed vessel Sans Culottes, took as prize the said brigantine Betsey, belonging to some subject or subjects of the United Netherlands, then in open hostility and actual war with the French republic and her citizens, and brought the said brigantine and property, as prize into the port of Philadelphia—he therefore prays that he may be hence dismissed, and the said brigantine Betsey and cargo, and the said armed vessel called the Sans Culottes discharged from arrest.

Joseph Moulinary.

P. S. Du Ponceau,
Advocate for the Respondents.

The replication of Jehu Hollingsworth, and John Shallcross, to the plea of Joseph Moulinary:

These repliants asserting that all the matters and things in the petition and libel of the said repliants are true, do reply and aver, that the matters and things in the said plea by the said Joseph Moulinary pleaded, are not true; and particularly that the said brigantine Betsey did not at any time whatever belong to any subject or subjects of the United Netherlands, or of any other foreign power, state or kingdom, all which they are ready to maintain and prove when, &c.

Jehu Hollingsworth, Jun.
John Shallcross.
Wm. Lewis, for Libellants.

PETERS, District Judge. Being satisfied by the papers produced to the court, that it appears, prima facie, that the brig Betsey is American property, and the cargo the property of subjects of the king of Sweden; and that the capture, so far as those papers evidence, is not a taking by one enemy from another; and the ship and goods being expensive and perishable, I pronounce the following interlocutory sentence and decree. It is, however, to be understood, that I do not hereby preclude further investigation and inquiry into any matter or thing, herein taken, quoad hoc, for granted; but the whole subject, as to fact, law and jurisdiction, is open for discussion, and for the final sentence and decree of the court.

It is ordered and decreed by the court, that the brigantine Betsey in the libel mentioned, her tackle, apparel and furniture, and the goods, wares, and merchandize wherewith she was loaded at the time of her capture, be delivered to the libellants in this cause, on their entering into stipulation to abide the final order and decree of this, or the court of appeals in this cause, and to make restitution of the vessel and cargo, or the value thereof, in case the libel be finally dismissed. And now, to wit, this thirteenth day of June, one thousand seven hundred and nine-four, the libellants exhibit a notice from the respondents to shew to the court certain books, papers, letters and documents therein mentioned, which notice is filed, among the exhibits in this cause; and the libellants produce and shew to the court the books, letters, papers and documents so required: Whereupon, the counsel for the respondents waive all further controversy respecting the property of the said brig, and the cargo on board her at the time of her capture. It is also agreed that the cargo is protected from capture by the treaty between the United States and the French

nation: Whereupon, and on consideration of the evidence produced in this cause, I do finally adjudge, order and decree, that the said brigantine Betsey, her tackle, apparel and furniture in the libel mentioned, and the goods, wares and merchandize on board her at the time of her capture, be restored to the libellants with costs agreeably to the prayer of the libel. But at the request of the counsel for the respondents, the point of damages is reserved for argument, and the further and final decree of this court; and the respondents have leave to answer further on that point.

And now, viz. June 17th, 1794, the respondents in this cause, for further answer to so much of the libel of the said Jehu Hollingsworth and John Shallcross, as prays for damages to be allowed and assessed to them, against the said respondent for the seizure, detention, and bringing in as prizes of the said brig Betsey and her cargo, under protestation that this honourable court is not competent to give damages in a case of this nature, justify the taking and bringing in as prize of the said brig Betsey and her cargo, by alleging, that it is lawful by the laws of war, for an armed vessel of a belligerent nation duly commissioned, to seize and take upon the high seas, and bring into port for legal adjudication a vessel sailing under a neutral flag, on suspicion that such vessel does not bona fide belong to neutral subjects or citizens, but that she is the masked property of the enemies of the country to which the armed vessel belongs. That at the time of making the said capture, the respondents had probable ground to suspect that the said brig Betsey was the masked property of the enemies of the French republic, and brought her into the port of Philadelphia for legal adjudication. On this ground, protesting as aforesaid, they pray that the libel of the said Hollingsworth and Shallcross, in as much as it respects damages, be hence dismissed with costs.

P. S. Du Ponceau,
Advocate for Respondents.

The replication of the libellants to the plea of the respondents, dated 17th June, 1794:

The libellants expressly denying that at the time of making the capture in the libel and plea mentioned, the respondents had probable ground to suspect that the said brig Betsey was the masked property of the enemies of the French republic, and saving to themselves all benefit of exception to the said plea, reply and say that nothing in the said plea contained ought to preclude them, the said libellants, from the recovery of damages against the said respondents agreeably to the prayer of their libel.

Wm. Lewis, for Libellants.

PETERS, District Judge. The brigantine Betsey, the property of the libellants, who are citizens of the United States, was, in pursuance of their orders, let on freight by the captain of the said brigantine, about the seventh of May, 1793, at the island of St. Bartholomews, to P. H. and A. Runnals, subjects of the king of Sweden and burghers of that island. The vessel being at St. Eustatius when chartered, a few hogsheads of sugar were purchased there and taken on board, as part of her cargo, agreeably to the charter-party, and the said brig sailed therewith from St. Eustatius to St. Bartholomews, where she completed her cargo, consisting of sugar, coffee and a few hides, which belonged to the freighters, P. H. and A. Runnals. The brig having thus completed her cargo, set sail from St. Bartholomews bound to Hamburg, agreeably to charter-party, on the 28th of the same month of May; on the 15th of the following June the vessel and cargo, when proceeding on her voyage aforesaid, were captured by the French privateer Sans Culottes of Marseilles, and on the 22d of July in the same year, brought into the port of Philadelphia. This privateer was under Spanish colours, and is a xebeck, whose fashion and appearance were peculiarly alarming. The circumstances happening at the time of capture will appear in the exhibits filed in this cause. On the 13th of June, 1794, after a minute investigation and severe scrutiny, in which even the books and private correspondence of the libellants had been repeatedly submitted to the council and other persons on the part of the respondents, the said council abandoned all further controversy respecting the property of the brigantine, and agreed that the cargo was protected from capture by the treaty between the United States and France.—Whereupon and on consideration of the evidence produced, a decree for restitution was passed, but the point of damages was reserved. On the hearing of this point, it was contended by the advocates for the respondents, that the circumstances occurring at the time of capture justified the bringing into port, and amounted to such probable cause as will, agreeably to the general laws of nations and the ordinances and regulations of France particularly, repel any claim to damages for the capture and detention.

I have maturely weighed the evidence on which the arguments of the advocates for the respondents were founded, and taken into consideration the authorities by them produced. yet I am nevertheless of opinion, that although the circumstances appearing to the captors at the time of capture might probably excuse an examination on the spot, yet they did not amount to a justification of their conduct in compelling the vessel to deviate from her lawful voyage in a manner so ruinously injurious to the owners of both vessel and cargo. Whatever may be the opinions of individual nations, having arms in their hands and of course the power to enforce such opinions, it is at least questionable whether neu-

trals are bound to submit to searches, however prudent it may be that they should, sometimes, yield in this particular. There are very respectable authorities which assert, that "a neutral ship is not obliged to stop to be searched;"[2] although there are others, holding the contrary doctrine.[3]

No one nation has, however, the right to dictate in this or any other particular to the rest, by its own ordinances, what shall be law of nations, the principles whereof must be founded in justice and established by common usage and consent. If a belligerent party captures and detains neutral property, he does it at his peril. Should the capture and detention, on investigation turn out to be unwarranted by the general law of nations, or forbid by particular treaty, he is bound by every rule of law and reason to make ample compensation. It appears clear that the capture of the Betsey and cargo was in every view of it unlawful, and being of opinion, that the circumstances relied on for probable cause, do not justify the detention and bringing into port—

I do decree, adjudge and order, that the respondents pay to the libellants the damages sustained by them by the unlawful capture and detention of the said brigantine Betsey and her cargo, with costs. And to the end that the said damages may be truly and justly ascertained, I do hereby order and direct the clerk of this court to associate with him three intelligent and disinterested merchants of this district, who, or any two of them with the clerk, shall examine into all circumstances relative to the vessel and cargo and the losses and damages consequent thereon, and ascertain the amount thereof, according to justice and good conscience, and the clerk is hereby directed to make report of the doings herein at the next court day.

Conformable to a decree pronounced by RICHARD PETERS, Esq., judge of the said court, in the above cause, on the eighteenth day of March last past, the clerk reports:

That having associated with him James Yard, Robert Ralston, and Daniel Smith, of the city of Philadelphia, merchants, the said clerk and his associates have examined into all circumstances relative to the capture of the said brigantine Betsey and her cargo, and the losses and damages consequent thereon, and are of opinion, that according to justice and good conscience, the said libellants Jehu Hollingsworth the younger, and John Shallcross, owners of the said brigantine, by reason of the capture and detention thereof, have sustained damage to the amount of four thousand two hundred and seventy-seven dollars and forty-nine cents, and that P. H. Runnalls, and A. Runnalls, the owners of the cargo, and charterers of the said brigantine, by reason of the capture and detention aforesaid, have sustained damages to the amount of two thousand four hundred and eighty-five dollars, and twenty-nine cents.

James Yard.
Robert Ralston.
Daniel Smith.

Samuel Caldwell,
Clerk of the District Court.

PETERS, District Judge. And now, to wit, this seventh day of April, in the nineteenth year of the independence of the United States, the clerk having agreeably to a former decree, reported—

"That having associated with him James Yard, Robert Ralston, and Daniel Smith, of the city of Philadelphia, merchants, the said clerk and his associates having examined into all circumstances relative to the capture of the said brigantine Betsey and her cargo, and the losses and damages consequent there-

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[2] See the case of Salloucci v. Johnson, Parker, 364, 365, for the opinions of the English common law judges, Willes, Ashurst and Buller (Lord Mansfield absent) all agreeing on this point. Also, that a neutral firing on a belligerent appearing under false colours is not a breach of neutrality.

[3] It seems to be a settled principle now, that neutrals are bound to submit to searches, and the modes of conducting such searches are the only subjects of dispute. Our nation has acknowledged this right by entering into arrangements in several treaties and conventions, as to the manner of effecting it. In the above case, testimony was taken (and had due attention paid to it) to shew that there was ground for apprehension on the part of the American master and crew, that the privateer was a cruizer belonging to one of the Barbary powers. The privateer was a xebec, and the colours under which she first appeared were false and suspicious. The fashion and appearance of the vessel created alarm in the minds of the captain, supercargo and crew, and induced some preparation for flight or concealment and destruction of papers, which however were not executed. Minute investigation was made as to the property which was suspected to belong to Dutch merchants, France and Holland being then at war; and the books and clerks of the owners were submitted for examination. The right of search and subjects connected with it are discussed in 2 Azuni, pt. 2, c. 3, and notes, as well as in other writers. This and some other cases determined here, shew that I have always considered it justifiable to examine into the claims of our own citizens, and to restore property indubitably neutral, when within our jurisdiction. In the cases of Findlay v. The William [Case No. 4,790], and Moxon v. The Fanny [Id. 9,895], I would not take cognizance of captures made by one enemy from another, under my ideas of the impropriety of the examination by judicial authority; afterwards I yielded to legislative injunctions and decisions upon this point. Modern authorities support the principle recognized by the act of congress, giving jurisdiction to the courts in cases of captures within our territorial limits; but no neutral sovereign or state has the right to examine into questions concerning prizes under other circumstances, though brought within its ports or jurisdictional limits, when such questions affect only belligerent nations. "The prerogative which exempts a ship of war or privateer from the jurisdiction of the sovereign into whose port the prize is carried, ought to have effect only in the case where the prize may belong to an enemy, or the subject of an enemy, and not when the sovereign of the port into which it is carried, or some other neutral power, is interested in the prize; or where it belongs wholly to a neutral, which is a different case."—2 Azuni, M. L. of Europe.

on, and are of opinion, that according to justice and good conscience, the said libellants Jehu Hollingsworth the younger, and John Shallcross, owners of the said brigantine, by reason of the capture and detention thereof, have sustained damage to the amount of four thousand two hundred and seventy-seven dollars and forty-nine cents: and that P. H. Runnalls, and A. Runnalls, the owners of the cargo, and charterers of the said brigantine, by reason of the capture and detention aforesaid, have sustained damages to the amount of two thousand four hundred and eighty-five dollars, and twenty-nine cents."

And the said report being read, and duly considered by the court, it is adjudged, ordered and decreed, that the respondent Joseph Moulinary, pay the libellants Jehu Hollingsworth the younger, and John Shallcross, the sum of four thousand two hundred and seventy-seven dollars and forty-nine cents, for their damages by them sustained by reason of the capture and detention of the said brigantine Betsey. And that the said respondent also pay to the said libellants, attornies in fact to P. H. and A. Runnalls, the further sum of two thousand four hundred and eighty-five dollars and twenty-nine cents, for their damages by them sustained by reason of the capture and detention aforesaid.

Ordered—That this decree be absolute, unless cause is shewn in four days.

Case No. 6,613.

HOLLINGSWORTH v. DETROIT.

[3 McLean, 472.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

INTEREST—USURY—COUPONS.

1. By the English decisions, compound interest is not recoverable, except in special cases. It is not usurious, but is supposed to be pernicious.

2. Interest, when due, may be demanded and recovered. But by the English rule, which has been adopted by some of the courts in this country, a note for the interest is not valid, unless given after the interest is due, and for the payment of interest that may afterwards accrue. The authorities in this country, on this subject, are conflicting.

[Cited in Aurora v. West, 7 Wall. (74 U. S.) 105; U. S. Mortgage Co. v. Sperry, 138 U. S. 341, 11 Sup. Ct. 321.]

3. Reason and justice require the performance of contracts, not entered into in violation of law.

4. The interest in this case was made payable, in the coupons, to bearer. They passed by delivery, which was intended to give them currency. This promise is within the 9th section of the Michigan statute, which gives interest.

[Cited in Wheaton v. Pike, 9 R. I. 133.]

5. And interest is recoverable on the sums named in the coupons, if not paid when due.

[Cited in Harper v. Ely, 70 Ill. 586; Mathews v. Toogood, 23 Neb. 538, 37 N. W. 265.]

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

In equity.

Joy, Porter & Abbott, for plaintiff.

Harbough & Lee, for defendant.

This case was submitted to the court on the following facts: Hollingsworth is the holder of a considerable amount of the bonds of the city of Detroit, payable at a distant period, with interest, payable semi-annually, on the 1st of May, and the 1st of November. Coupons, as they are called, are attached to these bonds, each of them for the interest, as it falls due, being a coupon to each bond for each semi-annual instalment of interest. These coupons are in the following terms, varying only as to the period when they fall due: "The city of Detroit acknowledges that there will be due Robert Hollingsworth, or bearer, on the 1st day of May, A. D. 1841, thirty-five dollars, being for semi-annual interest on bond No. 44, of the seven per cent. loan." Signed, "H. Howard, Mayor," &c. The plaintiff holds many thousand dollars in these bonds, and a large amount of coupons in arrear. These coupons are the subject of this suit, and the controversy arises upon the question, whether the judgment of the court shall be for the amount of the coupons without interest, or whether interest shall be added from the time they became due.

The 7th, 8th and 9th sections of the act of Michigan, which regulates interest, are as follows: Seventh section: "The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars, for a year, and at the same rate for a greater or lesser sum, or for a longer or shorter time." Eighth section: "Interest may be allowed and received upon all judgments at law, and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit, and such interest may be collected on execution." Ninth section: "In all actions founded on contracts, express or implied, wherever, in the prosecution thereof, any amount of money shall be liquidated, or ascertained in favor of either party, it shall be lawful to receive and allow interest until payment thereof."

If this question be examined on the broad basis of equity and reason, uninfluenced by the decisions of courts, no one could entertain a doubt on the subject. That these coupons are not usurious is clear. No more than the legal rate of interest is claimed on them, after they became due and the city failed to pay them. The coupons were negotiable, by delivery; and no question is made whether, when due, a demand of payment was made, or whether such demand was necessary. The point not being raised, need not be considered. As a new proposition, it would seem to be unaccountable how any one could doubt that the holder of these coupons, negotiable by delivery and payable to bearer, should not be entitled to receive

interest on default of payment, the same as in every other case, on a failure to pay a certain sum. The coupons are separated from the bonds, and must be considered as a promise to pay a certain sum of money at a future time, on the consideration of interest then due. Now, it is admitted that such an instrument would be valid, and if not paid at maturity would draw interest, if given after the interest is payable; but not valid, it is contended, as to the payment of interest, if executed before the interest is payable. The promise of payment is substantially the same in each instrument, and the only sensible distinction is, that in the one case the promise is to pay a sum for interest then due, and, in the other, when it shall become due. In both instruments the sum is specific, and the consideration a good and valuable one—the accumulation of interest. To make any distinction between these cases, would seem to savor more of legal nicety than sound logic. The reason given in the decisions is entirely unsatisfactory.

In Connecticut v. Jackson, 1 Johns. Ch. 13, Chancellor Kent says that, "it may be considered as a doubtful question, on the ground of the ancient authorities, whether the assignee of a mortgage, on a bill to redeem, be not entitled to interest on the whole sum which he paid. Nor are the imperfect cases, in the reign of Charles II., uniform or consistent, even on the general question, whether compound interest can be allowed, for the dicta are both ways." But the cases decided since the revolution of 1688, in England, Chancellor Kent says, have established the rule, that, except in particular cases, governed by special circumstances, compound interest was not allowable. In the case of Waring v. Cunliffe, 1 Ves. Jr. 99, Lord Thurlow said: "My opinion is in favor of interest upon interest; because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary, and I must overturn all the proceedings of the court if I give it. This is the general rule, but it is competent to the court to order even compound interest when justice requires it." Nightingale v. Lawson, 1 Brown, Ch. 443; Dornford v. Dornford, 12 Ves. 127; Raphael v. Boehm, 11 Ves. 91.

In cases of trust, a court of chancery will direct the trustee to pay interest upon interest, where he has used the money in his hands and neglected to account. Compound interest is not forbidden by the statute against usury, but it is held to be iniquitous, and chancery will not decree it, though agreed to by the parties. 2 A. K. Marsh. 335, 339; Mowry v. Bishop, 5 Paige, 98; Lewis v. Bacon, 3 Hen. & M. 89. It will be allowed on a special agreement in writing, prospective in its operation, and entered into after the lawful interest has become due. Van Benschooten v. Lawson, 6 Johns. Ch. 313. 316. In the case of Fobes v. Cantfield, 3 Ham. [Ohio] 17, "the debtor agreed, in 1807, that upon the principal and interest then due, he would pay the interest annually. This agreement he failed to perform. In 1812, he acknowledged the existence and obligation of the agreement, and settled the account according to it, and gave his notes for the amount, and the mortgage to secure the payment." This was set up against the mortgage, but the court held the interest was rightly paid. And again, in Watkinson v. Root, 4 Ham. [Ohio] 373, where the parties made a contract in April, 1826, by which the defendant agreed to pay to the plaintiff $4,586 in four equal annual payments, with lawful interest, to be paid annually; an action was brought for the interest, and the only question was, whether interest was allowable upon the successive annual charges of interest, after they fell due. And the court say, such a contract is prohibited by no statutory provisions, and we see no reason why it should not be enforced. 1 N. H. 179, is to the same effect. Where regular accounts are settled from time to time, interest on interest is allowed. 3 Brown, Ch. 440. Where bankers furnish an annual account without objection, an agreement shall be presumed that the balance of principal and interest shall bear interest. 1 Ball & B. 422. Accounts between merchants may be settled every half year, on the principle of compound interest. 9 Ves. 223, 224. It may be allowed where there is a contract implied, or it is the usage of trade. 2 Ves. Sr. 16, 17, 20.[2] A promissory note given for the payment of interest upon interest, which had previously become due, is valid. Wilcox v. Howland, 23 Pick. 167. In the same case it is said, "If a party holding a note payable at a future time, with interest annually, lets the time run by without demanding interest, he cannot afterwards, in an action on the note, recover compound interest." Yet he may sue for each instalment of interest as it becomes due. Cooley v. Rose, 3 Mass. 221; Greenleaf v. Kellogg, 2 Mass. 568. "It is not illegal to stipulate for compound interest, or that interest as it becomes due shall be converted into principal, and carry interest." Kellogg v. Hickok, 1 Wend. 521. If the debtor, instead of paying interest when it becomes due, gives his note or bond for it, there is no legal objection to enforcing the payment. Id.

From the above citations, it appears that the earlier decisions in England had not clearly settled the rule in regard to compound interest. There are dicta both for

[2] In Eaton v. Bell, 5 Barn. & Ald. 34, Chief Justice Abbott said: "It is now settled, that a party advancing money to another, is entitled to charge interest, and at the end of every year, then to add the principal to the interest." Bainbridge v. Wilcocks [Case No. 755]. "Compound interest is not illegal, and may be recovered on express promise, or on one implied by law, as a part of the contract."

and against it. But the more modern doctrine in England is, that "compound interest cannot lawfully be demanded and taken, except upon a special agreement, made after the interest has become due." And that a note given for the payment of interest before it has accrued, is not valid. This doctrine was laid down and followed by Chancellor Kent, in 6 Johns. Ch., above cited. It is founded upon the consideration, that "interest upon interest, promptly and incessantly accruing, would as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to influence the avarice, and harden the heart, of the creditor."

Now it is admitted, that there is no law prohibiting such a contract. But the courts have adopted the rule from notions of policy. All the authorities admit that the interest, payable annually or semi-annually, may be demanded and recovered as it becomes due, and that a note given for it may bear interest. And yet, when the loan is first negotiated, an agreement to pay interest on the interest after it becomes due, is not valid. The reasons for this distinction are unfounded in fact. It is supposed that the interest being due, and the debtor being pressed for its payment would be less likely to yield to the avarice and hardness of heart of the creditor, than when the loan was at first negotiated. Is not the converse of this true? When the loan is made, the borrower is generally sanguine that he shall be able to pay the interest, at least, as it shall become due. And if he fails to do this, he agrees to pay interest upon the amount of interest which he has failed to discharge. The essence of the agreement is, that the borrower shall pay the interest punctually as stipulated. Now, if he does not pay, does he not withhold from the creditor his due, and is it unreasonable that interest should be paid, as in all other cases, where there is a failure to pay money when due? But when the interest is due, the "hard-hearted" creditor demands the payment of it, and if not paid, he may resort to legal coercion. Here the judicial shield might protect the creditor with a better grace, and with greater propriety, than against a contract to pay interest upon interest, made under more favorable circumstances. The fact is this judicial legislation, to get rid of express contracts, which are not made in violation of law, is wrong in principle.

The rapid accumulation of interest is another objection made to this mode of computation. This objection has no better foundation than the negligence of the borrower. He is not presumed to be punctual in paying the interest when due, and he must be protected in this indifference to his contract against his hard-hearted creditor. In other words, the creditor is more lenient than justice required, or the debtor had any right to expect; and for this lenity by the creditor, and indifference to his obligation by the debtor, he shall be the gainer, and the creditor the loser. Now this argument is as unsound in morals, as it is in logic. Such a principle might be established by an arbitrary legislative enactment, but it is not sustainable as judicial legislation. The powerful mind of Lord Thurlow would not yield to such logic, but he was governed by the force of precedent. Precedents are not to be lightly regarded, but when they subvert contracts, and are founded in error, they should be abandoned. Prior to the reign of Henry VIII., usury, that is, the taking of interest, was deemed a crime, in the language of an attorney general of England, to be classed with murder and treason. In modern times, a usurious contract is only void in whole or in part, because it is made so by statute. Where an individual agrees to pay the sum of one hundred dollars on a certain day, but fails to do it, can there be any difference whether that sum was due for property purchased, or for the use of money at a legal rate of interest? The consideration in the one case is as good as in the other, and interest on the failure of the debtor is recoverable in either case.

The case under consideration is stronger than where the payment of interest is regulated by the principal bond. The coupons were given for the different instalments of interest as they became due, and were made payable to bearer. On their face was expressed, that the amount was due for interest, &c. The coupons could have been made payable to bearer, for no other purpose than to give them currency. They passed as bank notes payable to bearer pass. The coupons acknowledged a sum to be due in each, and this brings them within the ninth section of the act of Michigan, above cited, which gives interest. It is notorious that the city was unable to pay the interest as it became due, and it could not have been collected by legal means. But now the city opposes the claim of interest on interest, under the precedents stated. These precedents are opposed by other decisions, and by every consideration of sound policy, of morals, of logic, and of law. A want of punctuality in the payment of their engagements, by public bodies, is injurious to the community at large. It introduces a loose morality, and works a pernicious effect upon society. We think that these instalments of interest, made payable by these coupons being for a sum certain, were expressly within the ninth section, and that the interest is recoverable, from the time the city failed to pay it.

Case No. 6,614.

HOLLINGSWORTH v. DUANE.

[Wall. Sr. 46.] [1]

Circuit Court, D. Pennsylvania. May 18, 1801.

ABSENCE OF MATERIAL WITNESS — MOTION FOR A POSTPONEMENT.

The defendant swearing at the moment of trial, that he had heard of one who could be a material witness for him, is no ground for postponing the trial, though he swears positively by a supplemental affidavit, but without any new information, that the witness is material.

[This was an action on the case for a libel on the plaintiff in the Aurora, a newspaper published by William Duane.]

The above cause being called for trial, Dallas, of counsel with Duane, moved to put it off, on the affidavit of the defendant, which stated that he had been informed, that one Hercules Mulligan, of the city of New York, was a material witness for him on the issue joined, and that he did not become acquainted with the fact before Saturday evening.

Before TILGHMAN, Chief Judge, and BASSETT and GRIFFITH, Circuit Judges.

GRIFFITH, Circuit Judge. Mr. Dallas, (without any opinion about the materiality of the witness, or the previous diligence, or its propriety in other respects,) do you mean upon the ground of bare information to your client, to insist on putting off the trial? The witness is not sworn to be material, by the defendant; he says he has heard so; he does not tell us from whom, or upon what authority he founds this belief. Were the other objections removed, it is impossible that the court can act upon a hearsay of this kind. If you can amend your affidavit as to the fact of materiality, I shall consent to it; and we will then consider the merits of your application.

The defendant immediately made another affidavit, in which, without setting forth the reasons or particulars of his knowledge, he expressly swore that "Mulligan was a material witness for him in the cause."

Cooper & Dallas pressed for a continuance. They stated that the issue was very material to the defendant, namely, whether a citizen of the United State, or an alien: that to prove himself a citizen, he found it necessary to establish his birth in the colony of New York, a period 40 years past, his parents deceased, in a country unsettled at the time, and himself an absentee from the place of his birth, since his infancy: that Mulligan was now sworn to be material, and of which the defendant from the information he had received, entertained no doubt. In a case of this kind, the point of diligence could not be insisted on. Duane had in fact been to New York himself to inquire after evidence, but knew nothing of Mulligan. It was in the nature of a new discovery of evidence, which even after a trial might be made the foundation of a new trial; and a fortiori, to put it off.

E. Tilghman and Mr. Ingersoll contended that the application was unprecedented, and that not a single requisite appeared in the case, to authorize a postponement. Rex v. D'Eon, 3 Burrows, 1513.

CURIA (GRIFFITH, Circuit Judge). This is a motion to postpone the cause for the absence of a material witness; and on the case made out, I am very clear, that, by law, we cannot grant it. There is no proof of Mulligan's materiality. The supplemental affidavit is, to be sure, positive; but the court must take in view the original deposition, by which it appears the defendant founds his knowledge on the mere hearsay of somebody, who the day before told him that Mulligan, who is in New York, could be a witness for him. It is evident that the defendant had no new information between the first and second affidavit; it has all been done in the face of the court, in a few minutes. Can it then be seriously urged, that a cause is to be put off on the affidavit of a party swearing at the moment of trial, that he has heard of material evidence? No trial could ever be had, if this were admissible; it would always be at the will of the party to put it off; for who might not receive information of material evidence? It is said the nature of the issue and the circumstances of the defendant make this a peculiar case, and not to be governed by the ordinary rules. I see no peculiarity. It is a mere question of citizenship, and the defendant conceives it important to prove his birth place. Is that a fact of so very particular a complexion? The action was brought to April, 1800, and issue joined in September of the same year. Has not the defendant had time enough to ascertain the fact since then, if there be any truth in it? No accident, no surprise, no difficulty insurmountable by ordinary diligence, is laid before the court, to furnish a ground for postponing the cause for this witness. Why was he not found out? It is barely said, "We did not hear of him before." What cause would ever come to trial, if this were a reason for putting it off, and given just at the moment when called on? In ejectments, and other cases, which should depend on ancient witnesses, on reputation, and other traditionary proofs, it might happen nineteen times in twenty, that a party would make some new discoveries, as they are called, at the eve of the trial; and that toties quoties. This notion of new discovery, as a ground for putting off a trial, is quite new to me. In very particular cases of surprise, loss or oversight, and where the new discovery is of evidence which of itself goes to destroy or support the action, and is fully set out and disclosed to the court, it is sometimes made a ground for a new trial; but a new discovery of additional or circumstantial evidence, after a trial on the merits, has not, within my reading, ever been made a ground for a second trial. If it were so, trials might be had without end. But as furnishing a reason for postponing a cause, I know of no case, where

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

a discovery of even material evidence just before the trial, has been held sufficient. If, then, this evidence appeared to us to be material, (as it does not,) yet as no subpoena was taken out, and no particular diligence to obtain Mulligan's testimony, I should be of opinion that the cause must proceed; the mere allegation that the defendant did not know of the witness before, notwithstanding. There might possibly be a case so peculiarly circumstanced, and those circumstances made out to the court in such a manner, as would induce it to postpone a cause, on the ground of a sudden discovery of a witness, or other material evidence. But the discovery here does not appear to be material; nor does it appear that this witness might not have been had with due diligence. If the testimony be of such a nature as will authorize a new trial, in case of a verdict against the defendant, he will have an opportunity to insist on the effect of the new discovery, in that way. But as the case now stands, neither materiality, nor diligence, nor any judicial precedent, that I know of, would authorize our allowance of the motion.

BASSETT, Circuit Judge. Within my experience, I have known much more injustice from the delay of trials, on what were called legal grounds for putting them off, than from precipitation and urgency in ordering them on. I am willing, however, to go as far as justice and precedent will authorize on these questions. But here, what reasonable ground is laid before us? Not a single requisite of the law, in the case. 1st. No diligence is pretended; no attempt to procure this testimony. But the defendant says he did not know of it! and why? He does not tell us what pains and measures he took, or why he missed Mulligan in his researches. 2nd. Again; it does not appear to us, that Mulligan is material. The defendant swears in his first affidavit, "That he heard on Saturday, that Mulligan could prove the place of his birth:" but his hearing so is no proof to the court, that the fact is so. Then as to his supplemental affidavit: that can go no higher than its source; it is but a part of the former. He indeed swears that Mulligan is material; but we know, because all this was done before our eyes, that he has got no new information: he swears positively upon the hearsay which is contained in the first affidavit. It is but one affidavit, and only amounts in evidence to us, that he has heard one Mulligan is material, and therefore he swears that he is so! This is not proving his materiality. 3d. But further, he does not even swear that he expects Mulligan's evidence at another time. However, it is unnecessary to add reasons; there can be no pretence for postponing the trial.

TILGHMAN, Chief Judge. It is extremely clear that the motion should be rejected. The supplemental affidavit was an indulgence; it is not a safe practice. But what do they prove? Why, no more than that the defendant has heard, and therefore is induced positively to swear, that Mulligan is a material witness, and that he did not know this until Saturday evening. To put off a cause, we must have the fact which is made the ground of it, properly proved. From these affidavits, we cannot say that Mulligan is material. The defendant's first and second affidavit must be taken together. They are both made before us on the table, and it is not pretended that he founds his knowledge of the testimony upon any other information than the hearsay stated in the first affidavit. Indeed, the supplemental affidavit, to say no more of it, seems a very extraordinary deduction from the premises contained in the first: but that is for the defendant's consideration. There is, then, no proof of materiality: there is none either of any diligence. On the whole there is not the least pretence for this motion: the trial must proceed.[2]

Case No. 6,615.

HOLLINGSWORTH v. DUANE.

[Wall. Sr. 51.][1]

Circuit Court, D. Pennsylvania. May 18, 1801.

CITIZENS—PLEA IN ABATEMENT — ASSESSMENT OF DAMAGES—VENIRE DE NOVO.

1. Where the defendant was born in the colony of New York, in 1760, of Irish parents, and in 1771 went to Ireland, and was educated and served his apprenticeship there, and remained in the British dominions until 1795, and then returned to America, he is not a citizen of the United States.

2. On a plea in abatement, if the jury find against the plea, they ought to assess the damages on the plaintiff's declaration; if this is omitted, a venire de novo must be awarded.

This was an action on the case for a libel on the plaintiff, in the Aurora, a newspaper published by the defendant. [The defendant had moved for a postponement, but had been overruled. Case 6,614.] The declaration stated the plaintiff to be a citizen of the United States, the defendant to be an alien, and subject of his Britannic majesty. The defendant pleaded in abatement to the jurisdiction of the court, "That long before the action was brought, and at the bringing of it, and at the time of his plea, he was a citizen of the state of Pennsylvania, and not an alien and subject of his Britannic majesty; and because the plaintiff was also a citizen of the same state of Pennsylvania, therefore by the constitution of the United States, the said circuit court had not jurisdiction over the parties," &c. To this plea there was a repli-

[2] See the trial [Case No. 6,615], by which it will appear that the testimony of this witness, if such witness there was, would have been immaterial; as the fact he was to prove, even admitting it to be so, did not, under the circumstances of the case, avail to make the defendant a citizen of the United States.

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

cation by the plaintiff, to which the defendant rejoined, and thereupon issue taken.

Mr. Ingersoll (with whom was Tilghman), for plaintiff, opened the cause, by observing very briefly, that the only principal matter of inquiry on this issue was, whether the defendant was a citizen of the United States or an alien. If he was a citizen of the United States, then his plea of being a citizen of the state of Pennsylvania could be proved; and in that case he admitted the court had no jurisdiction; because the constitution gave the federal court no cognizance of such a case between citizens of the same state; but if, from the evidence, it should appear that the defendant was an alien, or subject or citizen of some other or foreign power or state, then his plea failed, and he must answer to the action for the libel, in this court. He mentioned, that he was not minutely informed as to the evidence which could be adduced to prove the defendant an alien, but he understood it would appear in a very clear manner, that this was the fact; and as the burthen of proof lay on the party alleging the other to be an alien, he should proceed to call the witnesses.

Mr. Dallas, for defendant, said, that his client was an American by birth, and from thence derived his right to the claim of a citizen of the United States of America: that he conceived the only question to be tried was, whether the defendant was born within the limits of the American colonies. If that was proved he thought there was an end to the question, and the jury bound to find him, not an alien, but a citizen of the United States. He proposed to call one or two witnesses, who, he stated, would prove his birth to have been within the colony of New York. The only proof of the place of his birth arose from his own declarations to some of the witnesses. One of them stated, that according to the best of his recollection, the defendant had once told him that he was born in Canada; but of this he was not certain.[2] Another of the witnesses, however, who had been present at the same conversation, and whose recollection appeared to be perfect, said the other witness had been mistaken, as the defendant then stated the place of his birth to be on Lake Champlain, within the bounds of New York, but near to Canada. This witness further stated, that the defendant had repeatedly told him of his birth in the colony of New York, as he received it from his mother. The remainder of the evidence may be collected from what fell from the judges. After the evidence on both sides had been rested, the counsel immediately mentioned to the court, that they had agreed to submit the case to the jury, without argument, under the opinion of the court in point of law, whether the defendant was, upon the evidence, a citizen of the United States, or an alien.

GRIFFITH, Circuit Judge. Before we charge the jury, I wish the court to understand, whether (taking the relation of the defendant himself as evidence for him on this issue[3]) the facts on which he relies, in proof of his claim to be an American citizen, are as follows: That his parents were natives of Great Britain or Ireland, and previous to the year 1760, settled on the borders of Lake Champlain, within the limits of the British colony of New York; that the defendant was born there about the year 1760, and lived there with his parents, and the surviving parent, his mother, till he was seven or eight years of age; that his mother then removed from the colony of New York into that of Pennsylvania, and resided with him in the city of Philadelphia, in which place he went to school; that about the year 1771, he then being eleven years old, his mother removed with him to her former residence, in Clonmell, in Ireland; that he there completed his education; and somewhere in Ireland served an apprenticeship to the art of printing; that he came of age in 1780 or 1781, and after the peace, in 1783 or 1784, was pursuing his business as a journeyman printer in the city of London, which place he left about those years, and went into the British East Indies, where he resided until the year 1795, when he came into Pennsylvania, and has since resided there: and the question is upon these facts whether he is a citizen of the United States? The counsel for the defendant said that the statement was correct, and that their client relied upon it as entitling him to his claim of citizenship.

Mr. Dallas, for defendant, here said, that before the court charged the jury, he wished to read the case of William Smith, of South Carolina, which he thought applicable to the plea of the defendant.

CURIA. Certainly, Mr. Dallas; we should be very desirous of hearing all that can be suggested on either side.

Mr. Dallas then read the Case of William Smith, from Debates of Congress, fols. 196, 383, 391, and made some observations, with a view to establish his proposition, that birth in the colonies conferred a right of becoming a citizen of the United States, in the circumstances of his client.

The counsel for the plaintiff made no remarks, but submitted the case to the opinion of the court.

TILGHMAN, Chief Judge, after a few minutes conference on the bench with BASSETT and GRIFFITH, Circuit Judges, charged the jury as follows:

The single question for you to decide on

[2] This was a witness called for the plaintiff.

[3] No objection was taken by the counsel for plaintiff to the defendant's own declarations.

this issue is, whether the defendant be a citizen of the United States, or an alien. It is your undoubted province to decide on the truth of material facts, alleged on the one side or the other. These facts being settled in your minds, it is the province of the court to direct your judgments on the law, which arises between the parties out of the facts. In this case, the facts necessary to form a legal decision, and which you are to take as the foundation of your verdict, seem to be sufficiently settled. There is, indeed, some doubt upon the evidence, whether Mr. Duane was born in Canada or the province of New York. This question is to be decided by you. If you think from the evidence that he was born in Canada, then the whole foundation upon which his claim to citizenship rests fails; for in 1760, at his birth, Canada was a part of the French territory. Taking the fact, however, to be as stated by the defendant himself, in conversation with the witnesses who have been produced on his behalf, (and we think the probability is on that side,) viz. that he was born within the British colony of New York, in the year 1760, and removed with his mother to Ireland in 1771, at the age of eleven years, and continued within the British dominions during the revolution, and until 1795, under the circumstances before enumerated by Judge GRIFFITH, and assented to by his counsel—I say, taking his own statement as true, it is the clear opinion of the court, in point of law, that Mr. Duane was not, when he put in this plea, and is not now a citizen of the United States, but an alien. It is not the intention of the court, on a sudden, to enter upon a discussion of supposable cases, wherein the place of birth might confer a right of election on the party, at any indefinite time, to make that circumstance a ground for his claim to citizenship. We confine ourselves to the case before us. We are of opinion that there has been no period until this time, at which he became a citizen of the United States. At his birth, he was a subject of the king of Great Britain, as much so as if he had been born in Great Britain or Ireland. We were all so, at that time. In 1776, at the Declaration of Independence, he was permanently settled in Ireland, receiving his education, or learning his trade. After he came of age, which much have been in 1781 or 1782, we find him settled in business in London, and from thence in 1783 or 1784, going out to the British possessions in India, where he resided until the year 1795, when and whence he came to Pennsylvania. It seems to be the idea of his counsel, that because born in the colony of New York, and removed from the place of his nativity while an infant, he might re-claim his country in her state of independence, after he came of age. Without giving any opinion on this right of election, in such circumstances as the present, it is a sufficient answer to it in this case to say, that he made no such election. He indeed told Hickey in 1782 or 1783, that he had intentions of going to America, and according to Mr. Goodfellow's relation, Mr. Duane told him, that while he was in the British East Indies, he, on some occasion, made claim to be an American citizen. But no one can, for a moment, view such declarations as these, as amounting to an election of citizenship in the United States in virtue of his birth-right. If such a right did exist, he should, immediately on his coming of age, or as soon after as he could, have taken on him the actual character of a citizen of the United States. Instead of this, he remains from the year 1781, when he came of age, to 1795, within the British dominions; having in all that time done no act, or made any application, nor been recognized by any authority of either nation, as a citizen of the United States. Suppose he had been found in arms against the United States in 1782, after he came of age, must he not have been treated as a British subject? Could he have been hung as a traitor, on the ground of his having been born within the colony of New York, in the year 1760? Certainly not. Upon the whole, we entertain no doubt on this question, in point of law. We do not consider the defendant as ever having entitled himself to those great privileges and rights of citizenship which resulted to the people of the colonies, in consequence of the Declaration of Independence, the war which ensued, and the final recognition of them as independent states. If Mr. Duane can, merely in consequence of his birth in 1760, in a British colony, after a permanent removal from the year 1771 to 1795, a space of 24 years, and a residence within the British dominions as a British subject, come here and claim to be a citizen of the United States, it would be difficult to say who might not make such claim, or when a limitation would attach. The case of the Honorable Mr. Smith, which has been mentioned as parallel to Mr. Duane's, bears no resemblance to it. It differs in every circumstance. It would be wasting time to note the circumstances of discrimination. You have, then, gentlemen, the unanimous opinion of the court, delivered in haste, and without that precision of language which perhaps might be more impressive, that Mr. Duane, upon his own evidence, is not in law a citizen of the United States, but an alien. If you are of this opinion, upon the facts, you will find a verdict accordingly. On the contrary, it is your right to find him a citizen of the United States, if, upon the law and facts, you are of that opinion.

BASSETT and GRIFFITH, Circuit Judges, merely assented to the charge, without delivering any reasons.

GRIFFITH, Circuit Judge, observed to Mr. Dallas, counsel for defendant, that as

the matter was important to his client, and the point might be thought worthy of more consideration or revision, he would remind him, that if the opinion of the court was thought erroneous, the defendant might take a bill of exceptions, and have the question decided in the supreme court of the United States. Or if his counsel preferred a re-consideration in this court, he should be at liberty to move for a new trial, for the misdirection, if the jury should find against the defendant. The counsel for the defendant seemed to acquiesce in the opinion of the court, declining to take a bill of exceptions.

The jury retired for about two minutes, and returned a verdict, that the defendant was not a citizen of the United States, but an alien and subject of the king of Great Britain, which was entered accordingly.

NOTE. After the evidence relative to the alienage of the defendant was rested, some question arose whether, on this plea in abatement, in case the jury found for the plaintiff, it was proper for them to assess the damages against the defendant on the declaration. The counsel not having looked into the practice, agreed generally, that no prejudice should arise from the omission of it, if that should be the course of proceeding. The jury therefore only found a verdict on the point of the plea. The next morning, it was stated by the plaintiff's counsel, that upon examination, they were satisfied the jury ought to have assessed damages for the libel (Eichorn v. Lemaitre, 2 Wils. 367); and the question now was, what ought to be done. Mr. Ingersoll, for the plaintiff, moved, that the court should charge a jury under a law of the state. Province Laws, p. 116, § 27. But the defendant's counsel superseded this motion by consenting, "that a venire de novo should go on the issue in abatement, and a special jury should be struck; but that on the trial the jury should find for the plaintiff on the issue of alienage, and assess the damages for the libel; on which assessment the defendant should be at liberty to offer in mitigation of the damages, any evidence which might be legally given on the general issue joined."

[Subsequently Mr. Dallas, for the defendant, moved to set aside the verdict in this case because the foreman of the jury which gave the verdict was an alien, of which fact the defendant was ignorant at the time of impaneling the jury. Griffith, Circuit Judge, overruled the motion. Case No. 6,618. See, also, Cases Nos. 6,616, 6,617, 14,996, 14,997, and 16,654, all on questions as to contempt of court during the proceedings in this case.]

Case No. 6,616.

HOLLINGSWORTH v. DUANE.

[Wall. Sr. 77.] [1]

Circuit Court, D. Pennsylvania. May 22, 1801.

CONTEMPT—PUBLICATION PENDING SUIT.

Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, &c. with reference to the suit, or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment.

[Cited in Piper v. Pearson, 68 Mass. (2 Gray) 121; People v. Wilson, 64 Ill. 227.]

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

[This was an attachment for a contempt in connection with Case No. 6,615.

[The plaintiff in this case had succeeded in securing a verdict against the defendant for a libel published in his paper (Case No. 6,615), in consequence of which the defendant published the article mentioned below, reflecting upon the action of the court, and the present proceedings to attach him for contempt were instituted.]

Lewis, on a former day, had produced in court No. 3171 of the General Advertiser, commonly called "The Aurora," published by the defendant Wm. Duane in the city of Philadelphia, which contained the following paragraph:

"Wednesday 20th May.

"The Age of Revolutions!

"The recent trial in the circuit court has exhibited many curious occurrences: among others,

"Infinite pains, expense, and zeal, were employed to confer the last stroke of infamy on an American by stigmatising him with the title of a British subject!

"The open and uniform adherents of the British government, concurring in the sentiment that to be a British subject is infamous!

"The prosecutor and the prosecuted agreeing, that to be a British subject in America is infamy!

"Old Tories the most active in establishing this most infamous of verdicts!

"Men saved from the gallows, and a public execution for treason against American liberty, by the benignity of a republican chief justice, converted to the opinion, that to be a British subject in America is to be infamous!

"Old Tories proving their attachment to republican government by professing hatred of British subjects!

"Struck juries and Mr. Adams's Judiciary Law, giving very happy exemplifications of the moderation and the kind of justice which republicans are to expect from their adversaries!

"Moderation in the mouths of Tories, daggers and dungeons in their hearts!"

Having proved by an affidavit annexed, that the paper was purchased at the defendant's office, Lewis obtained a rule on him to show cause this day, why an attachment should not issue against him, for a contempt of the court, in reflecting upon the proceedings, pending the suit, &c. Upon coming on of the rule, some question arose as to the order of proceeding.

Mr. Ingersoll cited Rex v. Read, Vern. & S. 295, and Long v. Elways, Mos. 250, relative to the exhibition of interrogatories.

GRIFFITH, Circuit Judge. The mode of proceeding in this case is very clear of difficulty. The prosecutor has proved by an affidavit, that the paper was published at the office of the defendant, and that he is the

editor. The editor is called on to show cause why an attachment should not go on against him for it, as a contempt of the court. On this rule he may controvert the fact by affidavits; he may explain; or palliate; he may contend on any legal ground that the court ought not to award an attachment; in short, he may defend himself in person or by counsel, as he is advised. At this time, no question can be made about interrogatories. The prosecutor must prove, and he has already proved the publication. When the defendant has made his defence, we shall discharge the rule, if on any grounds, we think an attachment ought not to go. But if we are of opinion that the fact on which the rule is taken, is not sufficiently answered or excused, and that in point of law a contempt has been incurred, we shall direct an attachment to issue. When this is done, and the defendant brought in upon the attachment, he may submit his contempt without interrogatories, to the court, or he may demand of the prosecutor to file interrogatories, stating the questions on which the contempt turns; and if on his oath, he gives such answers as purge him from criminality, he must be discharged, and the prosecution falls to the ground. This right to demand interrogatories is in his favor; he is not obliged to ask for them, nor can the court force them upon him. If he will not pray interrogatories, the matter of contempt being proved by the affidavit or other testimony of the prosecutor, to the satisfaction of the court, they will give judgment against the offender being in custody on the attachment. On this point of interrogatories, there is certainly a diversity of opinion in the books (see 6 Mod. 73; 4 Bl. Comm. 287; Rex v. Beardmore, 2 Burrows, 792; Rex v. Edwards, 4 Burrows, 2105; Rex v. Read, Vern. & S. 295; Long v. Elways, Mos. 250; Rex v. Sims, 12 Mod. 511; Respublica v. Oswald, 1 Dall. [1 U. S.] 328); but I take the law here to be as laid down above. If the defendant's counsel can show any cause against the attachment, they may do it after the counsel for the prosecutor opens the nature of the rule, and the grounds on which he proceeds.

Mr. Lewis, for prosecutor.

An infamous libel having been published by the defendant in his paper, the Aurora, against Levi Hollingsworth, the latter, to vindicate his character, and inflict on the defendant such damages as a jury might deem adequate to the injury, instituted an action in this court for redress. The defendant pleaded to the jurisdiction of the court; that plea was tried on Monday last, and the jury found a verdict against the defendant. This, however, did not terminate the cause, the same being, as yet, pending, and on account of an informality, to be tried over again on the damages, at the next term. The day but one after the trial, the defendant, in his paper, published an account of the proceedings and trial, in which he reflects on the plaintiff in the most gross and scandalous terms; abuses the jury by the most reproachful epithets, and the verdict, he styles the "most infamous;" attacks the system of struck juries generally; and the judges who tried him are implicated as acting with partiality and injustice; and in short, representing the trial collectively, and all concerned in it, as actuated by the most depraved and wicked motives: (here he commented on the different passages of the paper.) This is certainly one of the most flagrant attacks which was ever made upon the honor, independence, and character of a court of justice; and unless punished in an exemplary manner, courts will become contemptible, useless, and even pernicious. It is of the last importance, that a party should proceed in his judicial course for redress, free from any influence but that of the regular and standing operation of the law. His character, his cause, his proceedings, the witnesses, the judges, jurors and officers should be subject to no extraneous impression, fears, or control. If lawless men, void of decency, and urged on by passion and interest, shall be permitted to vilify and insult judges, jurors, witnesses and the parties, what must ensue but a total perversion of justice, and indeed, almost the extinction of justice itself? Jurors will not serve, witnesses may be made to suppress or pervert the truth, the judges themselves may feel their independence attacked, and the parties and their counsel will be intimidated in their proceedings. To prevent such direful consequences, and to secure to every man the peaceful and impartial investigation of his claims before the tribunals of his country, the law is, that pending a suit, it is a contempt of the court to publish either false accounts of their judicial proceedings, or even true ones, without proper permission, (4 Bl. Comm. 285,) or any other matter tending to influence the course of justice, or reflect upon the persons and parties concerned in its execution. That this was an offence falling under the head of "contempt of court," and punishable as such, would admit of no controversy. It was the law of England, of Pennsylvania, of the United States; it must be the law every where, or no law would long exist any where.

Sir William Blackstone (volume 4, p. 285), in considering the law of contempts, says: "Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptu-

ously of the court or judges acting in their judicial capacity; by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom,) is entirely lost among the people."

Pool v. Sacheverel, 1 P. Wms. 675, Lord Parker, Chancellor, anno 1720: A marriage had been adjudged in the spiritual court, and affirmed in the delegates, between Sacheverel and his maid servant, and afterwards a trial had in the common pleas about the title, wherein the fact of the marriage was again found. The proof of the marriage was an entry in the register of the Fleet prison, 27th November, 1705, between Robert Marshall and Anne How; in her answer she said Sacheverel was married to her under that name. One Pool, who married the daughter of Sacheverel by the first wife, brought a bill before Parker, Lord Chancellor, against the pretended second wife (the maid,) Sacheverel being dead, touching the real and personal estate. While this suit was depending, the father of Pool put an advertisement in the Daily Currant, offering a reward of £100 to whoever would make legal proof, that there were persons really of the names of Marshall and How, who were married, and to whom the entry of the 27th November, 1705, referred. On motion to commit Pool, (the father) after great consideration the Lord Chancellor committed him. He observed, "that this tended to the subornation of witnesses; was very dangerous, and not only greatly criminal, but is a contempt of the court, being a means of preventing justice in a cause now depending, which is aggravated by the marriage having been pronounced good in the court of delegates, and also a verdict at the bar of the common pleas in its favor; and as the court may, so it ought in justice to punish this proceeding." It was objected that nothing had been done in consequence of the advertisement; that it is not an offer to a particular person; that a person coming in for such reward, is no witness. These objections were overruled. It was said the matter was over by the sentence in the spiritual court and the trial in B. C. But per Lord Chancellor King: "It is not over; for suppose, on the reward offered by this advertisement, a dozen of affidavits should come in, proving what is desired, this might induce the court to grant a new trial, and overturn all the former proceeding. It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print to procure evidence, and is tantamount to saying that such persons as will swear, or procure others to swear, shall have £100 reward, and this in a cause now depending here; and though the intention of the party so advertising may be innocent, (and I, knowing the man, believe it was so; insomuch, that if a court may be said to have inclinations or impressions from thence, I must own I should be influenced by knowing Mr. Pool to be an honest man,) yet the justice of the court, nay, the justice of the nation being concerned in so public a case, I cannot dismiss the party, though his counsel offer to pay costs to the other side; but in justice and for example's sake, he must stand committed."

2 Atk. 469, Hardwicke, Ld. Ch. anno 1742: This was a motion to commit the printers of the Champion, and of the St. James's Evening Post, for publishing a libel upon the defendant, in a cause depending before the court, and for reflecting upon the witnesses. In this case the chancellor said "that nothing was more incumbent on courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public, against persons concerned as parties in causes, before the cause is finally heard. It has always been my opinion, as well as of those who have sat here before me, that such a proceeding ought to be discountenanced. But to be sure, Mr. Solicitor General has put it on the right footing, that though this should be a libel, yet unless it is a contempt of the court, I have no cognizance of it. For whether it is a libel against the public, or private persons, the only method is to proceed at law. The defendant's counsel have endeavoured two things: 1st. To show the paper not defamatory. 2nd. If defamatory, yet no abuse upon the proceedings of this court and therefore no room for me to interpose. The letter is artfully written, but taking the whole together, there can remain no doubt with every common reader at a coffee-house, but this is a defamatory libel. It is also plainly levelled at the executors, parties in this cause, though their initials only are used; but all libellers now know, that printing initials will not serve their turn: even feigned names wont do. It is true the court is spoken of with respect; but that is colorable only, and such colors shall never impose on the court. There are three different sorts of contempt.—One kind is scandalizing the court itself. There may be, likewise, a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves and characters. There is the Case of Rakes. There are several other cases of this kind; one strong instance of Captain Perry, who printed his brief before the cause came on; the offence did not consist in the printing, for a man may give a printed as well as a written brief to counsel; but the contempt of this

court was, prejudicing the world with regard to the merits of the cause, before it was heard. On the whole, there is no doubt this is a contempt of the court," &c. And the printers were committed.

2 Ves. Sr. 520, anno 1754, Hardwicke, Ld. Ch.: It appears by this case, that the chancellor had committed Mrs. Farley at the instance of the plaintiff, for publishing an advertisement relating to an answer by Sir Robert Cann, the defendant, at his request; he had also committed Cann. On the motion to discharge them upon submitting, paying costs, &c., lord chancellor said: "His reason for committing, was not only for the sake of the party injured by such advertisement, but for the sake of the public proceedings in this court to hinder such advertisements, which tend to prepossess people as to the proceedings in the court."

Our own judicatures have every where acted upon these principles, as their undoubted right, as incidental to the execution of their powers of office, and sanctioned by immemorial usage. In Oswald's Case, 1 Dall. [1 U. S.] 319, some attempt was made to question the right of the court to punish as for a contempt, printed publications, pending a cause, tending to prejudice the public mind relative to the parties, and to bring suspicion on the impartiality of the judges. This was supported on the 9th section of the Pennsylvania bill of rights, which declares, "that in all prosecutions for criminal offences, a man has a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with the witnesses; to call for evidence in his favor, and a speedy public trial by an impartial jury of the country, without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." The declarations in the bill of rights (section 12), "that the freedom of the press shall not be restrained," and in the constitution of Pennsylvania (section 35), "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government," were also insisted on, as exempting Oswald's publication from the cognizance of the court. But the chief justice, (McKean,) and the other judges, were clear in their opinion, and satisfactorily prove that contempts of the court, by reflecting and libellous aspersions tending to defeat and discredit the administration of justice, were no way affected by these constitutional declarations. They held, "that he who attempts to raise a prejudice against his antagonist, in the minds of those who must ultimately determine the dispute between them; and who for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice, wilfully seeks to corrupt the source, and to dishonor the administration of justice." Page 325. They held it to be a contempt of the court, and that it was their undoubted right and duty, to punish it in a summary way, as in other contempts; and they did so by fine and imprisonment. The chief justice (McKean) in delivering the sentence said, "that doubts had been suggested (by the defendant's counsel) whether even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of England, think, that without this power no court could possibly exist; nay, that no contempt could indeed be committed against us, we should be so truly contemptible. The law on the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt," &c.

The publication now before the court, is of a complexion of the deepest dye; containing the most false, abusive, and contemptuous imputations; attacking the character of the plaintiff, representing him in the most odious and criminal lights; charging the jury with having rendered a most infamous verdict; reflecting upon struck juries in general, and upon the administration of justice in this court. He urged that all this was done, pending the cause, and during the sessions of the court, and almost in its very view; and above all, that the whole representation was wicked, false, and malicious, within the knowledge of the defendant, whose trial had been fair, impartial, and even indulgent, and so entirely satisfactory, that his counsel had not even suggested a scruple, as to the strict propriety either of the law, or the verdict of the jury. He insisted, that the contempt far exceeded that of Oswald's, which in comparison with this, might be termed decorous and innocent; and, that unless the court would secure its own independence, and the just claims of all persons and parties to protection against public insult and abuse, for doing their duty under the most solemn sanction of law and the constitution, in cases depending, the court would sink into contempt, trials would be governed, not by law and evidence, but by the agency of a scandalous and corrupting licentiousness of the press; and that all concerned in the administration of justice, must soon quit their stations, or their virtue and independence become the sources of the greatest injuries to their feelings, their families, and fortunes. He cited many cases in the supreme court of Pennsylvania, in which contempts of this nature, had been held punishable in this way: as Lessee of Hurst v. Britton, Wright v. Updike, the case of S. F. Bradford, (a case in Chief Justice Kinsey's time), and Republica v. Carol.[1] He added, that if the principle of Oswald's case [supra], or the precedent there established, needed any confirmation, they had received the sanction of the legislative assembly of Pennsylvania, on

[1] [Unreported.]

his memorial of the 5th of September, 1788, to impeach the judges. On this memorial, it was resolved, "that the house, having, in a committee of the whole, gone into a full examination of the charges exhibited by Eleazer Oswald, of arbitrary and oppressive proceeding in the justices of the supreme court against him, are of opinion, that the charges are unsupported by the testimony adduced, and consequently, there is no just cause for impeaching the said justices."

Mr. Dickerson showed cause.

The contents of this paper have been greatly misrepresented, and its criminality, if there be any in it, much exaggerated. It must be allowed, that there is some bitterness of complaint in it, and several expressions of a nature to excite uneasiness in the mind of the plaintiff; but the remarks are of a general nature, not pointed at the plaintiff, nor at the jury, nor at the court, by any precise allegation. The insinuation of the plaintiff's being a Tory, cannot operate, in the least, to his prejudice, in the future stage of the cause, nor can any thing said of this jury. In fact, the verdict in the abstract only, is spoken of as infamous, that epithet by no means being applied to the jurors. As to the judges of the court, not a word is pointed at them; and upon the whole, the publication cannot be viewed as likely to have any influence upon the merits of the future controversy. (He here attempted to show that the paper contained no reflecting matter.) 1st. The assertions may be all fairly explained, so as to bear no contemptuous meaning; or at least, as only applicable to what is past, not what is to ensue. The defendant in his publication, speaks of a point already decided, and it has not been contended that mere libellous matter, after a question decided, can be the foundation of a summary proceeding, as for a contempt. 2d. But upon constitutional and legal principles, it may be questioned, whether the case now before the court, is proper for their interference in this way. This method of trying and punishing at the discretion of the court, upon attachment, without the intervention of a jury, under an allegation of contemning or offending the court, must be looked upon as the exercise of a jurisdiction unfriendly to liberty, dangerous to the citizen, and easily capable of being perverted to the most oppressive purposes. It is evidently, therefore, the duty of judges to admit complaints of this nature with great caution, and to reject every attempt to introduce this summary and arbitrary mode of trial, except in cases where it is absolutely necessary to the attainment of justice. There are, indeed, many instances in which the court possess the power of fining or imprisoning for contempt, by attachment, or in a summary way, officers of the court, being under its immediate command and superintendance, and, by accepting the office, tacitly submitting to this mode of coercion for delinquency, may be punished in this way. Jurors, summoned to attend, and absenting themselves, or being guilty of negligence or contumacy, may be so punished: for to proceed in the ordinary way by indictment, would be too slow to effect the necessary purposes of justice. So for contempt of the process of court, there can be no other effectual redress; the course of justice must be stopped, if the courts could not compel obedience to their rules and orders, by fine and imprisonment. So for irregularities and misbehaviour in the face of the court, instantaneous punishment is essential to the existence of the court; it could not proceed without this power. But it cannot fairly be contended, that it is essentially necessary to the ends of justice, that contemptuous words or libellous publications, not any ways impeding the cause, and pronounced, or printed out of the view of the court, need to be punished in this way. What if the defendant libels his adversary, or even abuses the judges, may not the cause proceed with equal celerity, and does it necessarily follow, that such publications will do injury to the party? Would not the ordinary, solemn and impartial course, by action or indictment, sufficiently punish, and equally deter men from such abuses?

GRIFFITH, Circuit Judge. Mr. Dickerson, conceding this publication to be a libel upon the party, and a contempt of the court, and there being no statute on which contempts are indictable; will an indictment, as at common law, lie against the offender?

Mr. Dickerson. I am not prepared to answer that question: perhaps an indictment would not lie. But what I would prove, is, that let the mode of redress be what it may, the one now adopted is inexpedient, dangerous, and unconstitutional. By the constitution of the United States (article 3, § 2), it is declared, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held," &c. And by the eighth amendment, it is declared, that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state, &c.; to be informed of the nature and cause of the accusation; to be confronted with the witnesses," &c. These are explicit terms, and of the highest possible authority. If the publication in question is criminal, if contempt of court be a "crime," then it falls within the above constitutional provision, which declares that "the trial of all crimes, except on impeachment, shall be by jury." It will be found difficult to reconcile the present proceeding with the plain and solemn definition and injunction of this great charter; and though it must be admitted, that some cases of contempt are not to be proceeded on by indictment, yet it does not therefore follow that every case of this sort is excepted out of the provisions of the constitution. It is much safer to narrow than to enlarge the sphere of

summary punishments; and without absolute necessity, courts of justice should avoid the exercise of a jurisdiction, confessedly of an arbitrary complexion, in violation of the general principles of the common law, repugnant to the broad terms of the constitution, and when enforced by judges of the greatest impartiality and moderation, still liable to invidious reflections and jealous surmises. It will be difficult for the bulk of mankind to believe, that he can be wholly impartial, whose reputation and dignity have been attacked, or a dispassionate and equitable executor of the law, who sits to judge and to punish an offence committed against himself. Does this species of contempt, then, if it be one, necessarily call for this mode of redress? It would seem not. The great distinction I lay down, between those contempts which may, and those which may not be punished by attachment, is this: Where the contempt goes to resist, or stop, or evade the process or orders of the court, so that, without immediate coercion, the proceedings of the court must be impeded or defeated, there a summary correction of the abuse is requisite; as on subpoenas for witnesses, rules of the court, process to answer, &c. So against officers of the court, jurors, attorneys, and generally, in cases where the attachment itself is the agent for executing or enforcing the very matter of right or controversy between the parties, where without it, the court could not proceed to give the suitor a prompt and adequate remedy. The cases which must daily occur of this kind, are very many; and they constitute the bulk of precedents on this head. Blackstone, in his Commentaries (volume 4, p. 283), draws the distinction; he says: "The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are consequential, which (without such gross or direct opposition) plainly tend to create a disregard of their authority." By looking through the classes which he enumerates, it will be seen that the line I have laid down may be readily drawn. 2 Hawk. P. C. 230; 1 Salk. 84; 1 Strange, 185; 2 Strange, 1068; Sayer, 47, 114,—will show in what instances this power may be properly used, as necessary to the execution of justice between the parties, or the preservation of the court itself. But can it be proved, that newspaper publications, commenting on the proceedings of the courts of justice, or treating the parties and the judges disrespectfully, and even contemptuously, may not be punished, if they are criminal, in the ordinary method by jury, with sufficient dispatch and effect?

Does the publication in question, or any act of the defendant for which he is now brought before the court, interrupt the proceedings in the cause, or prevent the court in any manner from administering law and justice to the parties? If he is punished, will the cause be advanced; will any one point be settled between the parties? Does it not all end in mere personal punishment; is it not all merely for example; and if so, why is it not competent to the ends of mere criminal justice, to proceed according to the course of trial by jury, against the defendant in this case, as for any other criminal violation of the laws of the country? If it were even admitted, that upon the principles of the constitution, the court might proceed in this way, still, the argument, from policy and motives of prudence, is sufficient to repel this mode of proceeding, and put the prosecutor to a public prosecution by presentment and trial. In Rex v. Revel, 1 Strange, 421, it is laid down, that for contemptuous words spoken of a justice of the peace in execution of his office, it is optional to proceed by attachment or indictment. So in Rex v. Gray, 1 Burrows, 510, and Rex v. Jolliffe, 4 Term R. 285, for publications at nisi prius, designed to influence the trials, informations were ordered, and not attachment.[2] As to the cases which have been cited to warrant this proceeding, those from the chancery ought to have little weight. It is a peculiar jurisdiction. The chancellor is, constitutionally, a judge of law and fact; and there seems to be no such violation of the trial by jury, in his undertaking to try a misdemeanor committed in the course of the cause, tending to the perversion of the course of justice in his court.

The elementary writers on the English law, such as Hawkins, Blackstone, and others, lay it down, under the head of contempts, that publications, pending a cause, tending to influence the jurors, suborn or intimidate the witnesses or counsel, bringing odium on the party with reference to his suit; impeaching the integrity, or reflecting on the capacity of the court, are properly, and have been immemorially, punished in this way. But it must be remembered, that we have not adopted every tenet of the British jurisprudence. Our government rejects many of them, as incompatible with the general principles of liberty; and what is of more consequence to observe, the constitution of the United States has interposed the most solemn and explicit barrier between the citizen and a summary and discretionary mode of trial.

But it is said, the law in this country is settled; that defamatory publications, pending a trial and relative to it, are punishable as contempts of the court; that Oswald's Case in the supreme court of Pennsylvania in 1788, is decisive. I agree that case is law; (though a large minority in the legislature were

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2 Griffith, Judge. For contempts to inferior jurisdictions, not of record, nor having a general power to fine and imprison, (unless committed in presence of the officer and punished instanter,) there is no other method than by indictment. In the cases at nisi prius, last cited, an information or indictment was the only mode of proceeding; as the judge at nisi prius could not attach for the contempt; and as against the king's bench, none could be said to be committed against that court.

against sanctioning it;) but it is distinguishable from this. There the publication was before the trial, and invited the public to interest itself in his cause: it appealed to the jurors who were to try the question, and was plainly and openly avowed as a means of prejudicing the country against Brown, and the court. But here the observations are upon a past transaction; they apply to what has been done; they anticipate nothing; not a word is said relative to any future period of the cause. The plaintiff may be represented as having been a Tory, and as having been a traitor; the jury as having given an infamous verdict; the clerk as having been partial; the defendant as having been greatly injured by the proceeding, and the judges as having wilfully perverted the law. But what has this to do with, or how can it affect the trial or proceedings which may hereafter occur? As to the judges, indeed, nothing is said against them; the defendant was advised on that point before the publication, and it was conceived, that as the court was not reflected upon, there could not be any foundation for a proceeding of this kind. Upon the whole I submit: (1) Whether here is any such defamatory matter as will make the defendant answerable at all. (2) Whether upon the principles of the constitution, the court can punish in this mode. (3) If they can, whether it is expedient to adopt it; whether it is not better to put the prosecutor to proceed some other way.

E. Tilghman, contra.

There can be but two questions raised: (1) Is this publication a contempt of court? (2) If it is, has not the court power to punish it by attachment?

As to the first: It never was doubted by any lawyer or judge, that for any person to attempt by false, abusive, and artful publications, to influence or defeat a cause, while depending in court, was a contempt of the court. By the constitution and laws of the land, and from the essential nature of the thing, trials between man and man, for property, character, or other matter of controversy, must be decided in a due course of law, by judges and jurors, and upon the evidence and rules of action prescribed. When a suit is once brought, and the parties have put themselves upon the proceedings and decision of the proper judicature, for any one without any authority, any judicial character or concern whatsoever in the cause, or for one of the parties to take the cause, as it were, out of the court, and by an appeal to the ignorance or passions of mankind, by falsities or by misrepresentations, by abuse of a party or the court, or in short, by any, but judicial methods to attempt creating a bias, and prejudicing the legal decision of the cause,—this, of all other conduct, may be emphatically styled a contempt of the court. If indulged, if not checked instantly, it will sap the foundations of justice. It aims a fatal stab at the vitals of the constitution. The judiciary, instead of being the only independent and perfect safeguard of life, character, and property, will be reduced to the most contemptible condition, the sport, and insignificant tool of the very parties who come to it for redress! I ask, whether any good man, any sensible man, any man who really has a regard for true liberty and law, is prepared to advance the position, in earnest, that a court of judicature, competent to decide, and having cognizance of the cause by the constitution of the country, is to have no control over parties and others, so as to prevent or punish interferences in questions depending, calculated to defeat or prevent the very ends and objects of its institution? Liberty, and the true interests of man in society, can be maintained no longer, when the courts of justice, and their constituent members, shall be subjected in the very act of exercising their constitutional functions, to be insulted, intimidated, misled, or influenced, by interested and artful representations, or by bold and infamous calumnies vented through the medium of the press! The law is, it ever was, and while truth, and right, and safety, are the great objects of the judiciary, and the dearest interests of man, it must ever be a contempt, an unauthorized and insolent attack upon the justice of the country, for any man, a party or not, to interfere in judicial proceedings, under the mistaken and insidious pretext of the "liberty of the press." No such liberty exists; it would be liberty gone mad. What restraint, what unreasonable restraint can it be for parties and others to refrain from publications relative to each other and the merits of their judicial controversies, until ended judicially? What has the public to do with them? What end is to be answered, but to create false impressions, or to answer some purpose not attainable in due course of law? For these reasons it never has been questioned, nor will be, by any man attached to the constitution of the country, of which the judiciary is a branch, that publications of this kind are contempts of court. As to the paper in question, it would be offending the common sense of mankind, to enter further into proofs of its malignity, its falsehood, and abusive reflections upon the party, the jury, the court, the officers concerned in striking the jury, and indeed upon every body any way concerned in the prosecution. It was made, not only pending the cause, but sitting the court, and after the discovery of the informality, and express agreement to try the cause over again on the libel, at the next term. It is calculated and intended to render the plaintiff odious in the eyes of his fellow-citizens, to intimidate and influence the clerk, future jurors, the counsel concerned, and even the court, and to inspire a false and unmerited sensibility for supposed hardships inflicted on the defendant, than which nothing can be more unfounded; for not only was justice done, but never had a party more

indulgence extended to him. The most of his evidence was inadmissible, being merely what he had told his witnesses, and yet the court received it, and gave him the full benefit of it in the decision.

But 2dly, if this be a contempt of the court, can it be punished by attachment? It has been stated, that this is an unconstitutional proceeding; it deprives the party of a trial by jury! If this argument be good for any thing, it must have an universal application, for the words of the constitutional articles are universal, that the "trial of all crimes shall be by jury." It is said, this is a crime, and therefore must be tried by jury. But should a witness refuse to give evidence, or to attend on a subpoena, should a party refuse to obey a legal order of the court, should an officer refuse to execute its legal process, should a juror refuse to be qualified, or misbehave by resisting confinement till a verdict be found, or would eat and drink, or quit his companions, nay, if men, in the face of the court, should commit violence, abuse its officers, or the court itself,—are not all these crimes, and by the construction put on the constitution, to be tried only by jury! This argument goes much too far; it would shut up the courts of justice. The truth is, that the "criminal prosecutions," and the "trials" spoken of in the constitution, and which it is declared shall be determined by jury, refer to those general and public offences against the United States, which, had they been committed against the separate states before the adoption of the constitution, would have required the presentment of a grand jury, and were triable by a petit jury. The constitution does not affect those proceedings in the tribunals of justice against officers and others, instituted at the instance of the party or the court, to coerce or punish them for contempts committed in the course of particular causes. Those are not the "trials" which it is said shall be by jury, in Const. art. 3, § 2; nor those "criminal prosecutions" intended by the eighth amendment, in which it is said, "It shall be the right of the party to have a speedy and public trial by an impartial jury," &c. Such an idea was never entertained by any one. The constitution does not make any alteration of the preceding law on this head; it gives no new right to the citizen, but merely secures those inestimable privileges from being abridged or destroyed by any legislative act of the federal government: it goes no further than Magna Charta. A construction, which deprives courts of justice of the necessary and useful authority of punishing contempts by attachment, is not to be admitted. It was not the intent of the convention to create a judiciary, and leave it so contemptible as to be incapable of executing the laws of the land. The power of punishing contempts, is part of the constitution of a judiciary. It could never be intended that misbehavior, and offences in and against the courts, should be only triable by jury, and punishable according to the dilatory proceedings in that mode of trial. In short, the constitution leaves the judiciary, as to all offences committed against it, and which are punishable by fine and imprisonment, or attachment, without any control. I have never heard that the acts of the federal legislature which expressly authorize the courts to punish for contempts, were ever opposed, on that point in congress, as unconstitutional.

These acts are decisive on this point, for it is expressly enacted, "That all the said courts of the United States, shall have power to punish by fine or imprisonment at the discretion of the said courts, all contempts of authority in any cause in hearing before the same." 1 Story's Laws, p. 60, § 17 [1 Stat. 83]. This law to establish the judicial courts of the United States, was passed on the 24th September, 1789, not more than six months after the commencement of the federal government, by many of the very men who sat in the convention; and until this day the constitutionality of it has never been questioned in or out of congress. And the act which gave birth to this court, passed so late as February, 1801, § 10 [2 Stat. 92], enacts, "that the circuit courts shall have all the power heretofore granted by law to the circuit court of the United States, unless where otherwise provided by this act."

There is, then, the common law; there are express and multiplied adjudications both English and domestic; there is nothing contravening this jurisdiction in the constitution; there is an express act of congress almost coeval with the constitution, giving the power; and it is clear that without it, the judiciary itself must be annihilated. And are we at this time of day to question the authority of the court to punish for contempts! But what is the mischief? Why, the court may act arbitrarily; they may be violent and cruel in their discretion! This objection goes not to the power, or the expediency, but to its limitation. Yet, I trust, that discretion in this case will never be abused: when it is, let the constitutional remedy be applied. This discretionary power has existed in England time out of mind: it has been assumed and acted upon in all the courts there and here, from the commencement of the governments, and I know not an instance of abuse! What if a jury were to convict, in this case is not the punishment still discretionary? And how many other crimes are left for their punishment, to the discretion of the court? An exception which goes to the integrity and moderation of the judges, is levelled at the constitution itself. Government must trust its power to men, and when they are constitutionally selected, made independent, bound by oath and reputation to act well, and subject to impeachment for misbehavior, you have reached the summit of human security. If you seek for any thing more perfect, it will be necessary to bring down

judges from the skies. But the gentleman has given up his own position over and over again. He says, contempts may be punished summarily, but not this contempt. And why not this? Of all others it is most direct and pernicious. This very species we find the subject of attachment from the earliest times; and in Pennsylvania, where the constitution is full as strong in favor of jury trials and the liberty of the press as that of the United States, the supreme court has assumed an undoubted jurisdiction in these cases. It is not questioned; Oswald's Case is full in point: that is admitted to be a legal adjudication; and yet the publication was innocent, harmless, and polite, compared to this.

To conclude: This publication is a gross and flagrant contempt of this court; and the power and duty of this court give a right to inflict, and demand punishment in the ordinary and usual manner; and unless some example is made, it were better to settle controversies in any other way, than to appeal to courts only to mock their authority, and poison the streams of justice. The gentleman has not even pointed out any other mode of checking or punishing such offences. He has talked of some other; but when asked what it is, candidly says, he knows of none. I submit the question to the court, with no other sensation of uneasiness but what arises from having too long detained it on a point upon which, in my opinion, no judge or lawyer can entertain the shadow of a doubt.

THE COURT (TILGHMAN, Chief Judge, and GRIFFITH, Circuit Judge; BASSETT, Circuit Judge, absent) immediately gave an opinion. Each of the judges entered into the history of the trial, pointed out the gross falsities and unprincipled tendency of the publication. They stated, that no manner of doubt existed in their minds, either of the expediency or legality of punishing contempts of this nature by attachment; that in doing so, they neither assumed, nor designed to arrogate jurisdiction; they found themselves by their commission and by the laws of the land, in full possession of it, and bound by their oaths and the high duties of their official station, to exercise a just and lawful discretion in punishing, and as far as they could, preventing by examples, an abuse, which if not repressed, must overturn the administration of justice. Individually, they disavowed any feelings but those of a desire to discharge their duty. The paper, as far as it reflected on them, (if it meant any reflection,) excited no resentment, They were, indeed, sorry to find that any man should be so lost to decency and truth, as to publish to the world, and in the face of so many witnesses of the falsity, such flagrant calumnies upon the administration of justice. The offence was denominated a contempt of the court; but it did not follow that the judges must be attacked: it was equally a contempt when pending the cause, the party, his witnesses, or the jurors are reflected upon; or indeed, if the publication is only calculated to influence the decision of the controversy; the degree, indeed, may vary. They said, that though they knew nothing of the publication, till brought into court on this motion, they considered the prosecution as a meritorious attention to the true interests of society, and an advancement of justice. As to the manner, and with what moderation they should exercise their powers in case of the contempt being established, those were matters, about which they were to answer to their consciences and country. Intrusted with the execution of justice and the dearest interests of man, independent of power, and under every moral tie to perform their duty, they should proceed fearless of calumny, and above influence of any kind; and if it should be found necessary to punish, the degree should be such, as in their best judgments, might serve rather as an example to prevent future offences, than designed essentially to injure the aggressor.—They therefore directed that the rule for an attachment should be made absolute.

[NOTE. The defendant in the above case was taken into custody, and, in justification of his acts of contempt, attempted to show that they were provoked by a libelous article aimed at him, which had been published in Wayne's Gazette of the United States the day after the trial (Case No. 14,997). Thereupon a rule to show cause why an attachment for contempt should not issue against him was laid on Caleb T. Wayne (Id. 16,654), who evaded service, in consequence of which a new rule was laid upon him, with an order that service at his last place of abode should be sufficient (Id. 6,617).]

Case No. 6,617.

HOLLINGSWORTH v. DUANE.

[Wall. Sr. 141.] [1]

Circuit Court, D. Pennsylvania. May 26, 1801.

ATTACHMENT FOR CONTEMPT — EVASION OF SERVICE.

A rule upon a party to show cause why an attachment should not issue against him for a contempt, must be served personally: but if he evades the service, or other circumstances render it proper, the court will order that service at his last place of abode shall be deemed sufficient.

[Cited in U. S. v. Anonymous, 21 Fed. 768.]

[Cited in Shattuck v. State, 51 Miss. 50.]

[The defendant in the above case had been attached for contempt, and in justification of his acts of contempt had cited an article aimed at him which had been published by Caleb P. Wayne on the day following the trial (Case No. 14,997). A rule to show cause why he should not be attached for contempt was laid on Caleb P. Wayne (Id. 16,654), the service of which Mr. Wayne evaded.]

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

Mr. Dallas now stated that copies of the rule granted yesterday upon Mr. Wayne [Case No. 16,654] had been made out, and every diligence used to serve one personally on him; that failing in this, he had caused one to be left at his usual place of abode, with his housekeeper. These facts were made out by affidavits, which further stated it as the belief of the deponents, that Wayne concealed himself with a view to evade the service. Upon this case, he moved that the court would proceed on the rule to show cause, as if there had been a personal service proved. He admitted that the usual practice was to serve the rule personally; but this was not essentially necessary, upon a rule to show cause, which was designed as merely a notice for the defendant to come in, if he chose it, and answer to a motion for an attachment. In Jones v. Griffiths, 4 Term R. 464, it was said by Lord Kenyon, "that in every case of the service of a notice, leaving it at the dwelling-house of the party, had always been deemed sufficient, and that in some instances of process, as a subpoena out of chancery, or quo minus out of the exchequer, the same service was sufficient." He further says: "In general, the difference is between the process to bring the party into contempt, and a notice of this kind, the former only of which need to be personally served on him." A rule on which the contempt is grounded, must appear to have been personally served. If a party is proceeded against for disobeying a subpoena or any rule of court, you must, on moving for an attachment, prove personal service of the subpoena or rule; otherwise the court will not grant an attachment; because there can be no contempt unless the party was served with the process; and the court would never proceed to adjudge one in contempt for not obeying a rule, or order, where it does not appear the rule or order was seen by the party. But here, the contempt is, for publishing a piece reflecting on the party in the cause. This must be proved to the court by the prosecutor, before they will order an attachment; and indeed has already been proved on obtaining the rule to show cause. This latter rule then, is only in the nature of a notice to come in and answer to a charge of contempt; and to clear himself of an attachment if he can. It is merely e gratia of the court, and requires no other service than other notices in the course of a cause, as of trial, &c. This was not a "process to bring the party into contempt," as expressed by Lord Kenyon in the case cited; but a notice to clear himself of it, if he could. All the cases turn on the service working the contempt. In Rex v. Smithies, 3 Term R. 351, and Rex v. Edyvean, Id. 352, the question turned on service of the rule, against which the contempt was committed; not on the notice to bring in the party to answer or excuse himself. In the latter case, Lord Kenyon said, that in general, personal service was necessary before a party could be brought into contempt; yet in that case, the act of parliament dispensed with it, by making public notice sufficient. He cited 2 Hawk. P. C. 230, § 37; 4 Bl. Comm. 286, 287; 1 Strange, 185,—to establish his proposition, that a rule to show cause against an attachment, is sufficiently served, if left at the party's place of abode.

Mr. Wallace was about to answer; but Mr. Dickerson objected to any counsel appearing for Wayne, because he was not in court. He said that as Wayne did not appear, the proceeding was necessarily ex parte. Either he had received the notice or he had not: if he had received it, then no objection could lay to the prosecution's going on, if he had not received it, or the service at the house was not evidence of it, then for counsel to be heard for him, would be preposterous, as they could have no authority from a party who was supposed to know nothing of the proceeding. He cited 2 Hawk. P. C. 214, where it is said, "that a party who is ordered to attend the court on a rule against an attachment, should regularly appear in proper person and not by attorney; as also must every one against whom an attachment is granted."

CURIA. Neither the reasoning nor the case is to the purpose. You suppose notice to have been served on the defendant, and are moving to attach him. He or his counsel happens to be before the court, and says that he has had no notice of this motion; you say you left notice at his house: they answer, this was no notice to him; and that produces a question of law. There is no such dilemma as is supposed by Mr. Dickerson. Your authority is that on a rule the party should appear in person. But this is taking the point about the service of the rule for granted. When the rule is served, then, to be sure, the defendant should regularly attend in person: but the question now is, whether a rule has been served. However, to end all difficulty, we will hear Messrs. Chauncey and Wallace as amici curiae: we are desirous of ascertaining what the rule of law is on the point.

Mr. Wallace contended, that leaving a rule at the house of a party, in case of an attachment, was not sufficient service. This was a summary and penal proceeding; and the writ of attachment, a high prerogative writ. The court might, indeed, in particular cases, grant it immediately, and leave the party to exonerate himself on interrogatories. But in this case, they had ordered a rule upon the party to show cause. This was meant for his benefit, and the intent was, and so is the practice, to serve the rule personally. In Tidd, Pr. 143, it is said: "The rule to show cause is drawn up for a particular day; previous to which it should be duly served. To bring a party into contempt, a copy of the rule must be personally served, and the original at the same time showed to him: in other cases, the same degree of strictness is not required in the service of the rule, but it is sufficient,

without showing the original, to leave a copy of it with any person representing the party at his dwelling-house," &c. He considered the practice as settled, that every rule and notice, tending to bring the party into contempt, or in proceedings of contempt, must be personally served.

Dallas, in answer to Tidd, said that it was only a recognition of the law which he had laid down; and related to the rule, for the disobedience of which, the attachment was moved for; that Tidd, in the margin, referred to 3 Term R. 351, the case cited by hm.

Before TILGHMAN, Chief Judge, and GRIFFITH, Circuit Judge.

GRIFFITH, Circuit Judge. The question is, whether the rule in this case has been duly served on the defendant. If the party conceals himself, that may be a ground for our directing service at his place of abode, to be sufficient. But that must be under a new rule with a special direction. I am of opinion, that the service in this case is not sufficient. The defendant is a third person, and no party to the cause. An application was made to bring him before the court for a contempt; and in order that he might defend himself, the court direct a rule on him to show cause against the motion. The party moving for the attachment, says, "It was left at his house, with his housekeeper." Is this service on the party? If we proceed, how do we know that we are not proceeding against him without a summons? It is a dictate of natural justice, that a party should have notice. There may be, and, indeed, are cases in which presumptive evidence of notice may be sufficient. Some of these are by statute; some by rules of court; some by practice. But on motions for attachment, I have always understood the law to be, that proof must be made of delivery of the notice to the party, or of its coming to his knowledge. In Rex v. Edyvean, 3 Term R. 351, Lord Kenyon's expression is, "That in general, personal notice is necessary before a party can be brought into contempt." In Jones v. Griffiths, 4 Term R. 464, the court seem to make no distinction, in cases of contempt, between the manner of serving the process on which the contempt is grounded, or of the rule calling on the party to answer the contempt: and in reason there is no distinction; for it may be certainly presumed that a rule to show cause, or a notice, by being left at the last place of abode, came to the defendant; why may not leaving a rule of court, on which the contempt arises, in the same way furnish the same legal presumption of its coming to his knowledge? In all my practice, I have never known the court to proceed on an attachment, without proof of personal service of the notice, or rule to show cause; or proving that it actually came to the defendant's knowledge. This is a safe and good rule; and conformable to justice and equity. I think the motion must be refused; and the prosecutor put to prove a personal service, unless dispensed with by the terms of the rule.

TILGHMAN, Chief Judge. There seems some reason for the distinction made by the counsel for the motion. Certainly, where you move the court for an attachment, because a party has disobeyed or contemned its process, or order, you must prove that such process or order was personally served. But where that proof is first made, and the case is such, that instead of an attachment at once, the court will give the party a rule to show cause, before they award an attachment; whether that rule, which is in the nature of a summons or notice, requires a personal service, or may be presumed to come to the party's knowledge by leaving it at his place of abode, is somewhat a different question. And yet, I cannot find that the distinction taken on this motion is any where recognized; but it seems rather to be the practice, and the idea to be collected from the books, that all notices on proceedings in attachments are to be personally served. This is a received notion in ordinary practice; and is, certainly, most conformable to the reason of the common law, which is ever opposed to an ex parte proceeding. Unless there is proof that the party did receive the notice, it would be proceeding against him unheard. There are cases, in which, by statute, or by received practice, presumptive service of rules or other process of the court, is deemed sufficient. But I am inclined to think that rules to show cause against an attachment, require personal service, or proof of the actual reception by the party. This is the most safe and satisfactory principle. If, indeed, it should appear that the party evades the service, or other circumstances render it proper, the court would direct the leaving it at his place of abode to be good service (see 2 Hawk. P. C. 230, note 3); and as in this case, pains have been taken to serve the rule personally, and the affidavits state that he secretes himself; we will make such an order if prayed for. But as the rule has not been served personally, the court cannot proceed further upon it.

BASSETT, Circuit Judge, was absent.

Mr. Dallas then moved for a new rule upon Wayne to show cause on the first day of October sessions next; with an order that service at the party's last place of abode, should be deemed sufficient: which was granted.

Case No. 6,618.

HOLLINGSWORTH v. DUANE.

[Wall. Sr. 147; 4 Dall. 353.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1801.

ALIENAGE OF A JUROR — EFFECT ON VERDICT — WHEN OBJECTION SHOULD BE TAKEN.

Alienage of a juror is cause of challenge, but is not per se sufficient to set aside a verdict, and this whether the party complaining knew the fact or not. The objection should be taken at the time of empannelling the jury.

[Cited in U. S. v. Baker, Case No. 14,499. Quoted in Brewer v. Jacobs, 22 Fed. 238.] [Cited in Wassum v. Feeney, 121 Mass. 94.]

[This was a motion to set aside a verdict.] On a former day, Mr. Dallas had obtained a rule on the plaintiff, to show cause why a verdict which the plaintiff had obtained against Duane, in an action on a libel, to recover damages, should not be set aside. See Hollingsworth v. Duane [Case No. 6,615]. The ground of Mr. Dallas's motion, was, that the foreman of the jury, which gave the verdict, was an alien, and that Duane was, at the time of empannelling the jury, ignorant of this fact. His proof of his alienage, was the oath of Mr. Leiper, that since the trial, the juror had told him that he, the juror, was not a citizen of the United States.

Mr. Dallas, in support of his motion, now contended, 1. That the system of jury trial, as known in England, and of course with all the English guards and means to secure a fair trial, was in force in Pennsylvania. It was established here by our ancestors, exactly as they knew that it existed at home. It was established here entire. It is spoken of in our colonial records, as a system already known. "Lawful challenges shall be allowed." ("Act for the advancement of justice and more certain administration thereof," passed in 1718, c. 274, § 4.) This referred to challenges lawful by the common law. The Revolution found at its origin, this free, ancient, and entire system existing among us. The constitution ordained by Pennsylvania in 1776, has as a leading feature in its bill of rights: "In trials between man and man, trial by jury shall be held sacred." It alluded to the system; including, of course, the right to challenge for causes, declared by common law, causes of challenge. By the present constitution, it is equally a section of its declaration of rights: "Trials by jury shall be as heretofore." Now, 2. By English law alienage is cause of challenge. I refer to elementary books. 3 Bl. Comm. p. 362. "If a juryman be an alien born, this is a defect of birth." And a man, he tells us just before, may be challenged "propter defectum." Lord Coke to the same point, (Co. Litt. 156,) says a man may be challenged "propter defectum patriae, as aliens born." We have decided (Respublica v. Mesca, 1 Dall. [1 U. S.] 73) that an alien may have aliens on his jury. The converse must hold true, and a citizen may keep them off. Especially is it true in a case like this, a case not addressing itself to the conscience, which is given to all alike; not resting on a violation of moral duty, which alien and native would alike feel, and alike punish, but a case of libel, and involving accordingly some of the gravest and most peculiar rights of an American citizen. Is he on such points as this to have for his judge a man educated under the despotic rule of the autocrat of the North, of the emperor of Austria, or the successors of Charles the First? Our rights and opinions on the subject of the press, are peculiar. What country of Europe has declared that the "printing presses shall be free to every person who undertakes to examine the proceedings of any branch of government," and that "no law shall ever be made to restrain the right thereof." In England the press is much restrained by her institutions, and still more by direct restrictions; and on the continent no man dares, or even thinks of expressing his sentiments respecting others, through the press. They would consider it a high offence to do so; yet with us, this right is regarded as essential to the establishment of the "great and essential principles of free government" (Const. Pa. 9). To form a judgment warranted by our rights, and principles of government; to say what, according to these rights and principles, recognised and ordained, amounts to transgressing the rights of the press, a man must be a citizen of this country; he must know its laws and constitutions; and must of course have been educated here; must have grown on our soil and in our atmosphere. By authority, then, and natural sense, it is clear an alien was incompetent to try this question; that his voice in the verdict accordingly amounts to nothing, and that therefore, this is a verdict by only eleven men; a void verdict; or in other words, no verdict at all. Had we at the time of empannelling these jurors known of this man's incompetence, we should have objected to him then. Having only discovered it since, we may do so now. The cases are numerous; that of Lord Herbert v. Shaw, 11 Mod. 111, is in point. It is there said, "If a party have cause of challenge, and knows of it long enough before the trial, and he does not challenge, he shall not have a new trial: contra, if he has not timely notice of it." The new trial in this case was refused because the party "knew" of the cause of challenge and had not availed himself of it. Of course the inference must be, (what indeed is elsewhere directly stated,) that if he had not known of the cause of challenge, a new trial would have been granted. The reason of the distinction is just: a man shall not when he knows a juror is incompetent, wait to see if the verdict will be for him,

[1] [Reported by John B. Wallace, Esq. 4 Dall. 353, contains only a partial report.]

and if not ask for a new trial; this would be unfair to the opposite party; but if he don't know of his incompetence, no unfairness can take place. In the first instance, he will be held to have waived the incompetence. In the second, having no knowledge of it, he cannot be supposed to have waived it.

Edward Tilghman and Mr. Ingersoll, said, in reply—1st. That there was no proof of alienage. 2d. That they thought it questionable whether it was cause of challenge in Pennsylvania; but 3d. That at any event the objection was too late after verdict.

GRIFFITH, Circuit Judge. The defendant comes after a trial and verdict, and suggests, that one of the jurors, being an alien, was disqualified, for that reason, to try the question, and as he might have been set aside by challenge and proof of the fact at the trial, it is now competent to examine the qualifications of the juror; and if defective, to avoid the verdict, on the further proof that such defect was unknown to the party. For the sake of putting my opinions on the question as argued by the defendant's counsel, I shall suppose the facts proved, viz. that the foreman is an alien; and that the defendant was ignorant of it when he was sworn. On these premises there is no ground for setting aside the verdict. I admit that it is a good cause of challenge that a juror is an alien; it is so at common law; and so far as the defendant's counsel argued without any objection, that this and most other causes of challenge at common law were sustainable in the state court of Pennsylvania and the courts of the United States. But it is one thing to set aside a juror on a challenge made to him and substantiated by proof, before he is sworn, at the proper time and place, and by the proper mode of trial, and another to allow the juror to be sworn without objection, and then to set aside the verdict of the whole jury, for a defect of qualification, which, had it been suggested in time, would have been attended with no consequence but that of calling on the next juror named in the panel. It is easy to see to what injurious consequences this practice would lead—of allowing a challenge after a verdict. The causes of challenge are infinite; and perhaps not one jury in ten are sworn, that if the situations, connections, interests and qualifications of each juror were critically inquired into after verdict, some one or more would not be found, in some capacity, the subject of challenge. If challenges for such causes could be inquired into at all after verdict, the consequence would be, that parties would lie by with their exceptions, take the chance of a verdict in their favour, and overset it if against them; it would at least make them careless and indifferent in the investigation of the panel; and thereby introduce the expense, confusion and delay of setting aside verdicts, instead of setting aside jurors, as they came to the book to be sworn.

I think it would go near to overturn the trial by jury, if it were allowed a good reason for setting aside a verdict, that a challenge would have lain to one or more of them. It is against the policy of the law, and runs through its whole system, (and I could, if it were necessary, illustrate the proposition by many instances,—2 Bac. Abr. 221, 222, 560; 1 Ld. Raym. 590, 671; 1 Strange, 480; 2 Strange, 732; Salk. 519; 11 Mod. 2; Cro. Jac. 283; 3 Term R. 689; Id. 452; 4 Burrows, 2252; 2 Burrows, 756, 757; 1 Term R. 190; 1 Tidd, Prac. 260, 16,) to allow a party to take an objection at a later period of the proceeding, after expense, and trouble, and trial, which he might and ought to have taken in an earlier stage. This rule I take to be peculiarly applicable to the case of challenge, for the reasons before mentioned. It would be attended with very inconvenient consequences, if it were permitted that a mere naked cause of challenge to a particular juror, might be brought up after a trial and verdict to defeat the whole. I always took this to be a settled rule, and founded in the wisest and most equitable principles; and I should as soon have expected to have heard an argument to prove that the verdict ought to be set aside, because the plaintiff was an alien enemy, or labored under some other disqualification, which might have been pleaded in abatement, as to hear it maintained that it was competent after verdict to inquire whether a juror was an alien; an infant; a servant; freeholder; of affinity to the party; interested; infamous; favorable. Upon the record no exception appears. None was taken by either party, when, if a cause existed, it ought to have been taken. The books of law furnish not only cases establishing the general principle, that causes of exception to the array or polls must be taken at the time—but meet the very circumstances now urged, either to set aside the rule, or frame an exception to it, which ought not to be made. Try. Per Pais (9th Ed.) 200, it is laid down, that all challenges must be taken before the jury are sworn. Andrews v. Linton, 2 Ld. Raym. 884: If a venire facias be returned by a man who is not sheriff, it is not assignable as error, because the party might have challenged the array for that fault at nisi prius; and therefore it is not assignable that the sheriff was out of the realm, and had no deputy, as the case is in Hen. IV., because it was a good challenge to the inquest. 3 Bac. Abr. 764, tit. "Juries," E, note, it is said to be laid down as a rule, that no juror can be challenged without consent, after he hath been sworn, either in a criminal or civil case, unless for some cause happening since sworn. The statute of 28 Edw. III. c. 13, § 2, which gives a trial de medietate linguae, enacts, that one-half of the

jury shall be denizens, and the other half aliens; but yet if he neglect to pray the benefit of the statute before the return of a common venire, he can neither except to such venire, nor pray a subsequent process de medietate linguae. So, if indicted for felony, and he plead not guilty, if he doth not premise his being an alien, before any of the jury sworn, he hath lost that advantage. 2 Hale, P. C. 272. 2 Lev. 242: Error from Norwich court to B. R., and assigned, that the sheriff, by whom the judgment was given, had not taken the oaths and subscribed the declarations according to 13 Car. II. c. 1. The defendant pleaded, that the oaths and declarations were not tendered to the sheriff. Plaintiff demurred, and resolved, that this is not assignable contrary to the record and admittance of the parties; for this is in effect to say he was not sheriff; because the statute says, upon default, &c., it shall be void; contrary to Hippsly v. Tucke [2 Lev. 184]. And Holt, C. J., in 2 Ld. Raym. 884 (Andrews v. Linton) confirms the report of Levinz, and said he was counsel in Denning v. Norris; and the court held there, that since the defendant had admitted the judge to be a judge by plea to the action, he was estopped to say he was not a judge afterwards. And Holt further said, in this case, that the defendant has all the term to make complaint of any irregularity concerning a writ or execution of it; as the sheriff also has to disavow the return; but if the defendant permits the term to pass without application made to the court, and the return is filed and made a record of the court, every one is estopped to say that the person who returned it was not sheriff. The more direct cases on this point are numerous.

In 21 Vin. Abr. tit. "Trial," 274, 275, many cases are cited from the Year-Books, which established the general rule, that a juror once sworn, cannot be challenged for any cause, unless arising after he is sworn. Wharton's Case (Mich. 44, Eliz.) Yel. 24. Three were indicted of murder, and eleven of the jury sworn; and the trial put off for a tales; on the day of the return the queen challenged one who had appeared the first day, and was sworn for a cause in esse the first day, but then not known to the queen's counsel, to wit, that he was within the distress of Cromer, who was master to Wharton, one of the persons indicted. The justices of B. R. being in doubt, sent to the justices of B. C. whose opinions were that the queen could not have that challenge now, any more than she could have it the first day after the jury was sworn, though the same cause was still continuing. All the cases, however, admit, that after a tales the jurors first sworn may be challenged for cause happening since the tales awarded. This Case of Wharton's is very strong, and has never been controverted. It goes to establish the strict rule in regard to challenge, that even where no verdict has been given, but where the juror is called a second time on a tales, and is to be sworn over again, (for I take it that upon a tales returnable another day, and not de circumstantibus, the juror must be resworn,) yet the party having omitted to challenge the juror when first called and sworn, cannot afterwards except to him. 2 Hale, P. C. 270. Lord Hale, going over this subject, recognizes this law: he says, indeed, that "upon a tales in felony or treason, the prisoner may challenge the jurors first sworn, peremptorily, for it is possible," he says, "a new cause of challenge may intervene after the former swearing:—but if he challenge for cause, he must show a cause happened after the former swearing." Lord Hale here states the rule to apply as strictly to the prisoner, though in a case of life, as to the queen. Id. 274. He comes over the very case from Yelverton, and says it was there ruled; 1st, That the king should not challenge any of the eleven sworn, unless it be for a cause happening since the swearing; and if it happens before though not known till after, it shall not be allowed. 2nd, That the eleven who were last sworn shall not now be first sworn, but be called as they happen in the panel; and the same law is for the challenge of the prisoner for cause, but he may challenge them peremptorily, &c. Aylett v. Stellam (Car. I.) Style, 100: A new trial was moved for, because two of the jury were of kin to the plaintiff. Rolle said it was not now material, whether they be of kin or no; for the defendant should have taken advantage of that upon his challenge at the trial. Maynard produced an affidavit, &c. Loveday's Case, Style, 129: A new trial was moved for, on an affidavit, that one of the jurors that gave the verdict had a suit at law with the plaintiff at that time, and therefore the trial was not indifferent. But the court said, it could not be, and asked the party why he did not challenge the juror for this cause at the trial, for want of which he had now lost that advantage. The preceding cases and principles would seem to leave no question on this subject. There is also a case which I shall mention among the rest as recognizing the same law; I mean that of Gilbert v. Rider, Kirb. 184, determined in the supreme court of Connecticut. The motion was to set aside the verdict because one of the jurors had not taken the oath of fidelity to the state. Swift contended, that the statute which declared that no person should execute any office, civil or military, who had not taken it, included him, and the objection was unknown to defendant at the trial. But per Tot. Cur.: If to act as a juror is to execute an office within the meaning of the statute, (which we apprehend not to be the case,) yet as the juror was not challenged, though the fact might have been known by inquiring of him, or otherwise, the exception being then waived, comes too late after ver-

dict. The exception does not go to the partiality of the juror, nor affect the obligation he was under to find a verdict according to the truth, and it is not stronger than the want of a freehold, which, though a ground of challenge, hath been repeatedly adjudged insufficient after verdict. By attending to the terms and circumstances of this case, it will appear to bear a close resemblance to the one before the court, and as far as it can be considered an authority, (and I think it has reason and law to support it,) it is adverse to the present application.

The principle which I go upon, is recognized in the following cases;—they establish this general doctrine, that a subsequent discovery shall not be let in to overturn a verdict, where the objection ought to have been made at the trial, and where it is of such a nature as ordinarily to require the party to be prepared with it. Turner v. Pearte, 1 Term R. 717: One of the grounds for a new trial, was an affidavit stating that it had been discovered since the trial, that five out of nine of the witnesses, were interested in the event of the cause. The court refused a new trial; declaring that the regular time to take the objection was at the trial; and though it might be taken after an examination in chief, yet that after a trial, no instance could be found where the objection availed, if not taken at the trial. The court said indeed, that where after a trial it appeared one or more witnesses was interested, it would weigh as a circumstance for granting a new trial, provided the merits were doubtful; but as a substantive objection, they were clearly of opinion it could not be allowed. Grose's opinion places the general principle in a plain light. Walker v. Scott (23 Geo. II.) 6 Bac. Abr. 672: Action for crim. con. Verdict £1000. A new trial moved for on affidavits of its having been discovered since the trial that the woman was not the wife of the plaintiff. But Pr. Cur.: It is an established rule that a new trial ought not to be granted on account of evidence discovered after the trial, which by using due diligence might have been discovered before. It is laid down in divers cases, that the court will not grant a new trial because one of the parties was not prepared at the trial to make out his case; it would be of the most mischievous consequences, &c. In the present case, the defendant ought to have been prepared to have proved the woman was not the plaintiff's wife, wlfich was the gist of the action, &c. In 1 Vent. 30, the court refused to grant a new trial, on affidavit that the foreman was brother-in-law, to one of the creditors of the plaintiff. Three justices of this opinion; but Kelynge for this, and another reason, thought a new trial should be granted. I shall conclude the cases and opinions on this head, which stand opposed to the present motion, with the words of Sir Edward Coke, in Floyd v. Barker, 12 Reporter [Coke] 23, speaking of sworn juries, he says; they are sworn in court as indifferent persons, and the law presumes every juror will be indifferent when he is sworn, nor will the law admit of proof against this presumption. And speaking of averments against jurors he says, "And it will be a cause of infinite vexation and occasion of perjury and smothering of great offences, if such averments and supposals shall be admitted after ordinary and judicial proceeding, and it will be a means ad deterrendos et detrahendos juratores a servitio regis."

The counsel for the defendant were aware of this rule of law, and of its propriety, that a cause of challenge to a juror, was not a cause for setting aside a verdict; but attempted to maintain, that where the cause of challenge was unknown to the party at the trial, the exceptions might be let in; and offered an affidavit of the defendant, simply swearing that "he did not know the juror was an alien." I certainly will not lay it down here, that in every possible case, what would be sufficient to set aside a juror on challenge, must be taken advantage of in that way, or the benefit be lost to the party: there may be many cases supposed, wherein the court would set aside a verdict, upon after-discoveries of the unfitness of a juror, though such matter existed before the trial. If a juror had privately laid a wager on the event of the suit; if a number of them had privately met together after they were summoned, and entered into a resolution to find against, or for, one of the parties right or wrong; if a bribe had been given; if a direct but secret interest transpired; or if any other cause of exception to the array, or to the polls had been discovered, and could be clearly made out and proved, after the trial, and which the party could not, by using ordinary diligence, have been informed of—in such cases, provided the court should think there was any good reason to believe the verdict might have been affected by such circumstances, there would be ground for a new trial; not because the matter was ground of challenge, but because it was an unfair trial. But as to the ordinary and legal disqualifications of jurors, such as citizen, freeholder, relation, servant, and every exception of a general nature, and capable of ascertainment by ordinary care and inquiry, cannot be admitted upon the plea of "ignorance," after verdict. For the question is not whether a man was ignorant of the fact, but whether that ignorance is imputable to the nature and circumstances of the after-discovery; or whether it is deducible from supineness, and that culpable negligence, to which the law allows no privilege. If simply swearing to "ignorance" of a fact, were to put a party on the same ground in regard to challenge after as before verdict, it is easy to see that the rule of making challenges at the trial would be good for nothing; the whole law would be changed ; the mode of trying challenges; the time; the opportunity for the juror and the

party to be heard; and verdicts would many times be overset after a fair trial, merely on the plea of a culpable ignorance. No—if a party comes to set aside a verdict, on the ground of a disqualified juror, he must make a very special case indeed; he must show, from the nature of it, that ordinary diligence could not have effected the discovery; that he was surprised; or that after due inquiry and pains, he had missed or been misled as to the fact.

In the present case, the objection is, that the juror was an "alien;" this, surely, cannot be pretended a secret or extraordinary cause of challenge. Almost any man in the city could have told the defendant whether the juror was a citizen; he might have asked him before he was sworn. In short, though I do not intend to distinguish this from other exceptions of a nature generally susceptible of discovery with due diligence, yet it strikes me, that a plea of ignorance as to the juror, on that score, of all others, is the least entitled to claim a relaxation of the rule of law. When, too, it is taken into consideration, that this was a special jury; the panel of which defendant must have had before the trial; and that upon his striking the jury, he might easily have inquired into their general qualifications, there seems not even a pretence left, for relying on this as an after-discovery; it may be so; but why was it left to wait the event of the verdict? The parties were bound to prepare their challenges—at least, all which related to the general qualifications of the jurors. There might, indeed, exist some extraordinary, secret and unexpected exceptions, which ordinary foresight might not anticipate, or ordinary vigilance detect; and when such cases happen, courts will exercise a legal discretion, and set aside a verdict which may have been tainted by such circumstances—not (as I said before,) on the ground of challenge, but of fraud, unfairness, and secret partiality: for I hold, that in all cases, after verdict, the proof must go further than to show that the juror might or would have been rejected on challenge, it must satisfy the court that the verdict was vitiated from the source; or lay a strong presumption to that effect; otherwise they would not be bound to award a new trial, which is never done but to attain justice. I would observe here, that the defendant states no single circumstance to account for his ignorance of the fact now made the ground of a new trial; it does not appear he ever made any inquiry, or used any sort of means to acquire a knowledge of the qualifications of this, or any other juror. How, then, can there be the least claim upon a court of justice to interfere? It would be holding out a temptation to negligence; it would be more. To set aside a verdict on such grounds, would be to punish one party for the carelessness, if not the criminal supineness, of the other.

Again—viewing the particular exception apart from the general principles I have laid down, as to challenges, and on which my opinion is given,—what is there in it which ought to induce a court of justice to set aside a verdict? Let it be admitted, for a moment, that this was one of those cases of ignorance which could be excused, from the nature and circumstances of the exception; and that no laches were at all imputable to the defendant; still, according to the rule I have before laid down in regard to challenges after verdict, the court should at least be satisfied, that there was a probability the defendant had sustained some injustice from the disqualification of the juror; his having been liable to an objection not taken, of itself not being a ground for setting aside a verdict. Now as to this, the defendant offers no proof —no single circumstance to induce a suspicion that the verdict was more unfavorable to him for the juror's being an alien: if any presumption is to be drawn, it would be the other way, from the situation in which the defendant stood on the record and on the trial —being considered as an alien; and in that light, an alien jury or juror has always been accepted an advantage; but certainly, the incapacity, (not intellectual, but merely political,) to say no more of it, operated with perfect equality between the parties; though an alien, he was equally indifferent between them; in short, he was, to every essential and every impartial result, as between plaintiff and defendant, ab omni exceptione major. On this ground, then, the defendant wholly fails in drawing any argument from the alienage of the juror against the verdict; and this ground alone would be sufficient to repel a motion for a new trial. However I again repeat it, that I wish to be understood as resting my opinion against the motion on the ground that it is not competent for a party to raise up a mere cause of personal challenge, of a general nature, and which might, with ordinary diligence, have been made in season, as a ground for setting aside a verdict, which stands clear of any other objection; and the oath of the party, or any other proof he could make, of his ignorance of the fact, (I mean of a fact of such a nature,) does not in the least vary the case; for ignorance of what a man ought to know, and might know, furnishes no excuse, nor is ever made by a court of justice a ground of relief, where such relief will work injury and loss to other persons.

The defendant's counsel, in the argument, cited a case or two, and as many dicta, in support of his proposition, that any cause of challenge, which, if made in season, would have been sufficient to set aside the juror, would also be sufficient to set aside the verdict, if not known to the party till afterwards; and this proved by his oath to the court. There are certainly some loose opinions and general declarations which might seem to countenance this doctrine; and yet, if closely examined, will turn out to be reconcilable with the law, as I have stated it; or

where irreconcilable, too vague, contradictory, and unreasonable, to overturn or shake the contrary doctrine. The case most relied on is that of Lord Herbert v. Shaw, 11 Mod. 111; [Lady Herbert v. Shaw, Id.] 118. The ground for a new trial there was proof that the Duke of Leeds, father of the Lady Herbert, had written a leter to each of the jurors, desiring their appearance at the trial; and concluding his letter with saying he should take it as a great favour, and be glad of an occasion to show how much he was their humble servant. The new trial was opposed; and principally on this ground; that the defendant's attorney knew of the letter before the trial, and did not make it an objection by way of challenge; it is reported that Holt, Powell, Pervis and Gould refused a new trial, "because the defendant, having notice of such a letter long before the trial, might have moved for a trial at bar, &c.:" and 2nd. It was said, "that if a party have cause of challenge, and knows of it time enough before the trial, and he does not challenge, he shall not have a new trial: contra, if he has not timely notice of it." It is true, that as the words of the court are here put down, it might be inferred, that want of notice of the objection to the juror, let the cause of challenge be what it might, would authorize a new trial: but certainly the court never meant to say that, where a party, by ordinary diligence, and with the means in his power, could have obtained the notice, that in such case he should use his want of notice as an excuse for coming after verdict with the objection. Could they mean to say that parties were not bound to use any diligence to discover whether the jurors were qualified, or not: certainly the defendant must contend for this construction, when he relies upon his mere oath, of being ignorant of a cause of challenge, which was easily ascertained, and obviously of a nature to call for his inquiries. If this idea is annexed to the words of the court in Lady Herbert's Case, it is clear, that there remains no necessity on any party to look to his challenges at the trial; he may wait in torpid ignorance and inattention to the most common and obvious causes of challenge; and after a trial—a fair trial—a satisfactory trial and chance of a verdict—make his very folly and culpable ignorance a ground for oversetting it; and thereby subjecting his adversary, who is in no fault, to the greatest inconvenience: it is evident, those judges could mean no such thing. What they said must be applied to the case before them, and to similar cases. That was a case, not of challenge to jurors for ordinary personal disqualifications, such as alienage; want of freehold; affinity in a near degree, &c.; but because of a secret correspondence between the party or her father and the jurors, amounting to maintenance, at the least: and no doubt, as I have before stated, that wherever a discovery is made after a verdict, of matter which, if it had been known at the time, would have set aside the juror, and of such a particular nature, as not to fall within the ordinary inquiries of qualification, such discovery, and proof of its being unknown at the time, would be sufficient to set aside the verdict; provided the court were satisfied that justice required the objection to prevail. This is the fair and only legal construction to be attached to the Case of Lady Herbert. The court were speaking of special and secret causes of challenge, which lay out of the ordinary road, and not of those which every party is bound to inquire into; and where, if he fails to do so, his ignorance can never be alleged, as a reason for inverting the order of challenges, and almost subverting the trial by jury. In Wharton's Case, Yel. 24, there it was agreed, that the cause of challenge was unknown, when the juror was sworn, to wit, that he was under the distress of Cromer, Wharton's master; yet that was not held a sufficient reason for dispensing with the general rule in regard to challenges; though it must be allowed, that a fact of that sort seems to lie remote from the common course of inquiry; but because capable of ascertainment with reasonable diligence, ignorance of it was not available; and indeed, it is probable as the law then was, that an objection in the nature of a challenge to a juror or verdict, was not receivable at all.

There are other cases cited by me, where want of notice is either taken for granted or stated; and yet the motion rejected. Dent v. Hundred of Hertford, 2 Salk. 645, was cited, where a new trial was granted, on affidavit that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced. It does not appear whether this declaration was made before or after the juror was sworn; though, being called foreman, it would seem as if he had been sworn. If so, then it is nothing to the defendant's point; for no challenge would lie; and the only redress was a new trial, for such gross partiality, and indeed, criminal violation of his oath. If it was made before the trial, and unknown to the party, it falls within the description of causes of challenge, of a special and private nature; and where the court interfere, not upon the footing of challenge, so much as to relieve the party, under their general discretion of granting new trials where it is evident the trial was an unfair one, and prejudicial to him, from causes of objection which fall within no common vigilance or care to arrive at. Parker v. Thornton, 2 Ld. Raym. 1410, 1 Strange, 640, a new trial was granted because one Hooper, who was challenged on the principal panel, and the challenge allowed, was afterwards sworn upon the jury as a talesman, by the name of Hook; although it was insisted the trial was satisfactory to Denton who tried the cause. Certainly in this case, the verdict being satisfactory was no reason for upholding it, because in fact only given by eleven jurors; for Hooper was challenged and set

aside, and came in again by the name of Hook, which was a fraud upon the party, and a high misdemeanor in the man. Russell v. Ball, Barnes, Notes Cas. 455: John Pearce was returned on the panel, but did not appear; but when he was called, his son answered and was sworn on the jury; the verdict was set aside, because not found by twelve of the jurors returned on the panel. It is evident that this was a void verdict, as the juror was not returned or named on the panel, and so no juror; besides, here was an evident imposition—the son personating and answering to the name of the father. This was not a case of challenge at all; but a deception on both parties; an irregularity which vitiated the whole proceeding. Norman v. Beaumont, Barnes, Notes Cas. 453: Richard Gearter had been summoned and drawn from the jury box, and put on the panel; but not attending, one Richard Shephard who had been summoned on the crown side, supposing he was called, answered and was sworn; neither party knew of the mistake; after verdict it was found out, and the defendant moved to set it aside. The plaintiff urged that the defendant ought to have challenged Shephard. Per Curiam. By the statute 3 Geo. II., all the twelve persons ought to be drawn from the box; and Shephard's name was never in it; the court are not bound by the record;—here has been no trial; this is no matter of challenge, &c.; verdict set aside. It is observable here, that both the court and counsel considered, that as a cause of challenge, though unknown, the objection was unsustainable; but the court said he was not a juror at all; there had been no trial, &c. These and other cases turning on similar grounds, are all clearly distinguishable from a regular trial, by jurors properly empannelled and sworn, and where the objection consists solely in "challenge," which is a technical term, and comprehends under it all those various causes of objection, which may be alleged against the array or polls propter affectum, defectum, delictum, &c. There is a case reported in Comyn, 601, 602 (Sir Geo. Wynn v. Bishop of Bangor), to this effect: A new trial was moved for; 1st. Because George Wynn, a shower for the plaintiff, on the view gave evidence to the jurors, by arguing against the likelihood that the places shown on the part of the defendant as the limits of their land, should be the boundaries, &c. 2d. That one of the jurors declared at the view, that by what they had seen, (before the shower for the defendant had shown,) they should soon determine the dispute; and afterwards, before the trial, said, Sir George Wynne was a neighbor, and, right or wrong, he would give it for him: and for these reasons, it is said, the court granted a new trial, though Baron Parker seemed to think, that, the words being known before the trial, and for them a challenge might have been taken against the person's being on the jury, that such challenge being omitted, it was not proper to allege the matter as cause for a new trial. It is not easy to collect from this case, and the expressions, whether the words were known to the defendant or his counsel, before the trial; and if they were, it does not appear that the court would have granted a new trial on that ground alone; it seems one was granted on the reasons assigned. If the words, however, were known previously to the trial, by the defendant, I have no difficulty in coinciding with Parker, that the defendant could not lie by with the objection till after verdict; such a position is contrary to every principle of policy, justice and convenience. Anon., 2 Vent. 173: There is a case reported in 2 Vent. 30, where, on a motion for a new trial, it appeared, the solicitor for the plaintiff had written two letters, to two of the jury, before the trial, importuning them to appear, and setting forth the hardships his client had suffered in the cause, and how he had verdicts for his title; the verdict was set aside for this. This was for the misdemeanor of the party, for embracery; it falls under the head of tampering with the jurors before trial, and not of challenge for legal disqualifications, such as alienage, infancy, want of freehold, affinity, good fame, &c., which all lie open to the ordinary care and inquiry for discovery. And yet, even in such a case as that of practising with a juror, if known before trial, the party must take the objection when he comes to be sworn. 6 Bac. Abr. (4th Ed.) 661, it is said, that where there is good cause of challenge to one of the jurors, but this not known, and consequently could not be taken advantage of at the trial, the court will grant a new trial: and Hyon v. Ballard, 7 Mod. 54, is cited. On looking into the case there is no such rule laid down, or indeed anything relative to this subject; it is, evidently, extracted from the dictum of Holt in Lady Herbert v. Shaw, and the book misquoted. I have before said, that the application of this rule must be confined to causes of exception or challenge, out of the ordinary cause of inquiry and information.

From this review of most of the cases, and perhaps all of any importance on the question, I think it may be pronounced, that they by no means authorize the position maintained on this motion, namely, that alienage of a juror, which the party, after verdict, swears he was ignorant of, is sufficient ground for a new trial. The cases are the other way; and justice and convenience repel the doctrine. My clear opinion is, that all general and ordinary grounds of challenge, such as alienage, infancy, servitude, bad fame, interest, affinity, intimacy, &c., which may be come at by inquiry, must be taken at the trial; and that no pretence of ignorance of such matters can be received to let in the exception after verdict. I have chosen to put my opinion on the general question, and as if the party had proved the fact of alienage: and though I do not at all rest myself

upon this, yet it is clear that the defendant has not proved the fact; and I take notice of it merely that it may not be supposed the court received the affidavit as proving it. The only proof laid before us that the juror is an alien, is the affidavit of Mr. Leiper, which states that since the trial the juror told him he was not a citizen of the United States. Surely what a juror has merely said after a verdict, can never be a ground for impeaching it. It is mere hearsay, and no sort of evidence of the fact. What the plaintiff confesses, may be evidence, but the plaintiff has an interest in the verdict, and the confession, or declaration of a juror, cannot deprive him of it. If the fact is so, and material, it is capable of direct proof. The juror might, perhaps, be allowed to make affidavit of it; or others could be found to prove it; but surely what jurors tell people after a verdict, can never be received as facts, on which the court will sustain a motion to grant a new trial. How easy it would be to set aside any verdict. Jurymen, though they consent, are not always satisfied with what has been done; they may, indeed, wish the verdict set aside; and if any matter which is dropped from them, true or false, may be picked up, and have the force of confessions—it is no difficult matter to see where it will end. I know nothing of the juror in this case, nor of his sentiments; but if he thought the damages high, and wished the verdict set aside, and has gone and told Mr. Leiper he was no citizen, it may be so or not, but certainly it is not proved to the court; the defendant does not even swear that he believes he is an alien, nor produce any other evidence of the fact. If a man comes to set aside a verdict for a cause of this kind, he must lay before the court all the circumstances; he must account for his laches; he must prove the fact; and he must leave nothing to doubt or conjecture. The case of Aylett v. Jewel is in point. Aylett v. Jewel, 2 W. Bl. 1299: A new trial was moved for, on the affidavit of the attorney, that some of the jury had confessed to him, that they drew lots, &c. "But, (as it is said,) there being no affidavits by the jurymen, or any other that was cognizant of this transaction, but merely this hearsay affidavit," the court thought it too dangerous to call a verdict in question, that had been deliberately given, upon so loose and slight a suggestion. And in Vaise v. Delaval, 1 Term R. 11, the court refused the affidavit of the juror himself of such fact.

2. Another ground is taken for setting aside the verdict, the affidavits of William Oliver, and Frederick Kimble, Jr. These deponents each say, "that previous to the trial of this cause, they had several conversations with one Joseph Prince, a juror, who tried the cause; that in these conversations he expressed great resentment against William Duane; and moreover declared frequently, and with great warmth, that he would send him out of the country, if he had power to do it." The defendant swears he did not know of these declarations till after the trial. The counsel for the defendant, on this motion has scarcely more than hinted at this, as a ground for it, yet I shall notice it. It is obvious that these facts, furnished causes of challenge to the particular juror, and fell under the description of challenge to the favor; this species of challenge is by law to be tried by triers, and not by the court: whether the juror would have been pronounced favorable or indifferent by such a tribunal, we cannot say; they might have considered him indifferent as to this question between the parties, although the juror was proved to entertain a general dislike and enmity to the defendant for his personal conduct and political opinions; it is not for us to say what their verdict would have been. Had I indeed been a trier, and these facts proved, I should probably have set aside the juror, in order to lay out of the defendant's way every possible disadvantage, and to avoid all suspicion that any juror acted under a bias of any sort. But this is not our province. This matter cannot come before us, (nor indeed the other of alienage,) now in the garb of a challenge to the juror; the time is passed for that; but the defendant must satisfy us that injustice has been done to him, or that he has sustained, in all probability, some actual injury from the admission of this juror: it is not enough to convince us that had we been triers we should have put the juror aside, after he has been admitted without objection, has been sworn, and rendered a solemn verdict, in concert with eleven others, his companions, against whom no suspicion lies; we cannot set aside such verdict, unless there be something so very strong in the nature of the exception, or something so extravagant in the verdict, as to induce a reasonable suspicion that justice has not been done.

I admit that this kind of complaint against the juror, to wit, that he was secretly his enemy, and harboured resentful opinions of him, falls within that class of exceptions after verdict, and after the proper time of challenge has passed, which will be received by the court as a ground for setting aside the verdict, on proof of its being an after-discovery; because, against such things a party cannot be supposed to come prepared. But, as I said before, he applies to the sound and legal discretion of the court, upon the whole case. The fact, whatever it be, if it existed at the trial, and was not objected, cannot form a substantive ground for setting aside the verdict: the defendant has lost the benefit of using it in that light, to reject the juror, and puts his case to the court, and must make out a sufficient one to set aside the verdict; and certainly the court will always give such objections their

proper weight, on a review of the whole case, and the nature of the verdict—in other words, if they think justice has been done, they will not undo the verdict; if they think otherwise, they will lay hold of such circumstances to give another trial, when without it, perhaps they might not think it justifiable. I am very clear in opinion, that the declarations said to be made by this juror, ought not in this case to prevail against the verdict. In the first place, they by no means relate to the cause between these parties: it is not pretended that he evinced any bias in regard to the particular issue between the plaintiff and defendant; it does not appear he knew of the controversy; the sentiments expressed seem to relate quite to another subject; and unless some special malice or bias, or partiality is proved in reference to the issue, or clearly appears after verdict to have operated on the minds of the jurors, it would be too much for the court, when jurors have been sworn and passed on the issue, to do all away upon a bare possibility that a general dislike to the party may have influenced their judgments in assessing the damages. The presumption of law and charity is, that they have done as they were sworn, to give a verdict according to the evidence. The objection, then, of itself not being of a nature from which to infer direct partiality or bias on the issue, the only remaining question is, whether there be any thing in the verdict which should induce the court to lay hold of this objection, and upon the whole case grant a new trial. Now as to the verdict, it is not pretended to be given contrary to law, or against evidence; or that there has been any mistake of the court; or misbehavior of the party or jury. It is not a motion on the ground of excessive damages: it is not pretended that the defendant can make a better case; or has discovered new evidence; or been surprised: in short, the court think, and the defendant's counsel have not made a question of it, that the verdict, upon the case, the law and the evidence, is a right and satisfactory one: to set it aside, therefore, would be an abuse of our discretion, and a real injury to both parties.

The Case of Fries [Case No. 5,126] was cited in favour of the defendant; the ground for a new trial there was, that "Rhodes, one of the jurors, after he had been summoned as a juror, declared at several places, at several times, and to several persons, that he was not safe at home, for these people; (meaning the insurgents,) that they ought all to be hung; and particularly that Fries (the prisoner) must be hung." The juror was confronted with the witnesses, who attested these declarations, and denied them as pointed particularly at Fries; but admitted he had made use of general expressions indicative of his disapprobation of the conduct of the insurgents. It is unnecessary to give any opinion on the propriety of the decision in Fries' Case [supra]. The judges were divided on this objection, yet I cannot help saying, that in a case of life, and where such a strong and pointed prejudgment of it had been given by one of the jurors, on the very issue, and against the party, and after he was summoned, and which was unknown at the trial, I should have been strongly in favour of a new trial, on the principles I have laid down in this opinion, unless, indeed, there had existed no manner or shadow of doubt of his guilt, upon the law and evidence. But the Case of Fries is quite distinguishable from this: it was a case of life—a case of doubtful law—of contrariety of evidence—a case where the juror was sworn, on several occasions after he was summoned, to have made hostile declarations on the general subject of the treason, and against Fries in particular; and actually declared that he must be hung. This is a case involving a mere assessment of damages—where no law, no contrariety of evidence occurred—no difficulty—and where the expressions of the jurors were made, we know not when; but not after they were summoned; and where they related not at all to the parties—to the issue—or matter they were sworn to try; and finally, where the verdict was consistent with law, authorised by the evidence, and entirely satisfactory to the court. For these reasons, I am for discharging the rule. The counsel who supported the first exception of alienage in the juror, endeavored to draw a distinction between a disqualification of that kind, and disqualifications from affinity, and other challenges of a peremptory nature, by contending that an alien could not be a juror at all; and therefore this was only a trial by eleven jurors. The plain answer to this is, that on the record it appears the verdict was found by twelve lawful men. The defendant comes and says, the first man was not a lawful juror; he was an alien. But to this the law answers, you are estopped now to make that a substantive objection; you cannot be permitted to show it; no judicial notice could be taken of it, for the reasons above assigned; and your proof of the fact amounts to nothing, further than to serve to govern the discretion of the court.

Case No. 6,619.

HOLLINGSWORTH v. FRY.

[4 Dall. 345.]

Circuit Court, D. Pennsylvania. Oct. Term, 1800.

DEEDS AND CONTRACTS — RULE OF INTERPRETATION—TIME OF THE ESSENCE—LACHES.

[1. The rule of interpretation, as to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the

parties, if such intention be consistent with the principles of law.]

[2. Where the time of payment is made a substantial, and not a mere formal, circumstance, it enters into the essence of the contract, and must be observed.]

[3. The failure to make a tender of a sum of money due under a contract until five years after the time limited by the contract for payment is such laches as will justify the dismissal of the plaintiff's bill.]

In equity. The bill, after setting forth a variety of transactions between the parties, relative to a tract of land, mills, and mill race, in Dauphin county, states, that on the trial of a writ of partition for the premises, they consented to withdraw a juror, and entered into the following agreement, dated the 19th of November, 1790: "It is mutually agreed, that judgment shall be entered for the defendant on the day in bank, on the 3d of January next, unless the said plaintiff, or Robert Ralston, his assignee, shall previous thereto, by such good and unexceptionable securities, in such sum, and in such manner, as shall be approved of by the honourable judges of this court, engage for, and secure, the payment of one moiety of all monies, which the defendant hath advanced, or expended, or shall appear to be reasonably entitled to, for, or by reason of, his improvement of the lands in question, or for any matter relative thereto, or of any other lands held in common, or jointly, between the said parties, within six months from the said 3d day of January next. But, in case such unexceptionable security shall be given, and a question shall arise as to the quantum of the monies, to which the defendant shall be entitled, then John Kean, Joshua Elder, and John Carson, gentlemen, or any two of them, shall determine the said sum, on full hearing of the said parties, their witnesses, and proofs. And in case of a full conformity thereto, and the money being fully paid and discharged as aforesaid, within the said period of six months, and not otherwise, that then judgment shall be entered in this action, not only for the lands in the declaration mentioned, but of all lands and mills held jointly, or in common between them the said parties, by virtue of any article between them, or between them and John Fisher, made. But if the monies so due shall not be paid and discharged within the said period, the defendant shall hold the said lands free and discharged from the claims of the said plaintiff, and all persons claiming under him; and judgment shall in such case be entered for him in this action." It, also, appeared from the pleadings and exhibits that the bond, required by the agreement, was duly executed on the part of the plaintiff; that the referees undertook the business of the reference; and that on the 13th of April, 1791, the following report was filed: "We the referees, &c. report that, after hearing the parties, their allegations, and witnesses, and investigating their accounts and vouchers, we are of opinion, that George Fry is reasonably entitled to the sum of 3646l. 6s. 2¾d. specie; that being the one moiety, or half part, of his expenditures on the lands, mills, and their appurtenances, in question, after giving John Hollingsworth credit for the money by him expended on the same lands." It, also, appeared, that the plaintiff filed a number of exceptions, which the supreme court, after argument, over-ruled on the 2d of July, 1791, and gave judgment on the report; and that, on the 26th of September, 1796, the complainant sent his son, to tender to the defendant, the amount of the report, in his favour; which the defendant refused to accept. Upon these general premises, the bill proceeded to complain, that the defendant had appeared in the supreme court, by his counsel, on the 2d of July, 1791, alleging the exceptions to the report to be untrue, whereas the complainant avers that they were true; that although notice had been given to produce books and accounts, none were produced on the hearing in court; that the conduct of the referees was improper in various particulars; that the books, accounts, and statements, laid by the defendant before the referees, were untrue and fraudulent; that the defendant suppressed several material documents which he alone possessed; and that the value of a moiety of the property in dispute is at least 10,000l. The bill concluded with a prayer for a perpetual injunction, against all proceedings on the judgment; for a discovery and account; for a partition of the premises; and for general relief. To this bill, the defendant filed a plea and answer: 1st. Plea in bar, a former bill in equity, for the same cause, filed by the complainant on the 24th of April, 1792; demurrer to the bill, and joinder in demurrer; and a decree, in April term, 1796, pronouncing the demurrer to be sufficient, and dismissing the bill; which decree remains unreversed, and in full force. 2d. Plea in bar, the judgment of the supreme court of Pennsylvania, (a competent tribunal) upon the agreement, reference, and report, which judgment remains still in force; with an averment that the complainant did not, within six months after making, or filing, the report, nor after the exceptions were overruled (which exceptions contained all the matter alleged in the bill) and the judgment rendered, pay, or offer to pay, to the defendant, the said sum of 3646l. 6s. 2¾d. or any part thereof. 3d. Answer, that the judgment was fairly obtained; that the defendant did not submit to the referees any books, accounts, or statements, that were untrue, or fraudulent, nor suppress any material documents; that on the 26th of September, 1796, the complainant's son came to him with a bank bill; but never before that time; and that the defendant had been exposed to all intermediate expenses and casualties, &c.

A general replication was filed; and, after argument, the following opinion was deliv-

ered, PETERS, District Judge, declining to take a part in the decision:

PATERSON, Circuit Justice. The great rule of interpretation, with respect to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the parties, if such intention be consistent with the principles of law. In the present case, there is no difficulty in coming at the intention, as it is clearly and forcibly expressed in the agreement, and is capable of receiving one construction only. The time of payment is made a substantial, and not a mere formal, circumstance; it enters into the essence of the contract; and, therefore, must be observed. The court cannot decree against the legal and express stipulation of the parties themselves. The situation of the parties, the nature of the property, and the speculative spirit of the project, were powerful inducements for drawing up the agreement, in the plainest and strongest terms, so as to leave no doubt as to the intention, and to render the time of performance a cardinal point. Again, if the agreement would admit of another construction, the complainant, under the circumstances of the case, comes too late to avail himself of it. The door of equity cannot remain open for ever. The complainant did not make a tender of the money, till a lapse of five years after the termination of the time limited by the contract. So far was he from using legal diligence, that he has been guilty of gross delay. In cases of the present kind, equity will not suffer a party to lie by till the event of the experiment shall enable him to make his election with certainty of profit one way, and without loss any way. This mode of procedure is unfair; contrary to natural justice, and in exclusion of mutuality. There is a strange mixture of legal and equitable powers, in the courts of law of this state. This arises from the want of a distinct forum to exercise chancery jurisdiction; and, therefore, the common law courts equitise as far as possible. Whether, if relief be proper, the supreme court of this state could have extended it to the complainant, it is unnecessary to determine. Thus much, however, might and ought to have been done, on the part of the complainant; he ought, when notice was given for him to show cause why judgment should not be entered, to have laid the equity of the case before the judges of that court, who, if they thought proper, might have deferred the entering of judgment, or ordered it to be entered on terms, to wit, to be vacated on payment of the awarded sum, by a limited period. But the complainant, although he had previous notice, did not avail himself of an appeal to the discretion of the court; but suffered judgment to pass against him, without making any objection. There being no equity in the complainant's case, his bill must be dismissed, with costs.

Case No. 6,620.

HOLLINGSWORTH et al. v. SEVENTY DOUBLOONS & THREE SMALL PIECES OF GOLD, Each of the Value of an Eighth of a Doubloon.

[19 Niles, Reg. 104.]

District Court, E. D. Pennsylvania. Sept. 29, 1820.

SALVAGE—FLOATING CHEST—COMPENSATION.

[While a ship was almost becalmed on the high seas, a floating chest was found, and with but little trouble was taken on board. It was at first supposed to be empty, but concealed in grooves and interstices were found 70 doubloons. *Held*, that the finders were not entitled to the whole property, though there were no claims or marks of ownership, but should be compensated as for a salvage service, and that a moiety should be allowed.]

[This was a libel in rem by Levi Hollingsworth and son and Jonathan Ogden, owners of the ship Jane, Frederick S. Luburg, master, and James Fairfowl, first mate, and others, the officers and crew of the said ship, against seventy doubloons and three small pieces of gold, each of the value of an eighth part of a doubloon, for salvage.]

PETERS, District Judge. The gold in question was discovered when the ship arrived in Philadelphia, in the remnants of an old chest, which had been broken up in the river Delaware, on the voyage from Lisbon, and the pieces had been thrown into the long boat. This chest was found floating on the ocean, after the vessel had been thirty-four days at sea, in lat. 38, 24 N., and long. 52, 28. It was supposed to be empty, but the gold was found concealed in grooves or interstices of the chest. No marks were seen on the chest. The remnants I have directed to be lodged in the clerk's office, for inspection, should any owner hereafter appear. The vessel was almost becalmed when the chest was discovered, she going only a knot or a knot and a half an hour, at the time. Some ineffectual attempts were made to secure the chest with a harpoon. On their failure, one of the libellants, a mariner (Benthal), jumped overboard, and made a rope fast to the chest by which it was hauled in.

This is a case of little merit, as it regards danger, delay, or any impediment to the progress of the voyage of the ship, nor was there any great exertion or labor on the ship's officers or crew in the salvage. Benthal had the most of any risk or exertion, in the securing of the chest. How or when it had been abandoned to the waves cannot appear, and is left to mere conjecture. It would seem that it had contained articles which had been taken out possibly by sea robbers, who had thrown over the chest as worthless. The owner, whoever he may be, would not have cast his money on the waters; nor would the takers or plunderers of the chest have voluntarily parted with this valuable portion of their prey. The ejection cannot, with any

tolerable plausibility, be considered as a voluntary abandonment, so as to entitle the finders to the benefit of the absolute rule of occupants "fiunt derelicta;" if even that definition of "derelict" had not been long exploded from the codes of maritime laws. The supplementary libel, claiming the whole, as derelict, under a rule which does not now exist, must be dismissed.

This must be considered as a case of salvage, subject to the principles established on that subject. These principles I have long ago settled in this court; they may be seen in several cases published in the admiralty decisions, and they need not be here repeated. A case, decided by Judge Johnson, in 1816, in the circuit court of the United States, for the South Carolina district,—Fisher v. The Sybile [Case No. 4,824],—confirms the views on the subjects of derelict and salvage, which I have long entertained, and is an able and clear exposition of the modern law respecting them. A reference to that case, which has been published in several public prints, of New York and Philadelphia, supercedes the necessity of any discussion on my part. The chance of the owner was indeed hopeless. He may not have recovered his property, unless through the accidental occurrence which has brought it within the power of this court, whose duty it is as well to reward sailors, as to take care of the property of owners, and afford them an opportunity of recovery. The sailors must stand on their own merits, without regard to the hopelessness of recovery by the owner. There is no distinction favorable to the finders of money; on the contrary, the maritime codes assign less salvage to those who find money, jewels, and other articles of such intrinsic value, but of less difficulty in saving or transporting. The only reason for any comparative advantage to such salvors, would be to encourage the disclosure of the finding, where concealment might be so easy, by a combination to secrete it, and thus, taking human propensities as we too often observe them, to reward overt acts of integrity, where covert malversation might have been, and, no doubt, often is, practised. The quantum of salvage is not fixed by any general rule, but depends on the circumstances of every case. I confess, the discretion I am often obliged to exercise, is sometimes embarrassing; in this case it is not easy to determine what is exactly right. I find by some authorities produced, and in some of the old maritime laws, that half the amount of the derelict has been given in many instances; much depends on the gross amount, for where that is large, I always give the less proportion, and thus sufficiently reward salvors, without an undue sacrifice by the owners, and I have concluded to allow half in this case, as the whole is not of great amount, and the establishment of a legal claim but slightly probable.

I decree the salvage allowed (the costs and charges being deducted from the whole amount), to be distributed as follows: The owners are to receive one-third of the salvage. The residue is to be divided among the officers and crew of the ship, in the manner and in like proportion as in the case of Taylor v. The Cato [Case No. 13,786], decided in this court, save that the part to be divided among the mariners, carpenter, steward and cook, shall be so allotted that Benthal shall receive two shares; the whole being divided into equal parts, and an extra share calculated upon; i. e. one is to be added to the actual numbers. Let a decree, in the usual form, be drawn on these principles. The remaining half of the balance of the whole is to remain in this court, deposited in bank according to the practice of this court, and the late law in affirmance of it, for the period of one year and a day, subject to any legal claims of the owner or owners; and if no such claims be interposed, the moneys remaining in court are to be disposed of agreeably to its future order and decree.

HOLLINS (DURAND v.). See Case No. 4,186.

HOLLINSBERRY (UNITED STATES v.). See Case No. 15,380.

Case No. 6,621.

In re HOLLIS.

In re KENNEY et al.

[3 N. B. R. 309 (Quarto, 82).] [1]

District Court, D. Massachusetts. 1869.

COMMERCIAL PAPER—STOPPAGE OF PAYMENT—ACTS OF BANKRUPTCY.

1. The stopping of payment of commercial paper, mentioned in section 39 of the bankrupt act [of 1867 (14 Stat. 536)], must be fraudulent, and must continue for fourteen days in order to be an act of bankruptcy.

[Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402; M. &. M. Nat. Bank v. Brady's Bend Iron Co., Id. 9,018.]

[See Baldwin v. Wilder, Case No. 806; In re Ballard, Id. 816.]

2. Such suspension or non-resumption is fraudulent (supposing the liability to be undisputed) when it is done purposely and not by accident or mistake.

[Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402.]

3. Semble. "Commercial paper" in this section means paper, which, by the law governing the contract, has the ordinary qualities and incidents of negotiable paper in the sense of the law merchant.

[Cited in Re Chandler, Case No. 2,591.]

[In bankruptcy. In the matter of John A. Hollis and of J. E. Kenney and others.]

LOWELL, District Judge. By section 39 of the statute, a banker, merchant, or trader, who has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be

[1] [Reprinted by permission.]

deemed to have committed an act of bankruptcy. Some difficulty has been found in construing this clause. A fraudulent stopping of payment is not an act heretofore known or defined, and it is not easy of definition. It is easy to see that a merchant or trader will never suffer his negotiable paper to be protested so long as he can provide for its payment; and it is therefore a ready and safe test of insolvency if he stops payment of such paper. Indeed, it is the popular way of expressing the fact of a trader's insolvency, that his paper has "gone to protest." But there is nothing fraudulent in the ordinary sense in such refusal caused by inability. On the contrary, under the bankrupt law it is the duty of a trader to stop payment when he finds that he cannot pay every creditor in full. It may be said, with some plausibility, that if a solvent trader stops payment, he commits a fraud on his creditors. But solvent men do not stop payment; or if they do, there is a more convenient and less expensive mode of enforcing their obligations, than by a resort to the court of bankruptcy.

Pressed by these considerations, some courts have rejected the word "fraudulently" altogether. Others have confined its application to the stopping of payment; and they read the statute, that if a merchant fraudulently stops payment, or if, without fraud, he suspends payment and does not resume it for fourteen days, he has become bankrupt. The more natural construction of the statute appears to me to be with those who hold that the word qualifies the whole clause, and that the suspension and non-resumption for fourteen days is explanatory of the meaning of a "stopping of payment;" namely, one that shall have lasted for that time.

As to the fraud, a mere oversight, or a vis major, or a fraud practiced on the merchant himself, or an honest defense to the particular paper refused, if these reasons or such as these occasion the refusal to pay, would take the case out of the statute. And this would be so, though the word "fraudulently" were omitted from the law; because such an accident or refusal could not fairly be called a stopping of payment. Still, congress might well insert the qualification for greater caution. My construction is, that "fraudulently" means knowingly, and without just excuse applicable to the paper itself.

Probably the fourteen days were given for the very purpose of guarding against accidents and mistakes; and I do not mean to say that when the mistake is discovered it is any longer an excuse. But if it is not found out within the fourteen days, perhaps the petition would be premature, or at any rate ought to be dismissed on payment of the suspended debt.

The differences of opinion which have been expressed by different judges, are, after all, of very little importance. Those judges who give the word "fraudulently" its greatest effect hold that for a solvent trader to suspend payment and not resume it for fourteen days, without some such excuse as I have referred to, is a fraud; and that, for an insolvent trader, who has suspended, not to go into bankruptcy within the same time, is a fraud; and as all traders must be either solvent or insolvent, this in effect makes the voluntary and unexcused suspension and non-resumption to be an act of bankruptcy without any evidence of fraud in the ordinary sense. And, on the other hand, those judges who reject the word, would not hold that every suspension and non-resumption is necessarily an act of bankruptcy; as if it be, for instance, a refusal to pay a note to which the trader believes he has a good defense. So that the practical result of all the decisions is substantially the same, except that in one view, there might be a stopping of payment for less than fourteen days, which would be an act of bankruptcy. But I think it will be some time before any creditor finds himself able to cover and prove any such fraud. None such has been either defined or proved in any reported case. If there be anything done which can defeat, delay, or hinder creditors, it is provided for in other parts of the section, and such an act would be itself an act of bankruptcy without any stopping of payment. But it must be distinctly averred and proved as a fraud and not as a mere incident of non-payment.

What is "commercial paper" is not an important question in this case. It has been sometimes said that only such notes or acceptances as the banker, merchant, or trader actually gives in the ordinary and legitimate course of his trade, are in that class. Another opinion is that all paper that, by the law governing the contract, has, in the hands of its actual holders, the qualities and incidents of ordinary negotiable paper in the sense of the law-merchant, is within the definition, whether it was really given by the trader in the usual course of his trade or not. And this is perhaps the better opinion. But the paper here confessedly comes within both definitions.

Case No. 6,622.

HOLLISTER v. LEFERN.

[Nowhere reported; opinion not now accessible.]

HOLLOMAN (FREELANDER v.). See Case No. 5,081.

Case No. 6,623.

HOLLOMAN v. LIFE INS. CO.

[1 Woods, 674.] [1]

Circuit Court, S. D. Mississippi. May Term, 1874.

LIFE INSURANCE — CERTIFICATE OF EXAMINING PHYSICIAN AS EVIDENCE—MISREPRESENTATION.

1. The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive unless the opinion of the physician was influenced by fraudulent representations or concealment of material facts.

2. An insurance company is not permitted to prove that the examining physician was incompetent; he was the agent of the insurer and not of the insured.

3. A declaration that the insured had not previously had a severe disease, *held*, not to include the ordinary diseases of the country which yield readily to medical treatment, and do not tend to shorten life.

4. A misrepresentation to avoid the policy must have been in relation to a material fact that would have probably induced the insurer to decline the risk.

5. The insured had, for a period of three months, about three years previous to the contract of insurance, disease of the bowels, having been perfectly healthy during the interval; this fact was not communicated to the insurers; the insured died about three years after the policy was issued, of a disease of an entirely different character: *Held*, that the previous sickness was not material, and the fact that it was not communicated would not avoid the policy.

Submitted to the court on the issues of fact as well as of law.

Adam & Speed, for plaintiff.

Harris & Harris, for defendant.

HILL, District Judge. This is an action of debt, commenced originally by attachment in the circuit court of Warren county, and removed to this court. It is brought to recover the sum of ten thousand dollars, alleged to be due on two policies of insurance, the one issued April 1, 1869, and the other April 1, 1870, for $5,000 each, on the life of Mrs. Rebecca A. Holloman, wife of the plaintiff, and for his use. A jury having been waived, and the questions of fact as well as law having been submitted to the court, they will be considered as presented by the pleadings and proof. There is no question raised as to the issuance of the policies, the payment of the premiums, or the death of Mrs. Holloman, or the liability of the defendant, unless the policies are avoided by reason of the fraud alleged in the pleas, which applies equally to both policies. The pleas all being affirmative, and the allegations therein being denied by the replications, the burden of proving the defense is thrown upon the defendant.

The defense set up by defendant in the pleas is in substance as follows: That the policies were issued upon conditions therein expressed, among which was this, that if any of the declarations made in the application for the policies, and upon the faith of which they were issued, shall be found to be untrue in any respect, said policies shall be deemed and held null and void. That among other declarations so made, it was declared said Rebecca A. Holloman was not consumptive on the days when made, to wit, on the 25th of February, 1869, and the 25th of March, 1870, and had not previous thereto had consumption, or habitual cough, and had not for some years previous thereto had any severe sickness or disease, and was not then, or had not before that time been affected with any disease or disorder; nor had the parents of said Rebecca A. Holloman been afflicted with any scrofulous or other constitutional disease, hereditary in character. That said declarations were untrue in this, that the health of said Rebecca A. Holloman was not good; that she had previously had consumption and habitual cough, and she had within the seven years preceding, and did then have, severe sickness and disease; and was then afflicted with disease of the womb of a severe and dangerous character, by means whereof the life of the said Rebecca was destroyed, and that the father of said Rebecca had scrofula, a disease constitutional and hereditary in its character, and which false and fraudulent declarations were made to deceive and did deceive defendant, and induced the issuance of said policies, whereby they became null and void.

The evidence produced to establish the declarations so made are the answers made by the plaintiff to certain questions propounded to him as the basis of the contract. To the 8th question, "What is the present state of the health of the party?" the answer is, "Good." To the 14th question, "Has the party ever had any of the following diseases?" (among which is consumption) the answer is, "No." To the 19th question, "Has the party had during the last seven years any severe sickness or disease? if so, state the particulars, the name of the attending physician, or who was consulted and prescribed;" the answer is, "No."

The declarations made by this proof, necessary to be considered, are: (1) That Mrs. Holloman was then in good health. (2) That she had not had consumption, cough, scrofula or other hereditary disease. (3) That she had not within the preceding seven years been afflicted with any severe sickness or disease. The first and third only of these declarations need be considered, as there is no proof to show, or tending to show that the remaining statement was untruthfully made.

The first question of fact to be ascertained from the proof is, was Mrs. Holloman in good health at the time these declarations were made? The defendant, to establish the allegation that she was not, has read the depositions of a large number of witnesses embracing the neighbors and acquaintances

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

of the deceased; some of the former servants of the deceased, and the nurse who attended her in her late sickness. I have carefully examined this testimony, and I find that the depositions, with the exception of three or four, fail to show that Mrs. Holloman's health was not good, at the times when the declarations were made and the policies issued. And as to the testimony of those who testify as to her ill health prior to the six months next preceding her death, it is evident they are mistaken as to the time, other than the attack while at Sharon in 1867; three of these witnesses testify that the death occurred in 1872, showing a want of memory which greatly weakens the weight to be given to their testimony. It is proved by Dr. McKie, that at a time when one witness states that the deceased was sick and using disinfectants in April, 1870, she was in fact in good health and at Sharon nursing her sick son. Besides, in addition to this rebutting testimony, a number of her relations and intimate friends testify that she was a healthy woman up to her last sickness, except an occasional attack of such malarious diseases as are common in that neighborhood. The physicians in the vicinity testify the same thing; so that aside from the testimony of Dr. Tuttle, who was the medical examiner for the first policy, and Dr. Jones for the last, the certificates of these physicians to the company upon such examination must be held as competent evidence of the facts certified to, and can only be rebutted by testimony establishing that they were deceived either by false statements or by the suppression of facts, without a knowledge of which such examining physicians could not come to a correct conclusion as to the condition of the party examined, and which could not be discovered by them upon the usual examination. The defendant must be estopped from denying the competency of the physician selected to make the examination, the physician being the agent of the defendant, and not the agent of the plaintiff. These certificates show Mrs. Holloman to have been in good health when these declarations were made; and as to the declarations made for the first policy, the good health of Mrs. Holloman is established by the testimony of Dr. Tuttle, taken upon both the examination of the plaintiff and cross-examination of defendant. The examination made by Dr. Jones on the 25th of March, 1870, for the last policy, states that Mrs. Holloman was then in good health. Dr. Jones was the family physician of plaintiff, as well as the examining physician of defendant, but his deposition could not be taken in consequence of the recent deprivation of his mental faculties. In confirmation of the correctness of his conclusions, Dr. McKie states, that in April (and it must have been at that time or shortly thereafter), the insured was in Sharon nursing her sick son for more than ten days, and was apparently healthy. In view of all the proof it cannot be otherwise held than that the allegation that Mrs. Holloman's health was not good, at the time these declarations were made, is not sustained by the proof.

The last question of fact to be considered is, had Mrs. Holloman, during the seven years next preceding the time when these declarations were made, been afflicted with any severe sickness or disease? This does not include the ordinary diseases of the country, which yield readily to medical treatment, and when ended leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life. The only proof tending to establish this allegation, not already considered is, that of her sickness while residing at Sharon in 1867. Dr. O'Leary, the physician who attended her, testifies, that soon after she came there he was called to prescribe for her; that her disease was chronic diarrhea or affection of the bowels, and he thinks he prescribed for her for two or more months, when she recovered. He states, that if it lasted only a few weeks it could not be called chronic. The testimony of the eminent medical men, who have been examined, leaves it uncertain as to what may be considered a chronic disease of the bowels, the causes being so various. As already stated, the common understanding of the question, as to whether the party has had, during the seven years, any serious disease, is whether it was such disease as often impairs the constitution and tends to shorten life, and which, if known, would have deterred the insurer from taking ing the risk without further examination and information. Testing the question propounded and the answer given by this rule, it is evident that had the answer been, that Mrs. Holloman had in 1867 (two years before the first and three years before the last answer) this affection of the bowels which entirely ceased within two or three months, and had not recurred, there would not have been the least hesitancy about taking the risk; such being the case, it must be held, that the last averment is not sustained by the proof.

Insurance companies, like all other parties, are entitled to the benefit of these contracts, and to be relieved from them when procured by misrepresentation and fraud, and are entitled to have their rights declared and enforced in courts of justice as those of individuals; but like individuals, are bound by the acts of their agents, and a knowledge of facts communicated to their agents is full notice to them. The testimony in the case shows, that Mrs. Holloman died of a disease to which females are subject, and more liable to at a certain age than any other. She had resided all her life in a malarious district; all these facts were well known to the agent and physician selected, and instructed by the defendant, and consequently

known to the defendant, who assumed all the risks incident thereto. The consideration upon which the contract is based, on the one side, is the reception of the premiums, and on the other, the payment of the policy when the death shall occur; the amount of premiums being regulated by the probabilities of the duration of life, and consequently of the amount of premiums to be paid. The false statement of facts, or the suppression of facts, to have the effect of forfeiting the claims of the insured and rendering the contract void, must be of so material a character, that if not made on the one hand, or if made on the other, they would probably have induced the insurer to decline the risk, or to materially modify its terms. The questions propounded must be such as can be reasonably comprehended by the answerer.

The same rules must be applied to this contract which are applied to others, to ascertain the mutual understanding of the parties, and when these rules are applied to the evidence in this case, it must be held, that the defenses insisted upon are not sustained, although the agent and counsel of the defendant have certainly bestowed an unusual amount of labor, and displayed great ability in preparing and presenting the defense. The plaintiff is, therefore, entitled to a judgment for the sum of ten thousand dollars, the amount of the two policies, and to the further sum of seven hundred and fifty dollars, interest thereon for one year and three months, making the sum of ten thousand seven hundred and fifty dollars.

HOLLOWELL (SCHWAB v.). See Case No. 12,500.

Case No. 6,624.

HOLLY v. UNION CITY.

[14 O. G. 5.]

Circuit Court, D. Indiana. June 3, 1878.

PATENTS—VALIDITY AND INFRINGEMENT—DEVICE FOR WATER SUPPLY.

[The Holly reissue patent No. 5,132, for a device for supplying a city with water, *held* valid as to the first claim, when limited to the device described and its substantial equivalents; and *held*, further, that it was infringed by defendant.]

[This was a suit by Birdsill Holly against Union City, Ind., to recover damages for the unlawful use of plaintiff's patent.]

DRUMMOND, Circuit Judge. This case having been brought on to be finally heard upon the pleadings and proofs, at the November term of this court, 1876, before their honors, Judge Drummond and Judge Gresham, holding the said term of court, and having been fully argued by J. E. Hatch, Esq., and George Harding, Esq., for the complainant and by L. L. Leggett, Esq., and M. D. Leggett, Esq., for the defendants, and the case having been submitted on the oral arguments of the said counsel, and written briefs filed at the same time, and due deliberation having been thereon had, this court finds:

First. That the letters patent granted Birdsill Holly, of Lockport, New York, March 2, 1869 [No. 87,413], and reissued August 2, 1870, and again reissued November 5, 1872, which said reissue was numbered 5,132, on the first claim of which the present suit is founded, are good and valid in law, so far as relates to the first claim thereof, when said first claim is limited to the device described in the said reissued letters patent, and its substantial equivalents; that the said reissued patent is for the same invention as the original patent, and that the method of supplying a city with water, in the first claim of the said reissue, is the invention of the said Holly, and that the said claim is not anticipated by any of the prior patents and uses pleaded in this case, and that the title to said reissued patent is in said Holly.

Second. That the defendant, by its use within the jurisdiction of this court, in connection with its water-pumping machinery, of the device shown and set forth in "Exhibit Union City Regulator," has infringed the said reissued letters patent and violated the rights of the said Holly, as secured by the first claim of said reissued letters patent No. 5,132, and it is therefore ordered, adjudged, and decreed, and this court, by virtue of the power therein vested, doth order, adjudge, and decree:

First. That the complainant do recover of the said defendant the profits, gains, and advantages that have arisen or accrued to said defendant from the use, between the date of the said reissued patent and the entry of this decree, of the said system of water-works described in said claim, as well as the damages that have resulted to the complainant by reason of the said unlawful use.

Second. That an account of the said profits and of the said damages be taken and stated and reported to this court by W. P. Fishback, Esq., who is hereby appointed special master commissioner for that purpose, and that the defendant, by its officers, appear before the said master, from time to time, on notification from him and under his direction, and that the attorneys, agents, servants, and employés of the said defendant appear before the said master from time to time as he may direct, and that the complainants may examine the said officers, employés, agents, attorneys, and servants of the said defendant, under oath, as to the several matters pending on the said reference; and that the said defendant, by its officers, produce before the master, on oath, all such deeds, contracts, specifications, papers, writings, and books, as the said master shall direct, that are in their custody or under their control or subject to their order, and that relate in any manner to the said matters which shall be pending before the

said master; and that the said master have all the authority and power conferred upon masters in like cases by the 77th and 78th rules prescribed by the supreme court of the United States, as rules of practice for the courts of equity of the United States.

Third. That an injunction issue out of and under the seal of this court against the said defendant, commanding it, its attorneys, agents, workmen, officers, servants, and employés, to desist from making, using, or vending any system of water-works whereby the water is pumped directly into the water-mains, the apparatus for that purpose being supplied with contrivances like, or substantially like, those shown and described in said reissued letters patent, by which the pressure within the mains may be preserved, in a great degree, uniform—sufficiently so for practical purposes—or whereby it may be increased or diminished at pleasure, or from in any manner infringing upon or violating any right or privilege granted or secured to the complainant by the said reissued letters patent.

Fourth. That the parties and master may apply, upon due notice to this court upon the foot of this decree, for such other and further order of instruction as may be necessary.

Fifth. That the complainant do recover the costs in this case to be taxed.

HOLLY (UNITED STATES v.). See Case No. 15,381.

Case No. 6,625.

HOLLYDAY v. The DAVID REEVES.

KEENE v. The DAVID REEVES.

[5 Hughes, 89.]

District Court, D. Maryland. Oct. 29, 1879.

DEATH BY WRONGFUL ACT—ADMIRALTY JURISDICTION—DAMAGES—FRIGHT AND MENTAL SUFFERING—COLLISION—WANT OF LOOKOUT.

[1. Damages are recoverable by a libel in rem in admiralty, for the wrongful death of a person, independent of statutory remedy.]

[Cited in The Manhasset, 18 Fed. 925; The Harrisburg, 119 U. S. 208, 7 Sup. Ct. 144.]

[But see note to Case No. 541.]

[2. In computing damages for a wrongful death, only the pecuniary loss is to be considered; nothing is to be allowed by way of punishment, or for the sufferings of the deceased, or for the bereavement of his relatives.]

[3. In the case of a minor son eighteen and a half years old, whose earnings amounted to less than the cost of maintaining him, the court considered the contingencies of his future earnings, and his contribution to the support of his widowed mother, etc., and the expense of recovering and interring his body, and allowed her $700 as compensation.]

[4. No damages are given for fright or mental suffering resulting from mere risk or peril, where no actual injury has been sustained; nor for the results of mental or nervous disturbance, where no bodily harm is sustained.]

[5. A collision occurred on the Chesapeake Bay, just off the mouth of the Chester river, between a steamer which had just come out of the river and a sailing yacht intending to enter the river, shortly after the yacht passed under the stern of a tow. The steamer was in charge of a captain and mate, both of whom were in the pilot house, and were strangers to the river and bay, and was without a lookout. The deviation in the course of the yacht, as she passed under the stern of the tow, was so slight as not to alter her lights to the steamer. The inboard screens of her side lights were not of the length required by law, but the lights were burning brightly, and were not discovered at all on the steamer until immediately before the collision. *Held*, that the steamer was solely at fault.]

In admiralty.

MORRIS, District Judge. These cases arise out of a collision between the steamer David Reeves and the sailing yacht Curlew, and were by agreement of counsel heard together, and upon the same testimony. The collision occurred on the Chesapeake Bay just off the mouth of the Chester river, near Love Point light, about 10 o'clock on the night of the 11th of August, 1879. The yacht was intending to enter the river, having come up the bay from Oxford. The steamer had just come out of the river, and was on her way to Baltimore. There was a steam tug, the Grace Titus, with a barge in tow, two or three hundred yards nearly straight ahead of the steamer, and the yacht, having passed under the stern of the barge and across her course, soon afterwards came into collision with the steamer. The mate of the steamer, who was at the wheel in the pilot house, saw the yacht just before the collision, and had her engine stopped and reversed, and ported his helm so that the force of the blow was not great; and the only direct and immediate consequence of the collision was a slight damage to the hull of the yacht, which was subsequently repaired.

With regard to the primary question, which of the two vessels is to be held responsible for the collision, I have no difficulty. The testimony of the persons on board the yacht, corroborated as it is entirely by the captain and mate of the Grace Titus and by the captain of the schooner Gerkin, has satisfied me that the lights of the yacht were proper and plainly to be seen, and that she held her course. The admissions of the claimants of the steamer and the testimony of their witnesses show conclusively that she had no look-out, and that the only persons on her deck giving any attention to her navigation were her captain and mate, both of them in the pilot house, both of them strangers to the bay and river, the mate indeed on his very first trip down the river. This too at a time when the attention of those steering the steamer was particularly occupied in taking their vessel by a short cut over shoal water between the upper end of Kent island and the light house, very considerably south of the actual river channel. It is useless to go into the details of the testimony, as under such circumstances, and coming out of the river where they were very likely to meet vessels, the absence of a competent and vig-

ilant look-out actually attending to his duties was a fault of the grossest character.

I find nothing in the testimony that satisfies me that the yacht by any fault or omission contributed to bring about the collision. The deviation in her course as she passed under the stern of the barge was so slight that it was not observed at all by those on board the Grace Titus, and the whole testimony satisfies me that it was not sufficient to have altered her lights to the steamer. With regard to the allegation that the side lights of the yacht could be seen across her bow, the weight of the testimony is that they could not be so seen, but that they were properly arranged. It is true that the inboard screens of her side lights were only sixteen inches long instead of three feet, as required by the Revised Statutes, and this would be a most serious fault if there was evidence to satisfy me that the steamer could possibly have been misled by the lights of the yacht, but the weight of the testimony to my mind proves that neither the captain nor the mate of the steamer ever saw the lights of the yacht at all until they saw her green light just under the steamer's bow. The only effect of the shortening of the screens, if it did have any effect, would have been to show both lights when only one should be visible, as the proof is that both lights were shining brightly. How then could the want of proper screens have possibly misled the steamer when, as I think, the proof shows they never saw either? The dim red light which they speak of having seen could not, I think, have been on the yacht at all, and it seems very probable that it was the port light of the Gerkin.

I must therefore find the steamer to have been in fault and alone responsible for the consequences of the collision. The first of these consequences was the injury to the yacht which was repaired at an expense of $79.61. The really important claims, however, for which these libels are filed grow out of other consequences which resulted from the collision, viz., (1) the death of young Newton Keene who, being precipitated overboard by the careening of the yacht under the force of the blow, was in the darkness of the night most unfortunately lost overboard and drowned; (2) the claim of Mr. Clarence Hollyday, who alleges that by reason of the nervous strain consequent upon his yacht being run down in the dark and the sad death of his young companion, who was his guest on board, he has been unnerved and unfitted for business and greatly disturbed in his health, sleep, and power to apply himself to any settled employment. Both these claims give rise to questions of importance.

With regard to Mr. Hollyday's claim; it appears by the testimony that he was not scratched or hurt by the collision, and the only result to his body that he was sensible of was that for some days afterwards he felt sore and stiff in his limbs, but he has been going about as usual ever since. A witness, however, with whom he is connected in business, testified that since the collision (a period of about seven weeks) he had not given as efficient attention to his duties as previously, but no data were given and probably none could be given in such a case upon which to base any estimate of pecuniary loss. From the authorities I have consulted I think that in such cases as this the proper rule is to give no damages for fright or mental suffering resulting from mere risk or peril where no actual injury has been sustained. Such cases are damnum absque injuria. The case of Chamberlin v. Chandler [Case No. 2,575], referred to by counsel as indicating the proper measure of damages, was referable to a very different ground. It was a case of a female passenger who experienced great mental suffering by reason of the wantonly harsh and indecent conduct of the master of the vessel, his acts indeed amounting to an assault, but in that case the accepting of the passage money raised an implied contract that the passenger while on board should be protected from such treatment. In no case similar to the one under consideration have I been able to find that damages have been allowed for the results of mental or nervous disturbance, where there has been no bodily harm sustained, and it seems to me that to hold otherwise would be to let in a class of claims, incalculable in numbers, which neither court nor jury could possibly estimate in money. I am therefore of opinion that nothing is to be awarded to Mr. Hollyday beyond proper compensation for the damage to his yacht.

We now come to the matter of the claim of Mrs. Annie E. Keene arising out of the death of her son. The question of the jurisdiction of the admiralty in the United States to entertain an action in rem for such a claim was ably argued by counsel and was discussed with great learning and research. I listened with great pleasure and instruction to the discussion, but I do not think that in this court the question can now be considered an open one. Upon appeal from this court, Chief Justice Chase sitting in the circuit court, decided the precise question in the case of The Sea Gull [Case No. 12,578], and held that damages could be recovered by a libel in rem in admiralty for the wrongful death of a person, independent of statutory remedy. This was conceded to be contrary to the common law and to the admiralty decisions in England. The question has never been passed upon by the supreme court, and their determination of it we cannot anticipate. Meanwhile the decision in the case of The Sea Gull [supra] has been followed in subsequent cases in this court and by the district judge of New York in the case of The City of Brussels [Case No. 2,745], and by Circuit Judge McKennan, affirming a decree of District Judge Cadwallader in the case of The Towanda [Id. 14,109]; and more recently by District Judge

Swing in the Southern district of Ohio in The Charles Morgan [Id. 2,618]. I therefore sustain the jurisdiction of the court to entertain the libel.

The next point then to be determined is what is the measure of damages to be applied to this claim. The proof shows that young Keene was eighteen and a half years old, and therefore lacked but two and a half years of his majority. It appears that at the time of his death he was employed as a clerk and salesman in the city of Baltimore, and was receiving eight dollars a week salary. It was proven that from the manner of his living, his social position and the society he frequented, the actual cost of his maintenance, in dress, board and lodging and necessary incidental expenditures, could not have been less than $500 a year. It would therefore appear from the proof that at the time of his death he was earning less by about $100 a year than it was costing to maintain him. His brother-in-law did testify that at the time of his death arrangements were about being perfected to establish him as the agent of the branch in Baltimore of a business about to be started in New York, and that large gains would have accrued to him amounting to perhaps $1,000 or $1,200 a year. But this was shown to be merely a hope and a sanguine expectation that might as likely end in failure as success. In this class of cases, whether brought under Lord Campbell's act in England or under similar acts in this country, it has been settled that only compensation for the pecuniary loss to the survivors is contemplated, and nothing is to be allowed for the sufferings of the deceased or the grief of surviving relatives or a solace for bereavement. In a Maryland case (Coughlan v. Baltimore & O. R. Co., 24 Md. 107) it was decided where a widow sued for the damages resulting from the wrongful death of her infant child, that the law entitles the mother to the services of her child during minority only, that beyond this chances of survivorship, his ability or willingness to support her, and her mental sufferings resulting from the death of her child, are matters too vague to enter into an estimate of damages intended to be merely compensatory. It is true that both in England and in some of our states it has been decided that damages are given not only with reference to a legal claim, but may also be calculated in reference to a reasonable expectation of pecuniary benefit extending during life. Dalton v. Southeastern Ry. Co., 4 C. B. (N. S.), 296; Franklin v. Southeastern Ry. Co., 3 Hurl. & N. 211. But in these cases there was proof to show that the person whose death was complained of had been in the habit of contributing money or services for the benefit of the plaintiff, and the jury were required to find that although the plaintiff had no legal claim on the deceased there was a reasonable expectation that the deceased would have continued to be able and willing in the future to contribute an equal amount of money or service. There was something therefore upon which to base an estimate of damage, and the jury was instructed not to make a mere guess but to be satisfied that there had been an actual loss of pecuniary benefit which might have been reasonably expected to continue if the deceased had lived. There is undoubtedly difficulty in reconciling these restrictions of the amount of damage to be allowed with the reasoning of the supreme court in the case of Railroad Co. v. Barron, 5 Wall. [72 U. S.] 90. In that case a passenger had been killed in a railroad accident, and the court would seem to hold that the whole matter of the damage to his next of kin must be left to the sound sense and deliberate judgment of the jury: a decision contrary to the usual tendency of courts to restrain the excesses into which juries are apt to run in such cases. It is to be noticed however that the case is based upon a statute of Illinois providing that the action shall be brought in the name of the personal representatives of the deceased, and the jury are directed to give what they shall deem a fair and just compensation for the pecuniary injury resulting from the death to the wife and next of kin of the deceased person, not exceeding $5,000. The circuit judge in his charge tells the jury that the policy of this law was evidently to make common carriers more circumspect in regard to lives entrusted to their care, and it is in that spirit that the statute was interpreted. But even in that case the jury were told that they were not to consider the pain suffered by the deceased or the grief of the surviving relatives, and that no damages were to be given by way of punishment. That they should consider the character, age, business habits, and means of the deceased, and whether such a man was likely to experience an increase or decrease of fortune if he continued to live, and that they might consider the contingency of his marrying and his property going in another channel. So in this case I must consider all similar facts and contingencies with regard to young Keene, so far as there is proof upon which to base such consideration; and having done so and taking note of the expense of recovering and interring his body, but allowing nothing by way of punishment and nothing for the bereavement of his relatives, I do not find this to be a case of any considerable pecuniary damage. I shall award to the libellant Mary E. Keene the sum of seven hundred dollars.

[NOTE. It was generally held in the United States prior to 1886 that a libel might be maintained in the admiralty for a maritime tort causing death. Cutting v. Seabury, Case No. 3,521; The Charles Morgan, Id. 2,618; The Sea Gull, Id. 12,578; Holmes v. O. & C. Ry. Co., 5 Fed. 75; The Towanda, Case No. 14,109; The City of Brussels, Id. 2,745; The Columbia, 27 Fed. 704, and Armstrong v. Beadle, Case No. 541. Contra, The Sylvan Glen, 9 Fed. 335. In this last case it was decided that damages are not recoverable in rem in admiralty for the wrongful death of a person unless by special statute.

The doctrine has been since set at rest by the decision of the supreme court in The Harrisburg, 119 U. S. 209, 7 Sup. Ct. 144, in which Mr. Chief Justice Waite delivered the opinion of the court. He reviews the American cases upon the point, a majority of which cases follow the rule laid down by Mr. Chief Justice Chase in The Sea Gull. See note to Case No. 541.]

HOLMAN (AMERICAN BIBLE SOC. v.). See Case No. 291.

Case No. 6,626.

HOLMEAD v. CHESAPEAKE & O. CANAL CO.

[1 Hayw. & H. 77.] [1]

Circuit Court, District of Columbia. April 29, 1842.

EVIDENCE—ADMISSIBILITY OF—TAXES.

1. Conversations as to the ownership of property between the father of the plaintiff and a third person may be given by that person, and is proper evidence to go to the jury.

2. The testimony of the assessor of taxes as to whom property is assessed on the books may be given to prove the payment of the taxes by the party in whose name the property appears on the said books, even if the assessment was copied from the book of a former assessment.

[Action at law by William Holmead against the Chesapeake & Ohio Canal Company, for damages.]

This is a suit for damages brought by the plaintiff against said company for constructing and building a dam upon Rock creek causing the land of the plaintiff to be inundated. The declaration averred that the defendant did not, as the act of congress of March 3, 1825 [4 Stat. 115], authorized it to do, apply to a justice of the peace for a warrant, nor did any justice of the peace issue any warrant, nor was any jury summoned to meet on the said land as is by the said act provided, nor was any inquisition had at any time, to ascertain the damages sustained by the said plaintiff by reason of the erection of the said dam, and the plaintiff avers that by reason of the erection of the said dam, his said land and the inheritance therein was and is greatly diminished and injured in value, and he hath repeatedly asked and demanded of the defendant compensation therefor. Yet the said defendant has wholly neglected and refused to make him any compensation therefor. The defendant pleaded the general issue. The plaintiff gave evidence that previous to the death of the plaintiff's father, one Douglass had the locus in quo enclosed, and possessed the same as tenant to the plaintiff's father from 1822 to 1829, when he left the said premises. One Vincent King testified for the plaintiff that the stone house situated near the low grounds alleged to be inundated by backwater from a dam erected by the defendant, was occupied by free negroes previous to 1817; that on one occasion the witness saw the plaintiff's father go to and return from the stone house aforesaid, and when he returned to the public road where the witness was, he told the witness, being then standing in the road, that he had gone to said stone house for the purpose of demanding his rent. No other person was present when this statement was made.

The defendant, by his counsel, objected to said testimony of the declarations of the plaintiff's father as evidence in this cause, but the court overruled said objection and admitted the same to go in evidence as explanatory of the purpose for which he went upon the land. The plaintiff gave evidence that since the death of his father, and before this suit, he went fishing on the premises in dispute, and walked over the same. That a cousin of the plaintiff testified that he well knew the land in question; that it has for more than thirty years, to the knowledge of the witness, been claimed by the father of the plaintiff and by the plaintiff; that the plaintiff is only son and heir of his father, John Holmead; that he knew that the land was rented by Douglass of John Holmead in his lifetime, and Douglass paid him rent; that since the death of John Holmead, which was in the year 1831, he has repeatedly been on the land with the plaintiff, and knew he always spoke of it and claimed it as his own; that after Douglass left the land it was occupied by a man named Troyford; that the ground was enclosed both during the lifetime of John Holmead and after his death, and that it was enclosed when witness was on the land with plaintiff; that he never heard plaintiff when on the land claim it, until about six or seven months before the sale to Cunningham, and then the plaintiff was on the land with witness, and told witness that he was about to sell all his land lying on that side of the creek; that he never knew any other person to claim the said land. The said witness, on cross-examination, testified that plaintiff did not at the time of making such statement point out the extent of his claim, and did not point out the locus in quo as part of his land, and was not then standing on the low ground covered by the water. The defendant objected to the admissibility of the above evidence so offered to the jury.

The plaintiff proved by one Pairo, that about thirty years ago, he, Pairo, married the aunt of the plaintiff, and knew the land, and heard plaintiff's father claim it from that time until his death as his, but never knew the plaintiff's father to claim it while on the land, except once or twice when there was an enclosure of about four acres; but who put it up or who worked it witness did not know; at that time plaintiff's father, while standing in said enclosure, said he owned about five or six acres there, and

[1] [Reported by John A. Hayward, Esq., and George C. Hazelton, Esq.]

both witness and plaintiff's father went away together, leaving no person in the house or in the enclosure, and he never heard of any adverse title to the said property. The plaintiff also proved by one Beall, that from 1833 to the bringing of this suit, the plaintiff paid taxes upon the property in dispute. To the admittance of the said evidence the defendant objected. The court overruled the objections.

In the cross-examination of said Beall, the defendant, by its counsel, asked him how he knew that plaintiff had paid the taxes for the property in dispute, and he said he knew it was for said property because he was one of the assessors and had assessed the same; that said assessment was entered in the books of the corporation of Georgetown, and was copied from the description of a former assessment to plaintiff's father, but witness did not survey the land, and does not know that the description given of it in said assessment would include the land in dispute, although he was one of the assessors and went upon the land to view it, and assessed the whole land which Douglass possessed, as well as more land than he possessed, all of which was assessed to plaintiff. The defendant, by its counsel, moved to exclude the evidence of the payment of taxes upon the ground that the best evidence is not produced to show that the taxes were assessed for the property in dispute, and that the witness' knowledge is based upon the written assessment and the description therein given, but the court refused to exclude the said evidence. The jury found for the plaintiff, and assessed his damages at $570, with interest from April 28, 1842.

The defendant, by its counsel, moved the court for a new trial: Because the verdict of the jury was against the law and the evidence of the case. Because the damages found were excessive. Because the court erred in the law of the case in refusing the instructions asked by the defendant, and in admitting illegal testimony.

James Hoban, for plaintiff.

Brent & Brent, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the motion for a new trial.

Case No. 6,627.

HOLMEAD v. CORCORAN.

[2 Cranch, C. C. 119.] [1]

Circuit Court, District of Columbia. June Term, 1816.

TRESPASS—QUARE CLAUSUM FREGIT—DAMAGES.

1. In trespass, when the defence is on warrant, the plaintiff is not permitted to give evidence of trespasses committed at a place not located on the plats: nor outside of the plaintiff's lines as located by him on the plats, although, by his title he had a right to locate them so as to include the place where, &c. The plaintiff is bound by his location, and cannot claim land not included therein. The plaintiff cannot recover unless he was in possession of the land at the time of the alleged trespass.

2. The court will not receive evidence of the declaration of jurors, that they assessed the damages by taking the average of the sums put down by each juror respectively.

Trespass, quare clausum fregit. Defence on warrant.

THE COURT (THRUSTON, Circuit Judge, absent, and MORSELL, Circuit Judge, sitting pro formâ, by consent of the parties, he having been of counsel in the cause) decided that the plaintiff should not give evidence of trespasses at a place not located on the plats, nor outside of the lines of "Pleasant Plains" as located by the plaintiff on the plats; although the plaintiff, by his title, had a right to locate "Pleasant Plains," so as to include the place where, &c., being of opinion that the plaintiff, in this suit, is bound by his location, and cannot claim, as part of "Pleasant Plains," land not located by him on the plat, as such, and that the plaintiff could not recover, unless he was in possession at the time of the alleged trespass.

Verdict for plaintiff. Damages, 170 dollars.

Mr. Wiley, for defendant, moved for a new trial on the ground of misbehavior of the jurors in taking the average of damages put down by each juror, and making that the amount of damages found for the plaintiff. The motion was grounded upon the affidavit of a person who heard one of the jurors state the fact.

Mr. Jones and Mr. Key, contrà. No evidence of what a juror said after giving the verdict ought to be received by the court. No juror should be permitted to criminate himself or his fellows. The evidence must come from some other source. Vaise v. Delaval, 1 Term R. 11; Barnes, 438, 441. If, after ascertaining the average, the jury agreed to find it as the plaintiff's damages, it was no misbehavior.

THE COURT (MORSELL, Circuit Judge, not sitting) was of opinion that such evidence ought not to be received, and overruled the motion for a new trial. See Peake (Am. Ed.) 187, and Seld. Prac.

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

HOLMEAD (ENNIS v.). See Case No. 4,492.

HOLMEAD (FOREMAN v.). See Case No. 4,935.

Case No. 6,628.

HOLMEAD v. FOX.

[1 Cranch, C. C. 138.] [1]

Circuit Court, District of Columbia. July Term, 1803.

EVIDENCE—BY-LAWS OF GEORGETOWN—CONSTABLE.

1. The original by-laws of Georgetown need not be made under the seal of the corporation.

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

2. A constable, appointed by this court, and residing in Georgetown, is "a constable of the town of Georgetown and precincts," within the meaning of the by-law concerning hogs.

Trover for hogs. The defendant justifies under a by-law of Georgetown, authorizing any person to take up hogs going at large, &c.

Mr. Woodward, for plaintiff, objected to the copy of the by-law offered in evidence, because the original by-law did not appear to have been made under the seal of the corporation, although the copy produced was attested by the clerk of the corporation, as a true copy under the seal of the corporation, and also by the mayor, who has also annexed the corporate seal to his certificate.

THE COURT overruled the objection; and a bill of exceptions was taken by the plaintiff.

Mr. Woodward, then objected, that the defendant was not "a constable of the town of Georgetown and precincts," within the meaning of the by-law, having been appointed as a county constable by this court.

But THE COURT overruled this objection, also.

Verdict for the defendant.

Case No. 6,629.

HOLMEAD v. MADDOX.

[2 Cranch, C. C. 161.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

COVENANT—DEFENCE—CONTRA BONOS MORES.

The owner of a race-field, who knowingly lets it for the purpose of public races, and for booths and stands for the accommodation of licentious and disorderly persons for the purposes of unlawful gambling and of gross immorality and debauchery, to the corruption of morals and manners, cannot recover the rent in an action of covenant.

[This was an action at law by John Holmead against John Maddox.]

Covenant for non-payment of $400, being the balance due for a year's rent of a race-field, upon an agreement under seal, dated January 17, 1817, at $700 a year, for five years. In the agreement it is called "The Washington City Race-field," and included "stables and sheds for the purpose of training race-horses in, for the spring and fall races, and also for match races."

Mr. Jones, for defendant, prayed the court to instruct the jury, that if they "should find, from the evidence, that before the execution of the lease, the said race-course, when used as such, was a notorious resort for large assemblages of licentious and disorderly persons for the purposes of unlawful gambling and of gross immorality and debauchery;" and that the plaintiff, at the time of making the said lease, knew that such practices were the ordinary concomitants of a race-course, when used as such, and especially of the race-course in question, and had reasonable ground to believe that the defendant intended to rent out booths and stands thereupon, to which such licentious, disorderly, and gambling persons would naturally resort, and for their accommodation; and that the said race-course, long before the said demise, and ever since, when used as a race-course, has been an offence and scandal to all moral and sober persons, and notoriously tended to the corruption of morals and manners, and that the plaintiff had reasonable ground to conclude that it would be so continued, and that, in fact, it has so continued under the said lease, then he is not entitled to recover in this action.

Mr. Key, contra, contended that racing, in itself, is not unlawful, and that the defendant might have prevented all the evils attending it, and prevented it from becoming a nuisance. It was his own fault, not the plaintiff's.

But THE COURT (THRUSTON, Circuit Judge, absent) gave the instruction prayed by Mr. Jones.

Verdict for defendant.

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

Case No. 6,630.

HOLMEAD v. SMITH et al.

[5 Cranch, C. C. 343.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

FORCIBLE ENTRY—CERTIORARI—JUSTICE OF PEACE—INQUISITION.

1. The circuit court of the District of Columbia has jurisdiction to issue a certiorari to a justice of the peace in a case of forcible entry and detainer; and in vacation the writ may be ordered by one of the judges. Bond and security must be given to answer for costs.

2. An inquisition, describing the property as "one tenement or storehouse with the appurtenances, in the county aforesaid," is too vague and uncertain, and will be quashed.

Certiorari to a justice of the peace to send up the record in a case of forcible entry and detainer. The petition of Anthony Holmead for the certiorari, on the 17th of November, 1837, addressed to the court in vacation, was presented to the chief judge. It stated that Clement T. Coote, a justice of the peace for the county of Washington, had, at the instance of Ann W. Smith and others, her confederates, issued his warrant, a copy of which was annexed, upon which a jury of twenty-four had found a pretended inquisition, a copy of which was also annexed; and that the justice was about to issue an order or warrant of restitution; and that the marshal had notified that he would turn out of the property whoever should be found therein; that one John B. Holmead, in behalf of one William Dougherty, had rented the premises by agreement with Ann W. Smith's agent,

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

one Richard C. Briscoe, the said John B. Holmead, being at that time lawfully in possession thereof, under an agreement with Briscoe, for one month. That Dougherty, by the said John B. Holmead, his agent, took possession under the agreement with Briscoe, and moved his goods into the same, and has been peaceably selling his goods therein by his said agent, until the proceedings instituted against him in the present case. That the justice has no jurisdiction in the case. That the petitioner, Anthony Holmead, has no concern whatever, or interest in, or possession of, the premises. That he has had no notice of the taking of the inquisition, and no opportunity to traverse the same. That their motive for making him a defendant, instead of John B. Holmead, was to get rid of his testimony respecting the agreement between John B. Holmead, in behalf of William Dougherty, and R. C. Briscoe, the agent of Mrs. Smith. To this petition was appended an affidavit by the petitioner of the truth of the facts stated in the petition. At the foot of the petition was the following order: "Upon filing this petition, and the bond of the petitioner to the United States, in the penalty of $200, with security to be approved by a judge of this court, conditioned to pay all such costs as may be awarded by the court against the said petitioner, in case he should fail to prosecute the writ of certiorari with effect, let the writ of certiorari issue as prayed. W. Cranch, C. J.," &c. "17th November, 1837." The writ was issued to the justice commanding him "to send, under his seal, the record of the proceedings aforesaid, with all things touching the same," "in as full and ample manner as it now remains before you, together with this writ." The record stated, in substance, that complaint had been made to the justice that Anthony Holmead, on the 10th of November, 1837, had forcibly entered into "the storehouse on lot numbered three,in square No. 432, in Washington City, in the District of Columbia, late in the occupancy of Benjamin S. Baily," of which Ann W. Smith, late of said county, was then seized in her demesne as of fee, against the form of the statute in such case made and provided. Whereupon the justice issued his warrant to the marshal, reciting the complaint aforesaid, and commanding him to summon and cause to come before him (the justice) at the premises, the said storehouse, immediately, twenty-four sufficient, lawful, and indifferent persons, dwelling near about the said tenement, so forcibly entered into and detained as aforesaid, to inquire," &c. The inquisition, signed by thirteen of the jurors, stated, "that Ann W. Smith, of the said county, on the 10th of November, 1837, was seized in her demesne as of fee of and in one tenement or storehouse, with the appurtenances in the county aforesaid; and that whilst the said Ann W. Smith was seized thereof, on the same 10th day of November, one Anthony Holmead, of said county, with force and arms, to wit, with a strong hand, did make a forcible entry into the said tenement, or storehouse and premises, then being in the seizin and possession of the said Ann W. Smith, and did, then and there, with force and arms, and with strong hand, unlawfully disseize the said Ann W. Smith thereof, and then and there, with force and arms, and a strong hand, did unlawfully expel and eject," &c., "against the statute," &c. The inquisition had no reference to the description of the property in the warrant.

Upon the return of the certiorari, R. J. Brent, for the petitioner, moved the court to quash the inquisition, because it does not describe the property with sufficient certainty; the only description is, "one tenement or storehouse, with the appurtenances, in the county aforesaid." 4 Com. Dig. tit. "Forcible Entry," D 4, note a; 2 Rolle, Abr. 86, "Indictment," M, pl. 4–7; Russ. 493; Gill's Case, 1 Rolle, 334. "Gill was presented for forcible entry into a messuage or tenement; and this was quashed, because messuage or tenement is not good; and Coke said he had quashed divers such presentments, in his time, for this exception." Ellis' Case, Cro. Jac. 634, Palmer, 277; King v. Sutton, 2 Keb. 671.

Mr. Hoban, contra, contended that this court could only issue a certiorari in a case where the justice had usurped an original jurisdiction belonging to this court; as in the case of Kennedy v. Gorman [Case No. 7,702], in this court at November term, 1833.

CRANCH, Chief Judge, said that this court had entertained jurisdiction, by certiorari, in forcible entry and detainer in several cases, and referred to the case of U. S. v. Donahoo [Case No. 14,982], in this court, at December term, 1807; and the case of the Lord Proprietary v. Brown, 1 Har. & McH. 428.

THE COURT (THRUSTON, Circuit Judge, absent) quashed the inquisition for uncertainty in the description of the property. "Tenement or storehouse" is too vague.

Case No. 6,631.

Ex parte HOLMES et al.

In re HOLMES et al.

[14 N. B. R. 493.] [1]

District Court, D. Massachusetts. June 26, 1876.

BANKRUPTCY—ATTACHMENT—COSTS.

The costs of an attachment which has been dissolved by bankruptcy may be paid out of the fund, unless the attachment did not and could not operate to preserve the property for the general creditors.

[1] [Reprinted by permission.]

[In bankruptcy. In the matter of Edward O. Holmes and John W. Blanchard, copartners.]

E. Merwin, for assignee.
G. M. Hobbs, for attaching creditors.

LOWELL, District Judge. The single question in this case is, whether the expenses of an attachment which one creditor had made of the goods of the debtors are to be paid by the assignee. I decided in Re Fortune [Case No. 4,955] that I had authority under the bankrupt act [of 1867 (14 Stat. 517)] to allow such a charge. That decision was made about seven years ago, and no one has ever taken the question to a higher court. It avoided the great injustice of dissolving an attachment and leaving its necessary expenses to be a charge upon the unfortunate creditor, who had exercised no more than his strict legal right; and I infer, from the acquiescence of the profession, that they do not consider the law to have been strained in the attempt to arrive at justice.

Since Fortune's Case it has grown to be the practice to allow these costs, unless it can be affirmatively proved that the attachments did not and could not operate to preserve the property for the general creditors. It is not a question of good or bad feeling in the creditor, or of intent on his part, so long as it is a real attachment not procured by the debtor for preference or concealment.

In this case there is evidence that the attaching creditor stood out against a compromise proposed out of court, which was satisfactory to a large majority of the creditors, and, by his attachment, forced a recourse to bankruptcy; that he opposed, both here and in the circuit court, a composition duly offered and accepted, under which the assignee now makes his settlement. If we infer motives in the usual way from acts, we may say that the creditor intended to bring about bankruptcy rather than compromise. But he did nothing beyond his right, and it is impossible for a court of bankruptcy to admit that bankruptcy is not a lawful mode of settlement for insolvent debtors.

By consent of the parties I have consulted with Judge Shepley, who informs me that, although the precise question has not been presented to the circuit court, yet he has had one case in another district in which he allowed certain expenses, incurred by petitioning creditors, by a course of reasoning which coincides entirely with that adopted in Fortune's Case, and that the practice is to allow similar expenses in the cases in this circuit. Of course it is understood that this is not a judicial opinion of the circuit judge, and he would not have been consulted excepting by the consent of both parties.

The circumstances of Fortune's Case may have led me to dwell more than is necessary upon the purpose for which the attachment was made. The practice has not turned upon motive, but upon probable or possible results.

The costs of the attaching creditor are to be paid by the assignee.

[In Case No. 13,183, a petition of review, filed by a creditor opposed to the composition agreed upon, was denied.]

Case No. 6,632.

In re HOLMES et al.

[8 Ben. 74;[1] 12 N. B. R. 86.]

District Court, S. D. New York. April, 1875.

PRACTICE IN COMPOSITION PROCEEDINGS—PRESIDING OFFICER—EXAMINATION OF DEBTOR—PLEADING.

1. Bankruptcy proceedings were initiated by H, one of firm of H. & L., against his partner. Before adjudication, both partners united in an application, under which proceedings in composition were pending. A meeting of creditors, having been called, was held at the office of the clerk and was presided over by the deputy clerk. One of the alleged bankrupts was under examination at the time of the promulgation of general order No. 36, requiring such meetings to be held before a register: *Held*, that that general order was prospective in its operation, and, in future proceedings, the meeting of creditors would be presided over by a register; but that, in the present proceeding, the deputy clerk should continue to preside.

[Cited in Re Mathers, Case No. 9,274; Re Proby, Id. 11,439; Re Bryce, Id. 2,069; Re Cheney, Id. 2,637.]

2. In composition proceedings a vote should not be taken, as long as creditors are prosecuting such inquiries of the debtors as will aid in determining whether the composition proposed should be accepted.

3. In such inquiries the books of the debtors must be produced, if desired, and a reasonable time allowed for their examination.

4. The presiding officer at such meeting has power to regulate the form and order of proceeding and to decide questions that arise, subject to review by the court.

5. The proceedings must be recorded in writing.

6. The examination of the debtor should be conducted like that of a witness in court.

7. The petition for a composition must set forth the nature and terms of the proposed composition and the belief that it will be accepted by two-thirds in number and one-half in value of the creditors.

[In bankruptcy. In the matter of Samuel Holmes and Lazarus Lissberger.]

F. N. Bangs, for creditor.
W. G. Choate, for debtors.

BLATCHFORD, District Judge. In this matter the alleged bankrupts were co-partners. One of them filed a petition in bankruptcy in this court on behalf of himself and against his co-partner, for the adjudication of both of them as bankrupts in respect of their co-partnership debts, and of the individual debts of each of them. There has been no adjudication of bankruptcy, but both of the co-partners have united in an ap-

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

plication, under which proceedings for a composition are pending under the seventeenth section of the act of June 22, 1874 [18 Stat. 182]. A first meeting of creditors having been called by the court to take place at the office of the clerk of the court, and the creditors having assembled, the deputy clerk held and presided at the meeting. Its proceedings being in progress and one of the alleged bankrupts being present at the meeting and being under examination by a creditor, the creditor raised the point before the deputy clerk, that, under general order No. 36, a register should hold and preside at the meeting. The point is certified to the court for decision.

The 17th section of the act of 1874 provides that the creditors may, at a meeting called under the direction of the court, resolve to accept a composition. The section provides for notice to each known creditor of the time, place and purpose of the meeting, but it contains no provision as to who shall preside at the meeting, and no provision requiring a register to preside at the meeting. It cannot be doubted that the meeting might lawfully be held in the presence of the judge and be presided over by him. It has been the practice in this district, where there has been an adjudication, to direct that the meetings of creditors in respect to composition be held at the office of the register to whom the case has been referred, and he has held and presided thereat. But in cases where there has been no adjudication, it has been the practice, in this district, to direct that such meetings be held at the office of the clerk of the court, and either the clerk or the deputy clerk has held and presided thereat. A reference of a case in bankruptcy to a register does not take place, under general order No. 4, until a voluntary petition is filed, on which there is a right to an immediate adjudication, or until, on an involuntary petition, there is an adjudication. The proceedings which are, by general order No. 4, required to be had before a register, are proceedings which are to take place after an adjudication in involuntary bankruptcy, or after the filing of a voluntary petition whereon an adjudication can be immediately had. Therefore, in the present case, where the adjudication was contested by the co-partner who did not join in the petition, no case for a reference to a register had arisen, and it was competent to the court to direct the meeting of creditors to be held and presided over by an officer other than a register. It seemed meet that the clerk of the court should be designated. The deputy clerk, a recognized statutory officer, duly appointed, acted in place of and in the absence of the clerk, with the assent of the meeting, down to the time this objection was made. The question arises whether, under general order No. 36, it is now incompetent to continue the meeting except with a register as its presiding officer. The general order is entirely prospective in its operation, and purports to refer only to proceedings for composition initiated after its adoption. These proceedings were initiated before, and the meeting was in progress, with the deputy clerk presiding, when the general order was promulgated. The meeting, though adjourning from time to time, is a unit. The general order provides that "the register acting in the case, or, if no register has been assigned, a register to be designated by the court, shall, at the time and place specified in the notice for holding such meeting, hold and preside at the same." No register could now, at the time and place specified in the notice for holding this meeting, hold and preside at it, for such time has passed. If the general order is to apply at all to this meeting, the meeting must be dissolved, and the proceedings which have taken place must go for naught, and a new meeting must be called. No such result could have been intended or contemplated by the general order. In the absence of any general rules as to compositions, the courts have administered the provisions in such manner as seemed most proper, and in consonance with the existing statutes and general orders. In future cases, the provisions of general order No. 36 will be observed, but the present case will proceed as it has thus far gone on.

The question is also certified to the court as to what is comprehended under the language of the 17th section of the act of 1874, to the effect, that the debtor is, at the first meeting, to "answer any inquiries made of him;" as to the extent to which creditors have a right to carry the examination of the debtor, at such first meeting; and as to whether, if an examination of the debtor is desired by any creditor, or is in progress, and other creditors desire to have a vote taken on a resolution for composition, and objection be made by any creditor to taking such vote before the examination of the debtor is completed, the presiding officer of the meeting ought to postpone the taking of such vote until after such examination is completed.

The statement which is required by the statute to be produced to the meeting by or on behalf of the debtor, and which statement is to show the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due, is a statement upon which the creditors are to act in determining, each for himself, whether he will vote in favor of a resolution accepting the proposed composition, and whether he will confirm it by his signature. The object in view in requiring the debtor to be present in person at the meeting and to answer orally any inquiries made of him, is to enable any creditor who may be dissatisfied with the contents of such statement, or may regard it as inaccurate, in omitting things which it ought to contain, or

in containing erroneous statements, to inquire of the debtor as to the particulars respecting which information is thought to be desirable. The composition proposed can be judged of only in reference to the condition of the debtor's affairs, in respect of debts and assets. The statement is supposed to contain a true exhibit of such affairs. The question whether the proposed composition ought to be accepted by any creditor, can be determined by him only after he has before him a true exhibit of the debtor's affairs. The percentage offered in settlement can be determined to be the proper percentage only by comparing a true statement of the debts with a true statement of the assets. The examination of the debtor, if desired or entered upon by any creditor, is for the purpose of arriving at a true exhibit of the debtor's affairs. The inquiries to be made must, of course, be only such as will properly be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted. Such inquiries are important, too, not merely with reference to the vote and action of the creditor who makes them, but with reference to the vote and action of other creditors. Therefore, such inquiries ought to be made and completed before any vote is taken, if any creditor desires the vote to be postponed until after the inquiries are completed. Creditors may go to the meeting with preconceived ideas in favor of a particular composition, and the creditor who desires to make inquiries may be satisfied that, on learning the true state of the debtor's affairs, such creditors will change their views. As he will be bound by the composition, if it shall be accepted and confirmed, and his name and address and the amount of his debt are shown in the statement of the debtor, he has a right to require that all creditors, in voting and in confirming, shall do so with knowledge of, or with the opportunity to know, the true condition of the debtor's affairs. Moreover, if the debtor has kept books in his business, such books, on the demand of any inquiring creditor, must be produced, and the debtor must answer all inquiries in reference to any entry in such books which bears upon the question of the exact condition of the debtor's affairs. These views appear to be those held by Judge Lowell, of the Massachusetts district, for he says, in Re Haskell [Case No. 6,192]: "The law requires the debtor to be present and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority, or by a single creditor, and including a due inspection and explanation of the books." The manifest intent of the statute is, not that the question of the propriety of the composition shall be left to be passed upon only by the court on such information as shall be obtained by the time the court is called upon to act, but that the creditors shall, in the first instance, pass upon its propriety, in view of the debtor's sworn written statement, and of an oral examination of him. The course of the examination must be regulated by the sound discretion of the presiding officer, in accordance with these views. If creditors who are prepared to vote on the resolution desire to do so without being detained while the examination of the debtor is proceeding, the matter can easily be arranged, by the announcement that the vote will not be taken before a specified time, and the creditors who do not desire to remain can depart and return at the designated time, or can give proper authority to others to vote for them. If when the books of the debtor are produced, it seems necessary that time should be given to have them examined by an expert, the presiding officer must regulate the matter of adjournment in his sound discretion. Where the books have been previously examined by a committee of creditors, that circumstance is entitled to consideration on the question of granting time for further examination of the books. Under the language of the general order, which requires the register to "hold and preside at" the meeting and to "report to the court the proceedings thereof, with his opinion thereon," he must be held to possess the power to regulate the form and order of proceeding at the meeting and to decide questions that arise, subject to review by the court. He must necessarily decide who are entitled to vote, and in respect to what amount of debts, and to pass upon the regularity and propriety, in form, of proofs of debt and of letters of attorney. Whether he has the right to reject a vote because the claim is disputed on its merits, is a question which must be passed upon by the court hereafter. The answers of the debtor to the inquiries made of him ought to be recorded in writing, in the form of an examination, and the debtor ought to be sworn to the truth of the document, and it ought to be signed by him, after being read over to him. The presiding officer is required by the general order to report to the court "the proceedings" of the meeting. This implies that the proceedings must be recorded in writing, as they take place, in order to be in a shape to be reported. The examination of the debtor ought to be conducted as the examination of a witness is conducted in court, and he should answer the inquiries made of him by an examining creditor, and do no more until the examining creditor has closed, after which he may, of his own volition, or in answer to inquiries by his own counsel, make such explanations as are relevant.

Some of the foregoing observations are not exactly apposite to the questions certified, but they have been made in view of suggestions and inquiries addressed to the

court by counsel on the oral hearing on the questions certified. And still further, in view of establishing the practice in proceedings for composition, it is proper for me to say, that the petition for a composition ought, in order to be in compliance with general order No. 36, to set forth not merely the fact that a composition has been proposed by the debtor or bankrupt, but, also, the nature and terms of the proposed composition, and the belief that such proposed composition will be accepted by two-thirds in number and one-half in value of all the creditors of the debtor or bankrupt, in satisfaction of the debts due from such debtor or bankrupt. The practice heretofore established in this district, of having a second meeting of creditors called by notice for the purpose of inquiring whether the resolution for composition has been passed and confirmed in the manner required by the statute, will continue to be observed, and such second meeting will be held and presided over by the register designated to hold the first meeting. The forms heretofore used for the three orders and the two reports will continue to be used, with the necessary change in the first order, to recite the contents of the petition, in the particular before mentioned.

[NOTE. A petition of review was filed in the circuit court. See Case No. 6,632a. Certain exceptions to the report of the commissioner were overruled in 2 Fed. 153, and, upon petition of review, the decision was affirmed in the circuit court. 7 Fed. 584.]

Case No. 6,632a.

In re HOLMES et al.

[15 Blatchf. 170; [1] 18 N. B. R. 230.]

Circuit Court, S. D. New York. Aug. 23, 1878.

BANKRUPTCY—COMPOSITION—PRACTICE—RIGHTS OF DEBTOR.

The amount at which the debt due to a creditor was fixed, in composition proceedings, for the purpose of a vote by the creditor, was *held*, under the circumstances of this case, not to have been so fixed as to estop the debtor from questioning the amount on which the percentage of the composition should be calculated, in paying the composition.

[Cited in Wilmot v. Mudge, 103 U. S. 219.]

[In review of the action of the district court of the United States for the Southern district of New York.]

In bankruptcy.

Francis N. Bangs and Melville H. Regensberger, for bankrupts.

Robert D. Benedict, for creditor.

WAITE, Circuit Justice. This is a petition for review, under the supervisory jurisdiction of this court in bankruptcy, and presents the following case: On the 9th of January, 1875, Lazarus Lissberger, one of the partnership firm of Holmes & Lissberger, composed of himself and Samuel Holmes, filed his petition in the district court of this district, for the adjudication of himself and his partnership as bankrupts. In the schedules of the indebtedness of the firm, attached to the petition, a debt due Henry F. Hamill is set forth, in these words: "Henry F. Hamill, about $100,000, open account for goods, wares and merchandise, sold and delivered by said creditor to the firm of Holmes & Lissberger." Upon the filing of this petition, an order was made by the court upon Holmes to show cause, January 16th, 1875, why the prayer should not be granted. No adjudication in bankruptcy has been made, but, March 27th, 1875, while the petition was still pending undisposed of, Holmes & Lissberger applied to the court to call a meeting of their creditors to consider a proposition of compromise, and annexed to this application a statement containing the names of the creditors of Holmes & Lissberger, together with their several addresses. In this statement appeared the name of Hamill. The meeting asked for was duly called and held, April 8th, 1875, and, in accordance with the practice of the court which then prevailed, the deputy clerk of the court presided. The debtors appeared and made their proposition in due form. They also made a statement of their debts and assets, as required by the act of congress [of 1867 (14 Stat. 517)], and were sworn and examined. In this statement the name of Hamill was given as a creditor, but the amount represented as due does not appear in the case as now presented to this court. The meeting, although commenced April 8th, 1875, was not concluded until August 14th. On the 12th of July, William Sinclair appeared as the representative of Hamill, under an appointment as receiver, with authority to collect the debt, and offered a deposition for proof of claim, amounting to $115,457.62. The debtors objected to the proof, on the ground, among others, that there was no such sum due. July 21st, Sinclair, as receiver, filed with the deputy clerk a communication in writing, whereby he withdrew his request for the record of his vote against the resolution, and asked that it be recorded in favor. He at the same time, withdrew his former deposition for proof, and accompanied his communication with another deposition. In this second deposition, it was stated that the firm was indebted to Hamill in the sum of $112,355.94, the particulars of which were as follows: 1. Eighteen promissory notes of Hamill, payable to the order of Holmes & Lissberger, amounting in the aggregate to $109,929.80, loaned by Hamill to the partners for their accommodation and used by them. 2. Goods sold and delivered at the agreed price of $141,925 51, against which the partners were entitled to credit, 1. For goods, $12,268 61; 2. For promissory

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

notes made by Holmes & Lissberger, payable to the order of Hamill, amounting, in the aggregate, to $127,230 84, which were loaned by the partners to Hamill for his accommodation and used by him. The balance between the debit items in this statement and the credit items was the amount of the debt actually claimed to be due. Upon the presentation of this proof of debt, the creditors who opposed the composition objected to the claim, upon the ground, among others, that the receiver was not a creditor of the partnership to any amount whatever, and that it appeared on the face of the proof itself, that he held security, the value of which had not been ascertained. Certain creditors further objected that Holmes & Lissberger, as sureties for Hamill on the notes which were primarily his own obligations, were, in the administration of their estate in bankruptcy, entitled to offset their liabilities as sureties against the purchase of iron set out in the proof. Holmes & Lissberger themselves objected to the proof, upon the ground, among others, that the amount for which the proof was made exceeded the sum on which Hamill, or his representatives, would be entitled to a dividend, by at least fifteen per cent., on such part of the accommodation notes of Hamill endorsed by them, as had already been proved, or were provable in the proceeding. On the 22d of July, the deputy clerk declared, that the proof of debt as presented was received subject to the exceptions which had been made. He also further declared, that Sinclair would be entitled to vote on account of the merchandise sold, to the amount of $129,656 90; but, as he had only made proof for a claim to indebtedness of $112,355 94, his vote, when taken, would be considered as taken on that sum. Holmes & Lissberger then objected to this ruling on the additional ground that it did not appear, upon the proof, that Hamill or his representatives had a claim against them for the amount of $112,355 94, and also upon the further ground, that they were not indebted to him in any such amount. Certain of the creditors then asked the deputy clerk to certify to the court the deposition for proof of claim by Sinclair, in connection with the evidence of Holmes taken upon that subject in the composition proceedings, and they objected against the admission of Sinclair to vote upon the compromise. They also objected, that, upon the division of the estate of the firm by the assignee in bankruptcy, no sum of money would be distributed to the receiver, upon a proper adjustment of the accounts, and that Holmes & Lissberger, in the distribution of their own estate, and the payment of their own debts, would not be bound to pay anything. They also objected, that Holmes & Lissberger were not bound to pay Sinclair anything on account of goods sold, so long as they or their estate were left unprotected by him on the outstanding notes. It was conceded, as a matter of fact, that the holders of ten of the notes of Hamill, endorsed by Holmes & Lissberger, amounting, in the aggregate, to $53,635 36, had been admitted as creditors, and the holders of nine of those of Holmes & Lissberger, endorsed by Hamill, amounting, in the aggregate, to $54,046 93, had also been admitted. All these several matters were certified as requested by the creditors, and the court thereupon decided that there was no error in any of the rulings of the deputy clerk. This decision having been reported to the meeting of the creditors, in due course of proceeding, the resolution accepting the composition was passed and signed by the requisite number and value of the creditors. Subsequently, upon the presentation of the resolution, and the statement by the debtors of their assets and debts, to the court, they were duly recorded and filed August 31st. Holmes & Lissberger paid all their creditors the amounts due them respectively, according to the terms of the compromise, except Sinclair. He thereupon, on the 2d of February, 1876, presented his petition to the district court, setting forth, that, after the proposition of compromise had been accepted by the creditors at the meeting called for that purpose, and on the 18th of September, 1875, Holmes, one of the firm, filed in the clerk's office of the court a statement of the assets and debts owing by the firm, in which the claim of Hamill against the firm was set down at $69,980; that he himself signed the compromise to accept fifteen per cent. on the amount due Hamill; that the amount was not stated at the time of obtaining his signature, and he was not then aware of the facts and circumstances connected with the amount due Hamill; that the compromise was accepted and recorded; that the time for payment had passed and no payment or offer of payment has been made to him; that it was within the power of Holmes & Lissberger to have given the exact figures and dates of the amount due from them, as the indebtedness arose out of but two transactions, and, in the month of September, 1874, the amount due had been settled, adjusted and agreed upon, in writing, signed by both Hamill and the firm, at $104,000. The prayer of this petition was for a reference to ascertain the amount due, and for the payment of the compromise percentage thereon, and that the firm might be directed forthwith to pay the percentage upon the amount admitted to be due from them in their petition and statement. March 8th, 1876, a reference was ordered, in accordance with the prayer of the petition, to take proof of the amount due, and report thereon. December 18th, the commissioner, to whom the reference was made, reported, finding due Sinclair, as receiver, $118,258 66. To this report Holmes & Lissberger excepted, on various grounds, but in effect, because their indebtedness was only $14,286 42. Upon the hearing of these

exceptions, the court, being of the opinion, "that the amount of the debt due said William Sinclair was fixed, in the proceedings on the composition offered by said bankrupts, at the sum of $112,355 94, in such wise that it cannot now be questioned by said bankrupts," adjudged that amount to be due, without any inquiry into the objections urged against the report, and directed Holmes & Lissberger to pay into court the compromise percentage thereon, amounting to $16,853 39, with interest from October 1st, 1875. The order of the district court is now here for review, and the single question presented is, whether Holmes & Lissberger are barred by the proceedings in composition, from showing, in this suit, that the amount they actually owed Hamill was less than the amount specified by Sinclair in his proof, and recognized by both the creditors and the court as the voting value of the debt for the purposes of their action when considering the propriety of accepting and confirming the composition.

The act of congress regulating proceedings in composition is an addition to, and an extension of, the relief granted by the original bankrupt act. It makes no special provision for proof of debts, although it calls largely for the action of creditors. The first thing to be done is for the debtor to ask the court in which his suit in bankruptcy is pending, to call a meeting of his creditors. Notice of the time, place and purpose of such a meeting must be given to all creditors who are known. The creditors assembled upon such a call may resolve to accept the composition offered by their debtor in satisfaction of his debts, but their resolution, to be operative, must be passed by a majority in number, and three-fourths in value, of the creditors present, either in person or by proxy, and confirmed by the signatures thereto of the debtor, and two-thirds in number, and one-half in value, of all the creditors of the debtor. In calculating the requisite majorities, creditors whose debts amount to sums not exceeding fifty dollars are to be reckoned in the majority in value, but not the majority in number; and the value of the debts of secured creditors, above the amount of the security, to be determined by the court, must, as near as circumstances admit, be calculated in the same way. The debtor, unless prevented by sickness, or other cause satisfactory to the meeting, must be present and answer any inquiries that may properly be made of him. He, or some one in his behalf, must produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom the debts are respectively due. The resolution, if passed and confirmed, must be presented to the court, together with the statement of the debtor as to his assets and debts, and the court, upon notice to all the creditors of the debtor, and upon hearing, must enquire whether the resolution has been passed in the manner directed by the act. If satisfied that it has been so passed, and that it is for the best interest of all concerned, the court must cause the resolution to be recorded and the statement of assets and debts to be filed. The composition then becomes binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in such statement. Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

From this recapitulation of the provisions of the act, it is apparent, that, to some extent, both the creditors and the court must depend upon the debtor for information as to the names of his creditors and the amounts due them respectively. Creditors need not prove their claims in bankruptcy, unless they wish to take some action in the progress of the bankruptcy suit, or share in the distribution of the estate. But, in composition proceedings, the debtor is the moving party. He seeks relief from his debts by the payment to each of his creditors of a part of what he owes them respectively, in satisfaction of the whole. It is optional with a creditor to act or not. If he fails to act, his non-action is equivalent to a positive vote against what the debtor wants, and is to be reckoned as such. But the debtor seeks relief against him as much as against others, and, if the requisite majorities are found to be in favor of accepting and confirming the proposition, he is bound equally with those who have given the affirmative votes, if his name and address and the amount of his debt are included in the statement of the debtor. As soon as the creditors come together under the call of the court, they may require the debtor to present his statement of assets and debts. What both they and the court want to know is: 1. Whether the debtor has offered all he can afford to pay; and, 2. What effect is to be given each vote, in the calculation of the requisite majorities. When the statement is made, each creditor present can tell for himself whether the amount due him is set forth correctly, and, if errors are discovered or suspected, the debtor is there to answer such enquiries as may properly be put to him upon the subject. Should disputes arise between the debtor and particular creditors, or should there be a suspicion of collusion, it would, no doubt, be competent and quite proper for the court to require proof of debts by creditors, in accordance with the provisions of the several bankrupt laws upon that subject. When the evidence of both sides is all in, the representative of the court who presides at the meeting may, if necessary, decide as to its legal effect, but, as the court has supervisory jurisdiction over him, it is always within the power of dissatisfied parties to obtain a review of his rulings. In this way, when disputes of this character arise, the court may be called upon to determine what ought to be

done under the circumstances of the case. Sometimes, it may be necessary to have the amount due definitely settled, either by the agreement of parties or judicial decision, before final action upon the composition is taken; and, at others, it may be sufficient to fix the value of the debt for the purposes of such action as the creditors and the court are required to take in considering the proposition, and leave the parties to their appropriate remedies for ascertaining the amount to be paid if the composition eventually becomes binding. All such matters may properly be left to the judicial discretion of the court. If it seems to be important that the creditors, or the court, should know the exact amount due before taking their final action, an appropriate order to that end may be made, but, if the matter in dispute is not such as materially to affect the result, or it is for the interest of all that the composition should be acted upon before an adjudication of the controversy, as between the parties themselves, can be had, nothing more need be done than to give such directions, for the government of the proceedings, as will protect the parties from harm notwithstanding the existing uncertainty as to the amount that is due.

An assignee in bankruptcy is chosen by the greater part in value and in number of the creditors who have proved their debts. Rev. St. § 5034. In making this choice, questions not unfrequently arise as to the right of a particular creditor to vote, and as to the value a debt is to have in the calculation of the majority. When such questions do arise, they may be referred to the court for settlement; but, I think, it has never been supposed that what was then done would ordinarily preclude either the assignee when chosen, or the bankrupt, or the creditor, from instituting a further enquiry, under the provision of section 5081, into the validity of the claim or the amount due. Proceedings for the choice of an assignee are rarely, if ever, stopped until the merits of a claim are adjudicated upon. It is sufficient if the court fixes its voting value for the time being. Thus, if a creditor whose debt is partially secured proves his unsecured balance, and the bankrupt or the other creditors are not satisfied with the value he puts upon the security, the court need not delay the election until the actual value can be ascertained by a sale, but may estimate the amount, and order the vote to be counted accordingly. So, too, if there are mutual debts, and the balance stated by the creditor in his proof is disputed, the court may fix the value for the matter in hand, and leave the parties to litigate further, if they choose, for the purposes of the distribution of the estate or any subsequent proceedings. The same practice is clearly applicable in cases of composition, and seems to be recognized in that portion of the act which requires the court to determine the value of the debts of secured creditors above their security, in estimating majorities. Under the general bankrupt law, if a secured creditor seeks to be admitted as a creditor for the balance of his debt over his security, the value of the security may be ascertained by agreement between himself and the assignee, or by a sale in such manner as the court shall direct. The special provision in the composition act was not intended as a substitute for this part of the general act, but to show in what manner the vote of this class of debts was to be estimated in the proceedings preliminary to the composition. The object was not to ascertain, as between the debtor and the creditor, how much was to be paid under the composition, but what influence the particular debt was to have on the deliberations of the creditors or upon the action of the court.

In cases of composition no dividend is paid to creditors. The debtor offers a pro rata payment in proportion to the amount of his unsecured debts. If the offer is accepted, the payment is for the satisfaction of the debts, and not as a dividend from the estate in bankruptcy. When the satisfaction is complete, the debtor is free to dispose of his estate as he will. His creditors, therefore, are not interested in the amount of his debts, except so far as it may affect his ability to pay, or the votes which are to be taken. In regular bankruptcy, however, when the estate of the bankrupt is distributed to the creditors in proportion to the amount of their respective debts, the case is different. There, each creditor is directly interested in the amount due to another, and ample provision is made for a contest in this behalf by the assignee, the creditor or the bankrupt. Rev. St. §§ 4980, 5081. No time is limited for the institution of such a proceeding. The necessary application may be made at any time before the final dividend.

Undoubtedly, all this machinery of the bankrupt law may be used by the court in composition proceedings, for the purpose of obtaining accurate information before deciding to accept or reject the offer of the debtor, but there is nothing in the law which requires it to be done. After the composition has become binding, the court has full power to enforce it, "on motion made, in a summary manner, by any person interested, and on reasonable notice." Under this power, ample opportunity is afforded for the settlement of all controversies between the debtor and his individual creditors. If the other creditors and the court are fully informed of the fact that there is a dispute between the debtor and his creditor as to the amount that is actually owing, and of the claims of the respective parties, before their final action is taken, which gives effect to the composition, they cannot complain if, when called upon to pay, the debtor insists upon what he claimed, while they were acting, were his rights in the premises.

This is not a proceeding to set aside a composition, but to enforce it; not to determine

whether this composition is binding upon this particular creditor because the amount due him was not correctly set forth in the debtors' statement produced at the meeting of the creditors; but to require the debtors to pay what they have offered. The question presented is not as to the effect of an error by the debtor, in his statement of debts, upon the validity of the composition, but, whether the debtor, when his statement is disputed by the creditor at the time, and a larger amount claimed as due, may resist the claim of the creditor, upon the motion of that creditor to have the composition carried into effect.

The language of the offer in this case, as accepted, was, "to pay our several creditors the sum of fifteen cents, in money, on every dollar owed by us to our creditors, without any interest calculated upon the principal sum of our indebtedness." If this were all, it is clear, that, in this action, the first thing for the court would be to settle the dispute between these parties as to the amount of the debt. The offer was to pay a percentage upon what was owing, and, in this case, that amount was not stated. This makes it necessary to enquire whether what was done at the meeting of the creditors and by the court has the effect of a judicial determination of the controversy. All that appears upon this subject, in the record, is, that the debtors, in their statements, reported a debt owing to Hamill, but, from what is said in the argument of their counsel here, it may fairly be inferred, that they were uncertain as to its amount. Sinclair appeared for Hamill at the meeting of the creditors, and offered a deposition to prove the amount. His claim, as stated in the proof, was disputed by the debtors and some of the creditors. They insisted that nothing was due, or, if anything, not so much as he demanded. The proof of debt was "received subject to exceptions," and, after the evidence of one of the debtors was taken, the officer presiding at the meeting ruled that Sinclair was entitled to vote, and that his vote, when taken, would be considered as taken upon $112,355 94. Upon the reference of the proof of claim and the evidence of the debtor to the court, the ruling of the presiding officer was confirmed. This is all that transpired upon this subject previous to the adoption of the resolution of acceptance at the first meeting of the creditors, save that the debtors always contended that they did not owe as much as Sinclair claimed. When Sinclair signed the resolution of acceptance for the purposes of its confirmation, as required by the law, the amount due him was not stated, and there is nothing to show that this omission was ever supplied. As this instrument was to be signed by both the debtors and the approving creditors, it is not improbable that the amount was purposely withheld, because the debtors were unwilling to commit themselves to the amount as claimed by Sinclair, and he was unwilling to bind himself in that way to accept the composition percentage upon anything less. From all this it seems to me clear, that neither the parties nor the court understood that any other question was submitted for judicial determination than the value which should be given the debt by the creditors and the court, when considering the propriety of accepting or confirming the composition. The debtors evidently so understood it, because they did not ask the court to pass upon the ruling of the presiding officer. They contented themselves with their exception upon the record, thus indicating their unwillingness to be bound for the payment of their proposed percentage upon the amount claimed, but consenting that the meeting should proceed with its business, under the ruling as made, without further opposition, so far as they were concerned. Sinclair, also, must have so understood it, for, when he called upon the court to enforce the composition in his favor, he did not ask for the percentage upon the amount for which his vote was taken, but prayed for an account of the amount actually his due, and the payment of the sum he was entitled to, calculated upon that basis. The other creditors, as has been seen, are not interested, because, notwithstanding they were fully advised as to the controversy in respect to this particular debt, they voted to accept the proposition and affixed their confirmatory signatures. The court, too, cannot have been misled, because, when called upon to cause the resolution of acceptance to be recorded, the amount due Hamill was left blank in the instrument containing the signatures of those who confirmed the resolution, although Sinclair, his representative, appeared as one of the signers. From this it may fairly be inferred, that the resolution was passed and confirmed without the vote of Sinclair, and that, so far as the other creditors were concerned, it was immaterial whether the amount due upon this debt was definitively settled or not.

If, instead of taking the vote of Sinclair, and counting it at the value he put upon his claim, it had been counted, under a similar order of the court and against his protest, at the amount fixed by the debtors, I cannot believe it would be seriously contended that he was bound to accept, in satisfaction of his debt, the percentage upon the amount thus treated as due. But, if the creditor is not bound, neither is the debtor. A judgment, or that which is the equivalent of a judgment, binds all the parties or none.

Upon the whole, I am clearly of the opinion that the action of the court during the progress of the composition proceedings was not an adjudication of this debt as between the debtors and the creditor, but only an estimate of the amount at which the debt was to be reckoned in calculating the majorities under the law.

The order of the district court, fixing the amount due at $112,355 94, without enquiry into the objections urged by Holmes & Lissberger, is reversed. No other questions are

decided. I have not enquired into the merits of the case. Neither have I considered the effect of anything that may have been contained in the statements presented by the debtors to the meeting of creditors or to the court. I only decide that the amount claimed by Sinclair in his proof of debt, although accepted by the creditors and the court as the true amount due for the purposes of their action, does not conclude the debtors, and that, in this action, they may show, if they can, that it exceeds what they actually owe, and upon which alone they are bound to make payment under the composition. The costs in this court must be paid by Sinclair, the receiver.

[Certain exceptions to the report of the commissioner were overruled in 2 Fed. 153, and upon petition of review this decision was affirmed by the circuit court. 7 Fed. 584.]

Case No. 6,633.

In re HOLMES.

[1 N. Y. Leg. Obs. 211; 5 Law Rep. 360.]

District Court, D. Maine. Sept., 1842.

BANKRUPTCY—PREVIOUS ASSIGNMENT—OPERATION OF LAW.

1. When the bankrupt law came into operation, it suspended all action upon future cases, arising under the state insolvent law. Where, however, the jurisdiction over a case, has been acquired by the state tribunals before the bankrupt law was in force, and rights have been acquired under the proceedings, the bankrupt law has not a retroactive operation to invalidate proceedings that were legal at the time when they took place; but, the state law having attached and fixed the rights of parties, they are entitled to proceed in the matter, and have the estate settled and distributed in conformity with the provisions of that law.

2. Where a debtor under an assignment for the benefit of his creditors in April, 1836, with a proviso that the creditors should release and discharge him from their debts in consideration of the dividends they might receive: *Held* that, although such an assignment is in itself an act of bankruptcy, if made while the bankrupt act is in force, yet such assignment having been made before the bankrupt law came into operation, the bankrupt law does not, by relation back, have the effect of rendering it void ab initio. *Held*, also, that the creditors who came in under such assignment were not preferred creditors.

[Cited in Day v. Bardwell, 97 Mass. 255.]

[In bankruptcy. In the matter of Charles W. Holmes.]

Howard & Osgood, for bankrupt.

Mr. Willis, for creditors.

WARE, District Judge. The first question, which has been argued upon the agreed statement of the facts, is, whether the assignee, under the voluntary assignment, shall retain and administer the estate under the state insolvent law, or the assets shall pass to the assignee of the bankrupt to be administered in bankruptcy. The assignment was good and valid to pass the property under the statute of Maine, of April 1, 1836 [Laws Me. 1832–39, p. 374], unless it was rendered void by requiring of the creditors a discharge of the debtor, as a condition of their becoming parties to taking any advantage under the assignment. The act requires that all assignments made by debtors for the benefit of creditors shall provide for an equal distribution of all the estate among such creditors as become parties to it, but is silent as to any terms which the debtor may impose as a condition of taking under it. The debtor has required in this case of the creditors, as a condition, a release and discharge from the whole debt in consideration of the dividend they may receive, although it may not be fully paid. The decisions of the courts of this state have established the principle, as a rule of local law, that such a condition in an assignment does not destroy its validity, nor render it void as being fraudulent against creditors. 5 Greenl. 245; 6 Greenl. 375; 2 Fairf. [11 Me.] 41. It would seem, therefore, that the assignment may be supported as a valid assignment under the statute, although it is connected with conditions not named in the act, such conditions being authorized by the local law.

The assignment had been made, the creditors had become parties to it, the estate was disposed of, and one creditor had been paid his dividend before the bankrupt act went into operation. It was decided by the circuit court, in Ex parte Eames [Case No. 4,237], that the bankrupt law, as soon as it went into operation, suspended all action on future cases, arising under state insolvent laws, where the insolvent persons came within the purview of the bankrupt act. But the decision is expressly limited to future cases; and it is stated, in the opinion of the court, that different considerations might apply where proceedings had already been commenced under the state laws. Where the jurisdiction over the case has been acquired by the state tribunals before the bankrupt law was in force, and rights have been acquired under the proceedings, the bankrupt law cannot have a retroactive operation to invalidate proceedings that were legal at the time when they took place. And the state law, having attached and fixed the rights of parties, they are entitled to proceed in the matter, and have the estate settled and distributed in conformity with the provisions of that law.

My opinion is, that the assignees, under the voluntary assignment, have a right to retain the property, and administer it under the state law. It may be true, as was contended at the argument, that such an assignment is, of itself, an act of bankruptcy, and consequently is sufficient to bring the party and his estate within the jurisdiction of the bankrupt court, if made when the bankrupt act is in force. But having been made before, and when it was a legal and valid act, the bankrupt law will not, by relation back, have the effect of rendering it illegal and void ab initio.

The second question is, whether the petitioner is entitled to his discharge. The objec-

tion is founded on the assignment. The proviso in the second section of the act declares, that if it shall be made to appear in a case of voluntary bankruptcy, that the bankrupt has, in contemplation of the passage of the bankrupt law, by assignment or otherwise, given or secured any preference to one creditor over another, he shall not receive his discharge, unless the same shall be assented to by a majority in interest of those creditors who have not been so preferred. There is no preference in this assignment made by the deed itself. By annexing to it a condition, that the creditors, by becoming parties, and taking under the assignment, shall discharge the debtor, it may, in its operation, establish preferences. But then the condition, to which the creditors are required to submit, is nothing more than would result from bankruptcy; that is, it operates to discharge the debtor. This is not such a preference, in my opinion, as is condemned by this proviso in the law.

See Ex parte Quackenboss [Case No. 11,489].

Case No. 6,634.

In re HOLMES.

[14 N. B. R. 209;[1] 3 N. Y. Wkly. Dig. 101.]

District Court, D. Vermont. May, 1876.

BANKRUPTCY—TIME OF DISCHARGE.

Where debts are proved and assets come into the hands of the assignees, the bankrupt need not apply for his discharge within one year from the adjudication of bankruptcy.

[In bankruptcy. In the matter of D. K. Holmes.]

SMALLEY, District Judge. This is an application for the bankrupt's discharge. It appears that the said Holmes was adjudged a bankrupt on the 2d day of September, 1873, and that assets came into the hands of the assignee and debts were proved against the bankrupt. It appears that the majority in number and amount of those who have proved their claims against the estate of the above-named bankrupt have signified in writing their consent that he may receive his discharge, and all the notices required by law and the rules of this court have been duly issued. The only objection now made to his discharge is, that the application was not made within one year after he was declared a bankrupt. The only question before the court now is, does it come within the limitation, as to time, of section 5108 of the bankrupt law? I am very clearly of the opinion that it does not; that section only applies to cases where no debts have been proved against the bankrupt, or no assets have come into the hands of the assignee. It is stated that this question has received a different construction in the Northern district of New York, but no such case has been shown me, and I cannot conceive any good reason for such limitation. It certainly seems to be the opinion of Judge Blatchford and the late Justice Nelson, in Re Greenfield [Case No. 5,775], that no such limitation exists as is claimed in this case, and, accordingly, I issue the discharge.

[1] [Reprinted from 14 N. B. R. 209, by permission.]

HOLMES, In re. See Case No. 13,183.

Case No. 6,635.

HOLMES v. BRADSHAW.

SEAMEN—WAGES—DISCHARGE—DISCHARGE OF CARGO.

[In respect to the time for the payment of wages to the crew of a vessel upon arrival in port, it was held that 15 days were a proper allowance for the discharge of the cargo, by analogy to the time allowed under the collection act of 1799, c. 128 (Bior. & D. Laws; 1 Stat. 627, c. 22), and that the 10 days ordinarily began to run from the period when the cargo actually was or might be discharged, and that the voyage was then properly ended: but in cases where the crew were discharged upon arrival in port, and were not retained for the purpose of discharging the cargo (which is a common practice), the 10 days should begin to run from the time of the discharge of the crew. The day of discharge is not to be included in the 10.]

[Before Davis, District Judge. Cited in The Mary, Case No. 9,191; 2 Pars. Shipp. & Adm. 366; and in Abb. Shipp. 635, note,—to the points as stated above. Nowhere reported; opinion not now accessible.]

Case No. 6,636.

HOLMES v. BUSSARD.

[2 Cranch, C. C. 401.][1]

Circuit Court, District of Columbia. April Term, 1823.

PRACTICE—SUPERSEDEAS.

A supersedeas judgment must recite the original judgment correctly.

[Cited in Chesapeake & O. Canal Co. v. Barcroft, Case No. 2,644.]

Motion by Mr. Taney and Mr. Redin, for defendant, to quash a supersedeas, and an execution issued upon the supersedeas, because it stated the original judgment to be for $700 and costs, whereas the original judgment was for $1,500, to be released on the payment of $700 and costs.

Mr. Marbury, for plaintiff.

THE COURT (THRUSTON, Circuit Judge, absent) quashed the execution and the supersedeas.

HOLMES (COULSON v.). See Case No. 3,274.

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

Case No. 6,637.

HOLMES v. DODGE.

[Abb. Adm. 60.] [1]

District Court, S. D. New York. Aug., 1847.

SEAMEN—WAGES—COMMISSIONER—REFERENCE—AWARD.

1. Where the respondent, in an action for a seaman's wages, relies upon a payment made in advance to the shipping agent by whom the libellant was shipped, the burden of proof is upon the respondent to show affirmatively, not only that the payment was made, but also that the shipping agent was authorized by the libellant to receive it.

2. Where, upon reference to a commissioner, there is a conflict of testimony upon a question of fact, the court will adopt the conclusion of the commissioner, unless there is a palpable preponderance of evidence against it.

[Cited in Egbert v. Baltimore & O. R. Co., Case No. 4,305; The Mayflower, Id. 9,345.]

3. As a general rule, a reference to a commissioner, in a suit for wages, is a regular and necessary step on the part of the libellant, incidental to the prosecution of the action, and cannot be the subject of an independent charge in a bill of costs.

[Cited in The Beaver, Case No. 1,200.]

4. Where, however, the reference is solely for the benefit of the respondent, the court will modify the order of reference so as to require the extra costs incurred to be defrayed by him. Such modification must be asked for on obtaining the order of reference.

5. Under rule 3 of the supreme court, the principal and his surety on the bond or stipulation given upon an arrest in personam, stand upon the same footing.

[Cited in U. S. v. Seven Barrels Distilled Oil, Case No. 16,253; The Wanata, 95 U. S. 617.]

[See Gaines v. Travis, Case No. 5,179.]

6. The award which grants execution upon a final decree, authorizes it against all parties embraced in the decree; and there is no necessity of special notice to the surety of respondent of an application for an execution against him.

This was a libel in personam, by Allen Holmes against A. P. Dodge, master of the brig Magdala, to recover wages earned on board the brig. The libel claimed wages for one month and twenty-eight days' services, at $18 per month. The claim was admitted by the answer, which set up as a defence the following items of payment:—

Cash advanced to libellant or order..	$18 00
Advances before sailing, in clothing, &c	10 20
Hospital money.....	65
Cash paid to libellant's proctor.....	5 95
	$34 80

On the hearing, no evidence was offered to show the first, third, or fourth payments. Evidence of articles of clothing furnished, without showing prices, was given. The court decreed in favor of the libellant upon his claim, and referred it to a commissioner to report the amount due. On the hearing before the commissioner, the following facts appeared. One Anderson, keeper of a sailors' boarding-house, had previously shipped a man on board the Magdala, who deserted before the ship sailed. This man was indebted to Anderson. Upon his desertion, Anderson caused the libellant, Holmes, to be arrested and taken on board the vessel, and he was there induced to sign the shipping articles. The sum of eighteen dollars was paid to Anderson, which constituted the first item of payment above stated; but there was a conflict in the testimony of the two witnesses examined upon the question, whether this payment was made with libellant's consent or without it. The commissioner adjusted the libellant's claim at $34.80; and upon other evidence before him, allowed the first, third, and fourth items of payment claimed, amounting to $16.80. But he rejected the item of $18 paid to Anderson under the circumstances already mentioned, and reported that that sum was still due to the libellant. The respondent filed exceptions to this report.

E. C. Benedict, in support of the exceptions.

I. The payment of one month's wages in advance is to be presumed, it being the uniform custom to make such payment.

II. The shipping articles recite a payment of the advance.

III. The witness Pike testifies that he saw the money paid to Anderson, and that it was so paid by the express direction of libellant. This testimony is, upon the whole, confirmed by that of Morris.

Alanson Nash, in opposition, contended that there was no sufficient evidence to show that Anderson was authorized by Holmes to receive the payment of his wages.

BETTS, District Judge. I think the decision of this case depends upon the comparative credit to be given to the witnesses Pike and Morris. Pike states that he saw the advance of $18 paid to Anderson, and that the libellant told witness that Anderson was to receive it for him. Morris says that he was present, and that no money was paid to Holmes, or directly for him; and that the money collected by Anderson was the advance to be made to the seaman in whose place libellant shipped.

The story, as told, raises a strong presumption that the landlord, Anderson, undertook to make the advance payable to the libellant satisfy a like sum which he, Anderson, expected to have received of the other man he had shipped, but who deserted, probably in his debt to that amount. He fails, however, to prove that Holmes directed such application of the money, or that he consented that the previous advance of that sum, if made to Anderson on account of the deserter, should be charged to him and be regarded as his advance.

It is highly probable, upon the confused statement given of the transactions, that Holmes stood in Anderson's debt, and if his advance passed, with his consent, into Anderson's hands, that it would all have remained

[1] [Reported by Abbott Brothers.]

there. But the accounts between these two men are not to be settled in this action, nor are the facts sufficiently stated to enable the court to say, with confidence, where the probable equity is. It is, however, clear, that the law casts upon the respondent the burden of showing the payment of the advance to libellant, or to his authorized agent; and that if a payment to a third person on behalf of the libellant is relied upon, the authority of such third person to receive the payment in the name of the libellant must be affirmatively shown. And as at best, the testimony is balanced on this point, the respondent must fail in this defence.

Independently of that consideration, it is not usual to reverse the judgment passed upon matters of fact by a tribunal or officer, having had opportunity for a personal examination of witnesses in each other's presence. A court, reviewing the evidence as reproduced upon paper, possesses but imperfectly the means of determining the relative credit of witnesses who stand in conflict as to facts; and it is always safer, when the preponderance is not palpable, to rely upon the discrimination and conclusions made by those who have seen and heard the witnesses, face to face, than to attempt to settle that point by weighing the written report of the testimony.

Upon both of these considerations, I shall adopt the decision of the commissioner as to the advance due to the libellant, and shall hold that the exceptions are not sustained. The decree will therefore be as follows:—Exceptions to the report of the commissioner having been taken in this cause on the part of the respondent, and it appearing to the court that the testimony before the commissioner, on the point in controversy, was in direct conflict, and that on a personal examination and hearing of the witnesses, he gave credit to one witness and discredited the opposing witness, and it not appearing that the collateral facts or circumstances afford just and satisfactory cause for changing the decision of fact made by the commissioner: It is ordered by the court, that the exceptions taken to the report filed in this cause be disallowed and overruled, with costs to be taxed.

The cause came up again soon after, upon an appeal taken by the respondent from the taxation of costs by the clerk, under the above decree. The libellant had charged and procured to be taxed a bill of $17.25, for costs of reference, independent of the $12 allowed the libellant in summary causes by the standing rule of court. Dist. Ct. Rules, 165, 176. The respondent appealed from that taxation.

BETTS, District Judge. As a general principle of practice, a reference to a commissioner in suits for wages is a regular and necessary step on the part of the libellant in the prosecution of the action. The court rarely takes the account between the seaman and the ship to determine the amount due, but as an ordinary incident to the suit, the computation is made by a commissioner, and if a reference were not moved for by the libellant, it would usually be directed by the court as an essential proceeding in the cause.

It is undoubtedly true that instances may occur in which the reference is solely on the motion of the respondent and for his benefit, the claim of the libellant being definitely ascertained in amount by his proofs upon the hearing. In such cases the court will, upon request, modify the order of reference, making it one granted in behalf of the respondent, and perhaps adding, also, in summary cases, a provision, that the extra costs incurred shall be defrayed by him. This is within the spirit of rule 171 of this court in respect to costs in summary actions, which imposes on the party obtaining a privilege the special costs created thereby.

The present case was one in which such a qualification of the usual order would have been proper, had it been asked for at the time the order was granted. Upon the minutes, however, the order now appears to have been moved for and taken in the usual mode; and under such circumstances, in my judgment, the libellant is only entitled to a single bill of costs, and such bill, in summary actions, is limited to $12, exclusive of disbursements. Dist. Ct. Rules, 176. The reference, like an assessment by the clerk or jury of inquiry in common-law procedures, becomes an incident to the cause, to be charged for as an item in the general bill of costs. There is nothing before me in these proceedings which will justify treating this case as an exception to the general rule, and the objection taken to the allowance of the expenses of the reference, independent of the costs of the cause, must accordingly prevail.

The cause came before the court for the third time, a few days later, upon a motion for execution against the stipulator, based upon an affidavit of one of the proctors, that execution on the final decree had issued against the respondent, and had been returned unsatisfied.

Alanson Nash, for the motion.

W. R. Beebe, in opposition, contended that an order to show cause should have been obtained and served upon the stipulator, and that for want of such notice, this proceeding was irregular.

BETTS, District Judge. The practice of the district court, in such cases, has been well understood and settled, under the standing rules of the court. Betts, Adm. 27. After final decree against the principal, an order may be taken, as of course, requiring the stipulator to fulfil his stipulation, or show cause in four days why execution should not issue against him. This order is to be served upon

the proctor of the principal party, and if no cause be shown, pursuant to its direction, a summary decree is rendered, and execution awarded thereon against the stipulator. Dist. Ct. Rules, 145.

The rules of the supreme court place the principal and his surety upon bond or stipulation, given on an arrest in personam, upon the same footing. The engagement of the stipulator is, that the principal party shall appear in the suit and abide by all the orders of the court made in the cause, whether interlocutory or final, and that he shall pay into court the money awarded by the final decree. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties, to enforce the final decree so rendered. Sup. Ct. Rules, 3. These stipulations may be taken by the marshal, or before a judge or a commissioner. Sup. Ct. Rules, 3, 5.

In the present case, the surety executed a bond to the marshal, pursuant to the terms of rule 3 of the supreme court The effect of the bond, and the remedy upon it, must accordingly be determined by the true import of that rule. It seems to me manifest that the court designed by the rule to place the surety precisely in the situation of the principal, regarding his engagement a legal assumption of the responsibility of the respondent. The final decree is to be enforced against both, by summary process of execution, and accordingly, the method by which the process against the principal is obtained, is the proper one to be pursued in procuring it against the surety also.

As an order to show cause is not required in the district court in respect to the principal, but execution is awarded by an order as of course, the distinction of procedure which before obtained in that court in respect to the surety, is abrogated by this rule of the supreme court, and one order is all that is necessary. The same award which grants execution on the decree, grants it as respects all parties bound by it; and as that order may be summary, it of course may be founded upon the decree itself, without any intermediate steps or notice. The term "summary proceeding," imports a step taken by the direct action of the court, and unless regulated by some condition or qualification of law, it will be free from delay or formalities. As summary arrests and summary judgments or decrees are, in contemplation of law, independent of the checks and formalities attendant upon ordinary proceedings of like character; so, also, a summary execution must be considered as the immediate award of that process after final decree rendered, and as subject to no other condition than that it be directed by the court.

The rule of the supreme court is not limited to the granting a power to give summary execution as a favor; it is imperative upon all the courts. They are required to issue the process against principal and sureties to enforce the final decree. The libellant is accordingly now entitled to that process upon this motion. He ought, however, to have taken the order for it together with that obtained against the principal, and the order now made must be without costs.

HOLMES (ELLIOTT v.). See Case No. 4,392.

HOLMES (GEAR v.). See Case No. 5,292.

Case No. 6,638.

HOLMES v. HOLMES et al.

[1 Sawy. 99; 1 Abb. (U. S.) 525.] [1]

Circuit Court, D. Oregon. April 12, 1870.

INADEQUACY OF PRICE — EFFECT ON SALE — MARRIAGE AT COMMON LAW—MARRIAGE, WHAT CONSTITUTES IT ACCORDING TO LAWS OF OREGON AND CALIFORNIA—MARRIAGES, WHEN VOID—COHABITATION NOT MARRIAGE —EVIDENCE OF PREVIOUS MARRIAGE — MARRIAGE, CONSENT NECESSARY TO—COHABITATION NOT SUFFICIENT EVIDENCE OF MARRIAGE TO FOUND CLAIM FOR DOWER THEREON — MARRIAGE, WITH THE CIRCUMSTANCES, SHOULD BE ALLEGED IN PLEADING

1. Mere inadequacy of price is not sufficient to set aside a sale, but when such inadequacy is so great that the mind revolts at it, the court will lay hold of the slightest additional circumstance of advantage or oppression to rescind the contract.

[Cited in King v. French, Case No. 7,793; Parkhurst v. Hosford, 21 Fed. 834.]

2. Semble, that at common law, or in the absence of any statute prescribing the mode of contracting marriage, a contract to marry per verba de futuro cum copula, does not amount to a marriage in fact.

3. The laws of California (Hit. Dig. 4, 466) and of Oregon (Code Or. 783, 785) require that the consent of the parties to become husband and wife, must be declared in the presence of a person authorized by such laws to solemnize marriage, and two witnesses, and without the observance of these formalities the marriage relation cannot be created or entered into, in either of such states.

[Cited in Re McLaughlin's Estate, 30 Pac. 655.]

4. Where citizens of a state purposely go beyond its jurisdiction and not within the jurisdiction of another state—as at sea—and then contract marriage otherwise than in accordance with the laws of such state, the transaction is a fraudulent evasion of the laws to which the parties owe obedience, and, therefore, void.

5. Living together as man and wife, although evidence of a previous marriage, cannot make parties man and wife, nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage.

6. Marriage, although arising out of contract or the consent of the parties, is a relation, as much so as that of parent and child, and such consent must be mutual and absolute per verba de praesente, not merely to live together exclusively, but to become joined to one another in the estate of matrimony.

[Cited in Sharon v. Hill, 26 Fed. 371.]

7. On a bill to enforce a claim to dower, cohabitation of complainant and deceased and other circumstances, examined and *held* not suf-

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

ficient evidence of a previous marriage between them.

8. Where a woman claims to have been the wife of another, it is an insuperable objection to such claim, that the pleadings do not contain an allegation of a marriage to such other, with the circumstances of time and place, and that she withholds her testimony as a witness upon the same point.

In equity.

W. F. Trimble, David Logan, and Erasmus D. Shattuck, for complainant.

Walter W. Thayer, W. W. Page, and William Strong, for defendants.

Before FIELD, Circuit Justice, and DEADY, District Judge.

DEADY, District Judge. This is a suit in equity, brought by the complainant, styling herself Glervina O. Holmes, against Thomas J. Holmes, Jr., his brother Byron, his three married sisters—Mary A. Goodenough, Alice J. Strowbridge and Theresa Coulson—and their husbands, to cancel and set aside a certain deed executed by complainant to defendants, and for assignment of dower in the lands affected by the deed.

The bill was filed January 26, 1869, and alleges:

I. That the complainant is a resident and citizen of the state of California, and that the defendants, except Theresa and her husband, are citizens of the state of Oregon.

II. That Thomas J. Holmes, late of Portland, Oregon, died intestate on June 18, 1867, leaving as his children and heirs at law said Thomas J. Holmes, Jr., and his brother and sisters aforesaid; that "complainant was the lawful wife of the deceased and lived and cohabited with him as his wife from the ——— day of December, 1865, to the time of his death;" "that during the said marriage" and at the time of his death, the deceased was seized in fee and possessed of certain blocks and lots of land in the city of Portland of the value of $100,000, the annual rents and profits of which are worth $10,000; that it was not necessary to sell any of said real property to pay his debts, but that the same was inherited by his heirs, who have since partitioned it among themselves; that "complainant is the widow of said Holmes, deceased," and by the laws of Oregon was and is entitled to dower in said real property; that the present value of such dower is not less than $25,000; that complainant has never been barred of her dower in said property, and that the same has never been assigned to her, but her right thereto is disputed by said heirs.

III. That said heirs pretend to have purchased and obtained a release of complainant's right of dower, by virtue of a certain deed signed by complainant, July 31, 1867, and by which complainant, styling herself Glervina O. Holmes, conveys to the heirs of Holmes, deceased, "all her right, title, interest, claim or demand, either in law or equity, as the widow of the said Thomas J. Holmes, or otherwise," in and to the estate of said Holmes, in consideration of the sum of $1,000, "and the further consideration that it was in his lifetime our wish and agreement before and in contemplation of marriage, that upon his, the said Thomas J. Holmes, death, all his property, both real and personal, should descend to his children, the heirs aforementioned, clear of and unencumbered with any claim of dower or any legal claim of myself in any manner whatever;" that said deed "was procured by said heirs to be executed by complainant through fraud, duress and undue influence exerted over her by said heirs, and especially by said Thomas J. Holmes, Jr., and J. M. Strowbridge," the husband of Alice J., aforesaid; and that the consideration of said deed "was grossly inadequate and the recitals therein contained false," and the same was imprudently executed, the complainant being ignorant of the value of her interest in the estate, and unadvised of the nature and effect of said deed.

IV. The bill then sets forth the circumstances and condition of the complainant, at and before the signing of the deed, at great length and with much minuteness, to the effect that the complainant, after the death of Holmes, continued to live in the home house, but that said heirs came there also and took possession; that said heirs then conspired with said J. M. Strowbridge to harass complainant and drive her away from said home and cheat her out of her interest "in the estate of her said husband;" that complainant was then poor and friendless, without means of support and "in great distress, mentdl and pecuniary," and without knowledge as to the value of the estate; that she did not sign said instrument freely, but through fear of said Strowbridge and Holmes, Jr., who, "in order to induce her to release her interest in said estate, falsely accused her of criminal intercourse with said Holmes, deceased, prior to his marriage with complainant and before the death of a former wife of said deceased, and represented to complainant that she was liable to a criminal prosecution, and unless she would give up her claim to said estate and leave the house and move out of the state, they would cause her to be prosecuted in the courts and held up to public scandal, infamy and disgrace, and to be punished by imprisonment; and that said Strowbridge and Holmes, Jr., made it a condition of said payment of $1,000, that the complainant should leave the state, and to that end said sum was made payable, $500 in Portland and the remainder in ten months after sight at Wells, Fargo & Co.'s in San Francisco.

On April 1, 1869, an answer to the bill was filed, purporting to be the answer of all the defendants except Mary A. Goodenough and her husband, but such pleading was not signed or sworn to by any of the defendants except Thomas J. Holmes, Jr. To this answer the plaintiff, on May 1, filed exceptions

for scandal and impertinence and insufficiency; which were afterwards heard and allowed by the court.

On August 21, the joint and several answer of all the defendants to the bill was filed, and on September 6 the complainant filed the general replication thereto.

By the amended answer, the defendants admit the allegations of the bill concerning the citizenship of the parties, the death of Holmes, the nature and value of the property of which he died seized, and its subsequent partition among the defendants, his heirs.

They deny that the complainant was ever the lawful wife of the deceased, or that he ever cohabited with her as his wife, or that he ever was married to her, or "that any relation created by marriage ever existed between them."

They admit the execution of the deed by the complainant to the heirs of the deceased for the consideration mentioned in the bill, but deny that the same was executed by her otherwise than of her own free will and accord.

They aver that for a long time prior to the death of the deceased the said Thomas J. Holmes and complainant "had been lewdly and lasciviously cohabiting together," and that upon the death of said Holmes complainant freely admitted to said heirs that she had never been married to deceased, and acknowledged that she had no claim on his estate. That she was only anxious to obtain sufficient means to go to her father, in Ohio, and leave the state quietly, without exciting comment upon her conduct in having lived illicitly with the deceased, and not desiring to be turned away penniless as a cast-off wanton, and that said heirs being also anxious to prevent the relation which had existed between their father and the complainant from becoming more notorious than possible, and to remove any cloud that might exist upon said estate by reason of said relation, it was mutually agreed between the parties, that the said heirs should pay said complainant the sum of $1,000, and that complainant should execute to said heirs the deed in question; and that in pursuance of such arrangement complainant executed such deed and not otherwise, and that the recitals therein contained were inserted at her special instance and request.

On January 6 and 7 the court heard the evidence of the parties, and on January 11, the cause was argued and submitted.

Two principal questions arise in the case: (1) Were the complainant and the deceased married to one another; and, (2) was the deed from the complainant to the heirs wrongfully obtained from her.

Assuming that complainant was the widow of Thomas J. Holmes, she was entitled to an interest in his property worth at the date of the deed $25,000. The mere money consideration of the deed—the sum of $1,000—is such a grossly inadequate price for property of that value, as to shock the conscience and confound the judgment of a man of common sense. The unprejudiced mind revolts at it, and can only conclude that some advantage must have been taken of the complainant's ignorance or necessities. But then again, the particular charges in the bill of oppression and conspiracy by the heirs and Strowbridge to defraud the complainant in this matter, are fully denied by the answer and altogether unsupported by the proof. There is no direct proof that complainant was well advised of the value of the property affected by the deed, but at the same time there is every reason to believe, from all the circumstances, that she must have known that it was worth many times what she was receiving for it.

Under what circumstances inadequacy of price will be sufficient to set aside a sale is well stated in two cases cited by counsel for complainant. In Hough v. Hunt, 2 Ohio, 502, the court says: "The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. When the inadequacy of the price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."

In Osgood v. Franklin, 2 Johns. Ch. 23, Chancellor Kent says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."

When a person gives $25,000 worth of property for $1,000, as in this case, the inadequacy is so very gross, that the court ought to "lay hold on the slightest circumstance of oppression or advantage," to set aside the sale. The fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed or was ignorant of the true value of the property.

The true explanation of this matter is to be found in the solution of the question—was the complainant the lawful wife of the deceased? If she was, the inadequacy of the price is so gross and palpable that the inference is almost irresistible that the parties who procured her to sign the deed took advantage of her situation, ignorance or some particular circumstances in her relation to the deceased, to induce or compel her to do so, and thereby intentionally obtained an unconscionable advantage to themselves which they ought not to be allowed to retain.

On the other hand, if the parties were not married, but merely living together in an un-

lawful manner, the matter is easily explained. The complainant, in that case, being in fact not the widow of the deceased, but only his mistress, would not be entitled to any share or interest in his property, and the deed and the professed consideration therefor would be as stated in the answer, only a plausible and decent sort of a contrivance between the parties to make some pecuniary provision for the complainant so as to enable her to leave the country and at the same time, as far as possible, conceal from the general public the improper nature of the deceased's relations with her.

The question of marriage or no marriage is often an embarrassing one to decide, particularly when the evidence is wholly circumstantial and the question arises between the issue of the alleged marriage and third persons, after the parties themselves have passed away. In this case the proof is wholly circumstantial, and the question arises between one of the parties to the supposed relation and the heirs of the other. The suit is maintained by that party not for the purpose of establishing her status as the once wife now widow of the deceased, but for the more practical one of obtaining a widow's share of his property as against his children and heirs. In this view of the matter, it may be considered as a suit between the deceased and the complainant to determine a claim to property unembarrassed by any consideration of the consequences of such determination upon the status or rights of third persons.

The answer admits the cohabitation of the parties as alleged in the bill, but denies the marriage. The complainant produces no direct proof of marriage, but relies upon the circumstances attending and surrounding the cohabitation as sufficient, in connection with that fact, to warrant the inference that a marriage had in fact taken place between the parties, at some time subsequent to the complainant's going from Portland to San Francisco, to meet the deceased on his return from New York.

On the trial the complainant put in evidence four letters written by the deceased to herself while he was making a voyage to New York via the Isthmus, dated between October 15 and November 12, 1865, and also one dated December 3, 1865, purporting to be written by John Altman—who is claimed to be the father of complainant—to the deceased. The two sons of the deceased, Thomas J., Jr., and Byron, and his son-in-law, Strowbridge, were examined as witnesses, besides other persons not connected with the family, as to particular acts and declarations of the deceased concerning the complainant and his relations with her.

It appears that at the time of his death Thomas J. Holmes was about fifty years of age, and that the youngest of his children was then quite grown up. That for at least sixteen years he had lived in Portland, and until 1865 with a second wife, not the mother of any of his children, who then died. That the complainant is near forty years of age, and was never married, unless to the deceased. That a few years before 1865 she was living with one Capt. Lyle as his mistress, who then died without making any provision for her; and that afterwards, and before the alleged marriage with the deceased, she was an inmate of a brothel in Portland; and that during some portion of the year 1865, and both prior to and at and after the death of Holmes' second wife, he kept and maintained the complainant as his mistress, in a house belonging to himself, at the corner of C and Third streets, in the immediate vicinity of his home, and where his wife aforesaid and several children then lived.

After the death of Holmes' wife in August, 1865, and sometime in the early part of October of that year, the deceased left Portland on a voyage to New York. A portion of Holmes' children continued to reside in the home house. It was during this separation that Holmes wrote complainant the letters above-mentioned. After Holmes left for New York, complainant continued to live at the house at the corner of C and Third streets, at the charge and expense of Holmes, until in the December or January following, when, probably in pursuance of a suggestion from Holmes, she proceeded to San Francisco, to meet him on his return from New York. In the month of April, 1866, or thereabouts, both of the parties returned to Portland, and thereafter continued to live together in the home house of the deceased, until his death, on June 18, 1867—which was sudden and unexpected.

This is a substantial statement of the general circumstances disclosed in the testimony, which tend to show the condition of the parties at or for sometime prior to the period when the relation of marriage is said to have commenced between them, and their conduct towards one another afterwards.

Besides these there are some special circumstances upon which the complainant relies as testimony to show a marriage between herself and Holmes.

Sometime in the summer of 1866, or within two or three months after Holmes returned from New York, Mr. Lakin testifies that Holmes brought complainant to the store where he was employed, and introduced her to him as Mrs. Holmes, and told him to let her have what she wanted and he would pay for it. After this, witness "sold her a considerable number of goods." Sometimes she paid for them, and sometimes they were charged to Holmes. Once or twice witness delivered parcels at the home house on C street, and saw Holmes and complainant there, as if living together then. Witness had known Holmes well in Portland for fifteen years, but this was all he knew of his relations with the complainant or of any recognition of her as his wife, or otherwise.

A. P. Ankeny testified that he had known Holmes many years, and had had confiden-

tial conversations with him. That he knew nothing particularly of the complainant, but had known her on the street for two or three years before Holmes' death. Saw Holmes and her together on the street once, and once at Holmes' house. Some two, or three, or four months before Holmes' death, in general conversation with witness, Holmes referred to complainant as his wife, and remarked that he had spent more happy hours in the last six months, than for twenty years before. That within three or six months before Holmes' death, at the office at the theatre, at request of Holmes, witness, in company with another person, whose name is not remembered, signed a paper as a witness, which he supposed to be a will, and which Holmes then said, related to his effects, and that he had made provision for his wife, meaning the complainant. The statements of Mr. Ankeny were somewhat general and indefinite, and he did not profess to give the language of Holmes, but only the substance of it; besides, it is not unlikely, that in the lapse of time, he has in some degree, confounded his general impressions of the matter with the conversations themselves.

D. W. Williams testified that in June, 1866, he was commissioner of deeds, for California, and that Holmes asked him to come to his house and take his wife's acknowledgment to a deed for property in California. That he knew Holmes, but not complainant, and that he went to his house, and there Holmes introduced him to a person whom he called his wife, and who signed and acknowledged the deed as his wife. That Holmes also signed and acknowledged, and that both parties told him that the property in question belonged to the wife. That because of some informality in the deed it was returned and re-acknowledged twice before him, under similar circumstances. The testimony of Mr. Williams was direct and certain, and it shows that either the parties were then, or supposed themselves to be husband and wife, or that they went through this proceeding before the commissioner for the purpose of producing the impression in this community that they were married, so as to prevent their cohabitation from giving rise to unpleasant comment and scandal, or it may have been that they had in some way held themselves out as husband and wife in California, and therefore the purchaser would not take the deed unless executed by Holmes, as well as the complainant.

Dr. I. A. Davenport testified that he had known Holmes for some time, and that he first became acquainted with complainant a few weeks before Holmes went to New York, in 1865. The complainant was then known by the name of "Clara," and Holmes had introduced her to witness by that name. Soon after Holmes' return from New York, witness said that he introduced complainant to him as his wife; but upon further examination he stated the occurrence in these words: "When Holmes asked me to go down to his house, I said how shall I address 'Clara?' and he said as Mrs. Holmes." The witness also testified that he was Holmes' physician, and that he visited the house in that capacity, and that the parties lived together as man and wife, up to the time of Holmes' death. It is apparent from the circumstances that Dr. Davenport was upon intimate and confidential relations with the deceased, and also the complainant. For instance, it appears from the correspondence of the deceased, that he repeatedly warns her against receiving visits from men during his absence, but he more than once commends witness to her, both as a physician and a friend. It also appears that witness is not upon good terms with Strowbridge and T. J. Holmes, Jr., and that he is very friendly to complainant and sympathizes with her. Supposing that at this time the parties really were married, it is singular that Dr. Davenport, the confidential friend of both parties, did not know it, and that he should ask Holmes on the way to the house—"How shall I address 'Clara?'" The very question implies that while he knew the parties were living together, yet that he had no reason to believe they were husband and wife, but was in doubt in what light Holmes wished his connection with the complainant thereafter to be regarded. For instance, whether, as in the past she was to be considered and treated under the professional name of "Clara," simply as his mistress, or whether he wished to impart to the relation some appearance of decency and legality by treating and addressing her as Mrs. Holmes. It is also remarkable, that although witness and Holmes were, as we may reasonably suppose, living in daily communication for more than a year after this marriage is alleged to have taken place, nothing appears to have ever been said about it between them, nor does it appear that Holmes in any way ever declared or intimated to witness that he had married complainant, or that she had ceased to be his mere mistress, except on the one occasion, when in reply to the direct inquiry, he told witness to address her as Mrs. Holmes.

Mr. Hamilton Boyd testified that he was well acquainted with Holmes in his lifetime, but did not know complainant. That he had a conversation with Holmes, in which H. asked him what he thought of his marriage, as the witness understood, referring to the complainant. Witness "tried to pass it off, and said he knew nothing about it." Holmes repeated the question. Witness replied "he had heard rumors to that effect, but he never believed them." Holmes did not then say that he was married, but repeated the question—"What do you think of my marriage?" to which the witness then replied—"It is in very bad taste"—whereupon the subject was dropped.

The testimony of this witness was distinct and unqualified. He and Holmes appear to have sustained friendly relations to one another, and no reason is apparent for any con-

cealment or mystery between them about any matter which in itself was lawful and proper. Holmes seems on this occasion, as on others, to have studiously avoided making an explicit admission that he was married to the complainant, while at the same time his conduct and expressions were calculated to give color to the impression or rumor that a marriage of some kind had taken place between them in California, before returning to Portland, in 1866.

The conversation itself is ambiguous and may be considered as evidence, either that a private marriage had taken place between the parties, about which Holmes was then feeling the pulse of his friends as to the propriety of making public, or else that there was no marriage, but some kind of a promise or understanding that there should be one, and he was endeavoring in this way, to ascertain how a marriage with such a person as the complainant would be regarded by his friends and the public.

In addition to these special circumstances, the complainant relies upon Holmes' letters to herself, as furnishing sufficient evidence of a promise to marry the complainant at some future time. Assuming the promise per verba de futuro to be so proved, it is maintained that this engagement and the subsequent copula, amount in law, to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law presumes the copula was allowed on the faith of the marriage promise; and that so the parties, at the time of the copula, accepted each other as husband and wife.

The proposition is substantially stated in the words of Bishop on Marriage and Divorce (section 90), where it is laid down that. in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such consent is to be presumed when the copula follows upon a promise to marry in the future.

But this doctrine is directly denied in Cheney v. Arnold, 15 N. Y. 345. Denio, C. J., delivered the opinion of the court, which was concurred in by his associates. The syllabus contains the point of the opinion, and is as follows: "A contract to marry, per verba de futuro, though followed by copulation, does not amount to a marriage in fact. Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing a performance, by formal solemnization, in the ecclesiastical courts, and was for some purposes regarded as a valid marriage by the canon law, but, it seems, never constituted a valid marriage at common law."

It must be admitted that there are some dicta of American jurists to the contrary of this case, and in accord with the rule maintained by Bishop; but Cheney v. Arnold is later than these dicta, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor Walworth, in Rose v. Clark, 8 Paige, 579, that at common law no marriage was valid unless celebrated in facie ecclesiae. In the earlier editions of Kent's Commentaries (part 4, p. 87), it was stated, that: "If the contract be made per verba de praesenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made in facie ecclesiae." Upon this proposition the supreme court of the United States in Jewell v. Jewell, 1 How. [42 U. S.] 234, were equally divided and gave no opinion. In a later edition of the commentaries this proposition is materially qualified by inserting after the words—"it amounts to a valid marriage" in the absence of all civil regulations to the contrary. This qualifying clause is found as early as the seventh edition, published in 1851, while the case of Cheney v. Arnold was not decided until 1857. Modified by this clause—in the absence of all civil regulations to the contrary—the proposition in Kent amounts to nothing more, than that in a state of nature no particular form or ceremony is necessary to give validity to the consent of the parties to the contract to become husband and wife, and the same may be said of any other contract.

But admitting that the law upon this question is with the complainant, and that a contract per verba de futuro cum copula constitutes a marriage, is there any such contract in this correspondence? It will not be pretended that it contains any express promise to marry the complainant at any time, or an express admission that an engagement to marry ever existed between the parties. Nor do I think that any such promise or engagement can be reasonably inferred from the correspondence, when read by the light of the surrounding circumstances.

The correspondence consists of five letters, purporting to have been written by Holmes to complainant. They are dated October 15, 16, 24, 29, and November 12, 1865. The first two were written at San Francisco, immediately upon his arrival there; the next two on board the Golden City, between San Francisco and Panama, and the fifth and last one, at New York. The first one is incomplete, being evidently continued on a second sheet, which is not produced. The omission is unexplained, and the presumption is that the missing portion of the letter would not, if produced, be favorable to the complainant's case, but the contrary. There is no doubt about the authenticity of the letters. Mr. Shattuck, one of the complainant's attorneys, testified that he received the letters from the hands of his client, a short time before she left for San Francisco, and that she left for that place about one and a half months before this suit was commenced.

Byron Holmes also testifies that they are in the handwriting of his father.

The letters are addressed to "Dear Clara," and are quite voluminous. Their general character, is all that can be stated here. Here and there they contain expressions which readily admit of being understood in a gross and indecent sense. The language and sentiments of the correspondence, and the topics discussed in it, clearly indicate that the parties had been living in a state of concubinage or worse, and that the relation between them was a mere convention by which they agreed hereafter, to commit fornication only with one another.

The writer is constantly assuring the complainant of his continence and fidelity to her, notwithstanding the many strong temptations which surround him, and as constantly cautioning the complainant against visiting houses of prostitution, or entertaining other men at her house.

True, there are some expressions in the correspondence that may be construed as indicating that it was the purpose of the writer to marry the complainant when he returned, if her conduct was satisfactory during his absence. Among these, the strongest are, that he regretted that he had forgotten the kind of goods she wanted for a wedding-dress, but would get something. That "the woman I marry must conduct herself during my absence so as to be above suspicion." "If you wish to become an honored wife, you must not visit houses of prostitution." No engagement to marry is alluded to, nor is the word "wife," or "marriage," or "marry" used, except as above stated.

Considering the previous lives and relations of these parties, an actual promise to marry, cannot reasonably be inferred from this correspondence. At best, it is merely evidence of a purpose or understanding that thereafter the complainant would give up her former vocation, and live with Holmes, exclusively, as his mistress.

Another circumstance connected with the correspondence, remains to be considered. In the letter of Nov. 12, Holmes writes that he is about ready to return to Portland, but that he will first visit complainant's father, in Ohio, and that he would leave New York, for that purpose, on the 14th inst. Whether he went or not, does not directly appear, but I infer not. However, a letter is produced in evidence, dated "Felicity, Ohio, Dec. 3, 1865," addressed to "Mr. Thomas J. Holmes," and signed "John Altman," and endorsed in the handwriting of Holmes—"From John Altman to Thomas J. Holmes." This letter came from the custody of the complainant with the others. It is brief, and begins by acknowledging the receipt of one from Holmes of "17th of November, with $20, enclosed, for which you will please accept my thanks," and proceeds—"you also desire my consent to a union with my daughter. Upon this delicate question I hope my consent is given to a gentleman of honor, of kind heart and tender feelings, and that the result will be for the good and happiness of you both in the future. With these few lines, hoping to hear from you soon, I subscribe myself yours, respectfully."

It cannot be denied, that upon the face of this letter it is asserted that Holmes, in his, of the 17th of Nov., had in some way, made a proposal of marriage with "Altman's daughter." What her name was, and why the proposal was accompanied with the exact sum of $20, does not appear. But why is not the letter from Holmes containing this proposal produced? If received by complainant's father, it is presumed to be in his custody, and at her service. If it was lost or destroyed, she could have her father's deposition taken and prove that fact and its contents. The omission to do this is sufficient to cast suspicion upon the integrity of this so-called Altman letter.

Besides one would hardly think that Holmes would deem it necessary to ask permission of her father or any one else, unless it was his own family, to marry a person in the situation the complainant then was, and had been. Admitting, however, that the letter was written by complainant's father, in response to one from Holmes, asking her hand in marriage, it cannot be believed in the light of all the other circumstances, that either Holmes or the complainant ever seriously intended anything by such proposal, other than to make an impression upon some one. For instance, the complainant knowing, or having good reason to believe, that she was regarded at home, as a lost, or fallen woman, might have suggested or assented to this application as a means of restoring herself in some degree, in the estimation of her family and friends.

These are all the special circumstances relied upon by the complainant, to prove a marriage in fact, between herself and Holmes. Neither the time or place of the alleged marriage is stated in the bill, and in the argument for complainant it was claimed that it might have taken place, either in Oregon or California, or at sea, between here and Panama. Admitting that the marriage might have taken place where there were no civil regulations prescribing specified forms and ceremonies as necessary to give validity to the consent of the parties, in my judgment these circumstances are not sufficient to prove either a marriage per verba de futuro cum copula or per verba de praesenti.

The question of marriage or no marriage in this case, arises between one of the parties to the alleged relation, and the legal representatives of the other. The determination of it does not involve the rights or status of innocent third persons, who have honestly given credit to and acted upon the appearances of a marriage between the parties or who are the issue of such parties, under circumstances where marriage was even pos-

sible. The complainant claims one third of the property left by Holmes, as against his own children and natural heirs, upon the single ground that she was his lawful wife at the time of his death. The burden of proof is upon her, to show this fact, and it is not sufficient to show that there might have been a marriage, but she must prove the fact directly, by the evidence of those who witnessed the contract, or by such an array of circumstances as admit of no other reasonable conclusion. It must also be a lawful marriage, contracted or celebrated according to the law of the land. The complainant contributed nothing to the accumulation of this property. She is in no sense or degree the meritorious cause of it. She went from a brothel to live with the deceased, even while his second wife was still living, and was supported by him in ease and luxury for nearly two years. She bore him no children, and probably rather gained than lost by the transaction. This is the extent of her merit so far as this property is concerned. Whatever she is entitled to, the law gives her as the widow of the deceased, and not otherwise, and she cannot complain if she is required to prove with reasonable certainty, the fact upon which her claim rests—a marriage with the deceased.

Now, if any marriage ever took place between these parties, it must have been either in the state of Oregon or California. There is nothing in the evidence to warrant the conclusion that the parties ever met elsewhere, except on the steamer on the return voyage from San Francisco to Portland. This court takes judicial knowledge of the law of California. Upon the subject of marriage it provides: "No person shall be joined in marriage unless such person shall have first obtained a license therefor, from the clerk of the county court, * * * which license shall authorize any judge, etc., to celebrate and certify such marriage." Hit. Laws Cal. 4466.

This language is mandatory, and prohibits persons from being joined in marriage except upon the conditions therein prescribed.

The law of this state provides similarly: "Before any persons can be joined in marriage, they shall produce a license from the county clerk * * * directed to any person, etc., authorized by this act to solemnize marriage, and authorizing such person, etc., to join together the persons therein named, as husband and wife." Code Or. 785.

But what follows is still stronger and more direct: "In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife." Code Or. 783.

The consent to become husband and wife —the contract out of which arises the relation—must be given as herein prescribed—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the states of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals, that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. For instance: If this marriage was contracted in Oregon or California, according to the laws of either state, it would have been done before some person authorized to celebrate marriage and make a record of it, by which the fact could be proven directly, and beyond dispute.

Nor do I think that citizens of this state, as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another state, as at sea, and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them.

In Milford v. Worcester, 7 Mass. 48, a certain man and woman came before a magistrate authorized to celebrate marriage, and requested him to marry them. He refused, but the parties then and there, in the presence of the magistrate and other witnesses, declared that they took one another for lawful husband and wife, each making to the other the vows and promises usual in contracting marriages. The statute does not require any form of words for the solemnization of marriage, but that the contract was to be solemnized before a justice of the peace or minister. The action was by the issue of these parties, claiming to be their legitimate children, and the question was, whether there was a valid marriage or not between their parents, and it was determined in the negative. Parsons, C. J., delivered the opinion of the court. In the course of it he says: "Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of the parties who may marry; so as to prevent a conflict of duties, and to preserve the purity of families, by describing the solemnities by which

the contract shall be executed, so as to guard against fraud, surprise and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and a dissolution of manners; and by declaring the causes, and the judicatures for rescinding the contract, when the conduct of either party and the interests of the state authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage. It has been truly observed by the counsel for the plaintiffs, that a marriage engagement of this kind is not declared void by any statute. But we cannot thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject. But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, cannot claim dower, nor the issue seizin by descent. Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment, as guilty of fornication, may depend on circumstances. If either of the parties were circumvented, and verily supposed the marriage legal, perhaps such party would be protected from punishment, on the general principle, that to constitute guilt, the mind must appear to be guilty. But every young woman of honor, ought to insist on a marriage solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws, as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction; and if not contemned, will lead to dishonor and misery."

But I am aware that there are some loose dicta scattered through the books, to the effect that a mutual engagement to marry between parties capable of contracting marriage, is valid, and constitutes a marriage, although not entered into or made, according to the forms, and before the person prescribed by the local law, unless the same is thereby expressly declared void. Without in any degree assenting to this doctrine, let it be assumed for the moment to be the law applicable to this case, while we consider whether the circumstances justify the inference that any such engagement took place between these parties.

First, it must be borne in mind that under the circumstances there was little or no inducement for marriage between these parties. They had long passed the heyday and romance of youth. Their acquaintance did not commence in innocent and honorable courtship and love, but in a mercenary and criminal commerce. No innocent offspring bound them to one another, or appealed to them for protection and legitimacy. The deceased was a man in the decline of life, with a handsome fortune and a grown-up family of sons and daughters. With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him. The complainant was also well advanced in years, and, considering her past career, was not likely to have sought marriage for either the primary or secondary object of that relation. In my judgment, the most reasonable inference from even the circumstances which are claimed to favor the hypothesis of marriage is, that the parties, after the death of Mrs. Holmes, agreed to live together as man and wife, that she was to be faithful to him, and he to her, as long as they lived, or remained connected. This, of course, was not an agreement then to marry, but to live together like husband and wife. Holmes had wealth and a home, and she was poor and out of the pale of society. She had lived as the mistress of one man, and afterwards as a prostitute. As she appears, from the testimony, there is no reason why she should decline to be Holmes' mistress, or why he should go so far as to offer her marriage as a consideration for the exclusive enjoyment of her person or society.

The parties having agreed to live together upon this footing, it was only natural that in some respects, particularly when third persons were present or concerned, they should treat one another as man and wife. Besides, Holmes had lived long in this community, and may be expected to have had some regard for appearances, as well for his own sake as that of his children around him. Indeed, at times, for this reason, he may have seriously contemplated marrying the complainant; but when he sounded his friends about the matter, as in the conversation with Boyd, and heard their opinion of the propriety of it, he shrunk back or procrastinated the matter. He might also have intended to have made provision for her in case of his death, which was sudden, and, doubtless, many years before he expected it.

But this agreement to live together bound neither of them, nor did it change their status or relation to one another. Living together as man and wife, although evidence of a previous marriage, particularly so far as third persons are concerned, cannot make parties man and wife. Nor can any length of cohabitation, however exclusive, ever constitute the relation of mariage. Marriage, is a relation, as much so as that of parent and child. It is founded in contract—in the consent of the parties. That consent must be mutual and absolute per verba de praesenti,

—not merely to live together exclusively, but to become joined to one another in the estate of matrimony.

In Letters v. Cady, 10 Cal. 533, the plaintiff sued as the widow of Cady for a share of his estate. Her complaint avowed that in 1853 she "was keeping a restaurant and public saloon in Grass Valley, and that she had accumulated in this business five or six hundred dollars; that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; that in accordance with his wishes she relinquished her business, sold her property, 'and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true and faithful and affectionate wife should do.'" There was a demurrer to the complaint. Field, J., delivered the opinion of the court. After stating the case as above, the opinion proceeds:—"These are all the averments respecting the marriage, and they are entirely insufficient. The facts alleged do not constitute a marriage. They are only prima facie evidence of a marriage. Living together 'as man and wife' is not marriage, nor is an agreement so to live a contract of marriage. From the character of the allegations, and the pregnant fact that the plaintiff does not even sue in her marital name, except under an alias, we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and the connection one to which it would be a perversion of language to apply the name of marriage."

But there are other circumstances disclosed by the testimony, the necessary inferences from which are overwhelmingly against the hypothesis that any marriage, or contract of marriage, ever took place between these parties, besides the direct testimony of some of the defendants to the admissions of the complainant to the contrary.

Byron Holmes, the younger son of the deceased, testified that he lived in the home house with the parties from the time of their return from San Francisco, in the spring of 1866, to the death of his father; and that he never heard the complainant addressed or spoken of by the deceased or other person otherwise than as "Clara." That he never asked her, directly, if she was married to his father, but in conversation she often told him, both before and after his father's death, that she claimed none of his property, and in reply to a question from complainant's counsel, he swore positively that in a certain letter, written by deceased to witness from San Francisco, in March, 1866, he did not inform witness that he had married complainant, but did say to him "that he had not or would not marry her." The witness also said that he had not this letter in his possession, but would produce it if counsel desired, but its production was not insisted upon by complainant.

Thomas Holmes, Jr., and Strowbridge, the administrators of the estate, both testified that soon after the death of Holmes, and while complainant was still in the house of the deceased, they conversed with her about her right to administer upon the estate, and informed her that if she had a certificate of marriage with Holmes, her right to administer should not be questioned. At first she said she had a certificate, but had promised Holmes never to produce it or show it to any one; but upon further conversation she burst out crying and acknowledged that she had no certificate, and had not been married, and that it was the second time she had been fooled, or deceived. Said she desired to go to her father, near Cincinnati, and wanted to know if witnesses could not raise her a certain amount of money to go with. Of course the fact must not be overlooked, that these defendants have a large pecuniary interest in the result of this suit. But that does not necessarily discredit their testimony, although it furnishes a reason why it should be carefully considered and scrutinized. Judging from the manner of the witnesses, the intrinsic probability of their statements and the absence of any direct contradiction of them, I see no sufficient reason for not believing them.

A. Johnson, called by complainant, testified that he had known Holmes for about fifteen years, but did not know complainant. That he was quite intimate with him, but never heard him say anything particular about complainant, and never heard him refer to her as his wife, or speak of being married. Add to this, that it does not appear that any one ever visited or received them as husband and wife, or that they ever appeared in public together, and that notwithstanding all the friends and acquaintance, which Holmes, from his wealth and long residence must have had here, no one is produced who ever heard him say that he was married to the complainant.

The very fact that the complainant released all interest in the property of the deceased, worth $25,000, for the insignificant sum of $1,000, is itself enough to raise the presumption that she did not then believe herself the widow of Holmes, and legally entitled to one third of his property. True, she might not have been aware of the exact value of the property, but she must have known that Holmes was a man of considerable fortune, and that the dower of his wife was worth many thousand dollars. His wealth appears to have consisted almost wholly of town property in the city of Portland, and from her residence in the city, and intimacy with the deceased, she must have had a tolerably correct impression of the value of his estate. I am unable to discover anything in the evidence, or the circumstances of the parties to justify the conclusion that any advantage was taken of the complainant to obtain this release. She was of mature age, had seen the world, and was

not likely to have been prevented by shame or mortification from coming before the public and asserting her rights, if necessary. A woman with a reasonable claim for $25,000 upon a solvent estate of a deceased person need not want for friends to assert her claim, in this country. She appears to have had communication with persons outside of the family of the deceased. Dr. Davenport visited her more than once, and Ferry once. They both conversed with her privately. Ferry appears to have taken an interest in her, and advised her that the best friend she could have was a good lawyer, and doubtless would have procured her an interview with one at any time. Dr. Davenport appears to have been her friend, as well as physician, and if she had desired it, was abundantly capable, and doubtless willing, to aid her in the assertion of any right she might have had as the widow of Holmes. Indeed, there is not much room to doubt but that he knew, directly or indirectly, from the parties themselves, what the real relation between them was; and I am satisfied that if he had had reason to believe that complainant was ever married to Holmes, he would have counseled and assisted her to maintain her right as his widow. Taken altogether, considering particularly the gross inadequacy of price, this sale of dower must have been either brought about by the defendants obtaining some controlling and unconscionable advantage over the complainant, or else it was a mere amicable and plausible contrivance between the complainant and defendants to give the former an opportunity to leave the country with sufficient means for respectable appearances, and at the same time conceal from the public, as far as possible, the fact that she and their father had been living together in a state of concubinage. In support of the first proposition there is only the single fact of the gross inadequacy of price, and that is a sword that cuts both ways, while all the facts and presumptions of the case are either reconcilable with, or directly tend to establish the truth of the second one, and I have little doubt but that it is the correct conclusion from the premises.

In pursuance of this contrivance, and as part of it, the recitals concerning the complainant's agreement not to claim the property of the deceased were inserted in the deed, and she was also described therein and in the petition for letters of administration as the widow of Holmes. It can't be possible that any woman knowing herself to be the lawful wife of Holmes, and entitled to his name and one third of his comparatively large fortune, would quietly consent to relinquish all this for $1,000, and also to leave the country, under circumstances which she must have known and felt, were a tacit admission to the contrary.

But the insuperable objection to the theory of marriage in this case, arises from the silence of the complainant. If it be true that she was ever married to Holmes according to law, or that he ever attempted or pretended to marry her in any way, or by any means, or that he ever promised to marry her, the complainant knows it, and can state the fact with the essential circumstances of time and place. A woman is not likely to forget when and where she was married, whether according to the forms of law, or otherwise. In this case, there is every inducement for the complainant to state the fact, if it be a fact. Her honor and a fortune are depending upon it. That she is not insensible to the latter consideration, the bringing of this suit bears witness.

Yet she does not even state in her bill that she was married to Holmes. She only alleges in general terms, that she "was the lawful wife of the deceased, and lived and cohabited with him as his wife, from the —— day of December, 1865, to the time of his death." Whether she was "the lawful wife of the deceased," or not, is a question of law and fact, and no facts are stated on which to base the conclusion that she was, except that she "lived and cohabited with him as his wife"—that is like his wife, after the manner of a wife. Now, living with the deceased, however long or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription nor copula, either singly or combined, can never constitute marriage.

Again, the allegations in the bill, indefinite and unsatisfactory as they are, are not sworn to by the complainant. The bill, although it need not have been sworn to, is verified by one of complainant's solicitors, who upon this point speaks, of course, from mere information derived from the complainant.

But why does she not appear here as a witness or give her testimony by deposition, and inform the court particularly when and where and by what means she became the lawful wife of the deceased, and why, if such be the case, she released her dower, worth $25,000, for the paltry and inadequate sum of $1,000? The complainant is a resident of San Francisco, and there was nothing to prevent her from being a witness in the case, either in person or by deposition. The withholding of her testimony, under the circumstances, gives good ground for presuming that it would be adverse to her claim. She asks this court to infer from circumstances that she was the lawful wife of Holmes, when she declines to come forward and testify to the fact under the sanction of her oath.

This circumstance alone is enough to convince any one that whatever agreement or understanding there was between her and Holmes, as to living together—and I have no doubt there was some—they never were married, or engaged to be married, in any sense of the word.

A decree must be given dismissing the bill.

[In Case No. 3,274, a bill was filed to establish a trust in favor of Teresa E. Coulson and her two said sisters. Upon answer being made, certain exceptions thereto were allowed.]

HOLMES (HUNT v.). See Case No. 6,890.

Case No. 6,639.

HOLMES v. HUTCHINSON.

[Gilp. 447.] [1]

District Court, E. D. Pennsylvania. Nov. 22, 1833.

SEAMEN—MEDICAL ATTENDANCE—ACCIDENT.

1. Where a seaman in a foreign port, contracts an ordinary disease without any fault of his own, and remains on board a vessel which is properly provided with a chest of medicines, the expenses for the attendance and advice of a physican, if evidently necessary for the safety of his life, are to be deducted from his wages.

2. Where a seaman is disabled by an accident in the actual discharge of his duty, he is to be cured at the expense of the ship.

[Cited in Richardson v. The Juillette, Case No. 11,784.]

[Cited in Holt v. Cummings, 102 Pa. St. 215.]

[This was a libel in admiralty by Fordyce Holmes against Joseph B. Hutchinson, master of the brig Paragon.]

Mr. Troubat, for libellant.

Mr. Hurst, for respondent.

HOPKINSON, District Judge. The libel, in this case, states a contract for a voyage from the port of Philadelphia to Vera Cruz, and thence back to Philadelphia, at the wages of fourteen dollars a month. The voyage commenced on the 22d June, 1833, and ended on 15th October, of the same year. The libellant avers a performance, in all things, of his duties as a mariner, and, after admitting certain credits, claims a balance of thirty-five dollars and twenty-five cents to be due to him. On the part of the respondent a further credit is claimed of sixteen dollars, being the amount of a physician's bill paid by the master of the vessel, for attending the libellant in a sickness at Vera Cruz. The only matter in dispute between the parties is, whether this bill is chargeable to the libellant or to the owners of the brig. The sickness, with which the libellant was afflicted, was a typhus fever, which was not contracted by any fault or negligence on his part, nor does it appear to be an endemic disease of the climate. The brig had a medicine chest, properly put up, according to the directions of the act of congress, and from it the libellant was supplied with the medicines used in his sickness, and he remained on board the brig. The physician was sent for by the captain when the libellant was in a state of delirium, and the charge is wholly for medical advice and attendance.

This is a case, in which: 1. The sickness was not produced by the fault of the seaman, nor contracted previous to his shipment. 2. It was not produced by any accident while engaged in service on board of the brig and in the discharge of his duty. 3. It was not an endemic disease of the climate to which the seaman was exposed. 4. It was not a contagious disease, dangerous to the crew, which made it necessary for their safety, to remove the man from the vessel, thereby incurring extraordinary expenses. 5. It was an ordinary disease which the man might have had any where, in any other place or employment.

I have found no precedent for charging the ship, in such a case, with the physician's bill for advice and attendance, even by judges most inclined to favour the seaman. It is not a question of boarding or nursing on shore during a sickness, but for the services of a physician evidently necessary for the safety of the life of the man; it would have been inhuman if the captain had not sent for him. But if the expense of medical aid is to be a charge upon the owners of the vessel, the master may be reluctant to obtain it, or altogether neglect it. The seaman, therefore, has an interest in taking the charge upon himself, although the physician may be called by the direction of the captain, in circumstances when the seaman could not be consulted about it.

The law of the United States seems to be settled on this subject, on the general principles of the maritime law, with such modifications as our act of congress has introduced. It is not to be doubted that, when a sailor is disabled in the actual performance of his duty, he is to be cured at the expense of the ship; but, on the other hand, when the sickness or disability is the consequence of his own misconduct or irregularities, he must be cured at his own charge. Judge Peters was not satisfied that the sick seaman should pay for medical advice, but that such advice, as well as the medicine, should be furnished at the charge of the ship, to complete the intent of the provision of the law, because of the inefficacy or danger of medicines administered ignorantly or carelessly. But he admits that the weight of authority is against this opinion, and he, very properly, yields to it; and agrees that the seaman had better pay for medical advice than risk the consequences of an indiscreet use of the medicine chest. He says, in the case of Walton v. The Neptune [Case No. 17,135]: "By the terms, in the alternative in the act of congress, that if the ship has no medicine chest, the owners shall pay the physician's bill, it seems, that if the ship is furnished with the chest, the sailor must pay for advice; but the ship must supply the medicine." In another case, that of Swift v. The Happy Return [Id. 13,697],

[1] [Reported by Henry D. Gilpin, Esq.]

the same judge speaks again on this subject: "The charge for medical advice is commonly mixed, in the gross, with the general items, per day or week, for boarding and attendance. The sailor must only pay for the former." After some further remarks, he says: "When one of a crew is seized with an infectious disease, he should be removed from the rest, and sent on shore, at the ship's expense, for the safety of the whole, and the advantage of the owner, who must count on extra disbursements if he will trade to ports or places, liable to such casualties." He adds that it ought to be borne by the ship, "from motives both of humanity and justice." This is well when the sick man is taken from the ship for the safety of the crew and the advantage of the owner, but I do not feel the force of any claim, on the part of the seaman, because the vessel is trading to a port or place liable to dangerous diseases. This he knew when he made his contract, and if it exposed him to extra expenses, as well as risk, it may be presumed that he took them into his calculation in fixing the price of his services, the amount of his wages; in this way, the owner has paid extra disbursements for this danger and these expenses. We shall have a very uncertain rule, if the legality of this charge upon the owners of a vessel is to be governed or regulated by the healthiness of the trade in which she may be employed, or the places to which she may go. In the conclusion of the judge's observations, he says: "Although, in ordinary cases, having a medicine chest on board may be a compliance with the act of congress, exceptions should be made where dangerous diseases require and compel extraordinary remedies and expense." By "dangerous diseases" we must understand such as had been previously mentioned by the judge, that is, infectious diseases, dangerous to the rest of the crew, and not merely dangerous to the person afflicted; for in the latter sense every disease might be included, according to its violence and the condition of the patient. In the case of Harden v. Gordon [Id. 6,047] the court said, that "its researches had not enabled it to detect a single instance in which the maritime laws of any foreign county throw upon seamen, disabled or taken sick in the service of the ship, without their own fault, the expenses of the cure." And it was also decided in that case, "that the act of congress had not changed the maritime law, except so far as respected the expenses of medicine and medical advice, when the proper medicine chest was on board, and within reach of the seaman." It is added, that "the charges of nursing and lodging, in all cases, and even of medicines and medical advice, in cases of a removal from the ship, were still to be charges against the ship."

It must now be taken to be the law of the United States, under our act of congress, that in the case of an ordinary sickness, not infectious or dangerous to the crew so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest according to the directions of the act of congress, the medical advice of the sick seaman, is not chargeable to the ship. Even under this modification of the general maritime law, it cannot be denied that sailors are highly favoured, and have advantages and privileges which belong to no other men who labour for stipulated wages. Other labourers in agriculture, in trades, in mechanical arts, are not only obliged, in case of sickness, accident, or other disability to maintain themselves and pay all the expenses of nursing, medicine, and medical attendance, but their wages, their only source of revenue, the only means by which they can provide for such expenditures, are stopped. The sailor, on the contrary, is still maintained by the ship, nursed at her expense, and furnished with necessary medicines, and his wages run on although he may not do a stroke of work for the whole voyage. It is true the seaman may lose his wages, however hardly earned, by casualties, to which the labourers on land are not exposed; but, in time of peace, they are of rare occurrence, and are scarcely considered in the contract. When they are more considerable, they have a proportionable influence on the rate of wages.

Decree: That the libellant, Fordyce Holmes, recover and have paid to him the sum of nineteen dollars and twenty-five cents, with costs.

Case No. 6,640.

HOLMES v. The JOSEPH C. GRIGGS.

[1 Ben. 81.] [1]

District Court, E. D. New York. Nov., 1866.

SALVAGE — STEAMBOAT — COSTS — PRINCIPLES OF PUBLIC POLICY IN SALVAGE CASES.

1. A sloop laden with iron ore, went on a rock in Hell Gate, and was left by her master and crew. The sailors, however, watched her from the shore till she was carried off the rock and floated towards the Bread and Cheese, a dangerous reef, when they put out in their boat to board her. A passenger steamboat on her way to Harlem also saw her position and went to her, and took her in tow before she reached the Bread and Cheese, and before the crew reached her, and towed her to Harlem; and the master of the steamboat, while negotiations were pending to settle the claim for salvage, filed a libel to enforce the claim. *Held*, that the facts make out a clear case of salvage.

[Cited in The Alaska, 23 Fed. 608.]

2. The opinion of the crew of the sloop that they should have been able to save her if the steamboat had not gone to her aid, although to be taken into account in fixing the compensation, as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage.

[Cited in M'Connochie v. Kerr, 9 Fed. 53; The Plymouth Rock, Id. 416; The Oregon,

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

27 Fed. 872; The S. A. Rudolph, 39 Fed. 333.]

3. The court, if it were not a case of salvage, might be inclined to withhold from the libellant his costs, because of his putting the claim in suit, while it was in a fair way to be settled; but the same considerations of public policy which affect salvage awards are not overlooked in disposing of the question of costs.

4. On a valuation of $1,500, the court allowed $300 and costs.

[This was a libel in admiralty by John H. Holmes against the sloop Joseph C. Griggs and her cargo.] The value of the sloop and cargo was about $1,500.

Messrs. Benedict, Tracy & Benedict, for libellants.

W. J. Haskett, for claimants.

BY THE COURT. This was an action in behalf of the owners and crew of the steamboat Sylvan Grove, to recover salvage. The evidence showed that on the morning of the 15th of March, 1866, the sloop Joseph C. Griggs, laden to the extent of her capacity with iron ore on deck, in passing through Hell Gate, was driven upon Negro Head Rock. Her large anchor had been let go, in an effort to avoid the rock, but had failed to bring her to, and she grounded upon a falling tide.

Her master and crew, anticipating that the sloop might heel over as the tide fell, removed their clothes, provisions, bedding, &c., to the boat, and in it betook themselves to the shore, intending, however to watch the vessel, and attempt to save her in case she should come off under the action of the strong ebb tide. While thus abandoned for the time, a strain came upon the chain of the large anchor, which tore up the windlass and freed the vessel from the anchor, and about the same time the current swept her off the rock. She began at once to drift down the stream in the eddies which make rapidly from Negro Head Rock to the Bread and Cheese, a dangerous reef at the upper point of Blackwell's Island.

While the sloop was on the rock her position had been observed by the persons on board the Sylvan Grove, a fast passenger steamboat engaged in making hourly trips between Peck Slip and Harlem, and her movement being seen while the steamboat was landing at Astoria, the landing was hastened and an extra man taken on board, and the steamboat started to rescue her. She was reached before she struck the Bread and Cheese, was at once boarded by some of the hands of the steamboat, and, lines being got out, was towed out of danger and taken to Harlem Flats. The movement of the sloop from the rock had also been noticed by her crew, who, with the exception of her master—then absent in search of his owner—at once started out in their boat, but failed to reach the sloop until just as she began to move in tow of the steamboat. They then boarded her, and with her were taken to Harlem. The sloop sustained little or no injury while on the rock, and on being released from custody in this action, proceeded on her voyage without repairs.

These facts, which are not seriously questioned, present a clear case of salvage. The sloop, when taken hold of by the steamboat, had no one on board, and was drifting towards a dangerous shoal, where, if she had struck, the total loss of her cargo would have been almost certain, and the vessel herself seriously injured, if not destroyed. The testimony of the crew and others, greatly relied on by the claimant, to the effect that, in their opinion, the vessel would have been saved by her crew if the steamboat had not gone to her aid, although to be taken into account in fixing the amount of compensation as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage. "A situation of actual apprehension, though not of actual danger, makes a case for salvage compensation." The Raikes, 1 Hagg. Adm. 247; The New Holland, Vice Adm. at Gibraltar. "Salvors," says Judge Story, "are not to be driven out of court upon the suggestion that, if they had not touched a derelict ship, the latter might in some possible way have been saved from all calamity, and therefore the salvors have little or no merit." The Henry Ewbank [Case No. 6,376].

The case being then, in my opinion, one for a salvage award, it remains to fix the amount. In determining this, I bear in mind that the whole doctrine of salvage rests upon considerations of public policy. I also take into consideration, on the one side, that the service in question was rendered promptly; that it was performed by a steam vessel; that the steam vessel was a passenger boat, at the time engaged in making a regular trip; that the place was one beset with dangers for sailing vessels, where steamboats of this class can often render powerful and much needed aid. On the other side, I notice that the steamboat was not detained so as to interfere with her next trip; that the service involved little labor or skill and no risk; that the crew of the sloop was near at hand, with a chance of being able, without assistance, to get their vessel into the true tide, and so to tow her by their boat to the adjacent shore.

How considerations like these have affected the determinations of courts of admiralty in awarding salvage, the cases, unnecessary to be cited here, will show. As somewhat analogous to the present case, I may, however, refer to the case of The Margaret, Shipp. Gaz. 1857, where a brig had touched on the spit of the Dutchman's Bank, but shortly afterward came off with loss of anchor, and then let go another and hoisted a signal, and where the court in awarding £250 to a tug which went to her aid, held that "not only the present, but the prospective state of danger of the vessel res-

cued was to be considered." I also refer to the case of The Ocean Witch, a schooner of 136 tons, which was towed off the sands in the Thames, where the court awarded £100, "in order to encourage steamers to assist vessels when ashore in the Thames." Shipp. Gaz. Feb. 1853. After duly weighing the considerations which the present case seems to present, my conclusion is that $300 is the proper sum to be awarded to these salvors, and I shall also give them their costs, although in view of the evidence tending to show that either undue haste or a misapprehension on the part of the master of the steamboat caused the claim to be put in suit while it was in a fair way to be settled without expense, I might, were it not a case of salvage, be inclined to withhold them. But I find, on looking into the cases, that the considerations of public policy which so largely affect every award of salvage are not overlooked in disposing of the question of costs, and that I should be departing from the rules usually applied in these cases by withholding costs. Thus, Dr. Lushington, in the case of The Rosalind, 2 Mar. L. C. 220, when he dismissed the libel on the ground that no salvage service had been performed, gave the libellants their costs, "in order to recognize the meritoriousness of their intentions;" and in the case of The Countess of Levin Melville, 1 Mar. L. C. 154, the same learned judge, when pronouncing in favor of a tender made without costs, declared the salvors to be entitled to full costs. So, too, in the case of The Innocenza, when a libel for salvage was dismissed without costs against the salvors, he cites, with approval, the words of Lord Stowell, that, "if, as a general rule, he accompanied a decree (adverse to salvors) with costs, it would discourage other salvors, a class of people not very able to comprehend these matters, and therefore would be likely to injure public interests." See, also, Coote, Prob. Pr. p. 63. A decree must accordingly be entered in favor of the salvors for the sum of $300 and their costs to be taxed.

Case No. 6,641.

HOLMES v. LISSBERGER.

[See Case No. 6,632a.]

Case No. 6,642.

HOLMES et al. v. The LODEMIA.

[Crabbe, 434.] [1]

District Court, E. D. Pennsylvania. July 16, 1841.[2]

SEAMEN—WAGES—FORBEARANCE—PRESUMPTION OF PAYMENT.

1. A forbearance to sue for nine months, even if the libellant was on the spot and the vessel within the power of the court during that time, does not raise a presumption of payment, either in the admiralty or any other court.

2. The mere naked fact that a plaintiff in the admiralty, or any other court, has discontinued his action, is not a bar to a subsequent suit.

This was a libel for wages [by John Holmes and Samuel Stratton, mariners, against the schooner Lodemia and Eliza, Levi Paine, master].

O. Hopkinson, for libellants.

G. M. Wharton, for respondents.

HOPKINSON, District Judge. John Holmes states that in April, 1839, the schooner Lodemia and Eliza being in the port of Philadelphia, and destined on a voyage to New Orleans and other places, Levi Paine, who was then her master, hired him to serve as a mariner on board of the schooner for her said voyage, at the rate of $16 per month, and he refers to the shipping articles to verify this allegation; he then goes on to allege a faithful performance of his duty for the space of eighteen months; and that he is entitled to the balance of wages due to him for the said service, which he avers is $195 22. The whole amount earned was $288. He allows credits for payment of $97 15, and makes an additional charge of $4 37, making the balance as already stated. The master of the vessel being changed, the answer is put in by William Pierce, the present master, who is also a part owner of the vessel, on behalf of himself and the other owners. The respondent alleges that the shipping articles referred to in the libel are in the possession of Levi Paine and not under his control, and therefore he cannot produce them to the court. In regard to the libellant Holmes, the answer merely avers that he has been paid his wages; that he was discharged from the schooner in October, 1840, and there is nothing due to him. Supposing the time of shipping to be correct,—and there is no denial of it,—the time of the discharge of the libellant, as stated in the answer, agrees with the term of service set forth in the libel, and is so far a confirmation of its truth. The whole defence against Holmes's claim is that he has been paid. Neither the service nor the rate of wages is brought into question. The only evidence of this payment set out in the answer, or relied upon in the argument, is that he "was discharged from the schooner in October, 1840, and, if he had any claim against her, it was in his power fully to bring it forward; that he has lain by, without preferring his claim, till this time—an interval of nine months." The owners of this schooner resided at Melville, in Cumberland county, New Jersey, but the libellant was shipped at Philadelphia, where the schooner then was. The port of her discharge and the termination of the voyage was at Melville. It may be presumed that the seamen, immediately on their discharge, came to this port to seek further employment, and it is no ground of

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

[2] [Affirmed by circuit court; case unreported.]

complaint, or evidence of payment, that they did not take out process, for the recovery of their wages, against the owners, in the district court of New Jersey, the judge of that court residing at a great distance from the residence of the owners. In November following, it appears that the schooner was again at Philadelphia, but whether Holmes had not gone to sea is not shown. It is also to be remembered that he took from the captain a certificate, now produced, stating that there was due to him, for wages, a balance of $218. Without attempting to account for his neglecting or delaying his suit for the recovery of his wages, it is enough to say that on no authority or reason can it be asserted that a forbearance to sue for nine months, even if the libellant had been here, and the schooner within the power of the court (which facts do not appear), raises a presumption of payment, either in the admiralty or any other court; most especially as more direct evidence of payment must, or should, be in the power of the respondents, either by receipts given, or the accounts of the schooner settled with the late captain. So far as respects the claim of Holmes I find nothing that raises a reasonable doubt of its justice, with the exception of the charge for $4 37, for work done, as to which the proof that has been given is not satisfactory, and which must be deducted from his balance, leaving now due to him $190 85.

In the case of Samuel Stratton, the libel avers that he shipped on board the said schooner in September, 1838; the vessel then lying at Bridgetown in the state of New Jersey, destined on a voyage to Philadelphia, thence to New York, thence to St. Augustine, and other places; that he was hired to serve as first mate of the schooner, at the rate of $30 a month, and he refers to the shipping articles to verify these allegations. He further avers that he faithfully served as first mate of the schooner for the space of two years, and that there is a balance due to him of his wages of $197 75. His account, annexed to the libel, claims a balance of $226 and gives a credit, on account, of $28 25, thus leaving now due $197 75. The answer of the respondents to this claim makes no denial, and raises no question, as to the time of service or the rate of wages; the shipping articles, as before stated, they cannot produce. The defence is put altogether on the averment that the libellant "filed his libel in this court and procured an attachment on the 19th November, 1840, claiming payment of wages due to him as mate of said schooner, and being for the same cause of action as is set forth in the libel filed in this case." It is admitted that there was no adjudication made by the court in that case; indeed it appears by the record that no answer was filed, and, of course, no hearing had by the court. The process was returned on the 20th November "Attached." and on the 21st the entry is "Costs paid." The answer now avers that this proceeding is a bar to the present suit, "it being unlawful for the libellant to abandon the former process, and tax the owners with new prosecutions for the same matters." It is further contended by the answer "that the said proceeding was terminated by the said Stratton receiving satisfaction in full of his said claim, and that he was fully paid and his demand satisfied, and that, as the record will show, the costs were also paid." The first ground is matter of law. Was the discontinuance or discharge of that proceeding a bar to the present suit? The counsel who filed that libel is, unhappily, not in a situation to inform us for what reason, or on what terms, it was discontinued, nor does it appear by the record, by whom the costs were paid. In the argument of the case the counsel for the respondent did not insist upon this matter as a legal bar to the present suit; nor, indeed, was it possible to maintain that the mere naked fact that the plaintiff, in the admiralty or any other court, had discontinued his action, would be a bar to a subsequent suit. It is no unfrequent occurrence, and may be done for many reasons which do not affect the validity of the claim, or the right of recovery.

The respondents' case then rests on the allegation of full payment and satisfaction of the debt. This is clearly an affirmative plea and calls for proof from them. None has been produced, but here too the presumption arising from the commencement and discontinuance of the former suit has been relied on. As we are entirely ignorant of the terms or reasons of that discontinuance, what can warrant us in assuming that it was in consequence of the payment or satisfaction of the debt? Is there any necessary inference of the fact? Certainly not. Is it not as reasonable to presume that the libellant consented to withdraw his attachment of the vessel on some promise of payment, or some other amicable arrangement for delay? If this was the case, and payment was then, or afterwards made, in pursuance of some such agreement, it is inconceivable that this should have been done without some receipt, some acquittance given to the respondents. If, on the other hand, it is contended that this payment and satisfaction had been made before the suit was brought, why have we not the proof of it, by the receipt of the libellant, or by the account settled with the owners by the former captain, in which he certainly would have claimed a credit for these wages, if he ever paid them. The respondents are thrown back entirely upon the presumption that because the proceedings in the former suit were withdrawn, therefore the money was then paid, or it was shown that nothing was due. If the latter, why is not the same proof given now that was then shown to and satisfied the counsel for the libellant, who certainly did not abandon the case without some evidence that it could not be sustained? To my

mind the more reasonable presumption is, that the vessel was discharged on some engagement to satisfy the claim; and, if so, it must be in the power of the respondents to show what it was, and a performance on their part. This presumption is fortified by a circumstance of some weight, although not necessary for the libellant. The amount claimed in the former suit was a balance of $286. By the account now produced and the claim now made by the libellant, his demand is reduced to $197 75, from which it has been inferred, and not without reason, that, subsequent to, or upon the discontinuance of the former suit, payments were made, and were the consideration upon which the attachment was withdrawn, and the promise of the respondents relied upon for the full discharge of the debt. If this was the case, and the payment has been made, it is certainly in the power of the respondents to show it. It must be observed that annexed to the libel formerly filed by Stratton, and now invoked by the respondents, there is a copy of a certificate, given by the master of the schooner to Stratton, acknowledging that there was due to him, for services as mate of the vessel, a balance of $286, which is the amount claimed for him in that suit. This certificate is dated on the 20th October, 1840, at Melville; the time when Stratton was discharged. The libel was filed and the vessel attached one month after the date of that certificate. In the absence of any contrary proof we must presume that no part of the balance had been paid in that month, because no credit was given for it by the libellant; and no proof is shown of any payment by the respondents. We may, therefore, believe, that the credits, now given by the libellant, which have reduced his debt from $286, to $197.75, are on account of payments made since the withdrawal or discontinuance of that suit, and were probably the consideration of that forbearance. In the account now presented with the libel the dates of these credits are not given. They would have made this part of the case more clear, but, as it now stands, we know that at the time Stratton was discharged from the schooner there was due to him the sum of $286; that when he brought this suit, a month afterwards, he claimed the same sum, and no proof is shown that any part of it had then been paid; that he now claims but the sum of $197.75, giving credits, of course, for the payment of $88 25, which can hardly be rejected by the respondents, and if admitted they show that, subsequent to the commencement of the former suit, these payments have been made. I cannot imagine a reason for which the libellant would have allowed these credits, unless he has received payments to their amount. He would have brought his suit now, as formerly, for the whole amount certified by the master to be due to him, had he not received these sums.

Decree for the libellant Holmes for $190 85, and for the libellant Stratton, for $197 75, and costs.

On the 16th July, 1841, an appeal was taken from this decree, to the circuit court of the United States for the Third circuit, and on the 25th October, 1841, that court affirmed the decree, with costs. [Case unreported.]

HOLMES (McCREADY v.). See Case No. 8,733.

Case No. 6,643.

HOLMES et al. v. OLDHAM et al.

[1 Hughes (1877) 76.] [1]

Circuit Court, E. D. North Carolina.

MUNICIPAL ELECTION—REGISTERING OFFICERS—INJUNCTION.

A bill of injunction will not lie in the United States circuit court to enjoin defendants, who are registering officers and poll-holders of election in a city of a state, from registering voters or holding an election in pursuance of state legislation and municipal charter.

[Cited in Guebelle v. Epley (Colo. App.) 28 Pac. 91.]

[This was a bill for an injunction by Duncan Holmes, Carter Gray, and others against W. P. Oldham and others.]

BOND, Circuit Judge. This is a bill to enjoin defendants, who are registrars and poll-holders of election in the city of Wilmington, North Carolina, from registering voters or holding an election under an amended charter of that municipality recently granted by the legislature. The reason alleged by the complainant why this remedy should be given is that the law amending the former charter of that city is unconstitutional. First. Because the districts into which the city is divided are largely unequal in proportion, though they have the same representation in the city council, and that this is particularly true of the colored population, which, in the third district, is by itself as large as the population of both the other districts. Second. Because the amended charter prescribes other qualifications for voters than are prescribed for voters in the constitution of the state, which are particularly oppressive to the colored people. Whatever may be said of the propriety or impropriety of the legislation in question, we are of opinion that the remedy sought for is not a proper one. There is no special wrong or irreparable damage alleged to be done or threatened to the complainants in person or property, but the injury threatened is stated to be the fear of great disorder and confusion, which would arise where there were two contending bodies claiming to be the common council, and to be entitled to the government of the city. The remedy for this is the writ of quo war-

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

ranto, brought by those out of possession of the office against those who hold it, and we know of no case where a court of equity has interposed by injunction to prevent an election upon such general grounds of fear, common to all citizens, even if the law under which it was about to be held was clearly unconstitutional. As is said by the supreme court of the state of Pennsylvania, in Smith & McCarty's 6th Equity Reports, "the power ought to be plain to authorize courts to forbid municipal elections when ordered by the legislature," and we may add, that before they exercise it there should be some threatened irreparable damage to the person or property of those who seek the remedy. If this election be an illegal, unconstitutional one, the remedy by quo warranto is complete. If it be a legal one, and the complainants or any of the citizens are deprived of their rights under the fourteenth or fifteenth amendment of the constitution of the United States, there is ample remedy in the courts, by indictment and otherwise, under the acts of May 1, 1870 [16 Stat. 140], and February 28, 1871 [16 Stat. 433], to punish the wrong done and to restore the rights of the parties. We think the injunction must be refused.

Case No. 6,644.

HOLMES v. SHERIDAN et al.

[1 Dill. 351;[1] 4 West. Jur. 339.]

Circuit Court, D. Kansas. 1870.

PRACTICE—PERSONAL LIABILITY OF MILITARY COMMANDERS.

1. Where two actions against the same defendants, one for trespass to the person, and the other for trespass to property, arose out of the same transaction, and might have been joined, the court, instead of ordering them to be consolidated, directed that they be tried at the same time and to the same jury.

[Cited in Keep v. Indianapolis & St. L. R. Co., 10 Fed. 459.]

2. A major-general in command of an army in the field in the Indian country may lawfully issue an order to arrest a person therein who has induced friendly Indians to steal cattle for him, with a view to turn such cattle over to the government under contracts to supply the army with beef; and the fraudulent possessor of such cattle cannot recover for them against the officer who, for such reasons, ordered their seizure.

3. A military commander, under circumstances of actual, urgent, and immediately pressing public necessity, may justify the taking of the private property of the citizen; in which case the citizen must look alone to the government for compensation. The existence of such necessity is a question for the jury, and must be clearly established by the party who alleges it.

4. Army contractors, their agents and assignees, or employees in the course of the execution of their employment, are subject to the rules and articles of war, and are liable to arrest by the military commander for frauds against the government under their contracts; but the officer making arrests must proceed, with reasonable diligence, to have the person arrested brought to trial.

5. Rules governing the measure of damages in actions against an officer for false imprisonment, stated.

Actions for trespass and false imprisonment. These were actions of trespass against Philip H. Sheridan and John H. Paige—the one for trespass to the person, and the other to the property of the plaintiff. They were removed into this court from the state court, and, after removal, ordered to be tried at the same time and to the same jury. The defendant, Sheridan, was a major-general in the army of the United States, and the other defendant, Paige, was a major under the command of General Sheridan. The United States government assumed the defence of the actions.

Mr. Sherry and Mr. Green, for plaintiff.

Mr. Horton, Dist. Atty., and Mr. Wheat, for defendants.

DILLON, Circuit Judge (charging jury). I. Under the statutes of the state relating to practice, adopted in this court, these two actions, which were originally brought in the state court, and afterwards removed into this court, might have been joined, and as both actions arise out of the same transaction, this court directed that they be tried at the same time and to the same jury. You are empanelled to try them; but you will consider them separately, the same as if each was alone before you. Both are actions in the nature of trespass,—the one to the property, the other to the person of the plaintiff.

In the action for trespass to property, the plaintiff asks to recover for certain cattle, which he claims that the defendants, on or about February 1, 1869, in the Indian Territory, took and converted to their own use, to the plaintiff's damage, in the sum of $7,900. In the other action the plaintiff claims for his alleged false imprisonment by the defendants, laying his damages in the sum of $25,000. The answers are in denial, and they also set up various defences by way of justification. The nature of these pleas in justification, and what is necessary to sustain them, will be referred to presently.

II. Certain facts, either admitted on the trial or not controverted, may first be referred to. The transaction under investigation took place in the "Indian country." The plaintiff, for himself or others, or both, was in possession of a herd of cattle, the same for which the present action is instituted. The defendant, Sheridan, was a major-general in the army of the United States, and was in command of an army force in the Indian country; and it is alleged that there was a war then being prosecuted by and under the direction of the defendant, as commander, against hostile Indians in the said territory.

On January 22, 1869, General Hazen, in command in the Indian Territory, under di-

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

rection of General Sheridan, issued a written order to one Lieutenant Doyle, to investigate alleged irregularities in the Indian department of the Indian Territory. On January 26, 1869, Lieutenant Doyle made a written report to General Hazen, stating that, "In regard to the cattle stolen by the Caddo Indians, I have the full particulars. Don Carlos made a clean breast of it;" and he then proceeds to state, in substance, that the Caddo Indians had been induced to steal the cattle; that Don Carlos, Griffenstein, and the plaintiff were concerned in the illegal enterprise of inducing the Caddo Indians to go and steal the cattle, and bring them up with a view to be sold or turned into the government under army cattle contracts. This report was laid before General Sheridan, and it is an undisputed fact that he ordered the cattle, now sued for, to be seized, and the plaintiff to be arrested, which were done, and the plaintiff was confined and put under guard. The cattle thus seized were afterwards turned over to the quartermaster's department and butchered, and fed to or otherwise used by the army. The plaintiff was kept in confinement for some time, and afterwards released by order of General Schofield, the successor in command of General Sheridan. The defendant Paige was a major in the army under the command of General Sheridan, and his part in the transaction consisted in obeying or executing the order of his superior officer.

III. The court will first instruct you in reference to the suit for the cattle. The plaintiff being in possession of the cattle, and the same having been seized by order of the defendant, Sheridan, the plaintiff is presumptively entitled to recover their value; that is, he is entitled to recover, unless the defendants have established some one or more of the defences set up in the answers. These defences will now be stated.

If you believe, from the evidence, that the cattle, for which the action is brought, were stolen, or taken from their owners without their consent, even though such owners may then have been, or may yet be, unknown, and if General Sheridan was informed of such theft, and that the cattle were intended to be put in on army contracts, then the order of the defendant, Sheridan, to seize such cattle would be a lawful one, and would not make him liable personally, and would also protect the defendant, Paige, acting under it.

If you believe, from the evidence, that the plaintiff was a party to a combination, whereby the Caddo Indians were induced to go to a distance where cattle were allowed to range at large by their owners, and to take them, without the consent of such owners, and bring them up into the Indian country with a view to sell or trade the same at a low price to those who sent them, so that the latter could sell or supply them to the government; or, if the plaintiff bought these cattle, knowing or having good reasons to know they were thus obtained (if such were the fact), he cannot or ought not to recover, for the law, as well as morality, decisively condemns such transactions as alike infamous and criminal, and it is the duty, as it should be the pleasure, of the jury, thus to decide. The burden of proof to show that the cattle were stolen and did not belong to the plaintiff, is upon the defendants. This may be shown by circumstances, if they are satisfactory to the minds of the jury.

IV. But the defendants claim that even if the cattle were not stolen, and though the plaintiff owned them, they are not liable, because they were seized by the defendant, Sheridan, upon a public necessity for the public use; and if so, the plaintiff's remedy is against the government, and not against its officers personally.

A military commander, according to the decision of the supreme court of the United States, may, under circumstances of necessity, take the private property of the citizen without being liable personally, in which case the owner must look to the government for compensation. But to justify a taking upon this ground, the necessity must be actual and urgent, and immediately pressing; and whether such a necessity existed is a question for the jury.

"In deciding upon this necessity, however," says the supreme court, "the state of facts, as they appeared to the officer acting, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable ground to believe it to be, and it is then for the jury to say whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that the private rights must for a time give way to the common and public good." Mitchell v. Harmony, 13 How. [54 U. S.] 115, 135; Wellman v. Wickerman, 44 Mo. 484.

The necessity claimed to exist in the present case is the need of the army in this distant region for animal food to prevent or remove scurvy among the troops, and to preserve or restore their health: of this you will judge, guided by the rules laid down. If such necessity existed, and if the cattle were seized for this reason, this defence is made out; but if no such necessity existed, or if they were seized for other reasons, this particular ground for defence fails. In de-

termining these questions you will look at and consider all the evidence, including the orders given, and the reasons assigned by General Sheridan for the seizure in question. If he assigned reasons for his seizure and did not include or refer to the one now under consideration as one of the grounds of his action, it is a strong, if not conclusive, circumstance to show that the defence of public necessity is not well founded, but is an after thought.

V. The court will now instruct you in reference to the action for false imprisonment. If war existed in the Indian Territory, and the defendant, Sheridan, as military commander ordered the plaintiff's arrest upon information of such character that rendered it probable that the plaintiff and others were guilty of the acts recited in the order for his arrest, and if there were no civil officers in the territory before whom the plaintiff could be prosecuted, then such arrest would be justifiable. But it would be the duty of the defendant after making such arrest to proceed with diligence to bring the plaintiff before a civil tribunal for the offences imputed to him, if the plaintiff was not subject to the rules and articles of war; and if he was thus subject to such articles, then before the proper military tribunal.

Contractors and their assignees and employes, when in the course of the execution of their employment, are subject to the rules of war, and are liable to arrest and punishment for fraud. Act July 4, 1864, § 7 (13 Stat. 394); Act July 17, 1862, § 16 [12 Stat. 596].

If the defendant failed to discharge the duty above set forth, and either arrested the plaintiff unlawfully, or kept him in confinement without trial an unreasonable time, he would be liable to the plaintiff. If you find that the plaintiff was a contractor or agent of a contractor, or an assignee thereof, for supplies for the army, and that he was endeavoring to practice a fraud upon the government, such as is claimed by the defendants, then the defendant, Sheridan, would, under the abovementioned acts of congress, have a right to cause his arrest, and would not be liable therefor; nor for his subsequent confinement, unless it is shown that the imprisonment was unreasonably long, or proceeded from malice, cruelty, or a desire to oppress and injure the plaintiff.

VI. If you find for the plaintiff in either or both cases, you will have to ascertain the amount of his damages. If the plaintiff is entitled to recover for the cattle, or any part thereof, the fair, actual market value of the cattle at the time and place of seizure is the measure of the damages. In respect to the action for false imprisonment, the measure of the plaintiff's damages (if he is found entitled to recover) is the actual loss sustained, unless the acts of the defendant were wanton, malicious, and oppressive; not done in good faith, but to injure the plaintiff; in which latter case the jury, not to reward the plaintiff, but to punish the defendant and make an example of his conduct, may give, in addition to actual damages, such sum as exemplary damages as they deem fitting and reasonable. But the jury should not go beyond actual damages unless it is shown that the defendant's conduct towards the plaintiff did not proceed from good motives and in the honest discharge of his official duties, but from a disposition or desire to oppress or injure him.

Paige stands, as to liability or non-liability, upon the same footing with Sheridan. If Sheridan's orders were lawful or justifiable, then they protect Paige, who acted under them. If unlawful, they will not constitute for Paige a defence, even though he was a subordinate officer. Mitchell v. Harmony, supra.

The jury found a verdict for the defendants. Judgment accordingly.

Case No. 6,645.

HOLMES et al. v. TROUT et al.

[1 McLean, 1.] [1]

Circuit Court, D. Kentucky. May Term, 1829.[2]

SURVEY—ENTRY—DEED—DELIVERY.

1. An entry that calls to begin at a tree marked J. P. about two miles up the first branch above Eighteen Mile creek, is sufficient, though the marked tree on the bank of the creek, is forty poles less than two miles from the mouth of the creek. A distance of forty poles, on a straight line, more or less, is not an unreasonable range within which a subsequent locator should search for the object called for.

[See note at end of case.]

2. The words used in an entry should be construed in reference to their popular signification, rather than to their grammatical arrangement.

[See note at end of case.]

3. A deed to Holmes, though absolute upon its face, is considered as intended to be made in trust; and under the circumstances, it is not considered as having been delivered.

4. An amendment of the original bill, as it asserts a new title, is considered, as it regards the statute of limitations, the filing of a new bill. Effect is given to the statute of limitations, there having been an adverse possession of twenty years, against the right asserted in the amended bill.

[Cited in Williams v. Carpenter, 42 Mo. 332; Illinois Cent. R. Co. v. Cobb, 64 Ill. 141.]

[This was a bill in equity by James Holmes and others against the heirs of Daniel Trout and William Moreland, to settle the title of certain lands.]

Mr. Todd, for complainants.

Mr. Wickliffe, for defendants.

OPINION OF THE COURT. The complainants state in their bill that "Edward

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

[2] [Affirmed in 7 Pet. (32 U. S.) 171.]

Voss, on the 11th October, 1783, made with the surveyor of the proper county, the following entry:—Edward Voss enters 10,000 acres by virtue of two treasury warrants, No. 8991 and 8990, beginning at the north-west corner of Patton's 8,400 acres survey, thence with Allen's line westwardly to the river, and along Roberts' line on the east for quantity." "Also 5,000 acres by virtue of treasury warrant No. 8,989, beginning at the south-west corner of Patton's 8,400 acres survey, then westwardly with Patton's, Pope, and Thomas' survey, thence up the river and on Patton's line on the east for quantity." That surveys having been duly executed on said entries the same were assigned to a certain Peyton Short, to whom patents were issued, dated the 12th and 14th March, 1790. That on the 10th December, 1796, Short conveyed to John Holmes, by deed, his whole claim to the land; but that by contract it is now jointly held by Holmes and the other complainants, and that the land is held by Holmes for their joint benefit. The complainants further state that conflicting entries have been subsequently made, by different persons, on the same land, and elder patents obtained, and they pray that a conveyance may be decreed to them on the ground of their prior equity.

In their answers, the respondents deny the equity set forth in the complainants' bill, and having the elder legal title founded upon valid entries and surveys, they pray the bill may be dismissed. Since the commencement of the present term the complainants have filed an amended bill, stating that the whole of the land in contest, was purchased for the use and benefit of Holmes, Slater, Caton, and Omealy; and that subsequently, by the consent of Slater and Caton, Omealy became their trustee. That an agreement was entered into between the complainants and a certain John Breckenridge, deceased, by which he undertook to render certain services as an attorney, for which he was to have one moiety of the land. That the original deed to Holmes never having been recorded, was handed to Breckenridge, with other papers relating to the business, and with directions to Short to make a deed to complainants and Breckenridge. That the said Breckenridge being in possession of the deed to Holmes, and authorized to receive a conveyance from Short to himself and the complainants, agreed to cancel the deed to Holmes, which was done by delivering it to Short, who cancelled it by erasing his name; and a new deed was made by him to Breckenridge and to William Omealy, as trustee for John Holmes and William Slater; and to Hugh Thompson as trustee for Richard Caton, dated 21st September, 1804. The amended bill further states that Breckenridge departed this life in January, 1806, before his part of the contract was performed; and that a bill was filed against his heirs by the complainants, for a re-conveyance of the land. That on the final hearing of the case the court decreed, as Breckenridge had but in part performed his contract, the deed should be cancelled as to all the lands within two adverse claims, to wit: that of the defendant, Howard, and —— Williams and Brown, and the complainants were decreed to convey to Breckenridge's heirs, a moiety outside of these claims. In pursuance of this decree, deeds were executed.

The complainants state that the whole of the land in controversy, is included in John Howard's claim, under which the defendants claim, and is referred to in the deed from Breckenridge's heirs to them; and that since the date of such deed, the equitable title has been vested in them. To the amended bill, Jeremiah Trout, William Buchanan, Jacob Overpeck, John Moreland, Walter A. Moreland, and William Moreland, defendants, answer, that they, with those under whom they claim, have been in the actual occupancy and peaceable possession of all the land claimed by them in their former answers, for more than twenty years before the filing of the amended bill, and they deny the statements made in it. On filing the amended bill, the parties agreed that the suit should progress in the names of the parties on the record, and that no advantage should be taken on account of the death of either of the parties, since the pendency of the suit; and that the decree shall be as valid as if the heirs of any such party were before the court.

It was also agreed that John Howard entered on the land in controversy, by virtue of his claim of 7,945½ acres by his tenants, and within the claim of C. Clark, that the entry was within the boundary of said Clark, and that Howard's claim wholly covered the claim of Clark. That this entry was made in the year 1804, and continued without interruption, adverse to the claim of Voss and Short, set up by the complainants, until the year 1813, when Howard, in an action of ejectment, by virtue of Clark's claim, was evicted and possession taken by William Moreland, a purchaser from Clark; and that such possession was continued by said Moreland until his death, and that his devisees have remained in the possession adverse to the complainants ever since. It was admitted that Daniel Trout, in the year 1808, purchased the claim of Daniel and Hite's 600 acres, within the tract claimed by the claimants, and at that time by his two sons, Daniel and Jeremiah, entered into the possession, which is still continued. That the defendants, Overpeck and Buchanan, in the year 1818, entered into the possession of the above tract under the said Daniel and Jeremiah, and have resided on it until the present time, all of whose possessions are adverse to the complainants. The grant of Daniel and Hite is admitted to be elder in date than Howard's or any other interfering claim. Clark's grant is older than Howard's, and Short's

is junior to it. As the defendants possess the elder grant, the complainants must rely on their prior equity; and to show this they endeavor to sustain the entry of Voss, under which they claim. This entry calls to begin on the north-west corner of Patton's 8,400 acres survey, and for Allen's and Roberts' line. Patton's entry was made the 26th December, 1782, for 8,400 upon a treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen Mile creek, beginning at a tree marked "J. P." to run north, five miles, then to extend off at right angles for quantity. This entry was surveyed on the 20th September, 1783, and calls to begin at a mulberry, elm, and sugar tree, marked "J. P.," standing on the bank of the first large creek running into the Ohio, above the Eighteen Mile creek, two miles up the said creek. On the 11th October, 1783, John Allen entered 1,000 acres, part of a treasury warrant, No. 14,198, beginning at the north-west corner of Patton's 8,400 acres survey, and running with his line S. 250 poles, thence down the creek on both sides westwardly for quantity, to be laid off in one or more surveys. Roberts' entry was made the 26th December, 1782, the same day Patton's entry was made.

It is argued by the counsel for the defendants, that Patton's entry, on which Voss' entry was made, is void for want of certainty and notoriety in its calls. The depositions of several witnesses have been read to sustain this entry. William Merriweather swears that Eighteen Mile creek was known previous to the year 1782, and that Patton's creek is the first one running into the Ohio above Eighteen Mile creek, except Bell's spring branch, which is not much more than a mile in length. That Patton's creek was so called from the time the above entry was made, and was generally known by that name as early as October, 1783. He does not recollect the year he became acquainted with the tree marked "J. P.," but he thinks within a year or two after the entry was made he was at the tree, about two miles up Patton's creek lacking forty poles, in company with persons who were about purchasing Patton's entry. The letters "J. P." were very large, and marked on a mulberry tree standing near the creek. That Patton informed him of the entry shortly after it was made, and that he had marked the tree and run one of the lines, before he made the entry. He states from the appearance of the tree, he has no doubt of its having been marked at the time as represented by Patton. He further states, he thinks it would be almost impossible for any one to have searched for the tree without finding it. And after finding the beginning corner of Patton's entry and survey, it would not be difficult for a subsequent locator to find by tracing the line, the north-west corner. Other witnesses prove the same facts. No doubt can exist that the Eighteen Mile creek was generally known at the time the entry was made, and that the branch called for is the one known by the name of Patton's creek. Between this creek and the Eighteen Mile creek, there is one or two small branches, neither of which could be taken for the call in the entry. But it is objected to the entry, that the call about two miles up the first branch, is not sufficiently definite to direct a subsequent locator to the marked tree. That the side of the creek on which the tree stands, is not designated, nor its distance from the creek; and that by actual measurement on a straight line from the mouth of the creek, the distance to the tree falls forty poles short of two miles. It is also contended that by the calls of the entry, it would seem to have been the intention of the locator that the body of the land should lie about two miles up the creek, rather than that point should constitute his beginning corner. This objection seems not to be well taken. The words of the entry are, "James Patton enters 8,400 acres," &c. "about two miles up the first branch above the Eighteen Mile creek, beginning at a tree marked 'J. P.'" &c. No one it is believed, could mistake these calls, or hesitate to conclude that the tree marked was the beginning corner. From this corner the entry calls to run five miles north, &c.

The rule which governs in the construction of entries has been long fixed, and if this were not the case, it would obviously result from circumstances. Entries were made at an early day by individuals who were better acquainted with the stratagems of savage warfare, than the precision of language. They were better hunters than critics. Entries must be construed by the popular signification of the terms used, rather than by the grammatical arrangement of sentences. If the intention of the locator can be satisfactorily ascertained from the calls of his entry, it must be sustained. The call to run up the creek in popular signification, directs the enquirer to follow the stream. As the Eighteen Mile creek is below Patton's creek, any person beginning his search at that point for the marked tree would trace the Ohio to Patton's creek, and would naturally seek for the marked tree on the lower side about two miles from its mouth. But it would not be unreasonable to require a search on both sides of the creek. This search would somewhat increase the labor of a subsequent locator, but it would scarcely lessen the probability and indeed certainty of finding the object. No witness saw the tree marked, but Merriweather saw it one or two years afterwards, and from the appearance of the letters "J. P.," he seems to have no doubt that they were made at the time Patton represented them to have been made. Saunders saw these letters in May, 1783, and the tree was pointed out to him by Patton, as his beginning corner. This was within five

months after the entry was made, and several months before the entry of Voss. Several witnesses state that the beginning of Patton's entry could be found by observing its descriptive calls.

Under the facts established, the court are of the opinion that the entry of Patton is shown to possess all the requisites of a valid entry. The variation of forty poles on a straight line from the distance called for in the entry, is not considered material. The circumstances under which this entry was made, would authorize no one to expect greater accuracy. Forty poles more or less than the exact distance of two miles, is a sufficiently limited range, within which for a subsequent locator to search for the object called for. This entry was surveyed on the 20th September, 1783, twenty days before the entry of Voss. Voss's entry calls for the survey of Patton, though it does not appear at that time to have been recorded. The north-west corner of this survey, which is the beginning called for in Voss's entry, could easily be found by tracing the line from Patton's beginning corner. Any variation in the length of this line, from the calls of the entry, cannot be material as to the dependent entry; as the distance is controlled by the marked corner, proved to have been made. The other calls in the entry of Voss are believed to be sufficiently certain, to enable the holder of a warrant to locate the adjacent lands, and this is a substantial compliance with the requisitions of the land law. The other entry of Voss for 5,000 acres, which calls to begin at the south-west corner of Patton's survey, seems to have been made conformably to law. To show a title from the patentee, a deed dated the 10th December, 1796, from him to John Holmes for 13,500 acres, is given in evidence. The signature of the grantor in this deed has been erased, apparently with the view of cancelling it. But, it is contended if such an inference can arise from the erazure, that the cancellation of the deed does not re-invest the fee in the grantor. That this can only be done by the solemnities of a deed duly executed. One of the subscribing witnesses to this deed, whose deposition is used to prove its execution, states that he was written to by Short to endeavor to make sale of the land for him; that on being told by Holmes what was the best he could do with it, witness advised him to sell, and told him he thought Short would be satisfied; and the witness understood the land was sold. He also states from his letter book, the deed appears to have been forwarded by him to Holmes, on the 3d January, 1797. A letter from Short to Holmes the 29th September, 1794, proposes to sell the lands at a certain price. This letter, however, treats Holmes as an agent to sell the land, and not in the light of a purchaser. An obligation, signed by Short 10th December, 1796, is also in evidence. In this obligation Short states, that he has executed a deed to Holmes of that date for two certain tracts of land containing 13,500 acres; which said deed is deposited in the hands of W. Morton, of Lexington; and, that should Holmes be dissatisfied with the warranty given in said deed, and it is not in pursuance of the meaning and intention of the above letter, he agrees to enter into such an instrument of writing.

From the whole of this evidence, it would seem to authorize the conclusion that the deed executed to Holmes was only designed to enable him to sell and make titles to the lands, for the benefit of Short. But, if any doubt remained on this subject, it is removed by a subsequent deed executed by Short, for the same lands, to Holmes and others, without any reference to the former deed; and by the amended bill of the complainants, who state that the first deed was cancelled by agreement between Breckenridge and Short, and that they claim title under the one subsequently executed. The first deed, though absolute upon its face, was intended to make Holmes a trustee for the use of Short, and the court have no difficulty under the circumstances, in considering it a nullity, so far as it respects the present controversy. This deed has never been recorded nor does it seem to have been treated by the parties as a valid instrument. There is no satisfactory proof of its delivery. From all the facts it appears most probable that it was forwarded to Breckenridge by Caton or some other person, and that it was never in the possession of Holmes, or intended to be. The complainants must rely upon their conveyance from Hart, dated 21st September, 1804. This deed conveys to John Omealy, trustee for John Holmes and William Slater, and to H. Thompson, trustee of Richard Caton; and to John Breckenridge the tracts of land set forth in the bill. From the amended bill it appears that Breckenridge was entitled to a moiety of the entire claim as a compensation for certain services to be rendered by him. That he died before these services were completed, and that the complainants filed their bill against his heirs and obtained a decree to certain parts of the land, which were afterwards conveyed to them by the heirs of Breckenridge.

A question is here made by the defendants' counsel, whether the title set up by the complainants in their amended bill is not in fact the commencement of a new suit; and, consequently, gives the defendants a right to insist on the statute of limitations, in bar of the complainants' right of recovery. If this shall be the effect of asserting the title in the amended bill, it is agreed between the parties that advantage may be taken of it. In the original bill, the title is stated to have been derived from Short, the patentee to Holmes, with whom contracts were made by the other complainants, for certain interests in the land. The amended bill sets up a title by deed from Short to John Omealy, trustee for John Holmes and William Slater, and

to H. Thompson, as trustee for Richard Caton, and to John Breckenridge. At law there is a material distinction between these titles, but not in equity. Under both deeds the equitable interest of the parties may be the same. In the original bill it is stated, that Holmes acquired the title and held it for the use of the complainants. Such an alteration, therefore, in the bill, as states the deed was made to them by Short instead of its having been made to Holmes for their use, cannot be considered as the assertion of a new title, or the commencement of a new suit. The case, however, is different so far as it respects the interests of the complainants, under the decree against the heirs of Breckenridge. A conveyance from them to the complainants was decreed on the ground that the consideration had, in part, failed. In the deed to Breckenridge there was no reservation or condition, no agreement to reconvey on any contingency. It was only by the aid of a court of chancery, that the right of the complainants could be established and enforced against a part of the land. Until the decree which cancelled the deed was pronounced, the complainants possessed no claim in law or equity to the land in question which could be rendered effective against the claim of the defendants. To the decree, therefore, must the complainants look for the origin of their title. This decree was obtained in November, 1822, and for the first time a claim is set up under it in the amended bill. This must be considered as the assertion of a title distinct from that which is set out in the original bill; and, as regards the statute of limitations, must be considered as the commencement of a suit. It follows, therefore, that the title to the land conveyed to the complainants, under the decree against the heirs of Breckenridge, in so far as it covers the land which has been occupied by the defendants, and those under whom they claim, adversely to the complainants for twenty years before the filing of the amended bill, in law and equity is vested in the defendants. The residue of the tract claimed by the defendants within the entry of Voss, must be relinquished to the complainants, as they hold the prior equity.

At a subsequent term surveys having been executed in accordance with this opinion, a final decree was entered.

[NOTE. From this decree the complainants appealed to the supreme court, where the decision was affirmed in an opinion by Mr. Justice McLean. 7 Pet. (32 U. S.) 171. It was held that the variation of 40 poles from the distance called for in Patton's entry was as little as could be expected under the circumstances. All the law requires is that the beginning corner could be found without difficulty. The evidence established prima facie that the tree called for was marked when the entry was made. In Kentucky, surplus land in a survey does not vitiate it. "The right asserted under the survey of Voss must be limited by the valid entries under which a part of the defendants claim to the calls of the entry which shall cover the quantity of acres that the surveyor purported to convey." Where there is no object called for to control a rectangular figure, that form shall be given to the survey.]

HOLMES (UNITED STATES v.). See Cases Nos. 15,382 and 15,383.

HOLMES (WALLACE v.). See Case No. 17,100.

HOLMES (WAYNE v.). See Case No. 17,303.

HOLMES, The LUCY C. See Case No. 8,597.

Case No. 6,646.

In re HOLT.

[3 N. B. R. 241 (Quarto, 58).] [1]

District Court, S. D. New York. Sept. 20, 1869.

BANKRUPTCY—EXAMINATION OF BANKRUPT.

Where bankrupt is upon his examination and fails to answer proper questions propounded, he will be compelled to answer by the court.

By the Register:

I, Isaac Dayton, one of the registers in bankruptcy of this court, in the absence of Register James F. Dwight, sitting and acting in his absence for him, do hereby certify that pursuant to an order made by me on the 7th day of September, A. D. 1869, Asa Holt, Jr., the bankrupt above named, was examined on oath, September 9th, 1869, before the undersigned, under and as required by the 26th section of the bankrupt act of March, 1867 [14 Stat. 529]. And I hereby certify that, in the course of said examination, the questions arose which are stated and set forth in the examination hereto annexed, which questions are hereby, at the request of H. C. Bennett, attorney for examining and contesting creditors herein, certified to the honorable the judge of the district court for his decision thereon.

Examination of Asa Holt, Jr., the bankrupt above named, taken pursuant to an order made in this bankruptcy court: "Q. 1. Mr. Holt, it appears your petition was filed the 19th day of December, 1868? (Question withdrawn.) Q. 2. About how much did you claim from Mr. Schell? A. I only claim what Mr. McIntire said it should be, which was ninety-six thousand dollars for three of us, myself, Mr. McIntire, and Mr. Davis. Q. 3. What was your proportion of it? A. One-third of the amount. Q. 4. When did that claim arise? A. In 1863, 1864, and 1865; 1864 and 1865, I think. Q. 5. Why did you not put it among your assets in your schedules? A. Because it had been settled by an irrevocable power of attorney given to Stephen T. Russell. Q. 6. When? A. In January, 1866. Q. 7. Did you know that statements had been made at the time you were in consultation with Mr. Rudd? A. Yes. I knew that statements had been made. Q. 8. You subsequently took a consultation with Mr.

[1] [Reprinted by permission.]

Rudd, and had a settlement with Mr. Schell, did you not? A. I did not. Q. 9. Did Mr. Schell pay you subsequently to this consultation two thousand dollars in cash, and three thousand dollars in acceptances? A. He loaned me that sum of money; he did not pay me at all. Q. 10. Just previously to the delivery of this five thousand dollars which I have spoken of, did you not execute and deliver to Mr. Schell a release? A. I did. Q. 11. Was that a general release? A. Yes. Q. 12. Did not Mr. Schell make the execution of this release the condition on which he would deliver to you this five thousand dollars? A. No, sir. Q. 13. Did he not refuse to deliver to you that five thousand dollars until you executed and delivered that release? A. There was no amount of money specified at all, nor any consideration. Q. 14. Question repeated. A. There was no amount of money nor consideration mentioned at all. Q. 15. Question repeated. A. He refused to answer me or have conversation with me, or business with me till that was settled. Q. 16. Question repeated. A. I can't answer any differently. Q. 17. Question repeated. The register considers the question has not been answered, and so states to the bankrupt. Witness gives same answer."

BLATCHFORD, District Judge. The witness has not answered question 13. From his answer to question 12, it is apparent that there can be no difficulty in his answering question 13 categorically. He must do so.

HOLT (BYRNE v.). See Case No. 2,272.

Case No. 6,647.

HOLT et al. v. DORSEY.

[1 Wash. C. C. 396.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

PRINCIPAL AND AGENT—PAYMENT TO AGENT.

A and B shipped a cargo of goods for C, but consigned them to D, the partner of E. Before the arrival of the goods, D died, C became bankrupt, and the defendant, under a power of attorney from E, took possession of them, sold them, and remitted part of the proceeds to E; at the same time informing A and B of his having taken possession of the goods; and when he remitted in part their proceeds to E, he advised A and B of such remittances, who approved of the whole of his proceedings. *Held*, that the defendant did not become the agent of the shippers, but was the agent of E; and that any remittances made to E, of which advice was not given by the defendant to A and B, that they were for the proceeds of the goods, were not a payment to A and B.

[Cited in Winship v. Bank of U. S., 5 Pet. (30 U. S.) 568.]

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

The plaintiffs [Holt & Co.] living in an interior part of England, in 1799, they shipped a cargo of goods, intended for a merchant in Baltimore; but to secure themselves, in case of any accident happening to the person so intended, they sent them to order; and a Mr. Willis, of that town, the partner of M'Call Medford of London, was authorized to receive them. At the same time, Medford, the friend of the plaintiffs, but who was not authorized thereto, by the plaintiffs, sent out a power of attorney, to the defendant [John Dorsey] to act in this business, if necessary. Before the arrival of the goods, Willis, the agent of the plaintiffs, died; and the person on whose account the goods were sent, having become bankrupt, the defendant took possession of the goods, and brought them to Philadelphia, where a part of them were disposed of. He informed the plaintiffs what he had done; and received their approbation and thanks, recognising the act of Medford, in procuring his interference upon the event, which had taken place, of the death of Willis, their agent. The defendant made remittances, through Medford, to the plaintiffs, which the plaintiffs received. The goods not sold, were delivered over to Mr. Lyle, the agent of the plaintiffs, in this country. The defendant corresponded with the plaintiffs, respecting these goods, and promised to remit the proceeds to them; and when he did remit, through Medford, he informed Medford, as well as the plaintiffs, on what account it was made. The defendant was the agent of Medford, in other transactions, and remitted them large sums of money, generally without making an appropriation of them; except in the cases above mentioned, where specific sums were remitted for the plaintiffs. A balance still remained due to the plaintiffs, which had not been remitted to the plaintiffs, or to Medford, on their account, by any specific appropriation. The plaintiffs, in a letter to the defendant, requested him to remit either to them, or to Medford, for them. It appears, by an award made in a dispute between the defendant and Medford, that a balance was due from the former, to the latter, of a larger sum than is now claimed by the plaintiffs, which the defendant was adjudged to pay, provided he received a full indemnification against the claim of the plaintiffs, for a part of that sum. The referees were of opinion, that the defendant was liable to Medford, and he to the Holts. Medford became a bankrupt two or three years ago.

It was argued by the plaintiffs' counsel, that if the defendant remitted the sum now claimed to Medford, unless he ordered the same to be paid over to the plaintiffs, the plaintiffs were not bound by it. That it appearing, that the defendant was a debtor to Medford, unless such an application was made, Medford had a right, which it appears he exercised, to apply the same to his own debt. That the defendant was a mere volunteer in this business, having been appointed

by Medford, as the substitute for Willis; and of course, he had no right to remit to Medford, so as to bind the plaintiffs, further than he was authorized by the plaintiffs to do; and consequently, that when he remitted to Medford, it was his duty to give notice both to Medford and to the plaintiffs, that the remittance was for them. But as the defendant was the acknowledged debtor to Medford, it could not, without such an application, appear, that the remittance ever was made. On the other side, it was argued, as if Medford and Willis had been the agents of the plaintiffs, and the defendant their agent; and consequently, it was contended, first, that there was no privity between the plaintiffs and the defendant (Roll, Abr. 607, 117; 4 Leon. 23; Fitz. 272); and secondly, that payments to Medford, before notice from the plaintiffs not to make them, were binding on the plaintiffs.

Porter & Tilghman, for plaintiffs.
Rawle & Meredith, for defendant.

WASHINGTON, Circuit Justice (charging jury). In the manner that this cause was opened, and treated by the plaintiffs' counsel, the court thinking, that the defendant was the agent of Medford & Willis, and that they were the agents of the plaintiffs, were of opinion, and should have charged the jury to this effect, that payments to Medford, before notice from the plaintiffs, that he was not to do so, would exonerate the defendant. But, upon a more correct understanding of the correspondence, it is plain, that Willis, in his individual capacity, was the plaintiffs' agent, and that the substitution of the defendant was a mere friendly, but unauthorized act of Medford, which entirely changes the nature of the case; for under this view of it, Medford, instead of being the constituent, was the agent of the defendant, through whom his remittances were made to the plaintiffs; and, from all the defendant's letters, it is clear that, he considered himself, as the agent of the plaintiffs only. These remittances, however, were authorized by the plaintiffs, but then it was essential, that whenever a remittance made to Medford, was intended for the plaintiffs, the defendants should, when making it, have declared to Medford, that it was so intended. There is the most solid reason for this. Because, as the defendant had to make considerable payments to Medford, on account of other transactions, if he did not apply the payment, it put it in the power of Medford to do it; and therefore, whatever might have been the real intention of the defendant, he prevented the plaintiffs from calling on Medford, for any part of a general remittance, or from enforcing payment, which would not have been the case, had he stated, that the money remitted was for the plaintiffs. We are not prepared to say, that notice was necessary to the plaintiffs, who possibly dispensed with it, by the general unqualified authority given to defendant, to remit to Medford. This being the case, any payments made to Medford, not specially appropriated to the plaintiffs, are not good as against the plaintiffs, and therefore the plaintiffs are entitled to a verdict.

The jury accordingly found for the plaintiffs their full demand.

[In Case No. 9,389, a rule obtained by defendant, to show cause why a judgment entered by virtue of an award of arbitrators, with provision for an indemnity, was discharged. The judgment, having been paid in full, was declared satisfied by the court. Id. 9,390.]

HOLT (FOX v.). See Case No. 5,012.

HOLT (LEIGH v.). See Case No. 8,220.

HOLT v. The MIANTINOMI. See Case No. 9,521.

HOLT (O'REILLY v.). See Case No. 10,563.

HOLT (ROBINSON v.). See Case No. 11,955.

HOLTON (THOMPSON v.). See Case No. 13,958.

HOLTSCLAW (UNITED STATES v.). See Case No. 15,384.

Case No. 6,648.

HOLTZAPPLE et ux. v. PHILLIBAUM.

[4 Wash. C. C. 356.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

EJECTMENT — TRESPASSER — IMPROVEMENTS — LACHES—PRESUMPTION OF CONVEYANCE—ENTRY—ADVERSE POSSESSION.

1. Improvements made by a disseisor or trespasser on the land of another, cannot give him a title at law to it, nor in equity, unless in a case of gross fraud on the part of the real owner.

2. Under what circumstances a conveyance may be presumed. What amounts to an abandonment of an equitable title to land. The consequence of such abandonment; and how the title may be resumed and secured after abandonment.

3. If the first settler or warrant holder abandon, and another settle on the land and afterwards abandon it also; the first claimant, by going on and perfecting his title will prevail against the other.

4. Settlement and improvement not necessary to give validity to the title derived under a Blunston's license.

5. Evidence of an intention to abandon, ought to be stronger in some cases than in others. Quaere. Can a man be presumed to have abandoned, after survey returned and purchase money paid.

6. Laches in a warrant holder in perfecting his title, will not affect him as against the proprietary, unless he took advantage of it by granting a vacating warrant. But a person having a legal title, who goes forward and perfects it, will prevail against the elder equitable title, which is obnoxious to the charge of laches;

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

unless the former had notice of the prior equitable title; and this court will in ejectment notice these titles.

7. Difference between abandonment, and a want of due diligence in perfecting the equitable title.

8. Statements made of facts, by the board of property in their decisions, are not evidence of the facts so stated.

9. What circumstances will authorize the presumption of a conveyance.

10. The same length of possession in the plaintiff in ejectment, which in the defendant would amount to a bar, is in the plaintiff a sufficient title for him to recover on. To avoid the force of it, the other side must prove that he brought suit, or made an actual entry on the land, within the time the law prescribes.

[Cited in Bradley v. West, 60 Mo. 35.]

11. Plaintiffs' adverse possession commenced in 1773; defendant's ancestor died in 1777, leaving the defendant a minor, who came of age in 1793, but did not bring the ejectment upon which he recovered the possession, till the year 1805, which was too late; the act of limitations of 1785, requiring the action to be brought within ten years after the disability removed.

12. To avoid the bar of the statute of limitations in ejectment by entry, the opposite party must prove that he made the entry with intent to claim the possession, and that he did some act indicative of such intention, or that he declared that he did enter for the purpose of claiming or taking possession.

[Cited in Armstrong v. Risteau, 5 Md. 274; Hood v. Hood, 25 Pa. St. 420; City of Pella v. Scholte, 24 Iowa, 296; Hinman v. Cranmer, 9 Pa. St. 41; Lingenfelter v. Richey, 62 Pa. St. 125.]

13. Proof that the party claiming the land "attended every year on the land, prosecuting and claiming his title to it, that the witness was with him every year on the land, but could not remember what he said when he was there," is not sufficient evidence of a legal entry to avoid the statute of limitations.

Ejectment [by the lessee of Holtzapple and wife against Phillibaum] for two hundred and fifty acres of land in Cumberland county. The plaintiffs' title commenced with a Blunston's license, dated the 17th of February, 1734–35, granted to John Calhoun to settle and improve two hundred acres of land on Robert Dunning's spring, next below James Dunning, to be bounded on the upper side by James Dunning, and on the lower by Ezekiel Dunning, and on the east and west by the barrens, to be surveyed to him on the common terms. In 1735, Calhoun, who then lived in Chester county, went to the land accompanied by a labourer, who assisted him in clearing about three acres of ground. He then paid a man in the neighbourhood to grub, enclose, and plough the land, and then returned to Chester county, where he died in 1752, having never visited the land after the time above mentioned, or made any further efforts to improve or settle the land in dispute. It appears by the field notes of Cookson, the surveyor, that he commenced surveying lands lying on the west side of the Susquehanna in the year 1742. It was proved that whilst Calhoun was engaged in making the small improvement before mentioned, he staid at the house of Robert Dunning, his brother-in-law, and that the latter was acquainted with the title under which Calhoun claimed the land. John Calhoun, by his will, devised this tract of land to his wife, with a power to give it by deed or will to any of his children; and in pursuance of the power, she conveyed the land to her son, James Calhoun, by deed bearing date the 20th of July, 1763. The defendant claimed under two warrants, the one dated the 16th of April, 1743, for one hundred and fifty acres, lying on the dry spring adjoining the lands of Ezekiel and James Dunning (being the same tract as that described in the Blunston's license) granted to William Armstrong; and the other, dated the 19th of November, 1743, granted to Robert Dunning for two hundred acres, including his improvements, between the lands of ——; interest and quit rents to commence from the first of March, 1737. Upon the first warrant £7. 10s. were paid in part of the purchase money, and on the receiver general's books, under date the 23d of November, 1743, Robert Dunning is debited for two hundred acres, including his improvement between Ezekiel and James Dunning, and credited £5. On the same books, under date the 24th of November, 1743, is found the following entry, viz. "William Armstrong Dr. to Robert Dunning £7. 10s. to land for which Armstrong paid this sum is said to belong to Dunning, and for which said Dunning is to have credit, by order of the secretary." Upon Cookson's field book, under date the 22d of March, 1764, and headed "Robert Dunning," are found the courses and distances of a tract of land, which the defendant insists are the bounds of the land in dispute, but which is not conceded by the plaintiff. It did not appear, however, that a regular survey of the land, agreeable to these notes, was ever made out and returned to the land office. On the 19th of June, 1764, a survey was made of the two warrants of Armstrong and Dunning, for John Dunning his son and devisee of Robert Dunning, who died in the year 1750. Upon an application to the deputy surveyor who made the above survey, to survey the Blunston license for the heirs of Calhoun, the above survey was returned for the heirs of Calhoun, as well as for Dunning, both on the same day. Calhoun immediately caveated the survey for Dunning, and in 1766, in the absence of Dunning, who had been duly cited to appear, the board of property, upon certain facts stated in the decision as having been proved to the satisfaction of the board, ordered the survey for Calhoun to be accepted, and a grant to issue thereon, and decided that the survey for Dunning ought not to be accepted. Some time in the year 1764, John Dunning entered into an agreement with James Fo-

ley to sell this land to him for £500, the said Dunning stipulating to repay whatever sum he might receive from Foley, and also to pay him for any improvements he might make on the land, in case he, Dunning, on account of the Calhoun claim, should be unable to make to Foley a good title. Foley entered upon the land, made considerable improvements on it, and was, some time in the year 1767 or 1768, forcibly turned out of the possession by John Dunning, who then took the possession. In the spring of 1755, John Dunning placed some negroes on the land to improve it, and before harvest of that year he removed them, and never put them on the land afterwards. Almost as soon as possession was thus taken by Dunning, an ejectment was served upon him by Calhoun, as proved by James Smith, Esquire, the counsel for Calhoun; who states further in his deposition, that Dunning informed him that the ejectment had been served; that he did not intend to contest the plaintiff's title, being advised that the Blunston license gave the plaintiff a preferable title to his, and that he should give up the possession, which he accordingly did; in consequence of which no further proceedings were had in the suit. Upon the entry of John Dunning, in 1768, the Calhouns again served an ejectment upon him; and in 1773, the jury being empanelled to try it, Dunning, by his counsel, refused to confess lease, entry, and ouster; upon which, a judgment was entered against the casual ejector, and upon a habere facias possessionem, the plaintiff was put into possession. After which, and in the same year, he sold the land to James Caruthers (under whom the plaintiffs claim), who entered upon the land, made many valuable improvements on it, and paid the whole of the purchase money about the year 1782. John Dunning then brought an ejectment in 1774 against Calhoun, and in 1782 a verdict and judgment were entered for the defendant. In 1796 another ejectment was instituted by the heirs of John Dunning (he having died in 1775) against Caruthers; and in 1803 the plaintiff obtained a verdict, which was set aside; and on a new trial, which took place in 1805, verdict and judgment were rendered for the defendant. Another ejectment was brought by the Dunnings, in the same year, against Caruthers, which was first tried in 1812, when a verdict was rendered for the plaintiff. A new trial was granted, which took place in 1813, when a similar verdict was rendered, and a motion for a new trial was refused. The cause was then taken before the supreme court, upon an exception filed to the charge of the judge who tried the cause; and the judgment of the court below was affirmed in the year 1817. The present ejectment was then brought in this court. John Dunning left six sons, the youngest of whom, Mark, was, at the death of his father, about eighteen months old; so that he came of age in the year 1793. Ezekiel, another of the sons, was also a minor at the death of his father, and came of age in 1791. No proof was given of the ages of the other sons. It was proved by James Davidson, that William Dunning (one of the sons of John Dunning, who was also empowered by his brothers to act for them), attended every year on the land, prosecuting and claiming his title to the land. That he was with him every year on the land, but he could not remember what he said when he was on the land.

The objections made to the plaintiffs' title, were:

1. That from the total neglect of this land by Calhoun and his family, and after so many years, the jury ought to presume that Calhoun did, by some instrument, or by parol (which was sufficient in those days), transfer his right in this land to Dunning.

2. That the terms on which a Blunston's license gave a title were, settlement and improvement; which not having been complied with by Calhoun, he lost his right: but if not so, still his making an improvement in 1735, and immediately abandoning it, and his laches in not following up his equitable title, by procuring a survey of the land, and paying the purchase money, or even asserting his title for twenty years, from 1735 to 1755; amounted in law to an abandonment, and enabled Dunning to appropriate it in 1743 and 1744, as he did, by the two warrants in the former year, and his survey in the latter. That a Blunston's license is no more than a simple location, by application, and may be as easily abandoned. Whart. Dig. p. 398; No. 195, p. 399; Nos. 198, 199, p. 383; No. 16, p. 386; Nos. 60, 61, p. 392; No. 127, p. 386; No. 55, p. 390; Nos. 95, 102, p. 393; No. 131, p. 396; No. 167; Graham v. Moore, 4 Serg. & R. 467; 3 Serg. & R. 383; Co. Litt. 245, 246; 2 Yeates, 462; 5 Serg. & R. 181; Dunning v. Caruthers, 4 Yeates, 13.

3. That whether there was, strictly speaking, an abandonment or not, still the laches of Calhoun deprives him of his priority in favour of Dunning, who appropriated the land by the warrants in 1743, and the survey in 1774.

4. The title of Caruthers is merely an equitable one, standing solely on the articles of agreement between him and Calhoun, whereby the latter agreed to sell this land to the former, and on receiving the purchase money, to make a conveyance; but no conveyance has been produced.

5. The plaintiff, in his opening, having stated, that he should rely upon possession in Caruthers, from 1773 till 1805, when the suit was brought by the heirs of John Dunning, which turned Caruthers out of possession, it was answered, that the limitation could not begin to run till 1789, when the state granted the patent to Calhoun, before

which, the title was in the state, against which the statute could not run: but that, at all events, though a suit was not brought till 1805, still it is proved by James Davidson that an entry was made yearly, and that they had the authority of the supreme court in the case of Carothers v. Dunning, 3 Serg. & R. 373, for saying, that, if the entry so proved was, in the opinion of the jury, made for the purpose of claiming the possession, it is sufficient. The plaintiff, in his opening, having relied upon the recitals in the decision, or order, of the board of property, on the caveat; the defendant's counsel denied that those recitals were ever prima facie evidence.

By the plaintiffs' counsel, it was answered:

1. That the presumption of a deed is never made, but where a long and uninterrupted possession, consistent with the title, is made out in proof; which is not this case. But even if it were, the presumption may be rebutted, and is so in this case, by the surrender of the possession to Calhoun in 1755.

2 and 3. A Blunston's license resembles a warrant in every respect, except payment of a part of the purchase money. 4 Yeates, 17. Settlement and improvement is not necessary to constitute a title under such a license; nor did the conduct of Calhoun in leaving his improvement, amount to an abandonment of his title. 3 Serg. & R. 379. The circumstances proved in this case do not amount to an abandonment. 2 Yeates, 83. From Cookson's field notes, it appears that no surveys were made over the Susquehanna, prior to 1742; from which time only can Calhoun become chargeable with neglect. But, even if an abandonment by him may be presumed, it can give no title to Dunning, whose warrant is founded in fraud and deception, practised on the land office, in asserting an improvement in 1737, when no improvement was made; and in asserting also to Armstrong, that he had obtained Calhoun's title; by which falsehood, he induced Armstrong to assign his warrant to him. These facts are proved by the recitals in the decision of the board of property, and are clearly to be inferred from all the circumstances of this case. If this be so, Dunning can have no title in law or equity. 4 Yeates, 13. Besides, if Calhoun be chargeable with abandonment, so also is Dunning; and upon this ground, likewise, he is prevented from impeaching the title of Calhoun. In addition to all this, he was a purchaser with notice of Calhoun's title, and therefore can have no title to oppose to ours upon the ground of abandonment, or of laches to postpone the prior right of Calhoun.

4. The possession of Caruthers, from 1773 to 1817, upwards of forty years, without his title having ever been questioned by the Calhouns, is quite sufficient to create a legal presumption that a conveyance was made to him by Calhoun. 4 Term R. 682; 1 Caines, 84; 7 Johns. 5; 10 Johns. 377; Ricard v. Williams, 7 Wheat. [20 U. S.] 109; 6 Bin. 416; [Hepburn v. Colin Auld] 5 Cranch [9 U. S.] 262; 2 W. Bl. 1228.

5. An entry to avoid the bar of the statute of limitations must be with intent to claim the possession, and the person must either claim it by some declaration to that effect, or by some act similar to those stated by Lord Coke in his comment on section 401 of Littleton's text. The evidence of Davidson falls far short of proving such an entry. 3 Bl. Comm. 175; 7 East, 311; 4 Johns. 402; Runn. Ej. 202; Clerke v. Pywell, 1 Saund. 319. Length of possession sufficient to bar an ejectment is sufficient also to give a title to the plaintiff. 3 Johns. 207; 13 Johns. 367; Adams, Ej. 76; 1 Salk. 421; 5 Serg. & R. 239.

Binny & Chauncey, for plaintiff.
Condy & Alexander, for defendant.

WASHINGTON, Circuit Justice (charging jury). The counsel for the plaintiff, and the defendant, having each, in his turn, pressed upon the attention of the jury, considerations which ought not to affect the merits of this case, but which are calculated to excite improper prejudices, it becomes my duty to notice them in the first instance, and to remove them out of your way. Each side has triumphantly boasted of the success which the Calhoun and the Dunning title has, at different times, obtained in the judicial controversy which has subsisted for nearly seventy years. To state that matter in a few words, it seems to stand thus: Calhoun claims credit for two refusals by the Dunnings, to face the Calhoun title in a court of justice, first in the year 1755, and afterwards in 1773. Two verdicts, and two judgments, and one decision of the board of property in favour of that title. The Dunnings offset against this, three verdicts and one judgment, a new trial refused by the judge who last tried the cause, and his charge to the jury approved of, and affirmed by the supreme court. I very much question whether either party has much cause to claim a triumph over the other. If the jury can weigh these claims, and, with any degree of accuracy, say which preponderates, it is more than I can. I think that, instead of making the attempt, it will be quite as well to pass them by, and to decide this cause uninfluenced by the past successes of either party. Each side has endeavoured to enlist the feelings, if not the judgment of the jury, in his favour; by speaking of, and magnifying the improvements made upon this land by Caruthers, on the one side, and by Foley and John Dunning on the other. In addition to this, an effort has been made by the counsel for the Dunning title to stigmatize Caruthers as a purchaser of a law suit, and as such, it is contended, no mercy should be shown him. Although Caruthers expected at the time he purchased this land, that the controversy was not at an end, he had, nevertheless, a

legal, as well as a moral right, to purchase from a person, not only in possession, but in possession under the judgment and process of a court of justice. On the other hand, Foley was, in some measure, a lite pendente purchaser. He bought, in March, 1794, with a full knowledge of Calhoun's title: the survey was made in June, and the caveat filed in July of the same year, before Foley had received a deed, paid the purchase money, or commenced his improvements. But really these matters, and the improvements connected with them, have nothing to do with the issue which you are sworn to try, and which involves the titles of these parties, and not their conduct in other respects, or their improvements. Improvements made by a disseisor, or trespasser, upon the land of another, can never give him a title at law, nor in equity; unless, perhaps, in a case of gross fraud on the part of the real owner, and under very peculiar circumstances. As to the titles under which these parties claim, they are soon stated. The plaintiff derives his under a Blunston's license, dated in 1734 and 1735; a small improvement in 1735; a survey on the 19th of June, 1764, and a patent on the 23d of April, 1789. The defendant claims under two warrants issued in 1743; one to Armstrong, who transferred his right to Robert Dunning, and the other to Robert Dunning; payment of £12. 10s. in part of the purchase money; a survey in 1744, not made out by the surveyor, or returned, at any time, into the land office; and a survey on the 19th of June, 1764, which refers to the former survey, as to a part of the land, and comprehends another parcel, then taken into the last survey. The Calhoun title then, being the eldest, must prevail against its opponent, unless it was parted with, and acquired by Dunning, abandoned, or its priority lost by want of diligence in perfecting it.

1. It is insisted by the defendant's counsel, that the jury are at liberty, and ought to presume, that such a transfer, at least by parol, was made to Robert Dunning; and that the abandonment of Calhoun of his improvements, his total indifference about the land for so many years, and the long possession of Dunning; afford a fair and legal ground for this presumption. If the last ground, upon which the presumption is rested, were made out by the evidence in the cause, the argument would, at least, have something to stand upon; as it is not to be questioned, that a long and uninterrupted possession consistent with the conveyance, the existence of which at a former period is asserted, will justify a jury, and even the court, in presuming that it once did exist. But in this case, there is no positive evidence that possession of this land was ever taken by Robert Dunning, or by his son John, before the year 1754 or 1755, unless you should think that an earlier possession is proved by James Foley. But, even if such a possession be proved, still a continuance of it is not; and even if it were, still the acknowledgment by Dunning of the Calhoun title in 1755, and the surrender of his possession taken in that year, would be abundantly sufficient to repel any presumption which a prior possession might have warranted. If a transfer by Calhoun of his title to Dunning had, in fact, been made, it would have given the latter a complete title against Calhoun in 1755, and was very improbable that the acknowledgment and surrender, then made by him, would have taken place.

2. We understand an abandonment to be a voluntary relinquishment of a man's equitable right to land, thereby leaving it vacant and open to future appropriation by others who should be inclined to take it up. The evidence of such a relinquishment may sometimes be so clearly demonstrated by the acts of the party, as to leave no doubt that such was his intention; as if a mere settler should leave the land, and remove to, and make a settlement elsewhere. Most frequently, however, the intention to abandon his right, is to be gathered from a variety of circumstances added together, no one of which might be sufficient to establish the fact. The inquiry for the jury in such cases must be, whether the circumstances proved in the cause, such as the acts or omissions of the party, afford a fair ground for presuming that such was his intention. For if, in the opinion of the jury, such an intention might justly be inferred by a person who subsequently appropriated the land, the title of the latter ought to be supported, although proof should be given of declaration to the contrary, by the owner of the prior equitable title.

Before I proceed to state the circumstances in this case from which an abandonment may be presumed, it will be proper to lay down two principles which we hold to be perfectly clear. The first is, that abandonment does not, per se, so absolutely and irrevocably destroy the equitable interest of the party, as to require a new contract with the government, in order to enable him to resume his rights, if he shall go on, and consummate his title, before any other person has taken advantage of his abandonment. There is a locus penitentiae existing in his favour, and if he shall afterwards proceed to make his survey, return it, and pay the purchase money before any other title has intervened, no subsequent appropriator can disturb him. So, if a settler were to abandon his settlement, but should afterwards return, renew his settlement, and complete his title, it could not be impeached by a subsequent warrant holder. 2. If, after the abandonment, or even before a third person should obtain a title, by warrant, or otherwise, for the land which he in like manner abandons, and the owner of the elder title should proceed to perfect his title, he would prevail against the subsequent appropriator. This proposition

is, in truth, a corollary from the first: for if abandonment do not amount to a total extinguishment of the title, so that it may be resumed with the consent of the state, if not to the prejudice of a subsequent appropriator, the latter, who has also abandoned, can have no equity against the owner of the prior right, and consequently nothing to oppose to his legal title.

In this case, each party charges his adversary with an abandonment, so that the jury will have to decide whether the charge is fairly imputable to both, or to either of the parties.

1. As to the Calhoun title. This commenced in 1734, and was followed up the next year by an inconsiderable improvement, which, in the same year, Calhoun deserted, and returned to his place of residence in a distant country, having employed and paid a man to enclose and plough the small piece of ground which he had cleared, but which, it would seem, was never done. From that time, to the period of his death, we never hear of John Calhoun, who died in the year 1752, nor of his family, after his death, before the year 1755, when the first ejectment was brought against Dunning. During the lapse of these twenty years, we are not informed that the Calhouns ever took, or attempted to take possession of this land, themselves in person, or by a tenant, or agent, ever exercised any one act of ownership over it, or even asserted a claim to it. In addition to this apparent indifference respecting the property, the defendant's counsel have argued, with much force, the total relinquishment of the improvement which Calhoun had once made on the land. Now, although we have from Chief Justice Shippen (4 Yeates, 13) the character of a Blunston's license, and entirely agree with the plaintiff's counsel, that settlement and improvement were not imposed by that instrument as conditions necessary to be performed in order to validate the title: it is still fair to contend, that if Calhoun thought otherwise, or from other motives was induced to make the improvement, his subsequent desertion of it is a circumstance, in connection with others, to show his intention to relinquish his right altogether to the land. It is, however, but a circumstance, to be weighed by the jury, in common with the other parts of his conduct before detailed. As to the two warrants granted to Calhoun for land in other places in 1737 and 1750, we think that they do not warrant any inference whatever, of an intended abandonment of this land. The first of these warrants is for an improvement made prior to 1734, and the latter speaks expressly of an improvement which one Daugherty had presumed to make. But the conclusive answer is, that, as Calhoun was not obliged, under his license to improve and settle; the improvements referred to in these warrants, even if they had been his own, would furnish no ground for inferring an intention to abandon his right under the license.

We come next to consider the alleged abandonment by the Dunnings. The warrants under which they claim were granted in 1743, and part of the purchase money was then paid. The lines were run in 1744, but no regular survey was made out, or returned into the land office at any time. No further step was taken towards perfecting the title until the 19th of June, 1764, when a regular survey was made for both Dunning and Calhoun. No possession was taken, or act of ownership exercised over the land by the Dunning family until 1755, unless the jury should consider an earlier possession as being proved by James Foley. But the strong circumstances of abandonment relied upon by the plaintiff's counsel, in addition to what has been mentioned, are, the acknowledgment by Dunning, in 1755, of the title of Calhoun; his relinquishment of the possession in consequence of that acknowledgment; and his leaving the land vacant from that time until the year 1764, when he sold to Foley; with the additional circumstance, that he too, like Calhoun, deserted, in the summer of 1755, an improvement and settlement which he had commenced in the spring of that year. It is not my intention to draw a comparison between the circumstances tending to prove the alleged abandonment by these parties for the purpose of showing on which side the weight preponderates, considering the jury to be exclusively the judges of that matter. But it is proper to state, that if you should be satisfied from the evidence furnished by Cookson's field notes that no surveys were made on the west side of the Susquehanna before the year 1742, then, in measuring the length of time during which Calhoun was chargeable with laches, you should commence with that year, and then the difference between the two parties, as to time, will be little more than a year. It is proper further to observe, that to warrant a presumption of abandonment, stronger evidence should be required in some cases than in others. Slight circumstances may be sufficient to show an abandonment of a settlement right, inasmuch as the act of settlement and improvement constitutes the whole of the inceptive title, and when the owner of it turns his back upon his settlement, and removes to some other spot, his intention to relinquish his right to his first settlement is demonstrated by the mere act of removing and settling elsewhere. Stronger evidence of such intention should be required where the title depends upon a written contract between the individual and the proprietary, as in the case of the holder of a Blunston's license. Still stronger, we conceive, would be necessary in the case of a warrant holder, who has paid part of the purchase money, and who would not be likely, intentionally, to relinquish his right to the land, and also to the money which he

had paid. And if a warrant holder, who has had a survey made and returned, and has paid the whole of the purchase, can abandon, (which the court questioned in the case of Lanning v. London [Case No. 8,074], though we understand the judges of the supreme court of this state do not question it,) the evidence must certainly be of such a character as to leave not a doubt about the intention, since a man must be under an unaccountable infatuation who, after having perfected his title except to the mere form of a patent, should voluntarily give it back to the state to grant away to others. If, upon the whole, the jury should be of opinion that the right of Calhoun was abandoned, then the plaintiff's paper title cannot prevail against that of the defendant, unless the Dunning title was also abandoned; and in that case, the title of Calhoun having been subsequently confirmed by the state, and advanced to a legal title, it cannot be impeached by the Dunning title.

3. The last objection to the plaintiff's title, is the want of due diligence in perfecting it by a survey and payment of the purchase money. It must be admitted, we think, that Calhoun was clearly obnoxious to this charge, and there can be as little doubt of the law applicable to such a case. The owner of a merely equitable title to land, derived from the proprietary, was bound to use due diligence in having it surveyed and returned into the land office, and perfecting his right, if not by a patent, at least by the payment of the purchase money. Nevertheless, if he failed to perform all or any of these acts, and the proprietary did not take advantage of his laches by granting a vacating warrant to some other person; or no other person had in the mean time acquired a right to the land, no length of time, during which his negligence might continue, would deprive him of his equitable title, which he might, at any time, convert into a legal one as against all subsequent appropriators. But if a junior right should intervene, and be followed up with due diligence, it would take precedence of the elder equitable title, inasmuch as the equity on which it is founded would be superior to that of the elder title, and it would have also the law in its favour. But this preference of the junior title can be claimed only when due diligence has been used to give it a legal character, according to the understanding of that term in Pennsylvania, and where it has been required bona fide, and without notice of the elder equitable title. This is the doctrine of courts of equity; I understand it to be that of the courts of this state, and I am almost ashamed to say that it has long been the doctrine of this court, in ejectment cases. It is not the doctrine of which I am ashamed, for none can be better founded on the great principles of justice than it is; but it is purely of an equitable nature, and is properly cognizable only on the equity side of the court. This is a very different case from one where the objection to the title is founded on abandonment, or a nonconformity to the law in the steps preceding the granting of the patent. These are legal objections to the patent itself, which is only prima facie evidence of the regularity of those proceedings. The case supposed, and which I think is altogether of equity jurisdiction, and belongs properly to that side of the court, is that of an elder equitable title opposed to a junior equitable title, clothed with an elder legal title. That is not the present case, as Calhoun had not only the prior equitable title, but also the legal title, and Dunning was, as is proved, and was admitted by the defendant's counsel, to be a purchaser of his warrant with notice of Calhoun's title. I can only say, in defence of the practice of this court in admitting these equitable considerations in trials of titles at law, that I considered it to be so settled at a very early day, and that the objection to it has in no one instance been made. It is now so ancient and inveterate, that we are not disposed to change it. It is proper at the same time to observe, that cases of this kind will not be considered as precedents for others not precisely like them, and that the equity side of the court, which is on all accounts best adapted to their investigation, is still open to the claim of a prior equitable title against a prior legal title, founded on a junior equitable one. The court is therefore of opinion, that the defendant has no equity to oppose to the plaintiff's title, so as to give him a preference on either side of this court. The notice however which deprives him of that equity has nothing to do with the subject of abandonment, as a man may lawfully appropriate land which another has abandoned, although he had full notice of his title previous to the abandonment. As some of the arguments of the plaintiff's counsel were founded upon the recitals or statements to be found in the decision or order of the board of property, it becomes our duty to say, that we do not, in this case, consider that decision as evidence of the facts it recites.

4. The next objection to the plaintiff's right to recover in this ejectment is, that his title is merely equitable, since he has produced no deed from Calhoun or his representatives to Caruthers. But we are of opinion that after so long a possession, uninterrupted by the family of Calhoun, or by any other person claiming under them, the law presumes that a conveyance was made, which by some accident may have been lost or destroyed, more particularly, as it was proved that all the purchase money was paid by Caruthers, and, by the articles of agreement between him and Calhoun, the conveyance was to be made when the purchase money should be paid.

5. The last point to be decided is the title of the plaintiff, founded upon length of possession. The position of the plaintiff's counsel, that an adverse possession in the defendant, for the length of time which will prevent

a plaintiff from recovering in ejectment, will also give to the plaintiff, who has had such a possession, right upon which he may recover, is unquestionable law. To defeat this right when asserted and proved by either the plaintiff or defendant, the adverse party must prove either a suit brought, or an entry made, within the time which the law prescribes. The adverse possession of Caruthers commenced in 1773, when John Dunning was alive. But the act of 1785 passed after his death, which happened in the year 1777. The third section declares that any person then having right of entry into land, and his heirs, might, within fifteen years from the passage of the law, enter or commence any action or suit as he or his ancestors might have done before the passing of the act. The fourth section contains the proviso saving the rights of infants and of others under the usual disabilities, and enabling him and his heirs, notwithstanding the expiration of twenty-one years from the time the right or title accrued, to bring his action, or to make his entry, so that he take the benefit of, or sue for the same, within ten years, next after such disability shall be removed. At the death of John Dunning, his sons were minors. His youngest son however came of age in the year 1793, and the ejectment under which Caruthers lost possession of the land, was not commenced until the year 1805, about twelve years after the disability of the youngest son was removed.

The only ground then upon which the right of the plaintiff, acquired by length of possession, can be resisted, is the alleged entry, as proved by James Davidson. But before we examine his evidence it will be proper to state to the jury what it is which constitutes a legal entry to avoid the bar of the act of limitations, and what the party must prove who endeavours to avoid it. Upon these subjects the law is perfectly clear. He must enter with intent to claim the possession; and he must do some act to prove that such was his intention, as by cutting a tree, digging the ground, or by other acts amounting to a trespass on the land, or he must declare that he enters for the purpose of claiming or taking possession. No particular form of words is prescribed by the law. The substantial part of the ceremony is, the taking, or declaring an intention to take, or claim the possession. It is contended by the defendant's counsel, that this is nothing but an unmeaning form, and that it is quite sufficient to prove to the satisfaction of the jury that the entry was made with an intention to claim the possession. In support of this position, the opinion of the judges of the supreme court of this state, in the case of Carothers v. Dunning, 3 Serg. & R. 373, is relied upon. If this was the opinion expressed in that case, highly as we respect the decisions of that court, we should feel ourselves under the necessity of dissenting from it; believing, as we do, that it is opposed to the most respectable authorities, and is countenanced by none. But I feel considerable confidence in saying, that the opinions of those judges have been entirely misunderstood by the defendant's counsel. The judges below, who tried the cause, left it to the jury to decide, from the evidence given of the entry, for what purpose it was made. The chief justice says, that this point was properly submitted to the jury; and who can doubt but that it was so? There were two questions to be decided. First, the quo animo, with which the entry was made, and this "was to be inferred from the words and conduct of the person who entered." The judge could do no otherwise than leave that question to the jury. The second question was, what constituted a legal entry? The complaint of the counsel for Caruthers was, that the judge below left this matter to the jury. But the answer given by the chief justice is conclusive; the judge was not asked to give a direction to the jury, upon that point, and therefore he committed no error in not giving it. Who can doubt of the correctness of this opinion? But the judge, in no part of his decision, affords a ground for saying that he considered the intention of the entry as the only matter to be determined. He was not called upon to decide that point, and he very properly avoided it. Judge Gibson, after stating the charge of the judge, "that an entry to avoid the statute of limitations must be made by the party claiming, or some one duly authorized by him, for the purpose of taking possession," and so leaving that matter to the jury, adds "an entry for the purpose of taking possession is good, (quoad that act, as I understand the judge), and if the counsel had desired a more particular exposition of the law on the point, the opinion of the court should have been specially required, without which, no omission is error."

Understanding these judges as giving opinions in reference to the case before them, we subscribe to them entirely.

What then is the evidence given of a legal entry by Mr. Dunning? Davidson says, that he attended every year on the land, prosecuting and claiming his title to the land, that he was with him every year on the land, but could not remember what he said when he was there. Now it is to be recollected, that the burthen of proof of the fact of a legal entry is on the defendant; and if the evidence which he offers is ambiguous or unsatisfactory, he falls short of establishing the material part of his defence. Dunning might have entered upon the land from a variety of motives to prosecute and claim his title, and yet never have claimed the possession, or thought of doing so, or even known that this was necessary. The witness does not recollect what he said, and he proves no one act amounting to a claim of the possession. What he states is a mere inference of his own. If we are to interpret what the witness deposes literally, viz. that he did no

more than claim title to the land, then it is clear that he failed to make such an entry as the law requires. To say, that the form of entry required by law is absurd, or that the jury may, upon such evidence as this, infer that he entered, not only with an intention to claim the possession, but that he did in fact claim it; is to confound all the well settled distinctions of law in reference to this subject, and would lead to the most mischievous consequences. It would be to leave to a jury the decision of the most intricate questions of law, under the cover of ambiguous evidence. Whether the entry was made in a legal form or not, is exclusively a question of law, when the fact is ascertained; and we can never consent to leave the decision of that point to the jury. It is our duty to instruct this jury, that an entry upon land, be the intention what it may, by a person "prosecuting and claiming his title to the land," is not such an entry as will defeat a title acquired by length of possession under the act of limitations.

Verdict for plaintiff.

Case No. 6,649.

HOLTZMAN v. FRANKLIN INS. CO.

[4 Cranch, C. C. 295.] [1]

Circuit Court, District of Columbia. March Term, 1833.

FIRE INSURANCE—REMOVAL OF GOODS.

Upon a policy of insurance upon certain goods whilst they should be and remain in a certain building, against any loss or damage which should happen by, or by means of fire, the underwriters are liable for loss and damage sustained by the removal of the goods in case of imminent danger from fire.

[This was an action at law by Thomas Holtzman against the Franklin Insurance Company.]

The policy recited that whereas the assured had paid the premium for insurance of $3,000, on a stock of groceries in a certain house therein particularly described "from loss or damage by fire whilst the said stock of groceries shall be and remain in the building aforesaid." "Now know all men by these presents, that in consideration thereof, the capital stock," &c., "of the said corporation shall be subject to pay to" the assured, &c., "any loss or damage which shall or may happen by, or by means of fire to the said stock of groceries in trade."

At March term, 1832, THE COURT (MORSELL, Circuit Judge, contra) refused to give the following instruction, prayed by Mr. Key, for the plaintiff: "That if the jury should be satisfied, by the evidence, that the goods insured were in such danger of destruction by fire as would have induced every prudent man to remove them to prevent such loss; and the plaintiff, for the purpose of saving them from such danger, had them removed from the building with all the care that could be applied to such removal; and that the goods were so removed, and that, in such removal, and before they could by any possible means be brought back again, they were lost and injured, and that no human care could prevent such loss or injury; then such loss or injury was a loss occasioned by the removal; and the removal was occasioned by the danger of fire; and the loss or injury was therefore occasioned by the peril insured against."

THE COURT also (MORSELL, Circuit Judge, contra), at the same term, at the prayer of the defendant's counsel, "instructed the jury, that if they should believe, from the said evidence, that the said goods of the plaintiff alleged to be destroyed or damaged were so destroyed or damaged after they were in fact removed as therein stated from the premises mentioned in the policy; and that the said goods were not destroyed or injured by fire; then the plaintiff is not entitled to recover in this action." "And further, that if, from the evidence aforesaid, the jury shall believe that the loss mentioned in the said evidence to be sustained, was caused immediately and directly by the moving of the goods of plaintiff covered by the policy of insurance as stated in the said evidence, and that the said goods were not destroyed or injured by fire, the plaintiff is not entitled to recover in this action." The jury found a verdict for the defendants.

Mr. Marbury moved for a new trial on the ground of misinstruction of the jury by the court; which motion was argued in part at the same term, by Mr. Marbury, for the plaintiff, and by R. S. Coxe and Mr. Bradley, for defendants.

Mr. Marbury cited Austin v. Drew, 6 Taunt. 436; Welles v. Boston Ins. Co., 6 Pick. 182; Marsh. Ins. 249, 251, 614; 2 Bl. Comm. 380; Cullen v. Butler, 5 Maule & S. 463; Bondrett v. Hentigg, Holt, N. P. 149; Wilson v. Royal Exch. Assur. Co., 2 Camp. 623; Austin v. Drew, 4 Camp. 360; Amory v. Jones, 6 Mass. 318; Lee v. Gray, 7 Mass. 349; Corp v. United Ins. Co., 8 Johns. 217; Saltus v. United Ins. Co., 15 Johns. 530; Craig v. United Ins. Co., 6 Johns. 250; 11 Petersd. Abr. 193, note; Patrick v. Commercial Ins. Co., 11 Johns. 9.

Mr. Coxe, for defendants, cited Marsh. Ins. 346, 485, 554, 716.

Mr. Bradley, for defendants, cited Jumel v. Marine Ins. Co., 7 Johns. 412; Gardere v. Columbian Ins. Co., 7 Johns. 514; Gardiner v. Smith, 1 Johns. Cas. 141; 3 Kent, Comm. 375; Green v. Elmslie, 1 Peake, 278; Martin v. Delaware Ins. Co. [Case No. 9,161]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 257.

Mr. Bradley had not finished his argument when the court adjourned, and the cause was continued to the present term, when THE COURT (CRANCH, Chief Judge, absent), granted a new trial without costs.

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

Upon the new trial, Mr. Coxe, for defendants, moved the court to instruct the jury "that if they should believe from the evidence that the said goods of the plaintiff alleged to be so destroyed and damaged, were so destroyed and damaged after they had been in fact removed, as therein stated, from the premises mentioned in the policy; and that the said goods were not so destroyed or injured by fire, then the plaintiff is not entitled to recover in this action,"—which instruction THE COURT (CRANCH, Chief Judge, contra) refused to give.

Mr. Marbury, for plaintiff, then prayed the court to instruct the jury, "that if they should believe from the evidence aforesaid, that the loss and injury to the goods happened in consequence of their removal from the house mentioned in the policy, without the neglect or fault of the plaintiff; and that such removal was occasioned by a fire in the neighborhood of the said house, by which the said goods were exposed to such present and imminent danger that a prudent man would not have permitted them to remain in the said house; and that as much care was used in the removal as a prudent man would have used in relation to his own goods similarly situated,—then the said removal was justifiable, and the loss and injury thereby happening, covered by the policy, and the plaintiff, therefore, entitled to recover."

Mr. Marbury, in support of his prayer, offered to cite many cases which he did not read.

Mr. Coxe said he had some strong cases on the other side. But THE COURT would not hear further argument, and gave the instruction as prayed by Mr. Marbury.

CRANCH, Chief Judge, said he wished for time to consider, or at least to look at the cases cited, as, in consequence of the former argument remaining unfinished at the last term, he had not looked at them in the vacation. He could not, therefore, join in giving the instruction. Verdict for plaintiff, $425.91.

HOLTZMAN (PLANT v.). See Case No. 11,206.

Case No. 6,650.

HOLTZMAN v. PLUMSEL.

[4 Cranch, C. C. 184.] [1]

Circuit Court, District of Columbia. Oct. Term, 1831.

INSOLVENCY—PRIOR APPLICATION AND CONVICTION.

The conviction of an insolvent debtor, upon allegations filed upon a former petition, when he was committed in execution in favor of another creditor who has since been paid, is not a bar to his subsequent application for the benefit of the insolvent act, when committed under a subsequent execution.

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

This was a petition by Plumsel for the benefit of the insolvent act for the District of Columbia; to which, objections were filed by Holtzman, a creditor, before CRANCH, Chief Judge, on the 6th of July last, and by him postponed, to take the opinion of this court, whether a conviction upon allegations filed upon a former petition, when the petitioner was committed in execution in favor of another creditor who has since been paid, is a bar to his present application, when committed under a subsequent execution.

Upon consideration of the seventh section of the act of March 3, 1803 (2 Stat. 237), and the second section of the act of June 24, 1812 (2 Stat. 755), THE COURT (MORSELL, Circuit Judge, absent) was of opinion that it is not a bar. Under the seventh section of the act of March 3, 1803, the debtor convicted "of fraud or deceit towards his creditors, or of having lost by gaming as aforesaid, or of having given any preference as aforesaid," "shall be precluded from any benefit under this act;" which words are explained, in the second section of the act of 1812, by the words, "he shall not be permitted to take the said oath, and shall be precluded from any benefit under the said act;" whereas, by the same sections of those acts, persons guilty of perjury in the proceedings under the said act, "shall be forever precluded from any benefit under this act." The word "forever," seems to make a distinction in the extent of the penalty affixed to the two offences. In the first case, it seems to contemplate a denial of a discharge from that imprisonment only of which the petitioner complains; in the second, a perpetual bar in all cases, because no credit can be given to his oath after a conviction of perjury.

HOLTZMAN (ROSS v.). See Case No. 12,075.

HOLWAY, The HELEN J. See Case No. 6,331.

Case No. 6,651.

HOLY et al. v. RHODES.

[2 Cranch, C. C. 245.] [1]

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

PROMISSORY NOTE—MAKER—DEFENCE—ASSIGNMENT.

It is no defence, at law, to an action by the assignee against the maker of a promissory note, that it was given for the purchase of land which the payee had not conveyed to the defendant as he had covenanted to do upon a previous cash payment made by the defendant; although the note was assigned to the plaintiffs after it was dishonored.

Debt by the assignees of John Johnston's promissory note for $550.

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

Mr. Swann, for defendant [William Rhodes], offered evidence that the note was assigned to the plaintiffs [Holy & Suckley] after it was dishonored; that it was given to Johnston in part payment for a house and lot; and that Johnston had not made the title which he had bound himself by his covenant under seal, and under a penalty to make, on payment of $500 in cash, which were paid. The defendant had not demanded the conveyance, and Johnston was always ready and able to make it.

THE COURT (THRUSTON, Circuit Judge, absent), upon the motion of Mr. Taylor, for plaintiffs, instructed the jury that this was no defence. Verdict and judgment for the plaintiffs.

Case No. 6,652.

HOLYOKE et al. v. DEPEW.

[2 Ben. 334.] [1]

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

CHARTER PARTY — RESTRAINT OF GOVERNMENT — DEAD FREIGHT—RECOUPMENT.

1. Where a vessel was chartered for a voyage to the Canary Islands and back to New York, the charter providing that the charterer should furnish, at the Canary Islands, 150 tons of barilla and 20 pipes of wine, or more, and the vessel arrived at the Canary Islands and discharged her outward cargo, on which freight was paid, and received on board 20 pipes of wine, but no barilla, although the charterer had it ready for her, because the authorities would not allow it to be put on board of her, unless she would first go to Vigo, in Spain, to quarantine, and the master refused to go to Vigo, but, after waiting the number of lay days specified, returned to New York, being obliged, for lack of the barilla, to put in at St. Thomas for ballast, and, on her arrival at New York, her owners sued the charterer to recover freight on the wine delivered, and dead freight for the 150 tons of barilla, and damages for being compelled to put in at St. Thomas: *Held*, that, as there was in the charter no exception of restraints of princes, there was an absolute engagement on the vessel's part to receive on board the barilla, even though the authorities of the Canary Islands should prohibit its being put on board.

2. In the absence of such a clause in the charter, the vessel was in fault in not being in a condition to receive the barilla, and the vessel, and not the charterer, must bear the loss.

3. The acceptance of the outward cargo, and the loading of the wine, did not excuse the failure of the vessel to put herself in a condition to receive the barilla.

4. The libellant was entitled to freight on the wine brought, but the charterer was entitled to recoup against it any damages set up in the answer, which arose out of any breach of the charter party by the libellants, to the amount of such freight, but, for any claim beyond that, he must resort to his own proper action.

[Cited in The Spartan, 25 Fed. 53.]

This was a libel for the breach of a charter party, brought by the owners of the schooner Ocean Belle against her charterer. The charter was made at New York, on the 18th of May, 1866, by [George E.] Holyoke and [James] Murray to William Depew, and chartered the vessel for a voyage from Bath, Maine, to Charleston, South Carolina, "thence to Palmas, Grand Canary, and discharge outward cargo, and load part there, and the rest at one or two ports at Fuerteventura or Lanzarote, or one port in each of them, and back to New York." The charter provided that the vessel should receive on board, during the voyage, the merchandise thereinafter mentioned, and that the charterer should furnish to the vessel outward from Charleston a cargo of yellow pine lumber, and in the Canary Islands 150 tons of barilla and 20 pipes of wine, or more, at the option of the charter friends, and should pay to the owners "for the use of said vessel during the voyage aforesaid," a specified sum for each one thousand feet of lumber delivered at the Canary Islands, payable on proper delivery, "and homeward on barilla six dollars per ton, and five dollars per pipe for wine, payable on proper delivery of cargo, in gold or its equivalent;" "the cargo or cargoes to be received and delivered alongside within reach of the vessel's tackles," "charterers paying vessel's port charges in Canary Islands." The vessel took on board the lumber, and delivered it at Palmas. At Palmas she took on board 20 pipes of wine, but no barilla or any other cargo. The wine was delivered to the charterer at New York, but the freight was not paid. The libel averred, that the reason why the vessel brought home no barilla was, that none was furnished to her, and that, in consequence of the want of a full cargo, she had not the necessary ballast, and was obliged to go before the wind to St. Thomas, and take in ballast; and that such deviation caused a delay of forty days, and a damage of $1,000. The libel claimed $100 in gold, freight on the 20 pipes of wine, at $5 per pipe, $900 in gold, as compensation in lieu of freight on 150 tons of barilla, at $6 per ton, and $1,000 for the damage by the deviation to St. Thomas. The defence set up in the answer was, that the respondent was ready to put the barilla on board, but the vessel refused to take it, the refusal consisting in the fact that the vessel had not such a clean bill of health as the authorities at the Canary Islands required, and was therefore prohibited by the authorities from taking on board the barilla; that the respondent was not liable for any damage caused by the deviation to St. Thomas; that, through negligence on the part of the vessel, some of the lumber carried outward was lost, and the arrival of the rest was delayed; that the respondent was entitled to recover from the libellants $2,500 as damages for loss of profits on the barilla, and for loss of market for and profits on lumber, caused by the delay in its arrival, and for loss of lumber, and otherwise; and that

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

the respondent was not liable for any sum to the libellants.

The facts of the case were agreed on by the respective parties, as follows: The schooner was furnished by the Spanish consul at Charleston with a clean bill of health, and started for Palmas with her cargo of lumber. On the voyage, she was obliged, by stress of weather, to put into Newport, Rhode Island, for repairs. From the same cause she lost a part of her deck load of lumber. She remained at Newport for about thirty days. While she was there, and when she left there, the Asiatic cholera prevailed at New York, and at some other places in the United States, but not at Newport or Charleston, nor did it prevail at Charleston when she left there. She went from Newport to Palmas with so much of her outward cargo as had not been lost. The port of Palmas has no harbor, nor has the port of Cabras, hereafter mentioned, in the island of Fuerteventura, but vessels proceeding to those ports come to anchor in a sort of roadstead on the windward side of the island, as near to the shore as possible, and are then loaded by means of lighters, which bring the cargo to them from the shore. The schooner, on her arrival at Palmas, came to anchor at the usual place of anchorage of vessels, and reported to the respondent's agent there, one Wood, who was the consignee of the cargo. Pursuant to the health laws and regulations duly established by the civil authorities of the Canary Islands, such authorities refused to permit the schooner to discharge her cargo, or receive any homeward cargo at Palmas, or hold any communication with the shore, because, as she had last sailed from Newport, a port of a country reported to be infected with Asiatic cholera, such laws and regulations required her to proceed forthwith to the port of Vigo, in Spain, a Spanish quarantine station, and there pass examination, and return to the island, after which, and not till then, she would be permitted to receive her homeward cargo. The master of the schooner refused to go to Vigo, which was distant fifteen or twenty days' sail from the Canary Islands. When the charter party was made, neither of the parties to it knew any thing of the existence of such laws and regulations of quarantine at the Canary Islands. No quarantine station existed at those islands at the time the charter party was made, or at any subsequent time up to the time the schooner finally left there. After some negotiation, the authorities of the island permitted the schooner to unload her outward cargo, and receive on board twenty pipes of wine as part of her homeward cargo. After that, at the request of Wood, she remained at her anchorage at Palmas some six days, to enable Wood to hear from certain correspondents of his, respecting the barilla for the homeward cargo. Wood then directed the schooner to go to the island of Fuerteventura, where the barilla required for her homeward cargo then was, ready to be laden on board the schooner, and take the same on board, and then proceed direct to New York. She accordingly proceeded to Cabras, the port of Fuerteventura. On arriving there, she made the usual anchorage, and her master communicated with one Hogg, the respondent's agent there. Under the same health laws and regulations, the authorities of the island of Fuerteventura refused to permit the schooner to receive any barilla, or hold any communication with the shore, and for the same reason as at Palmas, unless she would proceed to Vigo, and there pass an examination, and return to Cabras, after which, and not until then, she would be permitted to receive on board the barilla. Both of the islands are subject to the Spanish government. After some fruitless negotiations between Hogg and the authorities, Hogg told the master, that, if he would return to Palmas, he, Hogg, would send over the barilla immediately in lighters. Hogg believed at the time that he would be able to do so, but he subsequently found himself unable to do so, because the authorities, pursuant to such health laws and regulations, interfered and prohibited him from doing so. The schooner thereupon returned to Palmas. At that place, Wood informed the master that the vessel must go forthwith to Vigo, and there quarantine, as required by the authorities, and that, unless she did so, she would not be permitted to receive her homeward cargo. The master refused to go to Vigo with the vessel, and therefore the vessel received no barilla. The master then stipulated that the vessel would go to Vigo, and there go into quarantine, if the charterer would pay the additional expenses to be thus incurred. This stipulation was rejected by Wood. The master then stipulated that he would proceed to St. Thomas, and there fill out the homeward cargo, if Wood, as agent of the charterer, would take upon himself the risk of the loss or gain on such voyage, and the risk of the loss of the vessel by reason of such a deviation from her voyage. This proposal was rejected by Wood, on the ground that he had no authority to accept it. Thereupon the vessel, her lay days named in the charter party having expired, sailed from the Canary Islands for home, without the knowledge or consent of the respondent or his agent. For want of a full cargo, she was short of necessary ballast, and she was obliged to deviate from her direct homeward voyage, to obtain ballast, by which deviation she lost some thirty days, besides being subjected to some additional expense. Freight was paid at Palmas for so much of the outward cargo as was delivered there.

E. D. McCarthy, for libellants.
A. R. Dyett, for respondent.

BLATCHFORD, District Judge. The principal question contested in this case is, whether the respondent is liable for dead freight, or damages in lieu of freight, on the barilla called for in the charter party. It is contended, on the part of the libellants, that the health regulations of the islands did not suspend, impair, or dissolve the contract; that the vessel was in no fault; that the charterer was in fault in not supplying the barilla; and that the prohibition of the authorities fell on the charterer and not on the vessel. On the part of the respondent it is contended, that it was, by the contract, a condition precedent to the charterer's duty to furnish the barilla, that the vessel should be ready and able to take it on board; that the barilla was ready, and the charterer did every thing which was in his power to do without the concurrence of the vessel; that it was the vessel that was prevented from taking the cargo on board, and not the charterer who was prevented from putting it on board; that the vessel was never in a condition to receive the barilla, and did not perform her part of the charter party, and, therefore, the condition precedent to the liability of the charterer for any omission to put the barilla on board never arose; and that there was no fault on the part of the charterer.

The question involved is one depending entirely on the construction of the contract between the parties. By the contract, the vessel agrees to receive on board the barilla, and the respondent agrees to provide and furnish the barilla to the vessel, in the Canary Islands, the cargo to be received alongside within reach of the vessel's tackles. The only exception or reservation made by the contract in respect to these absolute engagements, is contained in the following clause: "The dangers of the seas and navigation, of every nature and kind, always mutually excepted." There is no exception in regard to the restraints of rules and princes, an exception often inserted in charter parties, and applying solely to the vessel, unless expressly stipulated to be mutual. Blight v. Page, 3 Bos. & P. 295, note; Touteng v. Hubbard, Id. 298; Sjoerds v. Luscombe, 16 East, 201, 206; Bruce v. Nicolopulo, 24 Law J. Exch. pt. 2, p. 321; Duff v. Lawrence, 3 Johns. Cas. 167. Therefore, in the present case, there was an absolute engagement on the part of the vessel to receive on board the barilla, even though the authorities of the Canary Islands should prohibit its being put on board. Such prohibition did not dissolve the contract, nor can it absolutely excuse a nonperformance of it. Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Blight v. Page, above cited; Hadley v. Clarke, 8 Term R. 259, 267; Spence v. Chodwick, 10 Q. B. 530; Medeiros v. Hill, 8 Bing. 231. The libellants might have inserted in the charter party a provision exempting them from being obliged to perform its covenants if restrained by rulers or princes. But there is no such provision. There was, however, a restraint by the authorities of the Canary Islands against shipping the barilla, and the question is, whether such restraint shall fall on the vessel or on the charterer. The charter party not having provided that the restraint should not, in any event, fall on the vessel, the only proper question for determination in this suit is, whether there was any such default on the part of the charterer as makes him responsible for the failure to load the barilla. The restraint was not one against the exportation of barilla generally, as in Blight v. Page, above cited, where the charterer was held liable. In that case, the charter party contained an exception in regard to the restraints of rulers and princes, and the exportation of barley generally, which was to be the homeward cargo, was prohibited by the authorities of the place of exportation. So, also, in Sjoerds v. Luscombe, above cited, where the charterer was held liable, the charter party contained an exception in regard to the restraints of rulers and princes, which the court held operated as an excuse only for the shipowner, and the loading of the homeward cargo contracted for was prevented by an embargo on all shipping. In Barker v. Hodgson, 3 Maule & S. 267, where the charterer was held liable, a pestilence broke out at Gibraltar, where the homeward cargo was to be laden on board, and, for that reason, the lading of the cargo was prohibited by law, and the decision of the court was placed on the ground that thereby the charterer was prevented from furnishing the cargo. In the present case, there was no general prohibition of the exportation of barilla, no embargo on all shipping, no pestilence at the place of loading, and nothing which prevented the charterer from furnishing barilla to a proper vessel. It is agreed that the cargo of barilla was at the island of Fuerteventura, ready to be laden, but the authorities refused to permit this particular vessel to receive it, because she had not properly quarantined at Vigo. In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss. Ogden v. Graham, 31 Law J., Q. B., pt. 2, p. 29; Spence v. Chodwick, 10 Q. B. 528; Brooks v. Minturn, 1 Cal. 484. The case is unlike that of Morgan v. Ins. Co. of North America, 4 Dall. [4 U. S.] 455. There it was held that the vessel had been in no fault. She took goods at Philadelphia on freight for Surinam, when there was an open commerce between the two ports.

When she arrived at Surinam, the authorities would not permit the cargo to be landed. The prohibition did not rest upon any thing in the character or status of the vessel. The court held that the obtaining permission to land the cargo was the business of the consignee, and that the freight was earned although the cargo was not delivered. The prohibition was like the embargo in Sjoerds v. Luscombe. But, in the present case, the difficulty was with the vessel. She was never in a condition to receive the cargo, because she had failed to comply with the health laws and regulations of the islands. Upon the agreed facts, I can perceive no well founded legal difference between the present attitude of the vessel, and her attitude if she had refused to submit to a lawful quarantine at Palmas, and had, therefore, left without the homeward cargo which she contracted to carry. The true rule is, I think, laid down in Duff v. Lawrence, 3 Johns. Cas. 164, 165. It is that where the owners of a vessel agrees to carry and deliver goods, unless prevented by some of the impediments mentioned in the charter party, many occurrences may take place, and loss or injury arise, in consequence thereof, which were not in contemplation of the parties at the time the charter party was entered into, and, of course, not provided for, and which must be borne by them respectively as it shall happen to fall; and that damage sustained in consequence of the vessel being obliged to perform quarantine, ought to be borne by the owner of the vessel, for it is a temporary prohibition, in no manner provided for in the contract, and which the shipowner ought to submit to, without prejudice to the charterer.

It is claimed by the libellants, that, even though the vessel was under an obligation to go to Vigo, the conduct of the charterer's agents at the islands amounted to a waiver of the performance of that obligation. It is alleged that it was the duty of the agent of the charterer, when the vessel arrived at Palmas, to have refused to accept the cargo she carried, or to attempt to supply her with any return cargo, until she had gone to Vigo and quarantined, if the plea now set up in defence was to be made. But I cannot concur in this view. The vessel was bound by the contract to go to both Palmas and Cabras, and her return from the latter port to the former was the result of a mutual arrangement between the master and Hogg, made in good faith on both sides, aside from the charter party. The master was under no obligation to return to Palmas. He might properly have refused to do so, and have gone directly from Cabras to Vigo. The agreed facts show that the charterer's agent always insisted, up to the very last, that the vessel should go to Vigo, and never waived the performance, by the vessel, of her obligation to go there. Nor can the acceptance of the lumber, or the loading of the wine, excuse the failure of the vessel to put herself in a condition to receive the barilla.

It follows, therefore, that the libellants are not entitled to dead freight, or damages in lieu of freight, on the barilla. Nor are they entitled to damages for loss of time, or expenses incurred by the deviation to St. Thomas on the homeward voyage, as the deviation was not caused by any act or omission of the respondent.

I do not see how the respondent can refuse to pay the freight on the wine, after having accepted it. His agreement is to pay so much per one thousand feet freight on the lumber, on its delivery at the islands, and so much per ton freight on the barilla, and per pipe freight on the wine, on proper delivery. When the lumber was delivered, the freight on it was paid. This is a practical construction of the contract by the respondent. Freight is to be paid, at the agreed rate, on whatever cargo is delivered. Freight is due on the wine, although no barilla was brought. Indeed, the answer does not set up that freight was not earned on the wine. The effect of the answer, in this respect, is merely to claim damages to an extent sufficient to absorb any claim of the libellants. The respondent is entitled to set off or recoup against the freight due to the libellants on the wine, any damage set up in the answer, which he can prove to have arisen out of any breach of the charter party by the libellants, to the extent of the freight, but, for any claim beyond that, the respondent must resort to his own proper action. Zerega v. Poppe [Case No. 18,213]; Thatcher v. McCulloh [Id. 13,862]; Bradstreet v. Heran [Id. 1,792]. The freight to which the libellants are entitled, is the sum of $100, with interest from the time the wine was delivered, without reference to the provision of the charter party in regard to gold. A decree will be entered accordingly.

HOLYOKE MUT. FIRE INS. CO. (MAUGER v.). See Case No. 9,305.

Case No. 6,653.

HOMANS v. COOMBE.

[2 Cranch, C. C. 681.] [1]

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

ATTACHMENT—EXECUTION—JUDGMENT—SURPRISE.

The court will set aside a judgment against the garnishee, obtained at a former term by surprise, and will quash the execution thereon issued.

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

This was an attachment issued by way of execution upon a judgment against Mr. Zantzinger, and the marshal returned that he had "attached credits in the hands of Griffith Coombe, and summoned him as garnishee in the presence of" D. B. and B. O. T., July 28, 1824. At the return of the writ, Mr. Coombe, the garnishee, being called, and not appearing, judgment of condemnation was rendered against him at December term, 1824, for the whole amount due from the defendant, Mr. Zantzinger. The writ of attachment issued under the act of assembly of Maryland of 1715 (chapter 40) does not state any particular sum as being in the hands of the garnishee, nor does it even name a garnishee. It commands the sheriff to attach the goods, chattels, and credits of the defendant to the value of the debt, and have them before the court at the return of the writ, to be condemned to, and for the use of, the plaintiff [Daniel Homans], unless the defendant shall show cause to the contrary; and to make known to the person in whose hands or possession the goods, chattels, and credits shall be attached, to be and appear at the court, at the return day of the writ, to show cause why the same should not be condemned, and execution thereof had as in other cases of recovery and judgment. By the 4th section of the act it is provided, "that no sheriff shall levy, by way of execution as aforesaid, against the said garnishee or garnishees, any more than the plaintiff's debt and costs, nor against any garnishee or garnishees, than what the said plaintiff in the said action shall make appear to the said respective courts, to be of the said goods, chattels, and credits of the said defendant in each respective garnishee or garnishees' hands, together with such costs only as the garnishee or garnishees shall put the plaintiff to, by denying him or themselves to be indebted to such defendant, and contesting the same." At the time of the judgment against Mr. Coombe, the garnishee, there was no evidence before the court to make appear what goods, chattels, or credits were in his hands.

Mr. Key now moved to set aside the judgment against Mr. Coombe, as having been obtained irregularly and by surprise; and produced the affidavit of Mr. Coombe, denying that he ever had any money or property of the defendant in his hands or possession; that knowing that fact, and believing that no person could aver or prove that he had, and that no judgment could be rendered against him without proof, he thought it unnecessary to take any steps for his defence, and the subject passed out of his mind, &c. There were also other corroborating affidavits.

THE COURT, at a subsequent term, set aside the judgment against the garnishee, as having been obtained by surprise, and quashed the execution.

[In Case No. 6,654, in an action against the garnishee, the plaintiff was nonsuited.]

Case No. 6,654.

HOMANS v. COOMBE.

[3 Cranch, C. C. 365.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

LIEN—BUILDING CONTRACT—COMMENCEMENT OF LIEN.

1. The lien which a builder, in Washington, has under Act Md. 1791, c. 45, § 10, is a remedy in rem only, and not in personam.

2. The lien commences with the recording of the contract for building, and does not overreach prior incumbrances.

Attachment, by way of execution, upon a judgment recovered by [Daniel] Homans against Zantzinger, for balance due upon a building contract. The attachment was served upon credits in the hands of G. Coombe, who was summoned as garnishee, and pleaded nulla bona. The building contract was dated 17th September, 1816, but not acknowledged and recorded until the 14th of May, 1817. The deed of trust, under which Mr. Coombe purchased the house, was executed on the 9th of May, 1817, five days before the acknowledgment of the building contract. The plaintiff had, within two years after the last of the work was done, proceeded at law, by an action against Mr. Zantzinger, upon the contract, and, on the 22d of June, 1819, recovered the judgment upon which this attachment was issued, by way of execution, under the Act Md. 1715, c. 40. Mr. Coombe had paid his purchase-money to the trustee, who sold the house under the deed of the 9th of May, 1817, and the question was, whether Mr. Homans had a lien on the house and lot prior to that of the said deed of trust. By Act Md. 1791, c. 45, § 10, "concerning the territory of Columbia and city of Washington," it is enacted, "that for all sums due and owing on written contracts, for the building any house in the said city, or the brick work, or carpenter's or joiner's work thereon, the undertaker, or workmen employed by the person for whose use the house shall be built, shall have a lien on the house and the ground on which the same is erected, as well as for the materials found by him; provided the said written contract shall have been acknowledged before one of the commissioners, a justice of the peace, or an alderman of the corporation of Georgetown, and recorded in the office of the clerk for recording deeds herein created, within six calendar months from the time of acknowledgment, as aforesaid; and if, within two years after the last of the work is done, he proceeds in equity, he shall have remedy as upon a mortgage; or, if he proceeds at law within the same time, he may have execution against the house and land, in whose hands soever the same may be; but this remedy shall be

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

considered as additional only, nor shall, as to the land, take place of any legal incumbrance, made prior to the commencement of such claim."

Mr. Morfit, for plaintiff, contended that when the building contract was acknowledged and recorded, the lien related back to its date, and thus overreached the deed of trust; and Mr. Coombe purchased with knowledge of the lien. It was agreed by the parties, that if such should be the opinion of the court, a verdict should be entered for the plaintiff; if otherwise, the plaintiff should be nonsuit.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the issue must be found for the garnishee: 1st. Because Act Md. 1791, c. 45, § 10, gives a remedy in rem only, and this is a proceeding in personam; and if the issue be found for the plaintiff, the defendant will be personally liable. 2d. Because the deed of trust under which the garnishee claims, was a legal incumbrance, made prior to the commencement of the plaintiff's claim to the lien, which commmenced only at the time of the recording of the contract. The plaintiff became nonsuit.

[A former judgment was set aside as having been obtained by surprise. Case No. 6,653.]

Case No. 6,655.

HOMANS v. MOORE.

[5 Cranch, C. C. 505.] [1]

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

JUSTICE OF PEACE—JURISDICTION.

1. A certiorari does not lie to a justice of the peace in a case of which he has jurisdiction.

2. A plaintiff may relinquish interest upon an open account and bring his action for the principal sum only, before a justice of the peace, if the principal does not exceed the sum of fifty dollars, although, with interest, the debt would exceed that sum.

Certiorari, to Mr. Justice Thompson, issued by the chief judge of this court on the 21st of March, 1838, in vacation, upon the petition and affidavit of the debtor, Benjamin Homans, which stated, in substance, that W. W. Moore had warranted him, before Mr. Justice Thompson, for $47.20, which, if due at all is due with interest from November, 1834, and that the debt and damages exceed the sum of $50, and the warrant and all proceedings under it are illegal and coram non judice. That to prevent an appeal, the creditor claimed a trial by jury; who rendered a verdict against the petitioner, upon which the justice rendered judgment. That he has a fair, bona fide, legal defence, which was not allowed him upon the trial. The petition was accompanied by another affidavit, stating that since the trial before the justice he has discovered that he can prove his set-off, which he did not know at the time of the trial; and that the present application is not for delay, but that substantial justice may be done. The certiorari was returned at the last term, and a rule laid upon Mr. Moore, the plaintiff, to file his declaration.

Mr. Hoban, for plaintiff, now moved the court to quash the certiorari and all the proceedings thereon.

Mr. Bradley, contra, relied upon the order of the chief judge for the certiorari.

THE COURT (CRANCH, Chief Judge, not sitting) decided that the creditor may relinquish the interest upon the claim and recover the principal before a justice of the peace, if the principal does not exceed $50; the claim being understood to be upon open account. Certiorari quashed.

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

Case No. 6,656.

HOMAS v. McCONNELL et al.

[3 McLean, 381.] [1]

Circuit Court, D. Illinois. June Term, 1844.

PROMISSORY NOTE—SET-OFF—PLEA.

1. Property received collaterally, and not in payment of a note, cannot be set up, in an action on the note, by way of set-off.

2. Unliquidated damages cannot be pleaded as a set-off.

[Cited in Crenshaw v. Jackson, 6 Ga. 509.]

3. Where a plea alleges that the payee of a note received another note and mortgage, to be applied to the note, it is to be construed that the proceeds of the note and mortgage are to be applied when received.

4. To make such a plea good, it is necessary to aver the receipt of proceeds, etc.

[This was an action at law by Homas against McConnell & Vansyckel.]

Hardin & Smith, for plaintiff.

Mr. M'Dougal, for defendants.

OPINION OF THE COURT. This suit is brought on a promissory note to Stittinius & January, for eleven hundred and fifty-four dollars and twenty-six cents, dated at St. Louis, 18th July, 1842, and payable the 26th of October, ensuing; which note, the plaintiff alleges, was assigned to him on the day of its date. (1) The defendants pleaded the general issue. (2) That when plaintiff bought said note of said Stittinius & January, he also received a note and mortgage upon personal property against Uriah Rapler, of the city of St. Louis, for over one thousand eight hundred and fifty dollars, the property of said defendants; that under and by virtue of said mortgage and note against Rapler, the said plaintiff has received all the property mentioned in said mortgage, and the said property so received was worth three thousand dollars, and the de-

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

fendants offer to set off said sum of money, the value of said property as aforesaid, against the damages claimed. (3) The defendants also pleaded, "that after the making of said note to the said Stittinius & January, he, said defendant, delivered to them a large amount of land of the value of one thousand dollars, which, by agreement, was to be credited on said note; and defendant then also delivered and sold to said Stittinius & January, a note against one Rapler, of St. Louis, for over eighteen hundred and fifty dollars, which note was secured by a mortgage given by said Rapler, for and upon property of over the sum of three thousand dollars in value, which note and mortgage were agreed to be taken and applied upon said note sued on; all of which was known to the plaintiff at the time he took and accepted said note. And defendant avers, that said Stittinius & January did not credit said note as agreed as aforesaid, nor has the plaintiff given credit since the assignment; and, therefore, the said defendant now here offers to set off said sums of money upon and against the damages declared for, and sought to be recovered herein." The plaintiff demurred to the second and third pleas. The second plea does not state that the property was received in payment. If received collaterally, it is not a proper subject of off-set. The demand set up as an off-set is unliquidated, and that is an insuperable objection to the plea. The same objection applies to the third plea. It avers that the payees of the note agreed to apply the note and mortgage specified, upon the note sued on, "all of which was known to the plaintiff, at the time he took and accepted said note." But the plea does not show that one dollar has been received on the mortgage, to be applied within the language of the plea. So that if the note before us had not been assigned, the plea would not have been good against the payees. The mortgage and note were not received in payment. The allegation that the land was to be credited on the note, shows rather that the proceeds were to be credited. The plea does not show that the land was received in payment of the note. The demurrer is sustained to both pleas.

Case No. 6,657.

The HOME.

[18 N. B. R. 557.] [1]

District Court, E. D. Michigan. April 1, 1878.

MARITIME LIEN—BANKRUPTCY OF CHARTERER—MATERIAL MEN.

1. A charterer of a vessel, having purchased supplies of a material man upon the credit of the vessel, afterward went into bankruptcy and proposed a composition with his creditors, which was accepted. *Held*, that the lien of the material man was not thereby discharged, even though he voted in favor of accepting the composition.

2. Money furnished to a vessel is not a lien, unless it be furnished for the purpose of paying claims which would themselves be liens.

On libel in admiralty for supplies.

During the year 1875 libellant, who was a shipchandler at Port Huron, claimed to have furnished the tug "Home" supplies and money to the amount of five hundred and seventy-eight dollars and eighteen cents, upon the order of Dale & Moore, the charterers of the tug; that the articles were furnished, with the exception of four items, hereafter mentioned. That they were necessary, and were furnished upon the credit of the tug, is admitted. It was insisted, however, in defence, that, shortly after the supplies were furnished, Dale & Moore were adjudicated bankrupts in the district court for the Northern district of Illinois; that a composition with their creditors was proposed by them, and received the assent of the requisite number and amount; that the resolution of composition was signed by the libellant; that the composition was subsequently carried out, and that it operated as a discharge of the libellant's claim. It seems that libellant had claims against Dale & Moore to the amount of over five thousand dollars, but that for the bill, which is the basis of this suit, libellant, in his proof of debt, claimed expressly a lien upon the tug, and did not waive the same in fact, whatever might be considered the legal effect of his joining in the composition. The case was defended by a mortgagee of the tug, holding under the legal owners.

Atkinson & Atkinson, for libellant.
D. C. Holbrook, for claimant.

BROWN, District Judge. Under general admiralty rule 12, a person furnishing supplies to a vessel has a triple security for the payment of his claim: (1) The owner, a charterer being regarded as the owner pro hac vice; (2) the master; (3) the vessel itself. A failure to collect from either does not impair his remedy against the others. He may pursue them successively until his entire debt is paid. The Paul Boggs [Case No. 10,846]; The Highlander [Id. 6,476]; The Hariett [Id. 6,098]; Granger v. Wayne Circuit Judge, 27 Mich. 406; The Kalorama, 10 Wall. [77 U. S.] 204; Harmer v. Bell, 22 Eng. Law & Eq. 62; Toby v. Brown, 11 Ark. 308; The Bengal, Swabey, 468; The John & Mary, Id. 471; Nelson v. Couch, 15 C. B. (N. S.) 99. Had the supplies in this case been furnished upon the order of the owners, there would be reason for insisting that the claim against the owner and the lien upon his property was but a single debt, of which the lien was but an incident, and that the release of one might operate as the discharge

[1] [Reprinted by permission.]

of the other; but there are in fact three independent though not joint debtors in this case, viz.: The charterer, the vessel, and the master, and the release of one does not impair the remedy against the others. The case does not differ from that of a debt against the maker of a note, secured by an indorsement, in which case it is now settled that the act of a creditor consenting to a composition does not discharge the surety. If a principal debtor becomes insolvent or procures a discharge in bankruptcy, clearly a surety is not released; so if the principal is discharged by his creditors, the effect upon the surety is the same, and the fact that the plaintiff assented to the composition is declared immaterial. Guild v. Butler, 122 Mass. 498; Browne v. Carr, 2 Russ. 600, 5 Moore & P. 497; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Exch. 10; Ex parte Jacobs, 10 Ch. App. 211. It is true that section 17 of the act of June 22, 1874 [18 Stat. 182], authorizing compositions, provides that creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution, without first relinquishing such security for the benefit of the estate; but the word "secured" here is confined to securities which, if released, would revert to the assignee. It does not apply to personal security, or security upon property which does not belong to the bankrupts. In re Spades [Case No. 13,196]. Even if the creditor be secured by a lien upon the property of the bankrupt, he may either release such lien and unite in the composition for his whole debt, or have his security valued and come in for the difference. In re Lytle [Id. 8,650]; Paret v. Ticknor [Id. 10,711]. If there were any doubt in this case with regard to the intention of the creditor in proving his debt, it is dispelled by the language of his deposition, disclaiming any intention of waiving his lien. I think the composition here must be held only to discharge the debt of the libellant against the charterers, and to have no effect upon his security. But the two items of forty-two dollars and eighty-one cents to J. R. Butler, and of thirty-seven dollars and fifty-five cents to F. & A. Myers, must be disallowed. They are charged in the account as money furnished the vessel. But it nowhere appears whether the bills which were paid by this money were themselves liens upon the vessel. The stipulation admits that the payment of these bills was made by the libellant after the goods covered by the bills had been delivered to the tug; but it does not appear what was the nature of the bills, or whether they could have been made the basis of a proceeding in rem. There is no proof whatever regarding the two items of fifty-three dollars and twelve cents and eighty-three dollars and sixty-eight cents, which must also be disallowed. For the residue, libellant is entitled to a decree, after deducting the amount received in the composition proceeding.

Case No. 6,658.

HOME v. SEMPLE et al.

[3 McLean, 150.] [1]

Circuit Court, D. Indiana. May Term, 1843.

DEBT—ACTION OF—WHEN MAINTAINABLE—PARTIES.

1. An action of debt will lie where the sum is certain, and it is the duty of the defendant to pay the amount to plaintiff.

2. The action may be brought by the assignee against the acceptor of a bill; and consequently by the payee against the acceptor.

3. An indorser may bring debt against the drawer, although there may be intermediate indorsements, by striking out those indorsements.

At law.

Wright & Patterson, for plaintiff.

H. B. L. Engram, for defendants.

OPINION OF THE COURT. This is an action of debt brought by the indorsee against the drawer of a bill, there being several intermediate assignments. A general demurrer was filed. It is laid down in Hardr. 435, that debt does not lie by a payee against the acceptor of a bill for want of privity. But debt will lie wherever the common law raises a duty, and the acceptor is bound legally and morally to the payee. He accepts and thereby promises to pay to the payee of the bill the sum named. There is then a privity between them, on which, according to the doctrine in Hardress, an action of debt may be sustained. In Bishop v. Young, 2 Bos. & P. 78, it was held that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. In that case the doctrine laid down by Hardress was considered. And in Raborg v. Peyton, 2 Wheat. [15 U. S.] 385, the court says: "In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and after indorsement, each incurs the same liabilities. And if an action of debt will lie in favor of the payee of the note against the maker, it is not easy to perceive any sound principle, upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties, as a drawing of a note." It has been held that debt will lie in favor of a payee against the drawer, in case of non-payment by the acceptor. Hard's Case. 1 Salk. 23; Hodges v. Steward, Skin. 346; 10 Wend. 341. Upon the whole, we think the action of debt in this case is sustainable, the plaintiff striking out the intermediate indorsements, and that the demurrer must be overruled. Judgment.

HOMEA (GATTMAN v.). See Case No. 5,271.

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

HOME FIRE INS. CO. (HUCHBERGER v.). See Case No. 6,821.

Case No. 6,659.

HOME INS. CO. v. The CONCORD.

[17 Pittsb. Leg. J. 148; 2 Chi. Leg. News, 249.]

District Court, E. D. Michigan. 1870.

ADMIRALTY — ARREST OF VESSEL — RIGHTS OF MORTGAGEE—DISCHARGE—SURETY.

1. In case of the arrest of a vessel in admiralty, a mortgagee has the right to intervene for the protection of his own interest, and contest a forfeiture.

2. When a vessel has been arrested, on being discharged from the arrest, upon giving the required bond or stipulation, she returns into the hands of her owner discharged from the lien which constituted the foundation of the proceedings against her, and forever and for all purposes whatsoever, the surety taken being as a substitute for the vessel, and the court has no jurisdiction or power over her thereafter in the same suit or for the same cause.

3. The only remedy in a case where the securities become insolvent would seem to be in an application to the court for an order requiring new securities to be given.

In admiralty.

LONGYEAR, District Judge. In this case the propeller was arrested November 10, 1868, and bonded on the same day by John Hutchings, claimant, with two sureties. December 18, 1868, Hutchings mortgaged the propeller to Eber B. Ward, who was intervened pendente lite, setting up his mortgage as the basis of his right to intervene. July 5, 1869, an order was entered in this court, remanding the propeller to the custody of the marshal, on the ex parte application of the libelants, on the ground that the sureties had become insolvent since the bond was given. Ward now moves to vacate the order so remanding the propeller on the ground that the court had no jurisdiction over the vessel after she was so bonded, and therefore had no power to make the order. It is contended, on behalf of libelants, that Ward has no standing in court, he being a mortgagee merely, and not the owner or an agent, consignee or bailee for the owner, as required by rule 26. Rule 26 has been considerably altered and enlarged, if not entirely superseded by the act of March 3, 1847 (9 Stat. 181). But the rule and the act relate exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property, or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene pendente lite, to participate in the distribution of proceeds, or to protect any interest he may have in the subject matter of the litigation. The right of a party to intervene for these purposes has been recognized both in England and this country as extending to judgment creditors who have acquired a lien, and also to attaching creditors. See 1 Conk. Adm. 55, 66–70, citing The Flora, 1 Hagg. Adm. 293, 303; The Rebecca [Case No. 11,619]; The Mary Ann [Id. 9,195], decided by Judge Ware in the district court for the district of Maine. This being so, what reason can there be why a mortgagee should not be admitted to intervene for the protection of his own interest, and contest a forfeiture so far as his right or interest would be prejudiced by the decree? I can see none. I am, therefore, clearly of the opinion that Ward is properly admitted to intervene as mortgagee, and consequently that he has a right to make this motion, and to be heard upon it.

The next and remaining question is as to the validity of the order remanding the vessel. I shall not stop to argue the question. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel on being discharged from arrest upon the giving of the bond or stipulation, returns into the hands of her owner, discharged from the lien incumbrance which constituted the foundation of the proceedings against her forever; and, for all purposes whatsoever, the surety taken being as a substitute for the vessel, and the court has no power or jurisdiction over her thereafter in the same suit for the same cause. The Union [Case No. 14,346]; The White Squall [Id. 17,570]; The Kalamazoo, 9 Eng. Law & Eq. 557, 560; 15 Law Rep. 563. No question of fraud, mistake or improvidence in entering into the bond or discharging the vessel arises in this case, and therefore need not be considered. The only remedy that seems to be provided in a case where the sureties shall become insolvent, is an application to the court for an order requiring new sureties to be given. Disobedience to such order would put the party in contempt, and he could be proceeded against accordingly, and be denied the right further to appear and contest the suit until he complied with the order, or otherwise purged his contempt. Adm. Rule 6. Ben. Adm. § 492; Conk. Adm. 112. I am, therefore, of opinion that the court had no power to make the order remanding the vessel into the custody of the marshal, and the motion to vacate the same must be granted.

HOME INS. CO. (CONNECTICUT MUT. LIFE INS. CO. v.). See Case No. 3,107.

HOME INS. CO. (HAMBLETON v.). See Case No. 5,972.

HOME INS. CO. (HOVEY v.). See Case No. 6,743.

HOME INS. CO. (KELLEY v.). See Case No. 7,658.

HOME INS. CO. v. The MOLLIE MOHLER. See Case No. 9,701.

HOME INS. CO. v. The OCEAN WAVE. See Cases Nos. 10,416 and 10,417.

HOME INS. CO. (SCOTT v.). See Cases Nos. 12,533 and 12,534.

Case No. 6,660.

HOME INS. CO. v. STANCHFIELD et al.

[2 Abb. U. S. 1; 1 Dill. 424; 4 Am. Law T. Rep. U. S. Cts. 171; 3 Chi. Leg. News, 97; 5 Am. Law Rev. 564.] [1]

Circuit Court, D. Minnesota. Oct., 1870.

INSURANCE—INJUNCTION—DISCOVERY.

1. A circuit court ought not to entertain a bill in equity filed by an insurance company, after a loss has occurred under a policy issued by them, to procure a decree canceling the policy and enjoining the insured from bringing any action upon it, where the bill is founded upon charges of fraud in obtaining the policy, which, if true, might be set up in defence of an action at law upon it. So *held*, where the policy contained a clause limiting the time for suing upon it to twelve months from the date of the loss; so that there was no danger of injury to the complainant through any unreasonable delay to sue.

[Cited in Bowden v. Santos, Case No. 1,716; Morse Arms Manuf'g Co. v. Winchester Repeating Arms Co., 33 Fed. 184; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 156; Walker v. Brown, 58 Fed. 26.]

2. Query, whether a circuit court within a state whose laws allow parties to examine each other upon a given cause of action or defense, ought to entertain a bill of discovery, merely in aid of such cause of action or defense?

[In equity. Bill by the Home Insurance Company of New York against Stanchfield and Newman.]

[1][The bill states, in substance, that the complainant is a foreign insurance corporation, and that the respondents are citizens of the state of Minnesota; that on the 15th day of December, 1858, it issued its policy of insurance to the respondent, Stanchfield, the loss, if any, to be paid to the respondent, Newman, whereby the complainant, in consideration of the sum of $45 premium, agreed to insure the said Stanchfield for one year, against loss by fire, to the amount of $3,000, on his three-story stone building in the city of St. Anthony, Minnesota. The bill alleges that when Stanchfield applied for insurance on the building, he made to the agent of the complainant the following representations: (1) That he was the owner of the building and ground on which it was situate. (2) That the property was not incumbered, except by a mortgage executed to a party outside of the state, which mortgage was without consideration and invalid, having been given to protect the property from his creditors. (3) That the building was worth $6,000, and that he had been offered that for it by a Mr. Sidle, a short time before. The bill states that these representations were false; that Stanchfield was not the owner, but does not allege who was; that the building was not worth $6,000, but only $1,500, and that Mr. Sidle never made any offer to purchase it. The bill particularly states that in addition to the mortgage which was admitted to exist, there was a mortgage to Phinney & Dorman for $2,727, a mechanic's lien in favor of Alden, Cutter & Hall for $1,365, and a mortgage to Corwith & Co. for $18,000. It is alleged that the complainant was ignorant of the existence of these incumbrances; that it relied on the representations so made; that the said Stanchfield knew they were untrue, and made them fraudulently to deceive the complainant and to procure the policy. It is also averred that the building insured was destroyed by fire on the 19th day of November, 1869, and that the falsity of the representations made by Stanchfield to procure the policy, and his fraud in that respect, were not discovered until two weeks before this bill was filed, which was on the 23d day of March, 1870. The bill also states that the policy has been demanded back of the respondent, and the premium money tendered to him, but that he refuses to accept the money or give up the policy; but on the contrary, threatens to institute a suit thereon. The bill asks for a temporary injunction to restrain the defendants from commencing an action, in any court upon the policy, and that on the final hearing the defendants may be decreed to deliver up to the complainant the policy to be cancelled, and that it be declared null and void, and for general relief. On the bill, and before answer, a temporary injunction was allowed by one of the judges of this court. The answer has since been filed, admitting the issuing of the policy, the loss, the intention to sue on the policy, but denying generally and specially the alleged fraud, or fraudulent representations or intent. The answer states that the defendant Stanchfield was and is the owner of the building and the ground. It admits that the defendant Newman (a son-in-law of Stanchfield), by agreement between the parties, paid taxes for the purpose of preventing the property from being sold to strangers, and for the benefit of Stanchfield, who was to reimburse him; that in 1865 (as the defendant Stanchfield has learned since the fire), Newman, in paying taxes, took a certificate of sale, but the answer alleges that he never made any claim by virtue of the said tax sale, and that prior to the fire, namely, in February, 1869, the amount which Newman had paid for taxes was repaid to him by Stanchfield. The answer admits that Stanchfield, when he applied for insurance, did state that he owned the property, and denies that such is not the fact, but avers, as above stated, that he did and does own it. As to the value of the building, the answer admits that Stanchfield stated to complainant's agent that it was worth $6,000; and it alleges that it cost $18,000 and was worth $9,000, and that the agent of the company made a personal examination of the building to learn its value, and that he relied on that,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Hon. John F. Dillon, Circuit Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 2 Abb. U. S. 1, and the statement is from 1 Dill. 424. 5 Am. Law Rev. 564, contains only a partial report.]

and not on any representation or statement of Stanchfield. The answer admits that Stanchfield stated to the complainant's agent, not that Sidle had made a formal offer of $6,000 for the property, but that he had said he would pay that sum therefor. Respecting the incumbrances, the answer alleges that Stanchfield stated that there was a mortgage to Corwith & Co., of Galena, Ill., for $18,000, which had been voluntarily given in 1858, to secure future or contemplated advances, and also to keep off some unjust claims; but he denies that he stated that it was invalid or without consideration, and he thinks he is now owing nothing upon it. It denies representing that this was the only mortgage or incumbrance, but admits that Stanchfield represented, that aside from certain judgment liens, it was the only incumbrance. It alleges that the mortgage to Pinney & Dorman for $2,727, mentioned in the bill, has long been paid, and denies the existence of the alleged mechanic's lien in favor of Alden, Cutter & Hall. A copy of the policy is filed with the answer. On the coming in of the answer, the defendants moved, at the June term, 1870, upon the bill and answer, before Mr. Justice Miller, and Dillon, Circuit Judge, for a dissolution of the temporary injunction, upon two grounds: (1) The answer denies the material averments of the bill; (2) the bill contains no sufficient equities to give the court jurisdiction in chancery, or to warrant the injunction. It is this motion which is now before the court to be decided.][2]

Atwater & Flandrau, for the motion.

H. H. Finley and C. K. Davis, contra.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge. This is a bill in equity by the Home Insurance Company of New York, to cancel a policy of insurance against fire, issued by it to the respondent, Stanchfield, and for an injunction to restrain him from commencing action thereon. The policy was in the usual form of such instruments, and by its terms was to continue in force for one year, or until December 15, 1869. In November, 1869, the building covered by the policy was consumed by fire, and in the March succeeding, the present bill was exhibited. The nature of the bill appears above, and it is, in substance, one to have the policy declared void because it was procured by the assured by means of false and fraudulent representations. A temporary injunction to restrain the respondents from commencing any action on the policy was allowed before answer. On the coming in of the answer, which denies the alleged fraud and fraudulent representations, a motion is made to have the order for the injunction vacated; and it is this motion which was argued by counsel, and which the court is now to decide. But the solicitors for both parties desired the questions arising on the bill and answer to be disposed of on their merits, and to have the court determine whether bills like the present one are maintainable in equity, when the fraud alleged as a ground for the cancellation of the policy is available to the company as a defence to an action on the policy, and constitutes, if proved, a complete defence thereto.

Under the full denials in the answer of the fraud charged in the bill, there would be little hesitation in holding that the injunction ought to be dissolved; but though dissolved, the bill would yet be pending, and the question as to the right to maintain such a bill would still remain to be decided.

The complainant's solicitor maintains that the bill is sustainable upon two grounds: (1) Because a discovery is sought, and relief consequent upon the discovery. (2) Because courts of equity have jurisdiction concurrent with courts of law in matters of fraud, and will, in all cases, set aside agreements obtained by means of false and fraudulent representations. Of these grounds in their order; and first as to the discovery. This is not a bill for discovery in aid of a suit or defence at law, and it is only a bill of discovery in the same general sense that every bill is such which seeks an answer from the defendant under oath. It is simply a bill calling for an answer under oath, and praying that a policy of insurance be set aside because it was procured by fraud. Bills of discovery had their origin at a time when at law a party was not entitled to and could not obtain the evidence of his adversary. By the legislation of Minnesota (St. 1866, 520), and by that of congress—Act July 6, 1862 (12 Stat. 588); Act July 2, 1864 (13 Stat. 351)—parties to suits at law, in equity and admiralty, are not only permitted to testify in their own behalf, but compellable to testify at the instance of the adverse party. Berry v. Fletcher [Case No. 1,356]; Rison v. Cribbs [Id. 11,860]; United States v. Hawthorne [Id. 15,332]. The effect of this legislation is to remove the grounds or reasons which originally existed for bills of discovery, and it may admit of doubt whether a bill merely to obtain discovery in aid of another action or defence ought longer to be sustained; but this is a point not now necessary to be determined. If the present bill be treated as one for discovery and relief, and as one where the necessity of obtaining a discovery is the ground of equity jurisdiction, the discovery sought has failed, for the answer denies all the essential averments of the bill charging fraud, and where this is the result the bill must be dismissed.

Speaking of such a case, Mr. Justice STORY says: "If the discovery is totally denied by the answer, the bill must be dismissed, and the relief denied, although there might be other evidence sufficient to establish a title to relief, for the subject matter is, under such circumstances, exclusively

[2] [From 1 Dill. 424.]

remediable at law." Story, Eq. Jur. § 691; Id. §§ 74, 690. As to the first ground of equitable jurisdiction, viz: the necessity for a discovery from the defendant, it fails because the complainant has failed to obtain the discovery he sought. Brown v. Swann, 10 Pet. [35 U. S.] 497; Russell v. Clark, 7 Cranch [11 U. S.] 69, 89; Young v. Colt [Case No. 18,155].

We are thus brought to the main question argued by the counsel, whether equity will entertain a bill to cancel a fire policy, filed after a loss has happened, where the foundation for the relief sought is the fraudulent representations of the assured in procuring the policy, with respect to the property, its ownership, value, the state of the incumbrances, &c., when such fraudulent representations are a good defence at law to an action on the policy, and available as such to the company.

If such a bill will lie, the present suit having been brought, and properly brought, the assured would not be allowed afterwards to sue at law on the policy, pending the equity suit to cancel it, and hence an injunction to restrain the commencement of such an action, if threatened, would be proper. But, if on the other hand equity will not entertain such a bill as the present, of course the injunction should not have been allowed, and ought to be dissolved.

The injunction feature of the present suit is thus dependent upon the principal inquiry before us, and we shall give no separate consideration to it. The policy to which this suit relates contains two provisions, usual in such instruments, to which reference may be made, as bearing upon the question to be decided. One is that the loss, if any happens, is not payable immediately, but only after the preliminary proofs required by the policy are furnished. The other is "that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, etc."

It may be here remarked that it is settled law that a condition in a policy requiring any action thereon to be brought within a limited and specified time is valid and binding. Ripley v. Aetna Ins. Co., 30 N. Y. 136; Roach v. New York Ins. Co., Id. 546; Carter v. Ins. Co., 12 Iowa, 287; Gray v. Hartford Ins. Co. [Case No. 3,375].

It is our opinion that the present bill sets forth no sufficient grounds for equitable interference, and we now proceed to state the reasons on which this opinion rests. No principle is more familiar than the one that where the law affords a full, complete, and adequate remedy, equity will not interfere. "Chancery," says Lord Bacon, "is ordained to supply the law, not to subvert the law." 4 Bac. Works, 488. In other words, the parties must litigate in the law courts, unless there are good or legal reasons for invoking the aid of equity. This principle, or rule must have full effect given to it in the courts of the Union, for it is recognized by the constitution, and by the judiciary act.

The constitution declares that "in suits at common law * * * the right of trial by jury shall be preserved" (Amends. art. 7); and the judiciary act in terms, provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy can be had at law" (1 Stat. 82, § 16).

In the case before us, no reason is set forth in the bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. Before the bill was filed, the loss had happened. By the terms of the policy, the assured was bound to sue within a year, or be forever barred. The bill alleges that he is about to bring an action on the policy. If the facts averred in the bill are true, they constitute a complete defence to such an action, and nothing is set forth showing that any obstacles stand in the way of making this defence at law. If no loss had happened, and especially, if the policy had many years to run, such as life policies, there would seem to be a necessity to sustain a resort to equity to cancel the contract, where it had been procured by fraud. But such is not the case now before the court. There are, however, other and perhaps more satisfactory grounds for not entertaining the present bill. The bill is one to have a contract, made between the parties, decreed to be delivered up to be cancelled. This cannot be done without wholly taking the matter out of the law courts, and cutting off all actions in those courts. If this bill is not sustained, the parties are simply left to their legal rights and remedies. If no hardship, no injustice, will result, and no reason appears for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity, to have "instruments cancelled or delivered up, is not, strictly speaking, a matter of right, * * * but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case." 2 Story, Eq. Jur. § 693.

Chancellor Kent, in holding that a court of equity had full power to order instruments to be delivered up, whether void or not, at law, and even if void on their face, after reviewing some of the leading English cases, says: "But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications

where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps," he adds, "the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation." Hamilton v. Cummings, 1 Johns. Ch. 517, 523, referred to by Marshall, C. J., in Peirsoll v. Elliott, 6 Pet. [31 U. S.] 95.

Applying these principles to the present case, we need not deny that equity has jurisdiction, by reason of the fraud alleged, to entertain the suit; but are of the opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties at law seems a more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because: (1) The company has a full, plain, and perfect defence to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper. (2) Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss. In the present case, only about seven months remained to the assured, and the bill alleges that he was about to bring suit; the purpose of the present bill is, therefore, manifest, viz.: to force the assured to litigate in equity instead of at law, thereby depriving the party of the right to a trial by jury. (3) If the bill be entertained because the insurance company has the right to resort to equity, then all similar bills must likewise be entertained in equity, and this gives the companies the advantage of a choice of forum. If the company prefers to litigate in equity, it will file its bill before the preliminary proofs are furnished, and thus compel the assured to settle the controversy in that court. If, on the other hand, the company prefers to litigate at law, it will simply omit to file a bill, and await the action of the assured, who, unless there is some special ground for going into equity, must be content with his legal remedies. (4) The effect of sustaining the right to resort to equity, would be to transfer the great bulk of all litigation arising out of losses under policies, from the courts of law into the courts of equity. The business of insurance is now almost wholly carried on by companies of large capital, and these are, in most instances, foreign corporations. From the supposed sympathy of jurors in favor of the assured as against the insurance company, and from the supposed even-handed impartiality of the judge, it is not difficult to see that companies, having the choice of courts, would prefer the equitable to the legal forum, in almost all cases. And the court must say that it is the result of its experience, in the trial of insurance cases, that the fears which the companies entertain as to the sympathy of the jurors in favor of the assured, have, by far too much foundation. But the remedy lies in the more liberal exercise by the common law courts of the power to grant new trials where verdicts are clearly wrong, and not in an extension of equity cognizance over controversies and issues in their nature essentially legal.

Having discussed the case on principle, it is due to its intrinsic importance, as well as to the importance which counsel attach to it, and the care with which they have prepared their arguments, that we should also examine it in the light of authority. All the cases referred to by counsel have been examined. Many of them are meagerly reported, and very unsatisfactory, and, some of them, conflicting. The result of the examination is the belief that the weight of modern judicial opinion is in favor of, rather than against the views above expressed.

It may be admitted that the early English cases below mentioned, would favor the retention of the present bill, for equity seems then to have exercised a very free jurisdiction, and to have cancelled policies with a liberal hand, even where there was a complete remedy or defence at law. Referring to this, Sir James Mansfield, C. J., in a case before him, said: "Courts of equity formerly exercised an odd jurisdiction on this subject" (Cousins v. Nantes, 3 Taunt. 517), "alluding, perhaps," says Mr. Phillips, who quotes the passage, "to cases of interference by equity courts, where there was an adequate remedy at law" (2 Phil. Ins. pl. 1933).

But, at the present day, insurance contracts are regarded by the courts as standing upon the same footing with other contracts, and there must be some good reason for a resort to equity with respect to them, else the parties, both the insurer and insured, must remain satisfied with their legal remedies.

The true doctrine is stated by Mr. Phillips (2 Phil. Ins. p. 574, pl. 1933). He says: "Courts of law have the usual jurisdiction upon policies of insurance." After noticing the former course of the equity courts, he adds: "The limits of the jurisdiction in law and equity, in respect to policies, are now as well settled as in respect to any other species of contracts, the general jurisdiction being in the courts of law, with exceptions upon the same grounds as other contracts." It is proper to observe that he subsequently says: "A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy, fraudulently ob-

tained" (Id. pl. 1988); and Mr. Angell adopts his language (Ins. § 384).

The material cases referred to by these authors, together with other cases, will now be briefly noticed in the order of their occurrence.

In Whittingham v. Thornburgh (1690) 2 Vern. 206, 2 Eq. Cas. Abr. 635, a life policy was obtained by fraud. After the loss, the court ordered the policy to be delivered up to be cancelled, and a perpetual injunction against the verdict obtained thereon at law. This case is very briefly reported, occupying but a few lines. The grounds on which equity interfered, not only with the policy, but with the verdict at law, are not stated. No point appears to have been made upon the jurisdiction in equity. In the report in 2 Eq. Cas. Abr. supra, it is said the answer confessed the fraud. In Goddart v. Garret (1692) 1 Eq. Cas. Abr. 371, 2 Vern. 269, which was a bill to have a marine policy delivered up because the insured had no interest in the property covered by the policy, the court made a decree as prayed, although there appears no reason why the defence was not open to the insurer at law. No question is made or discussed as to the ground of equitable interference; and this was the case cited by counsel when Mansfield, C. J., made the observation above quoted from 3 Taunt. 517, as to the odd jurisdiction formerly exercised by equity over policies of insurance. In De Costa v. Scandret (1723) 2 P. Wms. 170, 2 Eq. Cas. Abr. 636, the assured fraudulently concealed from the underwriter information which he had that his ship was in danger. Without anything being said in the very brief report of the case about jurisdiction, Lord Macclesfield, on a bill for injunction (against what does not appear) and relief, decreed the policy to be delivered up, with costs. In French v. Connelly, 2 Anstr. 454, 1794, which was a bill by underwriters for an injunction to restrain a suit at law, and for discovery and relief from the policy, because obtained by fraud, the court overruled a general demurrer to the bill, and properly enough, for at all events the underwriters were entitled to a discovery to aid the defence at law. The next case which it is deemed necessary to notice, is that of Duncan v. Worrall (1822) 10 Price, 31. In this case a bill by the underwriters for an injunction against an action at law on the policy, and to have the same cancelled because of false and fraudulent representations as to the neutral character of the property insured, "was dismissed on the ground that it was founded on matters which, if true, afforded a defence to the action at law, and therefore, there was no equity on the part of the plaintiff to warrant the interference of the court of equity."

The Lord Chief Baron Richards alludes in strong language to his experience of over forty years, respecting bills to stay actions on policies, and to cancel them; said he had never known one to have been brought to a hearing, and observed "that Lord Chief Baron Eyre, who was always, we know, considered a strong-headed man, used to say that he considered bills for discovery and injunction by underwriters in these cases, as being filed, for the most part, merely with a fraudulent intention to create delay, and I never remember one to have been acted on further than the dissolving the injunction." Fenn v. Craig (1838) 3 Younge & C. Exch. 216, also occurred in the exchequer, in equity. It was a bill by a life insurance company to cancel a policy on the life of a third person, obtained by the defendant by fraudulent representations as to the habits of the assured. The bill was filed promptly the next year after the insurance was made, and before the death occurred. It was held on demurrer that the bill would lie, Alderson, Baron, observing that the equity was strengthened because suit was brought in the lifetime of the person who was insured. This was right, and is not in conflict with the views expressed in the foregoing opinion, but rather co-incident with them. Thornton v. Knight (1849) 16 Sim. 509, holds, that even after a verdict at law against a policy, equity will not entertain a bill to cancel it, unless some equitable ground be shown, such as fraud. In the India & London Life Assur. Co. v. Dalby (1851) 7 Eng. Law & Eq. 250, the vice chancellor, on a bill to restrain an action at law, overruled a demurrer to the bill on the ground that there was an equity stated against the action. It is not readily perceived what equity was stated not available as a defence to the law action; but if an equity was alleged, the case is consistent with correct principle, viz., that equity will not interfere except where the remedy at law is inadequate, difficult, or uncertain.

The foregoing are the leading adjudications on the subject under consideration in England, and it is quite a significant circumstance against the present bill that the American reports do not show that any similar bill has been filed.

The cases in the English books show that when bills are entertained, injunctions are refused or dissolved, thus leaving the real litigation to be had at law. If the verdict is for the policy, of course the bill is dismissed. If against it, then the bill may be brought to a hearing, and the court will, in proper cases, order the policy to be surrendered, an order which, after such a verdict, is quite unnecessary and useless. The English cases referred to are not, as before observed, very satisfactorily reasoned, and are not free from conflict. The old cases are entitled to very little respect as authority, and the modern ones tend to show that equity will not oust the law jurisdiction, or interfere with the legal remedies where there is a full defence at law, and no obstacle in the way of making it. Insur-

ance contracts should stand upon the same footing as other contracts with respect to equity interference, else we have an anomaly in the law without any reason to justify it. The result is, that the motion to dissolve the injunction is well taken, and must be sustained.

MILLER, Circuit Justice, concurring in the foregoing result, observed: I am entirely satisfied with the opinion prepared by the circuit judge, both with the result, and the course of argument by which that result is attained. I think the turning points of the case are, that the loss had occurred before the bill was filed, and that by reason of the limitation in the policy as to the time of bringing suit, and the allegation that the defendants were threatening to sue at law, there is no danger of indefinite delay, nor is there any other circumstance alleged warranting a resort to equity. In case such a bill were filed before loss, or if a life policy, before death, I am strongly inclined to believe it should be sustained. Injunction dissolved.

Afterwards the court sustained a general demurrer to the bill, and dismissed the same. The course of argument by Marshall, C. J., in Marine Ins. Co. v. Hodgson, 7 Cranch [11 U. S.] 332, seems to support the conclusion reached in the foregoing case.

HOME INS. CO. (STILLWELL v.). See Case No. 13,450.

HOME INS. CO. (SWICK v.). See Case No. 13,692.

Case No. 6,661.

The HOMELY.

[8 Ben. 495.] [1]

District Court, E. D. New York. July, 1876.

SALVAGE—TUG AND TOW.

1. A tug having a brig in tow to bring into the harbor of New York carelessly ran her aground on the Romer Shoal, off Sandy Hook, and was unable to pull her off. But on the next morning another tug coming to the spot, the master of the brig made an agreement to be towed off for $2500, and the two tugs got the brig off: *Held*, that the agreement was exorbitant, and that $1250 was a sufficient compensation for the service.

[Cited in Brooks v. The Adirondack, 2 Fed. 393.]

2. The second tug was entitled to half of that sum as salvage, but the first one, having been the cause of the disaster, could not be allowed to participate.

[Cited in Greenwood v. The Fletcher and Grapeshot, 42 Fed. 504.]

An English brig, the Homely, coming at night, loaded, into the harbor of New York, engaged a tug, the C. F. Ackerman, to take her up the bay, on a hawser. The brig drew 14 feet, and the tug was notified that she drew so much and was directed to keep a north-west course and in deep water; but no further directions were given or control taken by the pilot on the brig. No one was on the stern of the tug to receive signals from any one on the brig, and the tug proceeding on the course of her own selection presently brought the brig aground on the tail of the Romer Shoal. The tug left her, being unable to pull her off and next morning a larger tug appeared, the Weed, and the captains of the two tugs consulted together and proposed to the brig to take her off for $2500. The master, under compulsion, assented, and the tugs pulled the brig off the shoal and brought her up to the dock. The weather was still and the vessel not in immediate danger. The owners of the brig resisted the payment of the $2500 as exorbitant, and thereupon the owners of the two tugs libelled the brig for salvage.

Butler, Stillman & Hubbard, for libellants.
Scudder & Carter, for claimants.

BENEDICT, District Judge. It appears to me that the sum of $2500 is too large compensation for the service rendered. For such a service rendered, under the circumstances, $1250 would be a reasonable and not illiberal reward.

But I do not consider the Ackerman entitled to any compensation for her portion of this service, for the reason that by her negligence the brig was placed in the position to require the assistance rendered. I am unwilling to permit that a tug employed to tow a vessel into the port should, through want of care, tow the vessel upon the Romer Shoal and then receive salvage compensation for towing her off. For the services performed by the Weed, in assisting to tow the brig off the shoal, a proper compensation may be awarded, but in that compensation the Ackerman cannot be permitted to share.

There will, therefore, be a decree in favor of the owners of the Weed for the sum of $625, with the costs of this action, and the claim of the owners of the Ackerman will be disallowed.

Case No. 6,662.

HOME MUT. INS. CO. v. STOCKDALE.

[16 Int. Rev. Rec. 30; 4 Chi. Leg. News, 325.]
Circuit Court, D. Louisiana. May, 1872.

STOCK COMPANIES — INTERNAL REVENUE TAX ON DIVIDENDS—CONSTRUCTION OF STATUTES—DECLARATORY ACT.

1. The plaintiff, an insurance company, paid to the defendant, as collector of internal revenue, upon his demand therefor, a tax alleged to have accrued upon a dividend which was declared on the 17th of January, 1870, of its earnings for the year ending December 31, 1869, and made payable on or before the 15th of March, 1870, and brought this suit against the collector to recover the amount so paid, and the court *held*, after considering the vari-

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

ous sections of the internal revenue law relating thereto, that the section which authorized corporations to act as agent of the government for the collection of the tax upon their dividends was not extended by legislative construction, and that agency expired with the law; that it was only by express authority conferred in the act that they could retain the tax upon payment of dividends; that when the plaintiff's dividend became payable in March, 1870, it was without authority to withhold the tax claimed; that if effect is given to the act of July 14, 1870 [16 Stat. 256], and the expired statute is construed to extend over the intervening time, it would impose retroactively the liability of an agent upon the plaintiff without the possibility of its fulfilling the duties thereof in withholding the tax from its dividend because it had already paid the same.

2. The legislature may pass a declaratory act, which, though inoperative on the past, may act in the future.

[Action by the Home Mutual Insurance Company of New Orleans against Sidney A. Stockdale, collector of internal revenue, to recover a tax illegally exacted by the defendant.]

Case & Rouse, for plaintiff.

J. R. Beckwith, U. S. Atty., for defendant.

DURELL, District Judge. This suit is brought to recover $2,871.68, paid by plaintiff to defendant as collector of internal revenue, upon his demand therefor, as a tax alleged to have accrued upon a dividend, which was by the plaintiff declared, and made payable in 1870. The suit was originally commenced in the Fourth district court for the parish of Orleans, and was removed to this court by writ of certiorari. The parties having waived a jury and agreed upon and filed a statement of facts, submit the cause to the court for its judgment thereon. The facts agreed upon may be substantially stated as follows: The plaintiff is a corporation engaged in the business of fire and marine insurance. Upon the 17th day of January, 1870, it declared a dividend of its earnings for the year ending December 31, 1869, amounting to the sum of fifty-seven thousand four hundred and thirty-three dollars, which dividend was payable on and after the fifteenth day of March, 1870, without deduction of tax. The assessor of internal revenue assessed a tax upon said dividend and surplus profits, at the rate of five per centum thereof, and returned the same to the defendant, collector of internal revenue, who demanded and received payment thereof from the plaintiff. The plaintiff having first appealed to the commissioner of internal revenue for the refunding of the amount so paid, and its appeal having been rejected, brought this action.

The question to be considered is, whether or not there was any legal warrant for assessing and collecting such tax. If there was, it is conceded that it must be found in the internal revenue act of June 30, 1864 [13 Stat. 223], and acts supplementary thereto. Section 120 of the act of June 30, 1864, as amended July 13, 1866 [14 Stat. 98], provides: "That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company; * * * and on all undistributed sums, or sums made or added during the year to their surplus or contingent fund"; and the corporations so taxed were authorized to deduct the amount of the tax upon the payment of their dividends. It is under this statute that the assessment and collection of said tax is sought to be justified; and looking to it alone, would appear to be so. But when we look at other sections of the act, standing in conjunction with it, we find it is only a part of the machinery of the law for the collection of the tax upon incomes. The 116th section of the act, as amended March 2, 1867 [14 Stat. 478], imposes a tax of five per centum upon the "income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends or salaries," etc. The 117th section, as amended, provides what items of income shall be included in the statement or return thereof, which is required to be made to the assistant assessor by the 118th section; and it expressly excepts, "the amount of income received from institutions or corporations, whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same." The reason of the exception is obviously because of the different method of collecting the tax upon such items of income, provided by the sections following. Mr. Justice Strong, in the case of Philadelphia & R. R. Co. v. Barnes [Case No. 11,087], reviews this question at length, and in his very able opinion given in that case, says: "It is indispensable to a correct understanding of the statute, that all its sections relating to the same subject should be read and considered together. Those numbered from 116 to 123 inclusive, are all classified under the title 'Income,' and they manifestly relate to the same subject; together they constitute a system devised to impose and collect a tax upon income and gains from any source whatever. The subject of the tax is one and the same though consisting of numerous constituents. But the mode of assessment and of collection is different, as applied to the constituents of income. Of a portion of his gains the taxpayer is required to make a return to the assistant assessor,

and himself pay the tax on that portion to the district collector. But a different mode of collection is prescribed for the tax upon dividends of banking, trust and insurance companies by the 120th section of the act. * * * Still the tax is upon the individuals whose gains such dividends and interest are, and it is a tax at the same rate as that collected from other incomes, but the corporations are made the agents of the government to collect it." And the learned judge comes to the conclusion that the taxes imposed by the 120th section of the act are the same as are imposed by the 116th section, to wit: taxes upon income, in which conclusion I concur. The supreme court, in Northern Cent. R. Co. v. Jackson, 7 Wall. [74 U. S.] 262, affirms the same doctrine.

It follows, then, that whatever limitation was imposed upon the income tax applies as well to the taxes upon dividends imposed by the 120th section. The limitation is found in section 119 as amended March 2, 1867, which provides "that the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April, in each year, until and including the year 1870, and no longer." It is elsewhere provided that the taxes so to be levied were to be levied upon the incomes "for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax." Therefore the last levying of such tax being for the year 1870, it was limited to income of 1869. Section 119 imposes no tax. The reference to taxes on income "herein imposed" must be applied to all the taxes on income, to that received from dividends, as well as from other sources. Philadelphia & R. R. Co. v. Barnes [supra.] Has there been any legislation which could effect an extension of the time during which such tax could be imposed? The 17th section of the act, approved July 14, 1870 [16 Stat. 261], provides, "that sections 120, 121, 122, and 123, of the act of June 30, 1864 [supra], as amended, shall be construed to impose the taxes therein mentioned, to the 1st day of August, 1870." This act is simply declaratory of the opinion of congress, and not a re-enactment of the law itself. The construction of statutes belongs, not to congress, but to the judiciary, a co-ordinate branch of the government. So far as congress assumes to give construction to existing acts to govern the decisions of the courts as to cases which have arisen or are pending, it is judicial; and as the judicial power is, by the constitution, vested solely in the courts, and withheld from congress, such acts are inoperative, except in futuro. "The legislature may pass a declaratory act, which, though inoperative on the past, may act in future." Postmaster v. Early, 12 Wheat. [25 U. S.] 136. See, also, U. S. v. Dickson, 15 Pet. [40 U. S.] 162; Bassett v. U. S., 2 Ct. Cl. 448; Aurora Borealis v. Dobbie, 17 Ohio, 125. The law thus sought to be extended by legislative construction created the corporations whose dividends were taxed under it, the agents of the government for the collection of the tax. That agency expired with the law. It was only by virtue of the express authority conferred in the act that they could retain the tax upon payment of dividends. Hence, when the plaintiff's dividend became payable in March, 1870, it was without authority to withhold the tax claimed, and it paid said dividend in full. If we give effect to the act of July 14, 1870, and construe the expired statute to extend over the intervening time, it would impose retroactively the liability of an agent upon the plaintiff, without the possibility of its fulfilling the duties thereof in withholding the tax from its dividend, because it had already paid the same. This result of construction could hardly have been contemplated by congress, and I do not deem it proper to give effect to it. In my opinion, it can only affect cases arising after its passage, if not inconsistent with other legislation. I am, therefore, of the opinion that the assessment and collection of the tax in this case was without authority of law, and that the plaintiff is entitled to recover the amount paid with interest. Let there be judgment accordingly.

The same judgment, in suits of the same nature, was rendered in favor of the Atlantic Insurance Company, the Union National Bank of New Orleans, the Sun Mutual, Germania, and Merchants' Mutual Insurance Companies, the Citizens' Bank of Louisiana, the Union Insurance Company, the New Orleans Mutual Insurance Company, the Pelican Insurance Company, the New Orleans Canal and Banking Company, the Crescent City Railroad Company, the Orleans Railroad Company, and the Vallette Dry Dock Company.

HOMTON (HILLS v.). See Case No. 6,508.

HONE (JEWETT v.). See Case No. 7,311.

Case No. 6,663.

Ex parte HONER.

[Cited in Ex parte Schaumburg, Case No. 12,441. Nowhere reported; opinion not now accessible.]

HONSINGER (GOODYEAR v.). See Case No. 5,572.

HOOD (COLLINS v.). See Case No. 3,015.

HOOD (GRAYDON v.). See Case No. 5,732.

Case No. 6,664.

HOOD et al. v. KARPER et al.

[5 N. B. R. 358;[1] 8 Phila. 160; 28 Leg. Int. 340.]

Circuit Court, E. D. Pennsylvania. Oct. 25, 1871.

BANKRUPTCY — INVOLUNTARY — BILL TO PREVENT EXECUTION—CONFESSION OF JUDGMENT.

1. Where only one subject of an intended execution can have been in view of the parties to

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a confessed judgment, a levy made accordingly on that subject and a sale of it by the sheriff, though constituting in form an involuntary transfer is indirectly transfer or disposition of the property by the debtor.

2. An intended security which would be ineffectual in the form of a mortgage or bill of sale, cannot be rendered effective through the device of a warrant of attorney given by a trader to a creditor, which enables him at pleasure to stop the debtor's business and prevent other creditors from getting any share of his available assets.

3. A confession of judgment, if otherwise invalid under the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], cannot be valid for any such reason as, that the power of attorney bore date more than four or six months before any actual mortgage or transfer.

[Cited in Zahm v. Fry, Case No. 18,198; Johnson v. Price, Id. 7,407.]

4. Where an execution must necessarily stop the debtor's business, the execution creditor, as a rule, has reason to believe the debtor insolvent, and in general intends what, if not prevented, would be a fraud on the provisions of the bankrupt law.

Bill at the suit of the petitioning creditors of an involuntary bankrupt merchant or trader, on behalf of themselves and the other creditors, to the intent that the assignee, when qualified, might be added or substituted as complainant. The purpose of the bill was to prevent a creditor from proceeding with an execution levied upon the stock in trade of the bankrupt. The execution was upon a judgment confessed by the bankrupt under a warrant of attorney. The warrant was dated more than six months, but the judgment was confessed within four months before the filing of the petition in bankruptcy. The judgment had not been an available security, as a lien upon real estate, or available in anywise except through such an execution as might be thus levied on the debtor's stock in trade; and was for such an amount of money as could not have been levied without closing his business and absorbing his available assets. The consideration of the judgment was not impugned. The warrant of attorney had been a renewal of, or substitute for, one originally given before the enactment of the present bankrupt law. A preliminary injunction having been granted, the subjects of the levy were sold under an order of this court, made by consent. The sale was under the direction of a commissioner specially appointed by the court; and the proceeds were brought into the registry of the court; all this having been done with a saving of any rights of the execution creditor, whose lien, if established, was to stand good upon the fund in court, and to avail him against the assignee in bankruptcy, &c. The thirty-fifth section of the bankrupt law of 2d March, 1867, enacts, that if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any * * * transfer * * * of any part of his property, either directly or indirectly * * * the person receiving such * * * transfer, * * * or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and that such * * * assignment * * * is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any * * * transfer * * * or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such * * * transfer or other conveyance is made with a view to * * * defeat the object * * * of this act, the * * * transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such * * * assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. The thirty-ninth section, after defining the cases in which a person may be involuntarily adjudged a bankrupt, upon a petition against him brought within six months after the act of bankruptcy, concludes with a provision which, as amended by congress on 27th July, 1868 [15 Stat. 227], is that, if such person be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred, contrary to the original act: provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy. At the October sessions of 1871, the case was heard upon bill, answer, replication and proofs; and was argued by Mr. Patton, for the complainants, and Mr. Sharp for the execution creditor, defendant. The questions argued were: (1) Whether, if the sale by the sheriff had not been prevented by the injunction, the confession of judgment, execution, levy and sale, would, within the meaning of the thirty-fifth section, have constituted an indirect transfer of the property, with a view to give a preference. (2) Whether the same acts would, under the same section, have constituted a transfer or other disposition, with a view to defeat the object of the bankrupt law. (3) Whether, if either of the former questions were answered affirmatively, the transfer or disposition was made at the date of the warrant, or at or after the time of confessing the judgment. (4) Whether, from the warrant of attorney, confession of judgment, execution and levy,

the execution creditor had reasonable cause to believe that the debtor was insolvent, and that the proceedings were in fraud of the provisions of the bankrupt act.

J. W. Patton, for complainants.
W. S. Stenger, F. M. Kimmel, and J. McDowell Sharpe, for defendants.

CADWALADER, District Judge. First. By the express language of the thirty-fifth section of the act of congress, the objectionable transfers described in that section are voidable alike whether made "directly or indirectly." Where only one subject of an intended execution can have been in view of the parties to a confessed judgment, a levy made accordingly on that subject, and a sale of it by the sheriff, though constituting in form an involuntary transfer, is indirectly a transfer or disposition of the property by the debtor. This needs no demonstration. If the proposition required the support of authority, it might be found in judicial opinions, at law and in equity, upon cases of leases on a condition that the term shall cease if assigned. In such cases, an involuntary transfer of the term under an execution, though it may have been levied under a judgment confessed by the lessee upon a warrant of attorney, is not a breach of the condition. But where the judgment appears to have been thus confessed with an intent of both parties that the term should be taken in execution, and thus transferred, the transfer is not considered involuntary, and the condition is broken. The defendant who could not make an effectual transfer directly, cannot make it indirectly.

Second. In England, independently of any question of preference, a transfer of the whole available property of a bankrupt trader may be voidable at the suit of his assignee from the necessary tendency of such a transfer to defeat the object of the bankrupt law. In the United States, under the words of the act of 2d March, 1867, there is less difficulty in so annulling such a transfer. The most beneficial purposes of the bankrupt law would be frustrated, if an intended security which would be ineffectual in the form of a mortgage or bill of sale, could be made effectual through the device of a warrant of attorney given by a trader to a creditor, enabling him at pleasure to stop the debtor's business and prevent the other creditors from getting any share of his available assets. It has been urged that a capitalist should be able, by advancing his money, or lending his credit, to promote commercial enterprise without insecurity as to reimbursement. The protection to which capitalists are thus entitled, should not, however, be so extended as to encourage them in the promotion of fraudulent overtrading by debtors to the sacrifice of other meritorious interests.

Third. The next question is, at what time the objectionable disposition or transfer was made or attempted; whether at the date of the warrant of attorney, or at or after the time of confessing the judgment. Here we may consider the confession of judgment, the execution, the levy and the sale, or attempted sale, as together constituting a single act to effectuate the transfer. It is argued that the transfer, though it was to be thus effected, was made through or by means of the warrant which was anterior. This undoubtedly is true. But it is not a consequence of these premises that the transfer was made at the date of the warrant. We concur in opinion with the judge of the Northern district of Illinois, that the preference by means of a judgment note is obtained, not with the note when a warrant of attorney to confess judgment is executed and delivered, but when it is executed by the entry of the judgment. The power, as he says, until thus executed, is dormant, and, in most cases, secret. Goldson v. Niehoff [Case No. 5,524]. The act of confessing the judgment is the debtor's act. It is true that this act is done by virtue of his warrant of attorney. But the attorney's act in confessing the judgment is that of his principal, the debtor. The warrant is of no effect until the power conferred by it is thus executed. If the debtor dies in the meantime, it is, from first to last, wholly inoperative. The case, in principle, is, in this respect, the same as if the debtor had given a power of attorney to execute a mortgage or other security, for a particular creditor's benefit. Such a power, even when irrevocable, does not, while unexecuted, constitute a mortgage or transfer of any kind. When the power is executed, the mortgage or transfer which thereby occurs, if otherwise invalid under the thirty-fifth section of the bankrupt act, cannot be valid for any such reason as that the power of attorney bore date more than four months, or more than six months, before any actual mortgage or transfer. It is contended that, in this case, the warrant of attorney having been a renewal of or substitute for a like warrant held by this creditor before the enactment of the present bankrupt law, must, in equity, be considered as having been given before its enactment. We think so. But this cannot be material, unless we are mistaken in the above opinion that the indirect transfer or disposition cannot be referred to the date of the warrant of attorney. If the nonexistence of a bankrupt law, at the date of such a warrant, might have suggested peculiar considerations under the bankrupt act of 1841, it may be observed that the phraseology of the act of 1867 is studiously different.

Fourth. Where an execution must necessarily stop the debtor's business, the execution creditor, in general, has reason to believe the debtor insolvent; and, in general, intends what, if not prevented, would be a fraud on the provisions of the bankrupt law. There is nothing in this case to take it out of the rule. For these reasons we are of opinion that if the assignee in bankruptcy was the complain-

ant, and the case had been ripe for a final decree, the bill would be sustainable. The reasons under the first, second and fourth heads will be understood as limited in their present application to the bankruptcy of a merchant or trader. Moreover, they do not apply to a judgment confessed, even by a merchant or trader, which, being otherwise unobjectionable in bankruptcy, is an available security as a lien upon real estate. Judgments of this kind, under warrants of attorney, may be innocent and useful securities. Nor, where a merchant or trader has no available real estate, are judgments confessed by him under warrants of attorney always necessarily objectionable. They may be for amounts comparatively small, so that executions on them would not stop his business. Their validity, as against an assignee in bankruptcy, may then depend, in some cases, on the question whether the creditor would have received a preference if he had taken a mortgage or bill of sale instead of the warrant of attorney. But the bill of sale, or mortgage, if not secret or unaccompanied by possession, may be the less questionable security. A warrant of attorney by a merchant or trader, though not always invalid, even where given within four months of his bankruptcy, must always be regarded with more or less disfavor in a commercial tribunal, such as a court of bankruptcy. There cannot be a final decree until the assignee in bankruptcy shall have become a party complainant. In consequence of the delay in this respect the bill would have been dismissed, if its dismissal had been asked on the part of the defendant, unless collusion with him by an assignee could be shown, or the delay could be otherwise explained or excused. As yet no assignee has been qualified. This may seem extraordinary. But the defendant's counsel admits that the delay is excusable, though its causes have not been fully explained. Although the execution creditor's proceeding was "in fraud of the provisions of the bankrupt act," the case was one of relative or constructive, not of actual fraud. The entry of a final decree against him would therefore, at all events, have been suspended for a brief period, after the above declaration of our opinion. He should, in equity, have a reasonable opportunity of considering whether to surrender his claim under the execution, prove his debt in the court of bankruptcy, and pay all the costs in this court and the charges incurred, or consent that they be deducted from his dividend of the money in court. But his decision must precede a final decree. After it, proof by him could not be allowed.

The District Judge added: The above opinion was concurred in by McKENNAN [Circuit Judge], on the 19th instant, before he left Philadelphia. The concluding provision of the thirty-ninth section of the bankrupt act of 2d March, 1867, as amended by the act of 27th of July, 1868, though not expressly quoted, was fully considered, as the opinion shows. That provision is in effect supplementary to the thirty-fifth section. The other enactments of the thirty-ninth section were not mentioned, because they only define the acts of a debtor for which he may be involuntarily adjudged a bankrupt. The decision of the case depended on the thirty-fifth section, which defines acts that may render other persons liable to actions at the suit of the assignee for the recovery of assets. But references to the thirty-ninth section occasionally facilitate the interpretation of the thirty-fifth; and it has occurred to me that the third of the questions which have been considered may be further elucidated by a comparison of the two sections upon one point. This question was, whether, under the thirty-fifth section, the objectionable disposition of property is at the date of the warrant, or at that of the confession of judgment. The thirty-ninth section makes the mere giving, under certain circumstances, of a warrant to confess judgment within six months before an adversary petition, an act of involuntary bankruptcy. This applies to the debtor only. The thirty-fifth section, of which the enactments affect other persons, does not mention such a warrant at all. Thus the creditor who has the warrant of attorney is never affected injuriously by merely having received it. The reason of the difference may be obvious, but is not therefore less applicable. The subsequent use of the warrant of attorney can alone give rise to any question so far as he may be concerned. To exempt him, by reason of its date, from all consequences for such subsequent use of it, would therefore seem incongruous. This may furnish a reason additional to those already given, that the date of the warrant is not the time of the objectionable disposition. If the decision of the present case had, under the thirty-fifth section, depended upon the question whether the debtor, within four months before the petition, procured the property to be seized on the execution, we would have been of opinion, that mere passive submission by him, without any direct promotion of the creditor's action, or any insidious artful omission tending indirectly to promote it, within the four months, was not such procurement. We do not decide the case on this point.

Case No. 6,665.

HOOD v. SPENCER et al.

[4 McLean, 168.] [1]

Circuit Court, D. Ohio. July Term, 1846.

PARTNERSHIP—OBLIGATION TO INDEMNIFY—BANKRUPTCY—PLEADING.

1. A partner having sold his interest in the concern to his co-partner, who gave a bond and security to relieve his late partner from the debts of the firm and to pay them out of his own property, is not an obligation merely to indemnify, but to pay the debts.

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

2. An obligation to indemnify, affords no ground for an action, until the party shall be damnified.

3. If the outgoing partner be discharged under the bankrupt law [of 1841 (5 Stat. 440)], he may still enforce the obligation to pay the partnership debts.

4. The creditors, for whose benefit the obligation was entered into may also enforce the obligation.

5. A replication is defective, to a plea of discharge in bankruptcy, which does not state the debt sued for, to have been placed on the schedule.

[Covenant by Hood, assignee of George C. Ritchey, plaintiff, against Eli A. Jesse and William Spencer, defendants.]

Hunter & Ewing, for plaintiff.

Mr. Stanbery, for defendants.

OPINION OF THE COURT. In the declaration, it is stated that George C. Ritchey and Eli A. Spencer, being partners in merchandise, and owning stock in trade, and being indebted as such partners, on the 29th of May, 1840, dissolved their partnership upon the terms that Eli A. Spencer should have the partnership effects, and indemnify Ritchey against the debts of the firm, contracted prior to August 27th, 1839, and pay them as they shall become due. Thereupon the said Eli A. Spencer, together with Jesse Spencer and William Spencer, the defendants in this suit, on the said 29th of May, 1840, made and delivered to Ritchey their joint bond reciting the purchase of Ritchey's interest in the store, by which they agree to relieve Ritchey from all debts against the firm, which had been contracted prior to the 27th of August, 1839, then due, or to become due, and to assume the payment of the whole of them; and pay them out of their own funds as they should become due. The declaration further states: "That Ritchey has been declared a bankrupt, and has obtained his final certificate, and the plaintiff Hood is his assignee. That the said E. A. Spencer and Jesse Spencer have also been discharged under the bankrupt law, and have obtained their final certificate. That prior to the 27th August, 1839, the said firm had contracted divers debts as partners, which remained unpaid at the date of said bond. A list of the creditors is then set out, nearly all of whom have obtained judgments against Spencer and Ritchey, after the 29th of May, 1840; and all such debts are alleged to be due and unpaid to the several creditors." The declaration then alleges, that by reason of said bond, the defendants became liable, before the discharge in bankruptcy of said Eli A. and Jesse Spencer, to pay said several creditors the amount due to each, respectively; but neither of said defendants has paid said debts to said creditors or to said Ritchey, before his bankruptcy, or to plaintiff as assignee since, etc. The defendant, William Spencer, demurred to the declaration. Eli A. Spencer pleaded his discharge under the bankrupt act; to which plea the plaintiff replied specially, to which the defendant demurred. The defense rests on the demurrer to the declaration.

In support of that demurrer, it is said, it must turn upon the construction given to the bond. If it is merely a bond for indemnity, then no action accrued to Ritchey; for it is not pretended he ever suffered any damage from the non-payment of the debts. The rule on this subject, it is said, is stated in Ex parte Negus, 7 Wend. 504, in the following words: "Where indemnity alone is expressed, it has always been held, that damage must be sustained, before a recovery can be had; but where there is a positive agreement to do the act, which is to prevent damage to the plaintiff, then an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must resort to the intention of the parties." And the counsel insists, that judging of the intention of the parties from what is recited in the bond, that indemnity was the sole aim and purpose of the bond. It was not, he says, in the expectation of the parties, that the mere liability of Ritchey to pay the partnership debts, should give him a cause of action against Spencer, or upon this bond; and nothing appears in the case to show that Ritchey has ever been injuriously affected by these debts; but only that up to a certain time, his liability continued. It is true the covenant is, that the debts shall be paid when they become due; and that covenant has not been performed. If it stood alone, there could be no question, but it is coupled with an express covenant of indemnity. This covenant gives character to the whole, especially when we consider the circumstances under which it was made. But, it is argued, if a right of action did arise to Ritchey in the non payment of the debts, that such right was extinguished ipso facto by Ritchey's discharge in bankruptcy. The debts to be paid were not due to Ritchey, but to third persons, who could not take advantage of the covenant, and who, in fact, wholly disregard this private arrangement, by suing both their debtors instead of the one who had agreed solely to pay their debts. Not a dollar of the money could come into Ritchey's hands, and the only effect of a payment of the debts would be to discharge him from liability.

The above comprises the principal grounds of the very earnest and somewhat elaborate argument, in support of the demurrer. They have been stated somewhat at length, that they may be applied with all their force to the case before us. We suppose that the court, in the case cited from Wendall, by saying where a covenant of indemnity is coupled with a covenant to do an act, the court must judge of the intention of the parties, could have had no reference to a case like the present. There may be cases

supposed, where the language of the court would be applicable. As a covenant to indemnify from a contingent liability, and to do an act in which the other party had no immediate and direct interest in its being done. But what is the case under consideration? A partnership is about to be dissolved; it owes debts; the goods are liable to pay those debts, to the exclusion of all other creditors; one of the partners takes them, and he with his two obligors "bind themselves, their heirs and assigns, to relieve the said George C. Ritchey from any and all claims, debts, dues, and demands against the said firm of Spencer & Ritchey, etc., that are now due, or that may become due hereafter; and that we will assume the payment of the whole of them, and pay them out of our own funds, as they may become due." Now there is but one way in which the obligors could "relieve" Ritchey from the debts of the firm; and that was by paying them. And if there is no other manner by which they could "relieve" him, does this not end the controversy?

The counsel uses the word "indemnity." That word, instead of the word "relieve," used in the bond, may be found in the declaration. And on this the basis of the argument rests. If that word, "indemnity," were as potent in this case, as the counsel supposes it to be, how readily could the declaration be amended, and the word "relieve" substituted for "indemnity." But if the word "indemnity" had been used in the bond, the construction of the instrument would be the same. It must be observed that the intention in requiring the bond was to secure the creditors of the firm, who were not parties to the agreement, and, consequently, were not bound by it. Ritchey, as an honest man, beyond any personal liability to the creditors of the firm, must have felt a desire to pay those men, who in selling their property to himself and partner, had confided in their integrity and ability to pay. And the law, which never presumes fraud, would fix an honest motive, to a fair transaction. Indeed, the instrument is not susceptible of any other construction. It is supposed that Ritchey could not have sustained an action on this instrument until he was damnified. If E. A. Spencer had misapplied or wasted the goods, could he not have filed a bill, and called on him to execute the trust? And especially could he not have done this, if his late partner and one of his sureties were about to become insolvent. Could not the creditors have interposed under like circumstances? An action may be maintained by a creditor where an individual has agreed to pay him, in discharge of a debt which he owed to another person, at the instance of such person. In every case where there is an agreement to indemnify an individual, and pay certain debts which he owes, no court, having any regard to good morals or law, could hold that an indemnity was all that the debtor could ask; or that it was all that the other party bound themselves to do. The construction would be that they were to indemnify the debtor by paying the debts, that mode being provided for in the contract. The whole of the contract must be taken together and construed. The undertaking was not to indemnify or pay the debts; it was to do both. Courts can not divide contracts, and hold that a performance in part shall be substituted for a performance in whole. And especially this will not be done where every moral consideration and fair dealings among men require the full performance of the contract. The demurrer to the declaration is overruled. The replication of the plaintiff to the special plea of discharge under the bankrupt act, by E. A. Spencer is defective, as it is not averred in the replication, that the claims of the firm of Spencer & Ritchey, referred to in the declaration, and covenanted to be paid by the defendants, were not named in the schedule of the said Spencer in bankruptcy. The demurrer, therefore, to the replication is sustained. Wherefore, it is considered, that said Spencer, by reason of his discharge in bankruptcy, go hence, etc. Leave given to William Spencer to plead.

HOOD (UNITED STATES v.). See Case No. 15,385.

HOOD, The ELLEN. See Case No. 4,377.

Case No. 6,666.

HOOE et al. v. ALEXANDRIA.

[1 Cranch, C. C. 90.] [1]

Circuit Court, District of Columbia. April Term, 1802.

CORPORATIONS—AGENT—AUTHORITY OF — LIABILITY FOR INJURY.

In an action upon the case against a corporation aggregate for injury done by their agent, it is not necessary to prove that the agent had authority under the corporate seal—nor under an order entered on the books of the corporation.

Action on the case for filling up and raising the street, so as to obstruct the doors and windows of the plaintiffs' warehouse. The plaintiffs [Hooe and Harrison] produced Mr. Faw, a witness to prove that he was appointed street commissioner by the corporation [of Alexandria], and that he had orders from them to raise and pave the street.

C. Lee, for defendants, objected to parol evidence of those facts, and contended that the plaintiffs ought to produce an authority to Mr. Faw, under the corporate seal, or by an order entered on the books of the corporation.

But THE COURT overruled the objection.

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

CRANCH, Circuit Judge, said that it could not be presumed that evidence of that kind was in the power of the plaintiffs; and that the jury might presume a power under seal from the facts proved.

[In Case No. 6,667, upon a verdict of one cent as damages, the court allowed full costs.]

Case No. 6,667.

HOOE et.al. v. ALEXANDRIA.

[1 Cranch, C. C. 98.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

MASTER AND SERVANT — NEGLIGENCE—VERDICT—AMOUNT OF—COSTS.

1. A person who has a right to do an act, has a right to the necessary means; and if, in the use of such means, a damage be sustained by another, the former is not liable.

2. The principal is liable for the conduct of his agent while acting in his employment, although he act without or contrary to his order.

3. Full costs are allowed upon a verdict of one cent damages in an action upon the case for damages occasioned by raising the level of the street.

Action on the case [by Hooe and Harrison] for filling up the street so as to shut up the windows and doors of the plaintiffs' warehouses.

Mr. Simms and Mr. Swann, for plaintiffs, moved the court to instruct the jury, "that if it shall be their opinion that Faw was street commissioner for the corporation of Alexandria at the time when the injury was done, and was then in the actual employment of the corporation, then the corporation are liable for his conduct while in their actual employment as aforesaid, although in the execution of the said employment he should go beyond their express orders," and that if, in raising the street, any damage accrued to the plaintiffs, they were entitled to recover in this action. Leader v. Moxton, 3 Wils. 461; Meredith's Case, 4 Term R. 794.

KILTY, Chief Judge. 1. The corporation have by law a right to pave the streets, and of course to raise or lower particular parts of any street, if such raising or lowering should be necessary for performing the work in a reasonable and proper manner; and the individuals who may be injured by it, have no right of action for such injury, unless expressly given by act of assembly. But, if a wanton and unnecessary injury is done, an action may be sustained. 2. The corporation, if liable at all, are answerable for the conduct of their commissioner if he was acting under their authority, and was engaged in the work in which they employed him, when the injury, if any, was done, although he may have acted without their orders, or contrary to them. But if he committed an injury unconnected with the business in which he was employed, his being in the employ of the corporation will not make them liable. The jury having found a verdict for one cent damages, a question was made whether that would carry the costs in an action upon the case for injury done by raising the level of the street. The authorities cited were, Rev. Code Va. p. 116, § 17, and the English statutes of 22 & 23 Car. II., and 8 & 9 W. & M.

Mr. Simms, for plaintiffs. The act of assembly has copied the English statutes, and the decisions in Virginia have been similar to those in England, and have confined the meaning of the act to actions of trespass, quare clausum fregit, although the words of the statutes, and of the act, are, "and all other actions personal."

THE COURT allowed full costs.

[In Case No. 6,666 an objection to certain evidence was overruled.]

HOOE (MILLER v.). See Case No. 9,573.

Case No. 6,668.

HOOE v. REES.

[Cited in Hellrigle v. Dulany, Case No. 6,343. Nowhere reported; opinion not now accessible.]

HOOE (UNITED STATES v.). See Case No. 15,386.

Case No. 6,669.

HOOF v. LADD.

[1 Cranch, C. C. 167.] [1]

Circuit Court, District of Columbia. June Term, 1804.

LANDLORD AND TENANT—TERM—HOLDING OVER.

If a tenant who has occupied and paid rent annually, holds over into a new year, it is evidence of a new demise for a year.

Debt for rent—demise for one year.

THE COURT was of opinion that although no special agreement was made about the rent, yet if the defendant had occupied and paid rent annually; and had continued into a second year, it was evidence of a new demise for one year. So if he had paid rent monthly, it would be a demise for a month, &c.

HOOFF (FARMERS' BANK v.). See Case No. 4,659.

Case No. 6,670.

HOOFF v. HERBERT.

[Cited in Smith v. Stoops, Case No. 13,110. Nowhere reported; opinion not now accessible.]

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

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

HOOFF v. LADD. See Case No. 6,669.

HOOFF (VIRGINIA v.). See Case No. 16,962.

Case No. 6,671.

In re HOOK.

[2 Dill. 92.] [1]

Circuit Court, E. D. Missouri. 1872.

HOMESTEAD EXEMPTION STATUTE OF MISSOURI CONSTRUED—PREVIOUS DEBTS AND LIABILITIES.

The Missouri homestead-exemption statute provided that it "should not apply to any debts or liabilities contracted before" it took effect: *Held*, that where a public administrator gave an official bond and received personal property of the decedent before the homestead statute went into force, his liability to the heirs and distributees arose in such a sense as to deprive him of a homestead exemption in property acquired after he received the assets of the estate, although it did not appear that at the time the property claimed as a homestead was acquired, the administrator had then converted the assets of the estate which had come into his hands.

This cause is here under the second section of the bankrupt act to review an order of the district court for the Eastern district of Missouri. In 1861, the bankrupt [Zadok] Hook became the public administrator for Callaway county, Missouri, and gave an official bond, with sureties, for the faithful performance of his duties. See Hook v. Payne, 14 Wall. [81 U. S.] 253; Same Case, 7 Wall. [74 U. S.] 425. In February, 1861, he took upon himself the administration of the estate of one Fielding Curtis, and at that time received personal property to the amount of $75,000 belonging to the estate. Afterwards, the distributees and next of kin of the said Fielding Curtis brought suit against Hook and his sureties on the administration bond, and recovered judgment against him in this court for over $40,000, which remains unsatisfied, and which has been proved up in bankruptcy against Hook's estate. After the execution of the bond of Hook as public administrator, and after Hook obtained possession of the property of the estate of Fielding Curtis, but before any conversion of the property by Hook is shown to have occurred, Hook acquired the property in which he now claims a homestead right. On the 23d day of March, 1863, the Missouri homestead act was passed (Laws 1863, p. 21). This act gives a homestead right to the extent of $1,000; and it is provided by the act itself that it "shall not apply to any debts or liabilities contracted before" it took effect, which was on the 23d day of March, 1863. In 1869, the homestead property was sold by the assignee in bankruptcy, yielding a surplus of $2,400 after paying off the incumbrance upon it; and Hook filed in the bankruptcy court his petition for an order on the assignee to set aside and pay over to him $1,000, as exempt to him in lieu of his homestead; and this petition was resisted by the distributees and next of kin of the said Fielding Curtis, who obtained against the bankrupt the aforesaid judgment.

Glover & Shepley and Mr. Meyers, for creditors.

W. B. Thompson and Henderson & Hayden, for bankrupt.

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

DILLON, Circuit Judge. We hold that the bankrupt is not entitled to the exemption; that the claim of the heirs and distributees was a liability contracted before, and in existence when, the homestead act was passed. Affirmed.

Construction of homestead exemption provisions. See Cox v. Wilder [Case No. 3,308], and cases cited in note.

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

Case No. 6,672.

In re HOOK.

[11 N. B. R. 282.] [1]

District Court, D. New Hampshire. 1874.

BANKRUPTCY—PROOF OF DEBT—PROMISSORY NOTES—ACCOMMODATION.

1. B. sought to prove against the bankrupt's estate, five promissory notes signed by C. and indorsed by the bankrupt. It appeared from the evidence that the bankrupt was in the practice of indorsing accommodation notes for C., and that the notes in question were given as security for such indorsements. The bankrupt indorsed and delivered them to H. for a consideration of about one-fifth of the face of the whole five. Some time thereafter, H. delivered them to B. without indorsing, for two lots of land valued at eight hundred or one thousand dollars, which he has never conveyed to H., but still holds. All the notes, except one, were overdue at the time of the transfer, and H. told B. that there was trouble between the bankrupt and C. *Held*, that the notes were without consideration as against C.'s estate, and could not be proved against it by the bankrupt for anything more than nominal damages, until he had been called upon to pay the notes he had indorsed for C.'s accommodation, nor by any one holding them without paying a valuable consideration, or with notice that there was no consideration therefor or in fraud of C.'s estate.

2. H. is chargeable with notice, for he was put on his inquiry by his knowledge of trouble between C. and the bankrupt, and by the exceedingly low figure at which the notes were sold; and if he neglected to inquire, he must be charged with all the knowledge he would have obtained if he had made inquiry or examination. B. does not stand any better in this respect than H., and he must be chargeable with notice of all the infirmities of the notes.

3. The notes in question cannot be proved for any sum.

Question as to proof of debt, certified to the court by Thomas E. Sawyer, register in bankruptcy.

CLARK, District Judge. The creditor, Bowley, seeks to prove against the estate of the bankrupt five promissory notes, all

[1] [Reprinted by permission.]

signed by Wm. Crawford, and all indorsed by the bankrupt, Leonard L. Hook, waiving demand and notice, as follows: March 13th, 1872, one thousand and forty dollars, on four months. March 30th, 1872, one thousand one hundred dollars, on five months. May 15th, 1872, one thousand five hundred dollars, on four months. May 24th, 1872, five hundred dollars, on five months. June 3d, 1872, one thousand two hundred dollars on demand—amounting to five thousand three hundred and forty dollars, exclusive of interest. Upon a hearing before the register on proofs submitted, the register was of the opinion that the whole of said claim should be disallowed; but, the creditor being dissatisfied therewith, an issue was framed and transmitted to the court for its decision. Upon a hearing before the court, it appeared that before and at the time these notes were given by Crawford to Leonard L. Hook, the bankrupt, he, the bankrupt, was in the practice of indorsing accommodation notes for Crawford; and these notes were given as security for such indorsements. There was no other or further consideration for them. The bankrupt kept them all in his hands until June, 1872 (precisely what day did not appear), and then indorsed and delivered them to Daniel Hook, for the sum of one thousand dollars or thereabouts, for the whole of them. Crawford, the maker of the notes, failed on the 17th of June, 1872.

The day before his failure, the 16th of June, Crawford sent two of these notes to the bankrupt, with information "that his (Crawford's) creditors were going to strike upon him," and he, the bankrupt, must take care of himself. Part of the notes were indorsed about the middle of June, 1872, and part in the last half of June; but all were so indorsed before they became due, except the one on demand, and that within sixty days after its date. Daniel Hook paid one thousand dollars for the whole of them. In August following, Daniel Hook delivered, without indorsing, all the notes to Bowley, the creditor, for two lots of land valued at eight hundred or one thousand dollars, which he has never conveyed to Hook or his assignee or bargainee, but still holds. All the notes at the time of delivery to Bowley were overdue, except one; and Daniel Hook then told Bowley there was trouble between Hook (Leonard L.) and Crawford. When Leonard Hook indorsed the notes to Daniel Hook, he, Leonard, had paid nothing upon the accommodation notes he had signed for Crawford. He does not remember that he told Daniel Hook what they were given for; "but he might;" said he proposed to sell them, and Daniel Hook told him what he would give for them, and then he indorsed them. Bowley did not know Leonard L. Hook was in bankruptcy. Upon these facts, I find,

First. That these notes were without consideration as against Crawford's estate, and could not be proved against it by Leonard Hook for anything more than nominal damages, until he had been called upon to pay upon the notes he had indorsed for Crawford's accommodation. Haseltine v. Guild, 11 N. H. 390; Lane v. Sleeper, 18 N. H. 211; Osgood v. Osgood, 39 N. H. 209. Nor by any one holding them without paying a valuable consideration therefor, or with notice that there was no consideration therefor, or in fraud of the bankrupt's (Crawford's) estate.

Second. I find that Daniel Hook must be chargeable with such notice; for if he had no actual notice, he was put on his inquiry by his knowledge of trouble between Crawford and Leonard Hook, and by the exceedingly low figure at which the notes were sold. And if he neglected to inquire, he must be charged with all the knowledge he would have obtained if he had made inquiry or examination. Oliver v. Piatt, 3 How. [44 U. S.] 333; Car v. Hilton [Case No. 2,437]; U. S. v. Sturges [Case No. 16,414]; Vattier v. Hinde, 7 Pet. [32 U. S.] 252; Godfrey v. Beardsley [Case No. 5,497]; Tardy v. Morgan [Id. 13,752]; Warren v. Swett, 31 N. H. 332; Dow v. Sayward, 14 N. H. 9; Cameron v. Little, 13 N. H. 26.

"What circumstances," says Story, "will amount to actual or constructive notice of any defect or infirmity in the title to the note, so as to let it in as a bar or defense against a holder for value, has been a matter of much discussion, and of no small diversity of judicial opinion. It is agreed on all sides that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry." Story, Prom. Notes, p. 267, § 197. The selling of notes amounting to five thousand three hundred and ninety dollars for one thousand dollars, coupled with the knowledge by the indorsee that there was trouble between the maker and the payee, was quite sufficient "to cast a shade on this transaction and to put the indorser on his inquiry," and to charge him with notice of matters of defense against these notes which he must have learned upon such inquiry. I think that Daniel Hook must be charged with notice that these notes were without consideration as against Crawford and his estate, and he must also be charged with notice that Crawford was insolvent. If Crawford was insolvent, as he really was, and these notes were without consideration, it was a fraud upon Crawford's estate and creditors, and upon the bankrupt law [of 1867 (14 Stat. 517)], for Leonard Hook to dispose of them to a third person so that they might be collected; and it was equally a fraud on the part of such person so to receive them for such purpose. It tended to charge Crawford's estate with a large amount of debts for which it does not appear to be justly

chargeable; and to enable Leonard Hook to realize one thousand dollars out of these notes, upon which there was nothing due—for he had paid nothing for them, nor upon any of the accommodation notes which he had indorsed for Crawford. To this fraud Daniel Hook was a party; and the law will not protect him in it by now allowing him, if the notes were in his possession, to prove them against the estate of Leonard Hook. But the notes are not now in his possession. He has sold and assigned them to Bowley, the claimant. Does he stand any better in this particular than Daniel Hook? I think not. It is a very suspicious circumstance that he received these notes of Daniel Hook for two lots of land worth eight hundred or one thousand dollars, and that he has never deeded the land either to Hook or any one for his benefit. It looks as though he was seeking to enable Hook to realize upon these notes through him, and that he was making himself a party to the fraudulent transfer of the same.

Again, he must be chargeable with notice of all the infirmities of the notes. All but one were overdue and dishonored when he took them. And as to that one, he received it under such circumstances as should have put him on his inquiry about it. If he had inquired he would have learned that Leonard Hook was insolvent, and that the notes had been passed to Daniel Hook for a very inadequate consideration; and in fraud of Crawford's estate, to enable Leonard Hook to realize something upon them. He can stand, then, no better than Daniel Hook. They are really in his hands with knowledge of all the material facts in regard to them, and so far he has paid nothing for them. He agreed to convey two lots of land for them, but never did it. The delivery of them to him was really without consideration. To allow him to prove and recover anything upon them, even against Leonard Hook's estate, would be to lend the aid of the court to what was evidently a fraudulent transaction; and this cannot be done, even to allow him to prove for the amount which he agreed to pay. They cannot, in the opinion of the court, be proved for any sum. "Fraud corrupts and destroys the whole debt." "Every party to proceedings under the bankrupt law, must be held to the utmost good faith; and he who attempts a fraud cannot, if discovered, complain when he is made to abide the legal consequences of his acts." In re Elder [Case No. 4,326].

HOOK (ROBINSON v.). See Case No. 11,956.

HOOK (UNITED STATES v.). See Case No. 15,387.

Case No. 6,673.

In re HOOLE.

[See 3 Fed. 496.]

HOOPER (FELCH v.). See Cases Nos. 4,717 and 4,718.

Case No. 6,674.

HOOPER et al. v. FIFTY-ONE CASKS OF BRANDY.

[2 Ware (Dav. 370) 371;[1] 6 N. Y. Leg. Obs. 302.]

District Court, D. Maine. Dec. Term, 1848.

CUSTOMS—SEIZURE—SHARE OF FORFEITURE—INSPECTOR—RIGHTS OF—EMOLUMENTS.

1. Inspectors of the customs are public officers, and not the mere servants and agents of the collector.

2. Where a seizure is made by a collector under the collection act, March 2, 1799 [1 Stat. 627], in pursuance of information given by an inspector of the customs, the inspector is entitled to the informer's share of the forfeiture.

[Cited in Fifty Thousand Cigars, Case No. 4,782; U. S v. George, Id. 15,197; U. S. v. One Hundred Barrels of Distilled Spirits, Id. 15,946; Four Cutting Machines, Id. 4,987; U. S. v. Chassell, Id. 14,789.]

3. No officer of the customs is debarred from receiving a distributive share of fines, penalties, and forfeitures, by the act of February 11, 1846, c. 7 [9 Stat. 3], allowed by previous laws, in consequence of having received his maximum of compensation allowed by law.

[Cited in Sprague v. West, Case No. 13,255.]

4. What is received by the officers of the customs for forfeitures, constitutes no part of the emoluments to which the limitation of the maximum is applied.

This was a petition of John K. Hooper and Nathaniel Shaw, claiming the informer's share in the proceeds of the sale of fifty-one casks of brandy, seized by the collector of Portland, and condemned as forfeited to the United States. It is alleged in the petition that, on the 27th of January, they found the brandy secreted in various warehouses in town, and suspecting it to have been illicitly imported took it into their possession, and on the same day gave the collector information; and that in pursuance of the information the seizure was made, and such proceedings were thereupon had, that the brandy was condemned as forfeited, and sold, and the proceeds paid into the registry, for having been landed without a permit, in violation of the 50th section of the collection law of March, 1799. The answer of the collector and surveyor, admits the facts stated in the petition, but denies that the petitioners are entitled to the informer's share, because they were at the time inspectors of the revenue, in the employment of the United States, and had received the full amount of the maximum of their compensation allowed by law. To this answer the petitioners put in a general demurrer.

Mr. Haines, for petitioner.

S. J. Anderson, for respondents.

WARE, District Judge. The proceeds of the forfeiture having been paid into the reg-

[1] [Reported by Edward H. Daveis, Esq.]

istry, there is no doubt that the court has the authority to determine to whom they belong, and to order the money to be paid out to those who are legally entitled to receive it. Westcott v. Bradford [Case No. 17,429]; The Langdon Cheves [Id. 8,064]; U. S. v. La Jeune Eugenie [Id. 15,551]. It is an authority that results to the court as an incident to its possession of the principal cause. McLane v. U. S., 6 Pet. [31 U. S.] 404. The petitioners claim the informer's share of the forfeiture, under the general collection law of March 2, 1799. The 91st section of that act provides, that all fines, penalties, and forfeitures, recovered by virtue of this act, shall be disposed of as follows, one moiety to the United States and the other to be divided between the collector, naval officer, and surveyor, in equal shares, or among such of these officers as may be in the district. Then follows a proviso in these words, under which the petitioners claim: "In all cases when such penalties, fines, and forfeitures shall be recovered in pursuance of information given to such collector, by any person other than the naval officer, or surveyor of the district, the one-half of such moiety (that is, of the officer's) shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor, in manner aforesaid." The answer admits that the seizure was made and proceedings instituted in pursuance of the information communicated by the petitioners, which resulted in a decree of forfeiture. The only question presented by the demurrer is, whether the petitioners are precluded from claiming as informers, on account of their being at the time inspectors of the customs. The language of the proviso is so plain that, had I not been informed at the argument that a different construction is put on the act, by the officers of the treasury department at Washington, I should not have supposed their right would admit of doubt. They cannot be included under the exception of naval officers, and surveyors, and when the information, in pursuance of which a forfeiture is recovered, comes from any other person, he is entitled to the informer's share. On what ground, then, can they be debarred from a claim which is open to every other person except the naval officer and surveyor?

It is true, as was suggested at the bar, that the inspectors are employed for the special purpose of preventing frauds on the revenue, and that in seizing smuggled goods, and communicating information of violations of the laws, they are only in the performance of their ordinary duties for which they receive a regular stipend. The argument is, that being thus paid, it is not to be presumed that an additional compensation is provided by law for services for which they are already fully paid. Certainly the courts can make no such presumption; but the inquiry is, whether the legislature has not offered them additional reward. It may be remarked that if this were a sufficient reason to exclude them from an extra reward, the same objection might be made to the claim of any other revenue officer. All are equally bound for all vigilance in protecting the revenue against frauds, and receive the regular emoluments attached to their offices, which are deemed an adequate compensation for their services. No presumption, therefore, arises from this circumstance, if they come fairly within the words of the law. But the enforcing of fines and forfeitures is always attended with more or less odium, and sometimes with danger, and though every man is supposed to be ready to do his whole duty, the legislature has thought it expedient to stimulate the activity and quicken the diligence of the revenue officers in doing what is sometimes an ungrateful service, by offering them a share in the forfeitures, which are recovered by their agency. The motive is to insure a more perfect execution of the fiscal laws, an object not only important to the government, but to every fair and correct merchant, who pays duties on his own importations; and it may be added, to the general morals of the community. There is scarcely anything more corrupting to the morals and industrious habits of a people than the practice of smuggling. It diverts men from the pursuits of regular industry, by the prospects of easily acquired illicit gains, and the transition from bold and desperate smuggling, to the more atrocious crimes of robbery and murder, has been found, by the experience of all nations, both natural and easy, and not very unfrequent. If the diligence of any officers of the revenue is to be encouraged by the offer of extra rewards, to whom would the offers be more naturally made than to the inspectors? They constitute the principal preventive police of the customs. They are employed for the express purpose of preventing and detecting frauds. They are the out-door guard, patrolling the streets, visiting the wharves and traversing the waters of the harbor, while the collector, naval officer, and surveyor, by the nature of their duties, are confined to their bureaus within doors. If extra vigilance and fidelity are anywhere to be sought by the offer of special rewards it would seem that they could nowhere be offered, where they would be more likely to accomplish the objects of the government than to the inspectors.

Another objection is made to the claim of the petitioners, and to me it seems to be the only one that can overcome the plain words of the statute. If it be well-founded it is a bar to the claim set up in the petition. It is this, that the inspectors are the agents and servants of the other officers, that their acts and information are the acts and information of the collector and surveyor. The collector, it is true, is authorized to em-

ploy inspectors, but not on his sole authority. It is only with "the approbation of the principal officer of the treasury department" that he can employ them. If they were the mere servants of the collector, it is hardly supposable that his nomination would require the confirmation of the secretary of the treasury. Again, the surveyor is authorized to direct and superintend the inspectors, weighers, etc., in the course of their duties. St. 1799, § 91. But this no more makes them the agents and servants of the collector and surveyor, than when any other subordinate officer is placed under the direction and control of his superior. An inspector may seize goods which he suspects to be illegally introduced into the country. If he seizes them without probable cause, the owner may have a remedy for the wrong in an action of trespass. If the collector adopts the seizure, he makes it his own, and he will be liable; but will it be pretended that, if he repudiates it, he will be responsible for the tortious act of an inspector? Yet this consequence will follow if the inspector is the mere servant of the collector. For there is no principle of law more firmly established than that the principal is responsible for the wrongful acts of his agent done within the scope of his agency. Story, Ag. § 542; Domat, Lois Civiles, liv. 1, tit. 16, § 3, No. 1. And yet I hold it to be quite clear that, unless he adopts the seizure of an inspector, he is no more liable for it than the postmaster-general is liable for losses individuals may sustain from the misconduct of his deputies. Dunlop v. Munro, 7 Cranch [11 U. S.] 242; Whitfield v. Lord Le Despencer, Cowp. 754. Inspectors are in fact public officers, commissioned and sworn as such, and are in the employment of the government, and not in the private employment of the collector and surveyor. They are so described in the law (St. March 2, 1799, §§ 39–53, 73) and an indictment will lie under the 71st section of that act, for forcibly resisting an inspector in the execution of his duties as an officer of the customs. U. S. v. Sears [Case No. 16,247]. It is only in a very limited and qualified sense that the inspectors are the agents of the collector and surveyor.

But the act of February 4, 1815, c. 31, § 7 (3 Stat. 198), has been referred to as an act in pari materia, and as giving a legislative construction to the act of 1799. The first remark that occurs on this part of the argument is, that this was a temporary act, passed to meet the emergencies of a state of war, and has long ago expired by its own limitation. It gave to the inspector when he seized goods out of the presence of the collector, twenty-five per cent. of the collector's moiety of the proceeds of the forfeiture. The argument of the counsel is, that, without this provision, the opinion of the legislature was that he would be entitled to no part. The words of the act give this to the inspectors, "in addition to such compensation as may be allowed them;" that is, as I understand the act, in addition to any compensation allowed by law. If it were necessary to give a construction to this obsolete act, that to which my mind would incline is, that when the inspector made a seizure out of the presence of the collector, on information from a private informer, the informer would be entitled to one-half the collector's moiety, this being expressly directed by the act as a reward for the information; and the inspector would be entitled to twenty-five per cent. of the moiety for making the seizure and securing the goods. But if he made the seizure on his own motion and on his own information, that the law did not intend to debar him of any right he had under existing laws to claim as informer, but gave the twenty-five per cent. in addition when the seizure was made out of the presence of the collector, and, of course, on the sole responsibility of the inspector. The reward for giving information was left as it stood before, and this was offered as an additional encouragement to inspectors, to stimulate their diligence and activity at a time when the execution of the laws was attended with much difficulty and some danger. Though this interpretation of the act may be open to some objection, I by no means think that the act of 1815, as a legislative construction of former laws, is so clear against the right of inspectors to claim as informers, as to overcome the plain terms of the act of 1799.

We come now to the principal objection set up to the claim of the petitioners, and I understand that it is mainly for the purpose of having a decision on this, that the present case is brought before the court. If this prevails, it is admitted that it applies as well to the collector and surveyor as to the inspectors. It arises out of the first section of the act of February 11, 1846, c. 7 [9 Stat. 3], which is as follows: "That collectors and all other officers of the customs, serving for a less period than a year, shall not be paid for the entire year, but shall be allowed in no case a greater than a pro rata of the maximum compensation of said officers respectively, for the time only which they actually serve as such collectors or officers, whether the same be under one or more appointments, or before or after confirmation. And no collector or other officer shall receive for his services, either in fees, salary, fines, penalties, forfeitures, or otherwise, for the time he may be in service, beyond the maximum pro rata rate provided by law." The objection to the claims of the petitioners, drawn from this act, is this. They are officers of the customs, and have received the full maximum of their compensation, as established by law, for the whole time they have been employed, and, therefore, under this act, it is argued, they can receive nothing more in the way of compensation, what-

ever may have been their services, whether as shares in fines, penalties, and forfeitures, or otherwise. This act is certainly not of very easy interpretation. I will proceed to state that which, after the best consideration I have been able to give the subject, seems to be the most reasonable; which puts it in harmony with other acts relating to the same subject-matter, and which carries into effect what appears to me to be the real intention of the legislature. In the first place it appears evidently on its face, to be an act supplemental to former acts fixing a limitation to the emoluments of certain officers of the customs. The first of these, and that which lies at the foundation of all which follow, is the act of May 7, 1822 (3 Stat. 693). The ninth and tenth sections of this act establish a maximum of compensation, for certain officers therein described, to be allowed in any one year, but they do not prescribe a maximum for part of a year. The consequence was, that when two or more collectors held the same office for parts of the same year, no limitation being applied to a part, except that which was established for an entire year, each officer might receive and retain, to his own use, the maximum for a full year, if the fees and other emoluments allowed by law amounted, during the period for which he held the office, to a sufficient sum. For all these fees he received, under the existing laws, to his own use, until they amounted to the maximum fixed by the law, and there was no maximum except that for a full year. This construction was given to the law by the courts, and it seems to be the only one that it admits. U. S. v. Pearce [Case No. 16,021]. It is very clear, that the first clause in the third section, does no more than extend the principle of the limitation to a part of a year, which the act of 1822 had established for an entire year. It allows the officer a compensation for a portion of the year, that he has held an office, only in proportion to what he would have had, if he had remained in office a full year, though the fees and emoluments may have amounted to a larger sum; and here it is to be remarked that the limitation, in the act of 1822, applies only to the ordinary emoluments allowed by law. Whenever the emoluments of any collector, etc., exceed the maximum, the excess shall be paid into the treasury. The 11th section expressly excludes from the operation of the law, what the officers may receive from the distribution of fines, penalties, and forfeitures.

The first clause of the act of 1846 does not in its terms, and manifestly is not intended to extend the limitation of the maximum to any other sources of emolument than those to which it was applied by the act of 1822. The whole difficulty grows out of the mention of fines, penalties, and forfeitures in the latter clause. After considerable reflection I have come to the conclusion, that these words have been introduced into the act through inadvertence. And I will now proceed to state the grounds on which this opinion is formed. The true sense intended by the legislature I suppose to be this. In all cases where a maximum of compensation is established for any particular service, or derived from any particular source for an entire year, the officer shall be allowed for that service only a pro rata sum for a part of a year. For instance, the collector is allowed in some districts to receive for his own use a sum not exceeding $6000, derived from fees, commissions, and all other ordinary emoluments, and, if they amount to more, the excess shall be paid into the treasury. This is a limitation of his whole emoluments derived from these sources. But there is a maximum also fixed for a particular class of services. By the act of March 3, 1841 [5 Stat. 432], the collector is directed to render, in his account, a return, 1st, of all sums of money received for fines, penalties, and forfeitures; 2d, of all sums received on account of suits instituted for frauds on the revenue; 3d, of all sums received for rents and storage of goods in public stores, and if it appears that the excess received for storage in any year, above what he pays for store rent, amounts to more than $2000, that excess should be paid over to the treasury. But this act, like that of 1822, fixes no maximum for what he may receive for his distributive share of fines and forfeitures. And the maximum for the excess of storage is fixed only for a year. If, therefore, he was in office for half a year only, and the excess in that time amounted to $2000, as there was no limitation for part of a year, below that which he might receive for a whole year, he might retain the whole for his own use, provided it did not carry up his whole emolument above the limitation fixed by law. Now under this clause of the act of 1846, when the collector is in office but part of a year, his fees and emoluments, for the excess of his receipts of storage, are cut down to a pro rata allowance, that is, to $1000, and this seems to be the proper operation of this clause. It operates distributively, for a part of the year on each and every source of his emoluments to which there is by law a limitation, to reduce them to a pro rata sum. No collector, or other officer, shall be paid for a part of a year, above a pro rata of the maximum for a full year provided by law, that is, established by prior and existing laws. But there is no law establishing a maximum for what a collector, or other officer, may receive for their distributive shares of fines, penalties, and forfeitures, and there can be no pro rata maximum for a part of a year, when there is no maximum for an entire year.

The limitation, in this clause, for a portion of a year, cannot, without doing violence to the language, be extended to any emoluments, to which there was no limitation by existing laws. It is by its own terms expressly confined to a maximum provided by law; that is, most certainly, laws then in

force. If the court were to extend it to emoluments received from fines and forfeitures, it would create a new limitation not known to the existing laws then in force. The whole of the first section, of the act of 1846, applies only to officers who are in office for a period less than a year, and its whole operation (and such is, I think, the manifest intention of the legislature where a maximum had been established by prior laws for an entire year) to extend the principle to the service of part of a year. The second clause of the section, as I understand it, operates distributively, and where there is a maximum fixed by law to an officer's emoluments for any branch of his services, it apportions these for a part of a year as the first clause does the whole. This interpretation of that act, it is admitted, is open to the grave objection that it leaves the words fines, penalties, and forfeitures, nearly unmeaning, and it is one of the fixed rules in the interpretation of statutes, that every word is presumed to have an appropriate office and meaning. The sense in which I understand them is, that no officer shall receive, in his distributive share of fines, penalties, and forfeitures, anything beyond the proportion fixed and allowed by law; that is, it leaves the existing laws without alteration. But with respect to the present case, it might perhaps be sufficient to observe that the petitioners do not claim in their quality as officers of the revenue, but simply as informers, claiming under the law precisely as every other person may, except the naval officers and surveyors.

My opinion is, on the whole, that where a seizure is made by the collector, under the act of March 2, 1799, in pursuance of information given by an inspector, and there is a decree of condemnation, the inspector is entitled to the informer's share. And no officer of the customs is debarred from receiving a distributive share of fines, penalties, and forfeitures, by the act of February 11, 1846, which is allowed by prior acts of congress, in consequence of having received the maximum of his compensation established by law, there being no law establishing a maximum for what an officer may receive as his distributive share of forfeiture.

Case No. 6,675.

HOOPER et al. v. The HIRAM.

[Fish. Pr. Cas. 69; 1 Car. Law Repos. 190.]

District Court, D. Massachusetts. Feb. 6, 1813.

PRIZE — DESTINATION — LICENSE FROM ENEMY — NEUTRALITY — PURCHASE OF GOVERNMENT BILLS.

[1. During hostilities between Great Britain and the United States, a vessel and her cargo owned by citizens of the latter country were captured by an American privateer when sailing for Lisbon, Portugal, with the intention of there selling the cargo at the risk and for the account of the owners, the proceeds to be remitted to England. The captured vessel was in possession of a license from the British consul for her safeguard from seizure from British men-of-war. It was *held* that, under such circumstances, the vessel was not lawful prize, and she was ordered to be restored to the claimants.]

[See note at end of case.]

[2. Neutral vessels have a peculiar character impressed upon them by the special nature of their documents with which they are invested. A distinction is to be made, however, between a complete adoption of a hostile character and a pass or license for a particular purpose, relative to the enemy's trade.]

[See note at end of case.]

[3. In such a case, the bona fide purchase by the neutral of English "government bills" by the sale of the cargo would not be a cause of forfeiture owing to the intimate connection of international trade, even though such a purchase would indirectly benefit the enemy.]

[See note at end of case.]

[In admiralty. Libel by Asa Hooper, and the master, owners, and crew of the private brig Thorn, against the brig Hiram and her cargo, whose master was John B. Barker. The case was heard on the claim of Samuel G. Griffiths to the vessel and 28 barrels of flour, and on the claim of Cornthwait and Cary and others to the remainder of the cargo.]

DAVIS, District Judge. This vessel, laden with flour and bread, sailed from Baltimore for Lisbon, on or about the 24th September last, and on the 15th of October was captured by the Thorn, and brought into the port of Marblehead. The vessel is not entitled to a register, but is duly documented as the property of Griffiths, the claimant, by a certificate from the collector's office at Baltimore, dated June 24, 1811. Among the ship's papers delivered to the captors, there was no document specifying the owners of the cargo. The supercargo, in his examination before the commissioners at Marblehead, on the 3d of November, declares the cargo (excepting 100 barrels of bread, the master's adventure) to be the property of several shippers at Baltimore, whose names he could not recollect, though he says he had received from them letters of instruction. The master, on his examination, November 15, declares the property to be as it is claimed, naming all the shippers, as they now appear to be evidenced, excepting one, and states that he signed bills of lading to the several shippers. The omission of the name of one of the shippers, in the master's evidence, is believed to be inadvertent, as the bills of lading were not in his possession. Four days after his examination, the supercargo delivered to the commissioners a bill of lading and invoice of the whole cargo, excepting the adventure. By those documents, Samuel G. Griffiths appears the sole shipper, and his orders to the supercargo are annexed, directing him, on his arrival at Lisbon, to dispose of the cargo, and to remit the proceeds to the shipper's correspondents in Liverpool, in England. The master also had writ-

ten orders from Griffiths, the owner of the vessel, to make sale of her at Lisbon, if any advantageous offer should be made, and to remit the amount to England. By the affidavit of claim for the lading, made by the supercargo, it is stated, that only 28 barrels of flour, belong to Griffiths; that the residue belongs to the other claimants in different proportions; that a separate bill of lading [and invoice was made out for each shipper excepting Griffiths, and that the master also signed a bill of lading] [1] for the whole of the cargo as the property of Griffiths; that all the separate invoices and bills of lading, with the instructions of the respective shippers, were deposited with Griffiths for safe keeping, the supercargo having first taken extracts for his guidance in relation to the disposal of the cargo; that the general bill of lading, with an invoice and letter of instructions from Griffiths, purporting the whole to be his property, were delivered to the supercargo at the time of sailing, and were on board at the time of capture. In explanation of this arrangement, it is stated, that it was thought advisable to have but few papers on board, in order to prevent embarrassment and delay, in case the vessel should be taken on her voyage, and carried into a foreign port. An objection was made to the admission of the papers delivered to the commissioners, by the supercargo, after the examination, but it was waived, and those papers were admitted by consent.

Among the papers found on board, was a license or protection, being a certified copy of a letter from Admiral Sawyer to Andrew Allen, Esq. late British consul at Boston, and an additional protection or letter of safe conduct from Mr. Allen. The vessel being found sailing with these instruments, appears to have been the cause of capture and bringing in, though other additional grounds for condemnation have been alleged and urged on the trial, particularly the destination of the proceeds of sale of vessel and cargo according to the instructions. The variance between the asserted interest in the cargo, and the papers on board, rendered further proof of property requisite. An order was made for that purpose, after a hearing upon the papers found on board, and the preparatory examination. Exceptions were made to the testimony of the master and supercargo, in some particulars which were supposed to render further proof inadmissible. The omission to disclose the invoice, bill of lading and orders above mentioned, on the examination, is not indeed explained to entire satisfaction, especially on the part of the supercargo, to whom those papers were committed; and it must appear in a degree strange, that the supercargo should not be able, on his examination, to recollect and name the shippers, whose property was committed to his management, and of whose instructions, though not then in his possession, he had taken minutes. I notice the explanations that have been offered. The omission, as to the invoice and bill of lading, whatever may have been its character, whether voluntary or inadvertent, was speedily repaired by a delivery of the papers in question to the commissioners; and I do not find the exceptions to the evidence of such a description as to justify a peremptory conclusion against the owners, and to preclude an opportunity for further proof in support of their asserted claims. That proof has been produced, together with proof relative to the manner in which the license was procured. The evidence presented fully establishes the property to be as claimed, and supports the account given in the affidavit of claim, by the supercargo, as to the ownership and arrangement relative to this voyage. The reason given for the simulation of papers, which corresponds with that given by the supercargo, I must admit to be real, though I must add, that the proposed advantage does not appear of sufficient importance to require such a disguise. It has had the common effect of such simulations, to perplex the inquiry and give a dubious character to the transaction. I know that to a limited extent there is an indulgence to such disguises in courts of admiralty, if the cause be explained to the satisfaction of the court, especially if intended to relieve from difficulites imposed by the restrictions of an enemy, and not originating in views to avoid or defraud the regulations of the country of the owners. The worst effect of such disguise, and it is a very serious one, is their liability to induce an adherence to papers on oath, by what has been denominated ship morality, too often widely different from that genuine morality, which is the basis of confidence and the great cement and support of social security and order.

Having permitted these claims to be verified by further proof, the real state of facts relative to the voyage, is clearly evidenced, in every material circumstance. The vessel and cargo are wholly owned by citizens of the United States, the destination was for Lisbon, and the cargo was there to be sold on account and risque of the owners, the proceeds to be remitted to England.

The destination was a lawful one. But it is contended that the claims should be rejected and the vessel and cargo condemned to the captors. 1. On account of the British protection or license. 2. For the destination of the proceeds, or the directions relative to the remittance, which are said to be in violation of the law of war, and the allegiance of the persons concerned in the voyage. These questions are novel and important. No express authority is produced by which they can be determined. There are no statute provisions on the subject, and it has fallen to my lot to examine the principles, to trace and estimate the an-

[1] [From 1 Car. Law Repos. 190.]

alogies urged or suggested as a ground of decision. This investigation has been pursued with diverted attention to other causes necessarily requiring a determination. In regard to both the questions, it is obvious, that the considerations by which they are to be governed have reference merely, to the rights and duties of a citizen in regard to his own country in a state of war. How the transaction would be viewed by the laws of nations, if the vessel had been captured by a ship of another belligerent with whom Great Britain is at war, makes no part of the present inquiry. The license, as it is called, is composed of three papers, a copy of a letter from Admiral Sawyer, dated at Halifax, August 5th, 1812. Mr. Allen's certificate annexed to and authenticating the copy, dated at Boston, Sept. 15, and another certificate from the same gentleman of the same date, addressed to all officers of his Britannic majesty's ships of war, or of privateers belonging to his subjects. It is contended that these papers stamp a hostile character on this vessel and voyage, which is insurmountable and fatal; that the American character of the vessel and adventure is forfeited by an association with enemies, and by being voluntarily placed under the protection of the enemy's armed force; and it is further contended that the possession of such license is evidence of an illegal commercial intercourse with enemies, and of enemies' interest in the concern; or of subserviency to the views of the enemy; in violation of the duties of the citizen and of his allegiance.

What shall constitute a hostile character, is sufficiently well determined in many instances, which are strongly marked. One characteristic is, the sailing under the flag and pass of the enemy. This is conclusive as to the character of the ship, and is a complete bar to the claims of an asserted neutral proprietor. 5 C. Rob. Adm. (Am. Ed.) 13. If assumed by a subject of the capturing belligerent, it would be equally conclusive as to goods, and would be decisive against the admission of any claim. In giving judgment on a case of this description, in relating to the Dutch flag and pass, assumed by a neutral, Sir W. Scott observes, that ships have a peculiar character impressed upon them by the special nature of their documents with which they are so invested, as to the exclusion of any claims of interest that persons living in neutral countries may actually have in them. In the same case he makes a distinction, however, between such a complete adoption of the hostile character, and a pass or license for a particular purpose, relative to the enemy's trade, without an alteration of the neutral character of the ship. The council for the claimants, in the Case of the Vrow Elizabeth, cited the Case of the Clarissa, in which the American owner obtained restitution of his share of the ship, though the vessel had sailed from Holland under a special pass or license from the authority of that country, to engage in the colonial trade. In that case, says Sir William Scott, the ship had merely a colonial pass or license, being in all other respects undoubtedly and avowedly an American ship, and described as such in the usual American documents. The distinction is applicable in the present case. The ship and cargo, which are clearly American property, are documented as such; the papers from the officers of the British government, also recognise her as such, and are merely intended to exempt the property from capture by the enemy's cruisers. The arrangement is an unusual one, and we have no express precedent by which to determine its legal operation. Exceptions from capture have sometimes been made by belligerents from motives of humanity, as in the case of fishing vessels, and at one time when Spain was at war with Great Britain and distressed by famine, in favour of vessels bound with grain to that country. Anciently, the admiral of France had the power of forming fishing truces or of granting passports to individuals, to continue their fishing or trade unmolested. It is not contended, that a vessel taking the benefit of these indulgences would be considered as offending, though in the instance of the French passports to fishing vessels, they were occasionally given to individual vessels, and did not operate by a general order or decree. In the present case it was not competent for Admiral Sawyer to give a general security against all the cruisers of his country, but he declares, that he shall give directions to the commanders of the squadron under his command, not to molest American vessels, unarmed, and laden with flour and other dry provisions bona fide bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of his letter under the consular seal of Mr. Allen. This is the mode adopted to notify the cruising ships of the admiral's instructions. If he had elected another method, and had published his instructions in the Gazette at Halifax, it surely could be no offence against the duties of a good citizen bound on a lawful voyage, to take with him one of the British newspapers, containing such instructions, as a security on such lawful voyage, not prohibited by the laws of his country. A certified copy of the letter, by a known officer, has, as appears to me, no other legal effect or operation. Mr. Allen's consular powers may indeed have terminated by the war, though his residence in the country was permitted, and I shall not undertake to decide on the propriety of his signing in that capacity. It was, probably, considered as a mode which would give greater security to the holders of the instrument, and render it less liable to exception or doubt from the enemy's cruisers. In this view it was rendered more valuable to the holders, and the procedure is entitled to can-

did consideration; at any rate, I cannot consider it as giving a vicious taint to the transaction, so as to subject the citizen receiving such a document to process of condemnation from the authorities of his country, which are to decide upon the operation of the paper. Mr. Allen aims to bestow a more extensive security than what is given by Admiral Sawyer, but it is, as it necessarily must have been, merely advisory. It is addressed to the officers of all the ships of war of his country, public or private.

The views and intentions manifested by those officers in these papers, have been particularly urged in argument. It is said, that they fully express purposes favourable to the enemy, and that the acceptance of papers with such indications implies a voluntary subserviency to British interests. In whatever terms these papers had been drawn, no one could suppose that they were granted from mere good will to this country, and if that had been affected, it could have deceived no one. In fact, whether expressed or not, the state of things presented a case in which there was a coincidence of interests. When this trade was left open, after the declaration of war, it must have been understood, that Great Britain would feel an interest in its prosecution. This could not but have been perceived and considered, when the act of the 6th July, 1812 [2 Stat. 778], relative to trading with the enemies of the United States, was passed. The subsequent relaxation of the rights of war and of capture, on the part of the enemy, relative to such trade, only presents a more decided manifestation of the estimated importance of the trade to Great Britain. It still is a legal and innocent trade to our citizens, until prohibited by statute; nor do I conceive that the expressions in the papers should subject the citizen to the imputation of intending the promotion of the views of the enemy; he has his own interest in view, and so far as any public considerations enter into the enterprize, he ought to be considered as favouring the views and interests of the country, who have left the trade open under a full contemplation of the state of the country and of the world, politically and commercially. On the face of the instruments, therefore, and viewing their whole tenor, I consider them not as conclusive against the claimants who are the holders of them. But the relaxation is not universal, and from the very nature of partial exemptions they are liable to a degree of suspicion —though not in themselves absolutely vicious, they may become so by the manner in which they were obtained, or the conditions on which they were granted; I have, therefore, in this case and another of similar description (The Hero) required further proof on this head, and the order for further proof is limited to the claimants, according to the general rule in prize cases. 3 C. Rob. Adm. (Am. Ed.) 267.

By the proof that has been produced, relative to the license in this case, it appears to have been purchased of a citizen of the United States, an inhabitant of Virginia, at the rate of one dollar per barrel for what the vessel would carry; that part of the consideration was paid in cash, the remainder to be paid on arrival of the vessel in Lisbon: that the license was in blank, and the person procuring the license declares, on oath, his belief, that the seller had no knowledge of or concern with Mr. Allen by whom the license was issued It is further testified that such licenses are a common article of sale in Baltimore and other places. On this evidence, I cannot conclude that any enemy interests are involved in the transaction, or that the terms on which the license was obtained, render it a vicious transaction, operating the forfeiture of the property intended to have been protected. The act of July 6th prohibits, under heavy penalties, the receiving, accepting or taking "a license from the government of Great Britain, or any officer thereof, for leave to carry any merchandise, or send any vessel into any port or place, within the dominions of Great Britain, or to trade with such port or place." The mere receipt and acceptance of a license or security from capture, in a lawful trade to neutral countries, is not prohibited. If not procured on terms involving enemies' interests, I cannot find the rule of law, which renders the vessel and cargo liable to condemnation, in our courts; for being possessed of such an instrument of protection, I am sensible, that the practice may be liable to abuse. It is capable of being converted into an instrument of monopoly, or the practice may have political bearings of serious import. This liability to abuse renders it, as I conceive, the duty of the court to require such proof of the manner of procuring the license, and of the terms and conditions; as shall enable it to form an opinion as to the fair and legal operation of the procedure. I am not convinced, from the evidence in this case, that the transaction relative to this license will subject the property claimed to condemnation. There may be considerations relative to the practice of dubious aspect, which it belongs to the government to estimate, and to make such provisions as the public interest shall appear to require.

The other ground of objection, is the direction to invest the proceeds of vessel and cargo in bills of exchange, to be remitted to England. The directions for the sale of the vessel are not absolute, it was to depend on the contingency of receiving an advantageous offer—If sold, however, the proceeds are directed to be remitted to England; some of the shippers direct the investment to be made in government bills, meaning, it is admitted, the bills of the English government. Others direct a remittance generally. As to the captain's adventure, it does not appear

in what manner it was his intention to dispose of the proceeds. Now if this property was intended merely to be landed at Lisbon, and to be afterwards transhipped to the enemy's country, it would clearly be a trading with the enemy, and such intention being manifested, it would be liable to condemnation, if captured in any stage of the voyage. The Jonge Pieter, 4 C. Rob. Adm. 65. But I am by no means satisfied, that the orders given in this case, as to remittance of proceeds would, if executed, be of like legal operation. To produce a conclusion of such serious consequence to the owners of the property, I ought to be assured, that there would be no mode of effecting the proposed remittances without implicating the claimants in the culpability of trade with the enemy. Now it is observable, that all the cases, and they are numerous, which have been cited from the books, respecting trade with the enemy, relate to tangible objects, capable of actual use for the purposes of life i. e. to goods and merchandise bound to or from the enemy's country. Of this description are all the instances cited in the case of The Hoop, 1 C. Rob. Adm. (Am. Ed.) 196, in which the law on this subject is so fully displayed and illustrated. I do not mean to infer, that other transactions would not constitute a trade with an enemy. It certainly may be committed by going to or coming from an enemy's country with a vessel without a cargo. But no case has been produced, though the attention of the able and learned counsel for the captors was specially directed to the inquiry in which the usual operations of exchange were considered as of this character. In fact, by an analysis of those operations, it will appear, that a substantial difference exists, in regard to aid an enemy between a trade in commodities, and what is called a remittance. If a citizen should convey commodities to an enemy's country, he affords him palpable aid, and the act is illegal. But if he should purchase of a fellow citizen, or of a neutral, a debt or demand against a subject of the enemy country, he renders no benefit to the enemy, there is only a change of the creditor. If the remittance be to pay a debt, the enemy country is indeed a gainer to the amount of the debt. How a remittance for such a purpose in time of war should be considered, it is not necessary here to inquire. The remittances in this case were specially intended as a deposit, until there should be an opportunity to withdraw the amount.

It is decided that a subject of one belligerent may lawfully purchase of a neutral, goods, or vessels, lying in a port of the opposing belligerent. The trade, in such case, is with the neutral, and the locality of the objects purchased does not vitiate the transaction. 4 C. Rob. Adm. (Am. Ed.) 233; Chit. Law Nat. 15. From this authority I should infer, that the supercargo, on this voyage, might lawfully purchase of a subject of Portugal, his debt or demand on England, or in other words his bill of exchange on England. But it is observed, that according to the direction of some of the shippers, the investment was to be made in government bills. Such an investment, it is urged, would be particularly noxious, having a tendency to sustain the credit and give additional value to the enemy's paper. So far as such direction may be evidence of an intent of a commercial dealing relative to this cargo or any portion of it with subjects of the enemy it is pertinent. But I do not consider it warrantable for me to make that inference, without more direct evidence. Government bills, as they are termed, it is affirmed, and I presume the fact is so, are in the market, bought and sold like other articles. A bona fide purchase of an English bill, of a neutral, would not place the party, on legal ground, in a different situation from the purchase of the bill of an individual. It would be otherwise, if the neutral were the mere agent, to procure such government bills from the British holder.

It cannot be denied that investments in government bills, would have a tendency to enhance the value of those bills in the market. This indirect effect, however, of the operation, would not as appears to me, render it criminal. By the law of war, we are not to benefit an enemy; on the contrary, according to Bynkershock, "Vetatur quoquo modo hostium utilitati consulere." We are not to consult the benefit of the enemy, and of course that trade and those operations are, by the law of war, illegal, which from their character, imply such a motive. But such is the connexion of human affairs, which national conflicts cannot altogether dissolve, that many operations may have an indirect effect to benefit the enemy, and yet the law of war has not considered them, embraced within its maxims of prohibition. If, for instance, the proceeds of the numerous shipments to Spain and Portugal from this country should be invested in British goods, it would undoubtedly aid the enemy, by the encouragement given to its manufactures, and in a degree, to its commerce. Still such purchases would be lawful to our citizens, if made bona fide of a neutral owner, such goods, thus purchased, might be lawfully transported to any other neutral country. The mere law of war, indeed would not prohibit the importation of goods, so purchased, even to our own country. It is our law of non-importation, made before the war, which has this operation.

If such investment be not illegal, I am not satisfied, that evidence of the debt, thus purchased of a neutral, might not be transmitted from the neutral country, without coming within the legal idea of trade with an enemy, as developed and illustrated by the cases which have been decided. It was, for a long time, lawful in England to insure enemies' property, and such was the common practice in that country in former wars with

France. Valin, in language, as Marshall observes, bordering a little on derision, remarks on the impolicy of such a rule of law, which was peculiar to England, and suggests the benefit derived from it by France. But we find no intimation, that the procurement of such insurance in England, by a subject of France, was illegal, nor is it made subject to any animadversion; and yet such insurance could not have been effected without a correspondence. So when in England, in the modern trials upon policies of this description, the foreign holder of the policy has been held not entitled to recover, the objection has not been made, even in argument; that the creation of the policy, which would necessarily involve a degree of communication with the enemy, was an act of trading; but that the object and effect of such policy was to protect the trade of the enemy. If, therefore, it were now lawful in England to insure enemies' property, it would not, as appears to me, come within the idea of trade with the enemy, for a citizen of this country to procure such insurance, though it could not be accomplished without a communication direct or indirect with that country. The same reason would apply to the mere transmission of the evidence of a debt or demand on an enemies' country, lawfully acquired.

I acknowledge the general obligation, of bringing every correspondence with the enemy, under the cognizance of government. A correspondence, intrinsically innocent, may be culpable from a non-conformity with regulations, calculated to assure the government, that nothing injurious is to be apprehended from any proposed communication. It would be reasonable, however, to expect a promulgation of such regulations, that every one might be secure from dangerous inadvertence. Besides, as the government has a public agent in Lisbon, and the charge in this case rests on intention, I ought not to conclude, that any correspondence, which the proposed remittance of bills to be purchased might require, would not be submitted to his inspection.

In speaking of the doctrine of insurance on enemies' property, as it formerly stood, I cannot omit to notice its application to the first objection in this case, grounded on the license from an enemy. The reasons which have led the courts of law in Great Britain, ultimately, to decide against the validity of such insurances, after long practice to the contrary, might cause that country to be dissatisfied with these indulgences granted by its officers; and for the reasons which induced France not to discountenance or disapprove of the procurement of insurances in England, in time of war, between the two countries; may we conclude, as to the innocence of obtaining these licenses or protections, if tainted with no improper contract or conditions.

Such are the views which I have taken on this subject. In contemplating the questions on which the cause depends, and in searching for just inferences from acknowledged principles, and from analogous determinations, I should not be surprised if my conclusions should be found erroneous, in which case they will be corrected by a superior tribunal, if the captors should be dissatisfied. I decree restitution to the claimants; but I do not think the captors should sustain the costs of bringing the case to adjudication, especially as further proof was requisite, and the obvious facts might induce the course pursued by the captors, consistently with sincere and honest conviction, that their procedure was justifiable. I therefore direct the payment of their necessary expenses.

NOTE. In the case of The Aurora [Case No. 660], an American vessel condemned by Judge Howell in the district court of Rhode Island, for having a Sawyer-license on board, it appeared that the vessel, which was bound to St. Barts, had a certificate from Andrew Allen, Esq., late British consul, stating, "that the voyage was intended to answer the views of the admiral's license, viz. a supply of the British West Indies. And it is understood, that, on the ground of a British supply being intended, and proceeded in, the condemnation took place.

The License.

"His Majesty's Ship Centurion, at Halifax, the 5th August, 1812.—Sir: I have fully considered that part of your letter of the 18th ult. which relates to the means of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, and being aware of the importance of the subject, concur in the proposition you have made. I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels unarmed and so laden, bona fide bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under your consular seal. I have the honour to be, sir, your most obedient humble servant, H. Sawyer, Vice Admiral. Andrew Allen, British Consul, Boston. (Stamp. Arms of the British King.)"

"Office of His Britannic Majesty's Consul. I, Andrew Allen, Jr. his Britannic majesty's consul, for the states of Massachusetts, New-Hampshire, Rhode Island, and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, Esq. vice admiral and commander in chief on the Halifax station. Given under my hand and seal of office, at Boston in the state of Massachusetts, this fifteenth day of September, in the year of our Lord, one thousand eight hundred and twelve. [Signed] Andrew Allen, Jr. (Consular Seal.)"

"To All Officers of His Majesty's Ships of War or of Privateers Belonging to Subjects of His Majesty: Whereas, from a consideration of the vital importance of continuing a full and regular supply of flour and other dry provisions to the ports of Spain and Portugal or their colonies, it has been deemed expedient by his majesty's government, that notwithstanding the hostilities now existing between his majesty's government and these United States, every degree of protection and encouragement should be given to American vessels laden with flour and other dry provisions and bound to the ports of Spain and Portugal or their colonies; and whereas in furtherance of these views of his majesty's government, Herbert Sawyer, Esq. vice admiral and commander in chief on the Halifax station, has directed to me a letter under the date of 5th August, 1812, (a

copy of which is herewith enclosed) wherein I am instructed to furnish to American vessels so ladened and destined, a copy of his letter, certified under my consular seal, which documents are intended to serve as a perfect safeguard and protection to such vessel in the prosecution of her voyage. Now, therefore, in prosecution of these instructions, I have granted to the American brig called the Hiram, of 219 tons burden, whereof John B. Barker, is master, now lying in the port of Baltimore, and ladened with flour and bread, bound bona fide to the port of Lisbon, a copy of the said letter of Vice Admiral Sawyer, certified under my consular seal—hereby requesting all officers of his majesty's ships of war or of private armed vessels belonging to subjects of his majesty, not only to offer no molestation to the said vessel, but on the contrary, to grant her all proper assistance and protection in her passage to Lisbon, and on her return from thence to her port of her original departure, whether laden with salt, or in ballast only. Given under my hand and seal of office, this 15th day of September, in the year of our Lord one thousand eight hundred and twelve. (Seal) Andrew Allen, Jun., His Majesty's Consul."

[NOTE. From this decree an appeal was taken to the circuit court (case unreported), where the decision above rendered was affirmed pro forma, but the captors allowed their expenses. Both parties then appealed to the supreme court. 8 Cranch (12 U. S.) 444. In an opinion by Mr. Justice Washington the decree was reversed. and the vessel and cargo condemned to the captors as prize of war. It was held that the real object of the license was to insure a supply of provisions to the allied armies in Spain and Portugal, thus making an unlawful connection with the enemy. The law presumes that the license was known to the owner of the cargo as well as the owner of the vessel. "The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war."

[Subsequently, from a decree of condemnation in the lower court, other claimants took an appeal, upon the ground that they had no notice of the license from the British consul. The supreme court, in an opinion by Mr. Chief Justice Marshall, affirmed the sentence. 1 Wheat. (14 U. S.) 440. It was held that however innocent, in point of fact, the claimants might have been, of the knowledge that the Hiram sailed under a British license, constructive notice of that fact must be imputed to them, because the supercargo must be considered the agent of the shippers, and his knowledge is their knowledge.

[The taxation of costs in this and similar cases was made in Case No. 6,527.]

HOOPER (PITMAN v.). See Cases Nos. 11,185 and 11,186.

Case No. 6,676.

HOOPER et al. v. RATHBONE et al.

[Taney, 519.] [1]

Circuit Court, D. Maryland. Oct. 15, 1853.

BILL OF LADING—LOSS OF CARGO—DEFINITION OF "PERILS OF THE SEA."

1. Where goods are shipped under a bill of lading, by the terms of which the ship-owners are exempted from responsibility for losses by perils of the sea; and a part of the goods are lost or injured: *Held*, that as a loss by perils of the sea is an exception to the undertaking of the carriers to deliver the cargo safely at the port of delivery, it is incumbent upon them to show that the loss in question was occasioned by such peril; otherwise, they are liable for the whole damage sustained.

[Cited in The Lydian Monarch, 23 Fed. 299.]

2. The ship was on a voyage from Baltimore to Liverpool with a cargo of wheat and tobacco; on the first day out from the capes of the Chesapeake Bay, and for several days after, she experienced heavy weather, and became leaky, the pumps became obstructed, and finally choked from the wheat getting into them; and as a measure of safety she was compelled to put into the port of St. Thomas; there she was unloaded, in order to repair, and a good deal of the wheat was found to be spoiled, and was thrown away; the storm was not violent enough to dismast her or carry away her sails, but it blew heavily; the sea was rough, and the ship was rolling and pitching in it, and shipped a good deal of water before any inconvenience was experienced from the wheat in the pumps: the ship was proved to have been among the strongest ever built in Baltimore; the bin where the wheat was stowed was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her: *Held*, that under the circumstances, there was nothing to which the disaster could be imputed, but the perils of the sea.

3. Although a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargoes, and may be disabled from proceeding on her voyage, by encountering winds and waves through which a different cargo might pass without injury; yet, if there was no fault in the ship, in her equipments, in the stowing of the cargo, or in the manner in which she was navigated, and if every precaution was taken which is usual and customary in transporting such a cargo, the owners cannot be charged with the loss.

4. After unloading the ship at St. Thomas, the wheat had to be reshipped in bags, and owing to the greater space occupied by the wheat in bags, than was occupied by it in bulk, and owing also to the want of proper contrivances, at St. Thomas, for stowing the hogsheads of tobacco, 1169 bags of damaged wheat were necessarily left out; there was no trade between Liverpool and St. Thomas, and no prospect of shipping the surplus wheat, except by chartering a vessel at a losing expense; which expense would only have been increased by storing the wheat at St. Thomas, till the owners could be advised, and instructions received from them: *Held*, that under such circumstances, the most judicious course, and the one most for the advantage of the owners, was for the master to sell the wheat at St. Thomas.

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

The libel in this case was filed on the 4th of December 1852, by the appellees [William Rathbone and others], merchants at Liverpool, and owners and consignees of certain wheat, shipped from Baltimore for that port, in the month of October, 1851, on board the ship A. Cheeseborough, of which the appellants [James Hooper and others] were owners. The libellants charged, that the respondents, their officers, servants and agents, so carelessly and improperly carried said wheat, and so carelessly and improperly and

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

negligently conducted and managed the said ship A. Cheeseborough, during her said voyage, and so carele y, improperly and negligently conducted themselves in reference to the said wheat, that by reason of such careless, improper and negligent conduct, only the amount of 7829½ bushels of said wheat were delivered to the libellants at the port of Liverpool, and the large quantity of 2936 bushels of said wheat, was not delivered to the libellants, but entirely lost to them.

The respondents, in their answer, after replying to the several articles of the libel, stated by way of defensive allegation thereto, that said ship A. Cheeseborough, after the said wheat had been shipped thereon, set sail on her intended voyage, on the 30th day of October, 1851, being then sound, tight, staunch and in every respect in a seaworthy condition, and suitably and properly apparelled and appointed in all particulars for the intended voyage; but that after prosecuting the voyage for some days, the ship encountered boisterous and stormy weather, and heavy seas, and shipped large quantities of water on deck; and by reason thereof, she labored very much, and rolled very heavily, and apprehensions were entertained on board lest, by the straining to to which she had been subjected, some of the seams of the vessel might have been parted, or other injury sustained; these apprehensions were greatly increased when, on trying the pumps, it was found that large quantities of wheat, and but little water came up. As early as the 5th day of November, this state of case existed; during that day, it blew a strong gale, and a heavy sea was running, and a great deal of water was shipped on deck, and the pumps were used every two hours; and as large quantities of wheat were delivered in pumping, it became necessary to draw very often the lower boxes, so as to clear them of wheat. On the following day, it was found that the pumps were so choked by wheat, that it became necessary to draw them every ten minutes, and it was discovered, at the same time, that there was much water in the hold.

On this day, the crew came aft and protested against proceeding further on the voyage; the master, at that time, did not yield to the request, but continued on his course, in hopes and under the expectation of being able to perform the voyage to Liverpool. On the next day, the pumps being still unmanageable, by reason that they choked every few minutes, the crew again came aft and requested the master to make for the first port, as it was not safe, in their opinion, to proceed further on the voyage; as the master, still hoping and expecting to be able to make the voyage in safety, did not at the time assent to this request of the crew, the mate entered his opinion on the log-book, that it was not safe to prosecute the voyage. It was not, however, until the 8th, that the master concluded to comply with the request of the officers and crew, and to make for the nearest port; and he was induced to comply, because the pumps were still continually, when used, choked with wheat; the vessel, still under close-reefed topsails, labored very hard, and took in a great deal of water on deck; and it was, moreover, discovered that smoke was rising from the wheat in the hull. It was under these inducements, and from a conviction that it would be perilous and reckless to hold his course, that the master changed his course, for the Island of St. Thomas, where he arrived on the 17th of November. During the voyage to St. Thomas, and most of the time, the ship made considerable water, and the pumps remained in the same state, and there was evidence that the wheat was being injured. That under such circumstances, the making for an intermediate port, was an incumbent duty on the master which he could not properly, and ought not have disregarded, and the making of the port of St. Thomas, was the making of a port of necessity. That as soon as said port of St. Thomas had been made, the master duly made protest, and applied to the commercial agent of the United States, there resident, to cause a survey to be made by competent and proper persons, of said vessel, &c.; that upon the warrant of said commercial agent, a survey was made on the 18th of November, 1851, by proper and competent persons, who reported that they found the hatches to have been properly secured, but who further reported that, upon trying the pumps, so much wheat came up, that it was impossible to ascertain what quantity of water the ship was making at the time; and they further reported, that it was unavoidably necessary that the cargo should be discharged, in order to have the timbers cleansed, and the pumps placed again in a working condition, and they accordingly recommended, that the cargo should be landed as quickly as possible, and that afterwards another survey should be made, in order to ascertain the state of the vessel, and to determine what further proceedings were necessary for the benefit of all concerned. That in accordance with the recommendation contained in said report, the cargo was in part removed, and a further survey was had of the same, under the direction and by the warrant of the commercial agent, by competent, experienced and proper persons; which said persons, after particularly examining, and surveying that part of the cargo which consisted of wheat in bulk, reported that they found the same in some places musty, and in the wings, wet with sea-water, but without extending far into the bulk of the cargo; and they recommended that the whole of the wheat should be put into bags, and brought on shore, in order that it might be ascertained how much thereof was in a fit condition to be reshipped, and what proportion

thereof was in a perishable state. That in pursuance of such recommendation, the cargo was in part unladen, when by the like authority, a survey was had of the ship and cargo, for the purpose of ascertaining the manner of the storage and the dunnage of her cargo, and particularly of the wheat in bulk; and also for the purpose of acertaining the condition of the said ship, and the mode and extent to which she had sustained damage, and what repairs were necessary to be made, and what should be done with the said wheat; and thereupon it was found and reported by the surveyors, who had been selected on that behalf; that the platform, bulkheads and ceiling of the wheat-bin or pen, had been substantially and protectively built, and that the same were sufficiently high from the ceiling of the ship, and also that the same were properly dunnaged underneath; but the said surveyors further reported that they further found, by examination, that a large quantity of wheat, was actually filled up between the ceiling of the bin, and the ceiling of the ship, and also between the timbers of the ship; and that the wheat had run out from the well-secured bin, through small openings of the ceiling of the bin and bulkheads, which small openings had been made from the straining of the bulkheads, in consequence of the heavy and sudden motion of the ship, in rough weather and heavy seas encountered by the ship on her aforesaid voyage; and that, as the wheat shifted its position to some extent during such motions, the grains were forced through such small openings. And the said surveyors recommended that the bulkheads should be taken down, the platform and the ceiling of the bin, and lumber boards taken up, and the ship's bottom perfectly cleaned out from wheat; and that the wheat below the ceiling, being entirely impregnated with salt water, and without any value, should be thrown away, to save further expenses thereon. That the said cargo was accordingly in great part landed (including all the wheat, except what was so thrown away); a further survey was directed by said commercial agent to be made of said cargo, to ascertain its state and condition, and what was the best to be done with the whole or any part of said cargo, for the benefit of all concerned; and thereupon competent, proper and judicious surveyors, in compliance with the direction to survey as aforesaid, did carefully examine and survey said wheat, which had been so landed, and being of opinion that the same was sound, the said surveyors recommended it all to be reshipped. That upon a former examination of the wheat on board of said ship, it had been found in some places to be musty; and the surveyors then acting, recommended that the whole of said wheat should be put into bags and brought on shore; which had accordingly been done, so that the wheat, when examined on the wharf, and recommended and approved by said surveyors, was already in bags, and when reshipped, it was accordingly reshipped in bags; and so much of said wheat was accordingly reshipped, as it was practicable, safely and properly to reship; but that it was necessary to leave out eleven hundred and sixty-nine bags in restowing the cargo, for want of room; which wheat thus left out, the said surveyors recommended should be sold at St. Thomas, for the benefit of those concerned, as no vessel could be procured to carry it to its destination, except at an exorbitant rate of freight. And said bags of wheat so left out were afterwards sold in conformity with such recommendation, and the proceeds thereof were paid over or remitted to the libellants. And the respondents, therefore, as to the quantity of twenty-nine hundred and thirty-six bushels of wheat mentioned in the libel as not delivered, said that part thereof was lost during the voyage to St. Thomas, and at said last-mentioned place, by being delivered by the pumps, as aforesaid, and thereby becoming damaged and lost; but how much is certain was thus lost, the respondents were not able to ascertain or show with any certainty; that other part thereof was damaged by sea-water, and thrown away as worthless, but how much was thus lost, they could not state with certainty, but they were informed and believed that it was a considerable quantity; and that the residue was not carried in said ship because it was impracticable, safely or properly to carry the same on said ship, and it was sold because it was really best for the interest of those concerned.

The following protest of the crew and officers of the ship was filed with the answer: "At sea, November 6, 1851, at noon. To Captain Binney: We, the undersigned, officers and crew of the ship Cheeseborough, of Baltimore, do hereby make our complaint, that for two or three days we have observed that wheat came out of the pumps at times, so we have to keep drawing the pumps repeatedly; but to-day it has come out in large quantities, so that we have to be continually drawing the boxes to get out little water. At noon, we found that all the pumps choked, and impossible to get the water out of the ship. We, therefore, think it best for the safety of the ship and cargo, to go to the first port to save life. We are all willing to stay by the ship to save cargo and ship to the last, provided that our petition is granted to us; we think it impossible to keep the pumps from choking, as it is growing worse and worse all the time. Your obedient servants, &c. (Signed by the crew and officers.)" The decree of the district court (Glenn, J.) was in favor of the libellants, from which an appeal was taken, and argued before this court.

J. V. L. McMahon and Brown & Brune, for libellants.

Wm. Schley, for respondents.

TANEY, Circuit Justice. The appellants in this case, who were the respondents in the district court, are the owners of the ship Cheeseborough, which sailed from Baltimore for Liverpool, on the 30th of October, 1851. The appellees were libellants in the court below. They shipped by the Cheeseborough, on this voyage, a large quantity of wheat in bulk; the wheat, however, did not load the vessel, and part of her cargo consisted of tobacco, flour and other articles, shipped by other persons.

It appears from the testimony, that the ship was detained (it is presumed by contrary winds) in the Chesapeake Bay; for she did not get to sea until the 4th of November. She went to sea with a fine strong breeze; but during that night, the wind increased, the sea became more rough, and the topsails were double-reefed; the next day, she had strong gales and a heavy sea, in the Gulf Stream, the vessel shipped a great deal of water, and rolled and pitched heavily; and on the afternoon of that day, a good deal of wheat was brought up by the pumps. On the third day out, the pumps choked from the quantity of wheat that got into them, and on the night of that day, the officers and crew presented to the captain a written request to put into the first port; stating in their application, that for two or three days they observed wheat drawn up by the pumps; that on the day before, a large quantity was brought up, and on the day they made the request, the pumps had choked; in speaking of days in this application, the seamen, of course, mean sea-time. The master did not, however, yield immediately to this application, but continued on his course, in the hope that he would be able to reach Liverpool in safety. But the pumps became almost useless from the quantity of wheat that escaped from the bin, and finding from an examination, made on the 11th of November, that the wheat was damaged, and some of it entirely spoiled, that the vessel had become loggy, and that the water was increasing in the hold, he determined to steer for the nearest convenient port, and arrived at St. Thomas on the 13th of the month.

Upon the arrival of the vessel at that port, it appeared, upon examination, that she had two feet of water in the hold, and the space between the bottom of the bin and the skin or ceiling of the vessel was filled up with wet and damaged wheat, which was spoiled and had become offensive in its odor. It was found necessary, upon survey, to unlade the vessel, in order to cleanse her from the damaged and putrid wheat, and put her in a condition to pursue her voyage to Liverpool. The wheat was landed in bags, the sound and undamaged part of the cargo separated from the rest, the damp and swollen part, which it was supposed could be saved, was placed in bags marked with a cross, and the portion which had become utterly spoiled was thrown in the sea, under the orders of the local authorities. After the vessel had been properly cleansed and refitted, the cargo was reshipped, and the vessel pursued her voyage to Liverpool, where she arrived safely and delivered the cargo in good order. The wheat was reshipped in bags, and owing to the want of proper contrivances at St. Thomas, for stowing the hogsheads of tobacco, as compactly as had been done at Baltimore, and owing also to the greater space occupied by wheat in bags, beyond that required for the same quantity in bulk, it was found impossible, upon reloading the vessel, to take on board the whole cargo, and eleven hundred and sixty-nine bags of the wheat marked with a cross were unavoidably excluded; in the language of one of the witnesses, the ship was chock and block full without them. The master, finding himself unable to take those bags, directed them to be sold at St. Thomas, at public auction, and took with him the proceeds of this sale to Liverpool, and paid them over to the libellants, under an agreement that the acceptance of this money should not prejudice any lawful claim they might have to a larger compensation for the loss they had sustained. And this suit is brought to recover the value of the wheat thrown away or sold at St. Thomas, upon the ground that the loss was occasioned by the negligence or misconduct of the ship-owners or their agents, or the want of seaworthiness in the ship, and that they are chargeable, therefore, with the amount which this portion of the wheat would have been worth if it had been brought to Liverpool safe and uninjured. The respondents, on the contrary, insist that the loss was occasioned by the perils of the sea, and that they are not liable for it as carriers, under the bill of lading.

The bill of lading is in the usual form; and as a loss by the perils of the sea is an exception to the undertaking of the carriers to deliver the cargo safely at the port of delivery, it is undoubtedly incumbent upon the respondents to show, that the loss in question was occasioned by such peril, otherwise, they are liable for the whole damage sustained by the libellants. The libellants insist that there is no sufficient proof of any storm or peril of the sea, that could have produced this disaster; and it has been argued, that it must have arisen, either from carrying too much sail, and thereby straining the ship, the first day out, when she appears, by the log-book, to have been pressed so rapidly through the water, or from some defect in the construction of the bin, or in the arrangement of the pumps.

It is true, that the storm was not violent enough to dismast her or to carry away her sails; but the evidence shows that it blew heavily, that the sea was rough, and that the vessel was rolling and pitching in it, before any inconvenience was experienced from the wheat in the pumps.

There is not the slightest evidence that the

ship was strained by carrying too much sail in heavy weather; and the proof is positive and uncontradicted, that the bin was constructed by one of the most experienced ship-joiners in Baltimore, and was examined by him and the master of the vessel, before the wheat was put in, and found to be without fault; and their judgment is confirmed upon the survey made at St. Thomas after the wheat was unladen, and the construction of the bin examined by the surveyors; and the proof is equally positive and uncontradicted, in relation to the sufficiency, and indeed, the excellency of her pumps.

Now, trying this case upon the testimony before the court, the conclusion is inevitable, that the loss was occasioned by the perils of the sea; for the ship is proved to have been among the strongest ever built in Baltimore; and if the bin was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her, there is nothing but the perils of the sea to which the disaster can be imputed. The master and the surveyors at St. Thomas attribute the damage sustained by the cargo to this cause; and this conclusion is further strengthened by the fact, that this ship, strong as she was, had been so strained by the rough weather to which she was exposed, that she leaked considerably more than at the beginning of the voyage, and required a good deal of caulking in her upper works, to enable her to proceed from St. Thomas to Liverpool.

No doubt a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargo; and she may be disabled from proceeding on her voyage by encountering winds and waves, through which a different cargo might pass without injury to the vessel or cargo. But it is not suggested that vessels of a different description from this, or differently fitted out, or differently laden, are required to transport wheat in bulk. And if there was no fault in the ship, or in her equipments, or in the stowing of the cargo, or in the manner in which she was navigated; and if every precaution was taken which is usual and customary in transporting such a cargo, I see no ground upon which the ship-owners can be charged with the loss. [Clark v. Barnwell] 12 How. [53 U. S.] 282, 283.

It is true, that in the written application of the crew to the master, to put into the nearest port, which was presented on the night of the third day out, they stated that they had, for two or three days before, observed wheat brought up by the pumps; and this statement would seem to imply that wheat had been leaking from the bin before the vessel was exposed to the rough weather spoken of in the testimony. If this was the case, it must undoubtedly have arisen from the imperfect construction of the bin, and the respondents would be answerable for all the damage sustained by the cargo. But these loose expressions in a paper of this kind, cannot outweigh the positive testimony of the witnesses examined in the case, and who testify to the sufficiency of the bin, and to the occurrence of strong gales and heavy seas, before any inconvenience was experienced from the wheat.

Nor do I see anything in the conduct of the master at St. Thomas, of which the libellants have cause to complain. It was obviously necessary to unlade the ship; and every precaution appears to have been taken to preserve the wheat from further damage. It could not be reshipped in the bin, as the whole cargo would inevitably have been lost, if the damp and damaged portion of the wheat had been mixed in bulk with the good. It was, therefore, absolutely necessary that it should be shipped in bags; and it is by no means clear, that the bags left behind could have gone in safety to Liverpool, if shipped with the rest of the cargo; for it appears that the wheat in some of them (how many is not stated) was still swelled and sticking together in cakes, when it arrived at New York. The surveyors, indeed, thought that it could all go safely to Liverpool; but the master thought otherwise; and I am inclined to think he was right.

However this may be, they were unavoidably left out, for the ship would not hold them; in the language of one of the witnesses, she was full, chock and block, without them; and, as they could not be transported in the Cheeseborough, it was evidently the interest of the owners to sell these bags of wheat at St. Thomas. There is no trade between Liverpool and St. Thomas, and there was, therefore, no prospect of shipping them from that port, unless a vessel was chartered for the special purpose; and the proof is, from those whose business required them to charter vessels, that they would not have engaged to charter one to take on board this wheat, in sixty days, at the rate of one dollar and fifty cents per bag, each bag containing only about two bushels. If they had been carried to Liverpool at such a freight as this, and the wheat, when it reached the port, found to be in the damaged condition in which it reached New York, it would probably have been a losing voyage to the owners; if it had been left in store at St. Thomas until the owners could be advised of the condition in which it was, the expense of storage would have been added to that of freight. The most judicious course, therefore, and the one most for the advantage of the owners, was to sell it at St. Thomas. This was done by the master, and the money accounted for and paid over; the sale appears to have been perfectly fair and for a fair price, and the conduct of the master, from the time the disaster happened, appears to have been not only honest and upright in intention, but marked also by much prudence and caution. The damaged wheat was placed in suitable

places to dry, and when he found that all of it could not be taken to Liverpool, the best of the damaged bags were carefully selected, and stowed on shipboard in the manner best calculated to protect the wheat from future injury. I see nothing in any part of his conduct of which the libellants have a right to complain; his duty to the shippers as well as to the ship-owners, appears to have been faithfully and judiciously performed; and there is nothing in the evidence to show that either party sustained the slightest damage from anything he did or omitted to do at the port of distress. The decree of the district court, therefore, must be reversed, and the libel dismissed with costs.

HOOPER v. The SAM SLICK. See Case No. 12,283.

HOOPER, The NATHANIEL. See Cases Nos. 10,030–10,032.

HOO SUE (LLOYD v.). See Case No. 8,432.

HOOVER (MANNING v.). See Case No. 9,044.

Case No. 6,677.

HOOVER et al. v. REILLY et al.

[2 Abb. U. S. 471.] [1]

Circuit Court, E. D. Michigan. June Term, 1870.

MISTAKE—REFORMATION OF AGREEMENT.

1. Where an agreement between two parties was reduced to writing, and read over and signed by the complainant, it is not sufficient in a suit in equity for the reformation of such agreement, for the complainant to allege that he supposed the terms of the written agreement were, in legal effect, the same as the true terms of the agreement previously entered into by the parties. Such a mistake is one of law, and not of fact; and will not warrant the interference of a court of equity.

[Cited in Morgan v. Bell (Wash.) 28 Pac. 931.]

2. What evidence is sufficient to warrant the granting of relief by a court of equity in a suit to reform a written agreement, on the ground of mistake,—explained.

Hearing in equity, upon pleadings and proofs.

The bill in this case was filed to reform a written contract. On November 13, 1865, complainants purchased of defendant Reilly an undivided one-fourth interest in a patent right for an improvement in harvesting machines, for five thousand dollars, as follows: Two thousand dollars, cash; five hundred dollars, note due March 1, 1866; and twenty-five hundred dollars, note due January 1, 1867. A written agreement was also entered into between the parties, in which, after reciting the terms of purchase as above set forth, it was provided as follows: "It is expressly understood and agreed, by and between both parties, that in case the validity of the claims, as set forth in the re-issued patent granted to the said John Reilly, should be declared null and void by the supreme court of the United States, and the protection thereon granted become worthless, then the said D. H. Hoover & Son" (the complainants), "shall be released from all responsibility of paying the last-mentioned note of twenty-five hundred dollars, and it shall be null and void." The bill alleged that this instrument was erroneous, and did not contain the true terms, nor all the terms of the agreement as actually entered into by the parties, in this: (1) Instead of the note remaining good and payable, in case the letters patent should not be declared invalid by the supreme court of the United States, as provided in effect by said agreement, the real agreement and contract was, that the said note was not to be paid until a competent court should declare, by judgment or decree, that the said patent was valid. (2) That the said instrument omits entirely to state that the said Reilly was to commence a suit immediately, for the purpose of testing the validity of the said letters patent, as was really and in fact agreed upon. The bill further alleged that the defendant Reilly drew up the said agreement, and that in doing so, he "fraudulently" made the alteration and omission above mentioned, and that complainants signed it "under a mistake, they believing when they signed such paper that it contained all the conditions," &c.; "that complainants are unlearned in the law, and that when they read said paper, as drawn by said Reilly, they believed the clause inserted therein making said note void, in case the patent was declared null and void by the supreme court of the United States, to be, in effect, what had been previously agreed upon between the parties," &c. The bill further alleged that suit had been commenced on the note mentioned in the agreement in the name of the defendant Reilly, for the benefit of the defendant Moore; that the defendant Reilly had not commenced suit to test the validity of his patent, and no judgment or decree of any court had been obtained declaring the same to be valid; and prayed that said written agreement might be reformed in accordance with the real intention of the parties, as set up and claimed in the bill, and for an injunction restraining the further prosecution of the suit upon the note. The bill did not call for an answer on oath, neither did it expressly waive an answer being put in on oath. The answer, however, was on oath, and it expressly denied all the material allegations in the bill as to there being any omissions or errors in the said written agreement; and alleged that said instrument set forth correctly the agreement, and the whole thereof, as it was concluded between the parties; that the complainants had not by their bill made a case requiring the interposition of the court, and defendants prayed the same benefit of this defense as if they had de-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

murred, &c. A replication was put in and proofs were taken; on which the cause was now heard.

Mr. Fisher and Mr. Oliver, for complainants.

Moore & Griffin, for defendants.

LONGYEAR, District Judge. The case made by the bill is, not that complainants were mistaken as to the words or language of the written agreement, but that they misapprehended its legal effect. They concede that they read it, and allege in express terms that they believed a certain specified clause to be in effect, what they allege the real agreement was. There can be, therefore, and is no pretense that there was any mistake of fact in the case. It was purely a mistake of law. The bill does not allege that the belief so entertained by complainants as to the legal effect of the language used, was induced or brought about by any device, statements, representations, or expression of opinion of the defendant Reilly. True, it is alleged that Reilly "fraudulently omitted," &c., and that certain provisions were "fraudulently omitted by said Reilly from said paper," &c. But these allegations relate exclusively to Reilly's acts in drawing the paper, and not in any manner to anything he did or said afterwards or at any time to induce in the minds of complainants the erroneous belief which they say they entertained. Neither can it be seriously contended that those are sufficient allegations of fraud upon which to base a prayer for a court of equity to exercise the high powers here invoked. The mere writing of the agreement different from what it was intended to be would be a mistake, an error, but not necessarily a fraud; and yet from aught that appears in the bill, this is all there was of it. There is no allegation of any concealment or misrepresentation as to the language used, but on the contrary the complainants had it in their possession, perused it, and, without any undue influence, concealment, surprise, or imposition whatever, formed a deliberate opinion as to its legal effect, and were satisfied with it.

The complainants then, by their bill, seek to have the written agreement reformed solely on the ground that, knowing what it contained and all its provisions, they signed it under a mistaken belief as to its legal effect. The case might perhaps appear more plausible if the language used were uncertain or ambiguous in its meaning, or of doubtful construction. But such is not the case. It is plain and explicit, and such that any person of even less than ordinary intelligence, although not learned in the law, could not fail to comprehend.

Although there are some decisions which would seem to be to the contrary, yet the law is well settled that agreements made and acts done under a mistake of law, stripped of all other circumstances, without any admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that kind of surprise which equity uniformly regards as a just foundation for relief, are held valid and obligatory. Adams, Eq. 189–191; 1 Story, Eq. Jur. §§ 16, 120, 151; Lyon v. Richmond, 2 Johns. Ch. 51, 60.

The case at bar comes clearly within the law as above stated, and, as made by the bill, is not such as to entitle the complainants to the relief prayed for. If, however, we pass beyond this aspect of the case, and look into it as a question of fact, the result must be the same. The case in this aspect, no doubt, comes clearly within a well-recognized branch of equity jurisdiction; but before the court can be asked to decree an agreement to exist between parties different from that which they have put in writing, a mistake in the written instrument must be clearly made out by proofs entirely satisfactory. "But," says Mr. Story, "if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief; upon the ground, that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." Mr. Story further says of this rule, "It forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions." 1 Story, Eq. Jur. §§ 152–157; citing numerous cases, English and American. See, particularly, Gillespie v. Moon, 2 Johns. Ch. 585–597; Lyman v. United Ins. Co., Id. 630, 634.

Apply this well established rule to the present case, and how does it stand? The mistake alleged in the bill, or any mistake whatever in the written instrument, is expressly denied by the answer. The bill does not expressly call for an answer on oath; neither does it expressly waive an answer on oath; it is entirely silent upon that subject. This was, of course, a defect in the frame of the bill, but the defendants having waived the defect and submitted to answer, their answer must be on oath, the same as though it had been so expressed in the bill, because, by rule 105 an answer on oath is not waived unless it is so expressed in the bill. By well known rules of equity pleading and evidence, the answer being strictly responsive to the bill in regard to the alleged omissions and errors in the written agreement, is evidence for the defendants, and can be overcome only by a clear and undoubted preponderance of proof.

The complainants and the defendant, Reilly, were sworn as witnesses. Upon a full and careful perusal of their testimony, I can see nothing in it to change the aspect of the case, as it was left by the pleadings. It is equally contradictory, and of no greater force or effect than the pleadings.

There were but two other witnesses who testified in the case; Mr. Eminger, on the part of complainants, and Mr. Robinson, on the part of defendants. Each of these witnesses testifies, that he was present and heard all that transpired between the parties; and the testimony of each is almost, if not quite, as directly in conflict with that of the other, as the testimony of the parties to the suit. The testimony of Robinson is, however, much the more pointed, specific, and satisfactory.

Eminger testifies upon the main point in controversy, as follows: "For the balance, a note was to be given, payable January 1, 1867, providing Mr. Reilly sustained his claims before a competent court. Afterwards, but before the contract was signed, he repeatedly asserted that the Messrs. Hoover should not pay said note unless his claim was sustained by the court." "After the papers were signed, Mr. Reilly again said, that the Messrs. Hoover should have no uneasiness concerning the last note, that he would never ask them to pay a dollar on it unless his claim should be sustained in court." And in a conversation witness had with Reilly after the contract was signed, he said, "You see I don't want anything but what is fair from the Messrs. Hoover, and that unless I make my claims good, I shall never ask them to pay a cent on the note." Thus far we are left entirely to inference, as to whether an adjudication was to be brought about by a suit to be instituted by one party or the other, and if so, by which party; or, whether it was left contingent upon a suit to be commenced by some other party. But inference is not sufficient ground upon which to do away with or reform a written agreement. As we have seen, the proof must be clear and positive. But this witness gives us a little more light upon the subject. He says, "Mr. Reilly did say that he wanted money to prosecute parties who were infringing upon his patent, meaning Mr. Seiberling, and that he would immediately, as soon as he got matters arranged at home, notify the parties, and if they did not agree to pay him royalty, he was to prosecute them in the highest courts, and thereby test the validity of his patent. It was also the understanding, that the contemplated suits should be or were a part of the contract, and that unless he made his claim valid, he would never ask the Messrs. Hoover to pay the last note of $2,500."

What "contemplated suits" are here referred to? Of course, those mentioned just before, that is, suits to be commenced by Reilly, in the contingency that parties infringing his patent, on being notified, did not agree to pay him royalty. As to what was to be done in regard to commencing suits in case such parties did agree to pay him a royalty, we are left entirely in the dark. The only inference we can draw from this testimony is, that if parties so infringing did agree to pay royalty, then no suits were to be commenced. And this is really the common sense of the thing after all. Let this be inserted in the contract just as testified to by this witness, in lieu of the provision as it now stands, and it would make no material change in the legal effect of the agreement as a whole.

The testimony of Robinson is much more explicit and satisfactory, and it contradicts Eminger in every important particular; and as he stands before the court on an equal footing with Eminger, as to credibility, his testimony at least neutralizes that of Eminger; and it may be further said, that, being in conformity with the written agreement, it is for that reason of greater weight than that of Eminger, which is in opposition to it.

The proofs therefore, do not bring the case within the rule of law above stated, under which relief may be granted in such cases, and for that reason, as well as for the reason before stated, that the bill does not state such a case as equity will relieve against, the bill must be dismissed, with costs to the defendants. Let a decree be entered accordingly.

HOOVER (WELCH v.). See Case No. 17,368.

HOOVER (YOUNG v.). See Case No. 18,158.

Case No. 6,678.

The HOPE.

[2 Gall. 48.] [1]

Circuit Court, D. Massachusetts. May Term, 1814.

CUSTOMS DUTIES — FORFEITURE — KNOWLEDGE OF MASTER—NON-IMPORTATION ACT.

1. The master of a ship is not a competent witness in an information in rem for a forfeiture occasioned by his misconduct. See Dunl. Adm. Prac. p. 248, c. 10.

[Cited in The Boston, Case No. 1,673; The Nymph, Id. 10,389; McKinney v. Neil, Id. 8,865; The Peytona, Id. 11,058; Patten v. Darling, Id. 10,812.]

2. Circumstances of presumption of master's knowledge of illegal goods being on board.

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

[This was a libel by the United States against the schooner Hope (Ritchie and Carson, claimants), for having imported and concealed on board goods of British manufacture, contrary to the existing nonimportation laws. The district court entered a decree in favor of the claimants, and the United States appealed.]

G. Blake, for the United States.

E. Rockwood, for claimants.

STORY, Circuit Justice. The schooner Hope has been seized, as forfeited for a violation of the sixth section of the non-importa-

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

tion act of March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]. From the evidence it appears, that in the latter part of the year 1812, the schooner was captured on a voyage to Spain, carried into England for adjudication, and there finally restored. She afterwards sailed from England, apparently without any cargo, having passengers on board, who had been prisoners of war, and arrived at Boston in August, 1813. On her arrival, she was reported as in ballast, and her manifest contained no statement of any British merchandise being on board. On search, however, in the cabin, under the berths of the master and mate, divers goods of British manufacture were found concealed, which were seized, and, no claim having been interposed therefor, the same have since been condemned and sold for about $1890. At the time of the seizure some of these goods were claimed by the master as his own property and some as the property of the mate and passengers. The goods claimed by the master were found in the same places, where the others were concealed, and the rule must apply, noscitur a sociis. It is an almost necessary presumption, that the master knew, where his own goods were; and if so, it is extremely difficult to suppose him ignorant of the concealment of the other packages. It was his duty to exercise every diligence in order to avoid involving the ship in the severe penalties imposed by law upon illegal importations. If these goods had been concealed in unusual places, to which the master might not be supposed to have had ordinary access, there might be some color for asserting his ignorance of the contents of the other packages. But here the very goods claimed by himself have been abandoned on account of their illegal character, and the other packages must, in a mind not wilfully blind, have attracted the strongest suspicions. The master had a right to know their contents, and being put upon inquiry by circumstances calling loudly for it, I must presume that he had full knowledge of the illegal character of the packages, and meant to take upon himself the peril of detection.

I regret, that I cannot see this case in the same favorable light, as the district court. The owners of the schooner do not appear to have had the slightest connexion with this illegal traffic: and it is unpleasant to visit upon them the penal consequences of acts, in which they took no part. But I cannot bend the rules of law to cases of individual hardship. My duty leads me through a harsh and narrow path; but I have the consolation to know, that another avenue is open to a department, which has the power to temper the severity of the law, and yield relief to innocent sufferers. It has been intimated, that if the court should be of opinion, that the master is a competent witness, and would indulge the parties with an opportunity, his testimony could be procured, to prove his ignorance of the illegal merchandize being on board. But even if competent, I cannot say, that the naked denial of the master, standing (as it should seem) in vinculis, could outweigh the other strong circumstances of the case. How could the master be believed, if he should deny his knowledge of his own adventure? I am, however, of opinion that in this case the master is not a competent witness. He is called to exempt the ship from a forfeiture, occasioned by his own illegal conduct. He has therefore a direct interest in the event of the suit; and the decree of condemnation would be good evidence in a suit brought against him by his owners. The better opinion in the authorities, in my judgment, supports this doctrine. Fuller v. Jackson, Bunb. 139; Spong v. Fasting, Id. 203. Vide, also, Green v. New River Co., 4 Term R. 589; Bird v. Thompson, 1 Esp. 339; Rickson v. Sandforth, Bunb. 139, note; Taylor v. McViccar, 6 Esp. 27. I reverse the decree of the district court, and adjudge the schooner Hope and appurtenances to remain forfeited to the United States.

HOPE (COLLINGS v.). See Case No. 3,003.

Case No. 6,679.

HOPE et al. v. The DIDO.

[2 Paine, 243; 2 Hunt, Mer. Mag. 169.] [1]

Circuit Court, S. D. New York. Dec., 1840.

SALVAGE—WHAT CONSTITUTES—PILOTS—PILOT GROUND.

1. Whether the towing into port of a vessel exposed to the perils of the sea without a rudder, can be considered a salvage service, will depend upon whether, by the loss of her rudder, she was rendered innavigable.

[Cited in The Alaska, 23 Fed. 603, 605.]

2. Pilots may become salvors; but they must first strictly discharge their duty as pilots; and the circumstances under which they may claim to be considered as salvors, must be such as require efforts, perils to be encountered, labor or skill, out of the line of their duty. If, in such case, they act under an agreement for extra compensation, they are thereby precluded from claiming as for salvage service. Where, however, there has been extraordinary personal merit or effort, or unforeseen exertion and hazard in the performance of the service, they are not absolutely concluded by such agreement; but a court of admiralty may, in its discretion, grant them an extra allowance.

[Applied in The Warren, Case No. 17,193. Cited in Flanders v. Tripp, Id. 4,854; The Alaska, 23 Fed. 603. Approved in The Cachemire, 38 Fed. 523.]

3. The limits of pilot ground are not fixed by any rule of law, but depend upon usage or custom; and that usage is not settled and uniform, but varies according to circumstances.

This was a case in admiralty [by Edward Hope and others against the brig Dido and her cargo], tried before the district court, in which a decree was made in favor of the claimants [case unreported], and came up on

[1] [Reported by Elijah Paine, Jr., Esq. 2 Hunt, Mer. Mag. 169, contains only a partial report.]

an appeal yesterday, before the circuit court. The full particulars of the case are set forth, as below in the following.

E. Paine, for pilots.

W. Q. Morton and D. Graham, Jr., for claimants of vessel and cargo.

THOMPSON, Circuit Justice. This case comes up on appeal from the district court of the United States for the Southern district of New York. There are cross appeals. The appeal taken on the part of the claimants of the brig and cargo, is upon the ground, as is alleged, that the case as made out by the libellants, is not one entitling them to salvage compensation. And the appeal on the part of the libellants is on the ground that the libel upon the cargo was dismissed with costs. The libellants, who were pilots of the port of New York, filed their libel against the brig Dido and her cargo, claiming salvage or pilotage, or compensation out of the same, for services rendered in towing the brig into the port of New York; having taken her up about twenty-five or thirty miles from the Hook, and then being about ten miles from the shore, having lost her rudder, but had sustained no other damage whatever, and was in all other respects well found. The testimony with respect to the distance of the Dido from the Hook when she was boarded by the pilot, is somewhat at variance; but the view which I have taken of the case, does not make it necessary that I should fix with precision the place where the vessel was boarded. The position as above stated is probably correct, and at all events, is sufficiently precise for all the purposes of this opinion.

The first case that presents itself, is whether this is a case for salvage compensation for the services rendered, so as to uphold the attachment of the vessel and cargo, or either of them, to enforce payment of the compensation. As has been already observed, the only injury which the Dido had sustained, or the only peril to which she was exposed, was being to sea without a rudder—being completely manned and equipped in every other respect. And whether towing in a vessel in this situation could properly be considered a salvage service, would seem to turn upon the question, whether she was thereby rendered innavigable; if she had become innavigable, the service ought to be considered a salvage service. The towing her into port would, in such case, in all probability be saving her from shipwreck, or some impending peril, which threatened either a certain, or strongly probable loss. But if the vessel was navigable, so as to be able to avoid any threatened danger, although navigated with greater difficulty and delay, it ought not to be considered a case for salvage. I assume the principle that the libellants being pilots, forms no insuperable objection against their claiming salvage where a proper case is made out. The appropriate duty of a pilot is to navigate the vessel; and if it was innavigable, his services as pilot could not be required. But wherever pilots are permitted to become salvors, public policy requires that they should be held strictly to the discharge of their duty as pilots, before they are permitted to become salvors, as is said by Mr. Justice Wayne, in the Case of the Ship Alexander [1] referred to in the argument. That pilots must, in all cases, before they can become salvors, go to the extreme point of their duty; and the circumstances of the case in which they may claim to be considered as salvors, must obviously be such as require efforts, perils to be encountered, labor or skill out of the line of their duty; and in that case, the judge said the vessel was in imminent peril, and that the service rendered saved her from impending wreck; and this view of the cases in which pilots may become salvors is fully borne out by the case of Hobart v. Drogan, 10 Pet. [35 U. S.] 108 in the supreme court of the United States. It would be difficult to bring the case of the Dido within the rule here laid down, if the service of towing had been rendered within what was admitted clearly within pilot grounds; but that is a point in dispute, and which will be hereafter noticed. The evidence shows most satisfactorily that it was not an uncommon thing for pilots to tow in vessels for which extra pilotage or compensation was given. The district court seemed to assume that the Dido was innavigable. The vessel, says the court, "had lost her rudder, and was without any substitute by which she could be steered so as to make any given course. Her movements were fortuitous, and she required some external power to aid in bringing her within the port; and that was effected by the agency of the pilot-boat, and could have been done by any other vessel of equal power, directed by any person not a pilot." Suppose a steamboat had gone out and towed in the Dido, as the pilot-boat did. It would not have presented a case for salvage, and authorized attaching the vessel and cargo. But in the absence of any specific agreement, the compensation for the services might have been in the common law courts, or in the admiralty, by proceedings in personam.

I cannot consider this a salvage service which will subject a vessel and cargo of the value of $150,000 to admiralty proceedings in rem, exposed to all the inconvenience and expense necessarily attending such proceedings, which are strongly exemplified by this very case, where the marshal's fees alone upon the service amounted to about $1,300. All this, however, must be submitted to, if the law has provided no other redress, or the libellants have not, by their own act, waived this mode of redress, if it ever existed. The

[1] Case No. 8,153.

view which I have of this case does not require me to decide whether the service rendered was, strictly speaking, a pilotage service. To decide this point it might be necessary to settle two distinct facts, viz.: whether the libellant, Hope, entered upon the service as a pilot, and what, properly speaking, is pilot ground, or the limits within which pilots are bound to cruise. Upon both these questions there is much uncertainty from the evidence. I would, however, observe, that if Hope went on board the Dido, professing to act as a pilot, and so gave Captain Adams to understand, expecting to receive extra compensation for towing the vessel, he thereby precluded himself from claiming as for salvage service, although towing might not, strictly speaking, fall within the duty of a pilot. And this construction would be strongly fortified by the uncertainty as to the limits, properly speaking, of pilot ground; upon which point the evidence is very unsatisfactory. These limits are not fixed by any rule of law that I am aware of; it must depend upon usage or custom, and that usage does not appear to be settled and uniform, but varying according to circumstances. When there was little or no competition among pilots, these limits were contracted within a short distance, and frequently much further than the distance at which the Dido was boarded. And, indeed, the pilot in this case swears that he had often been out as far as where he boarded the Dido, cruising for vessels, and in such cases he charged extra pilotage allowed by law. The weight of evidence, I think, is, that pilot ground has been generally understood as extending three or four miles outside the bar. But I would not be understood as at all settling that question in this case. But the ground upon which I place my opinion is, that the pilot, when he entered upon the service, or at any time during its performance, did not understand, or pretend that he was acting as a salvor, or entitled to a salvage compensation; and that, even admitting that his services might have been in the nature of salvage service, he, by his agreement and course of conduct in relation to his compensation, has precluded him from now setting himself up as a salvor, and enforcing his claim in a court of admiralty by proceeding in rem. I do not mean to be understood that, if there had been any extraordinary personal merit or effort, or any unforeseen exertion and hazard in the performance of the services, that the libellants should be absolutely concluded. This might then be a question resting in the sound discretion of a court of admiralty, having in view the equity and justice of the case and the reasonableness of the compensation. But, in the absence of any such circumstances, there can be no reason why a party should not be held to a waiver of the lien. Even if it should be admitted that this might possibly be considered a salvage service, it is of a doubtful character, and cannot be viewed as one of extraordinary merit by saving the vessel and cargo from certain or even probable loss, and is not one calling upon the court, upon principles of sound public policy, to make a liberal allowance, or, in measuring the compensation, to depart from what may fairly be presumed the understanding of the parties with respect to the compensation. But there are no extraordinary or unforeseen circumstances in this case calling upon the court, upon any principles of public policy, or the abstract justice and equity of the particular case, to depart from the agreement made by the parties themselves relative to the compensation.

Thomas and Edward Hope, Capt. Adams and Mr. Boyd and several others, were present, when the master was before the board of wardens, and it was mutually agreed by all the parties that it should be left to the wardens to award the compensation the libellants should receive. It was made a question in the court below, and on the argument here, whether this was a case coming within the jurisdiction of the board of wardens, the district court considered it a case not coming within the jurisdiction of the board of wardens, because it was a case of salvage and the jurisdiction of that board extended only to cases of pilotage. And, in my view of the case, it is unimportant to decide this question, because the parties, by their acts and agreements, have mutually submitted the matter to the wardens for their decision; and it comes within the spirit of what the pilot himself says was the understanding when he entered upon the service, that if he and the captain could not agree upon the compensation, it should be submitted to some third person to decide. And the appearance and hearing before the wardens was adopting that board as the third person ultimately to decide the question; and the result of my opinion is, that the award or decision of the wardens is the compensation which the libellants are entitled to recover; and the question of costs under all the circumstances, and considering the great amount to which they have accumulated, becomes a very important point in this case.

The decree of the district court having been reversed, so far as it considers the service a salvage service, for which the vessel was liable, and is substantially affirmed so far as it dismisses the libel against the cargo, the decree of this court may be considered an affirmance in part and a reversal in part of the decree in the district court, and no cost on the appeal allowed on either side against the opposite party. And the decree of this court being in favor of the libellants for $162 50, the amount of compensation allowed by the wardens would entitle them to recover costs, had that amount not been tendered and refused by libellants. But this offer of payment will, I think, discharge them from payment of costs. And, under this

view of the case, the result will be a decree in favor of the libellants for $162 50, and in favor of the claimants for the costs in the district court on dismissing the libel against the cargo.

NOTE. In the case of The Emulous [Case No. 4,480], Judge Story, in speaking of the rate of compensation for salvage service, said: "The subject is necessarily one in which the reward must depend upon a just estimate of all the circumstances of each particular case. The court may, indeed, assign some general limits to its discretion in certain classes of cases approaching nearly to the same general average merit. For instance, it may say, and indeed it has said, that generally, in cases of derelict, it will not allow more than one-half of the value as salvage. But extraordinary cases of great danger and gallantry may occur, in which the court would even desert this rule. On the other hand, it may say, that it will not generally award less than one-eighth, (a sum fixed by statute, as a minimum in certain cases of recapture,) unless under very peculiar circumstances. Indeed, looking to the general current of decisions, it will be found, that the court have not commonly allowed less than one-third, unless where the services have been quite inconsiderable, or the amount of the property has been very great. Still, this must be subject to many qualifications; and it will be found very difficult in practice to lay down any rules which would furnish a just guide to limit the discretion of the court. The court must endeavor to work its own way through every case, upon a comprehensive survey of all the circumstances. The circumstances entitled to most consideration in all cases of salvage, are, the value of the property saved; the extent of the labor and services; and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to by the court with uncommon favor. Lord Stowell has spoken on this subject with his accustomed force and elegance. 'The principles,' says he, 'on which the court of admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look, not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity, which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most, is the actual danger which they have incurred. The value of human life is that which is, and ought to be, principally considered in the preservation of other men's property; and, if this is shown to have been hazarded, it is most highly estimated.' On the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value. As the allowance of salvage necessarily rests very much in the discretion of the court, it is hardly possible, in many cases, that different courts, exercising independent judgment, should arrive at precisely the same conclusion. Each may exercise the most enlightened discretion; and yet, from the necessary differences of the human mind, they may differently adjust the salvage to the circumstances. On this account it has always been the disposition of the appellate courts of the United States, in all salvage cases, to discourage appeals, as mischievous and expensive to all parties. And, therefore, they generally adhere to the rate of salvage allowed in the court from which the appeal is taken, unless the evidence clearly calls for a different proportion."

Case No. 6,680.

HOPE v. EASTERN TRANSP. LINE.

[1 Wkly. Notes Cas. 394.]

Circuit Court, E. D. Pennsylvania. April 24, 1875.[1]

TOWAGE — CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY OF DEPOSITIONS.

[1. Refusal of the owner of a barge towed by a tug to go on board his barge to aid in rescuing her after she had broken adrift, *held* to prevent a recovery for her loss, if such refusal contributed thereto, unless, indeed, his refusal was based upon a well-grounded fear of endangering his life.]

[See note at end of case.]

[2. Deposition excluded in a trial at Philadelphia, it appearing that the witness generally lived in his boat, but when on land stayed in Jersey City, less than 100 miles from the place of trial.]

Motion for a rule for new trial. This was an action of trespass on the case tried before McKENNAN, Circuit Judge, for damages resulting from the loss of plaintiff's barge by reason, as was alleged, of the carelessness and want of skill of the captain of defendant's tug-boat, which was towing the barge up Long Island Sound. The plaintiff proved, on trial, that defendant's tug was towing three barges, one of which was plaintiff's, all abreast, and that, owing to roughness of weather, the captain of the tug began to let the barges out so as to tow them one behind the other, and that this latter method was the safest in bad weather. While doing so plaintiff's barge became detached from the tug, by the breaking of a hawser, and plaintiff and his hawsman, the only two people on board their barge, jumped from it on to the tug without any orders to do so. On behalf of defendant, the captain of the tug testified that he ordered the plaintiff, [Patrick F.] Hope, to go with him in a yawl on board the barge, to try to save her, which plaintiff, under apprehension of danger, refused to do; that the captain himself then went with one of his crew and remained on plaintiff's barge, occupied in efforts to save her, fifteen minutes according to plaintiff's testimony, and forty-five minutes, according to his own. The boat sank, and the defendant's captain testified that he believed that if plaintiff and his hawsman had not left the boat the barge would not have been lost. The plaintiff in rebuttal said that he did not recollect having been ordered by the captain to board his barge with him. One of the defendant's points was that "it was the duty of the plaintiff and his hawsman to aid in managing and conducting his boat, and go on board of it when he was directed to do so by the captain of the tug; and if when he was directed to go on board of his own boat to assist in managing her, he refused to do so, and his failure to do so contributed in any degree to cause the loss, the plaintiff cannot recover in any case, even though the de-

[1] [Affirmed in 95 U. S. 297.]

fendant may not have used proper care and diligence." This point was affirmed with the following qualification: "If the plaintiff declined to obey an order of the master of the tug, and his refusal contributed to the loss he cannot recover. But if the jury is satisfied that at the time an order was given to him, he was justified in an apprehension that his life would be endangered by obeying it, he was not bound to incur that hazard, and his omission to obey it would not condone the defendant's negligence." Defendant offered to read the deposition of a witness taken under a commission to New York. This was objected to on the ground that search for him had not been proved and that his alleged residence was in Jersey City, within a hundred miles of Philadelphia. Defendant on voir dire proved by its counsel that his clerk had gone out with a list of witnesses, among whom was this one, and had returned and told the counsel, that this one was not in Jersey City, and could not be found, as he was away in his boat. He lived in his boat, but stayed in Jersey City when he was on land. Objection sustained. Exception. Verdict for plaintiff for $2125.30.

Sydney Biddle (George Biddle, with him), for motion, now moved for a rule nisi. The effect of the answer given to defendant's point was that even if the jury believed defendant's testimony, viz. that the loss would not have occurred but for plaintiff's negligence in leaving and refusing to return to his barge, yet if he had a reasonable ground to apprehend that his life was in danger he was relieved from the duty of obeying the orders given by the captain of the tug. This substitutes the judgment of one who, for certain purposes, is as one of the crew, for that of the captain. All discipline must necessarily be destroyed by such a construction of the law. The apprehension was shown to be baseless by plaintiff's own statement, for he admitted having been on board the tug at least fifteen minutes after the tug's captain was on board his barge, and before she went down. As to the exclusion of the deposition the burden of proof is on the party objecting. Ridgeway v. Ghequier [Case No. 11,813].

Coulston, for plaintiff, was not heard on this motion.

Motion refused, CADWALADER, District Judge, saying that he took no part in the decision, but considered the first point as exceedingly important.

[NOTE. From this decision and the charge of the court the case was carried by the defendant to the supreme court on writ of error. 95 U. S. 297. The judgment was affirmed in an opinion by Mr. Justice Hunt. It was held that while the transportation company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply, yet the barge was under its care and management for the purpose of transportation, and subject to the judgment of its officers, and the question whether this judgment was carefully and skillfully exercised here was properly left to the jury. Where the barge was left under circumstances which involved imminent peril to the lives of those who remained on board of her, they were justified in abandoning her, and were not guilty of contributory negligence.]

HOPE, The (FALLIAGE v.). See Case No. 4,626.

HOPE, The (SKRINE v.). See Case No. 12,927.

HOPE, The (WILLIAMS v.). See Case No. 17,721.

Case No. 6,681.

In re HOPE MIN. CO.

[1 Sawy. 710.] [1]

District Court, D. Nevada. Oct. 25, 1871.

CONSTRUCTION OF LIEN LAW OF NEVADA—EFFECT OF REPEAL AFTER LABOR DONE — AMENDMENT OF CLAIM BY SETTING UP A SECURITY — WHEN ALLOWED.

1. Hauling quartz to a quartz mill is "performing labor for carrying on the mill." The lien is acquired by the performance of the work, and not by filing the notice, etc.

[Cited in Gould v. Wise, 3 Pac. 34.]

2. The repeal of the law after the lien has attached, by performance of work, does not defeat the lien.

[Cited in Brooke v. McCraken, Case No. 1,932; Tinker v. Van Dyke, Id. 14,058.]

[Cited in Garneau v. Port Blakeley Mill Co. (Wash.) 36 Pac. 463.]

3. Where a creditor, without any fraudulent intent, has, in ignorance of his rights, proved a secured claim as unsecured, he will be allowed to amend by setting up his security.

Petition of a creditor in bankrupt proceeding for leave to amend proof of his claim by setting up lien.

M. S. Stone, for petitioner.

W. E. F. Deal, for respondent.

HILLYER, District Judge. This is a petition filed by one J. A. Waddell for leave to amend the proof of his claim by setting out as security therefor a laborer's lien. Omitting such portions of the lien law as do not bear upon this case, it reads: "All persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done." St. Nev. 1869, p. 61. The mill upon which a lien is claimed, is one for crushing quartz and separating the precious metals therefrom, and the labor performed by petitioner was hauling quartz for the bankrupt to be crushed in this mill. This, it is said, is not "performing labor in carrying on the mill;" but I think it must be so considered. These laws always receive a liberal construction in favor of the laborer's lien. The labor of hauling quartz to a mill of this character is indispensable to carrying it on, and the language of the statute will not have to be strained in the least to

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

include within its terms the person performing such labor.

Another point is made upon the repeal of the law. The labor in this case was performed while the laws of 1861 and 1869 were in force, and before the commencement of proceedings in bankruptcy; but the notice and account required by the statute to be filed with the county recorder, were not filed until after the proceedings in bankruptcy were begun, and the laws of 1861 and 1869 had been repealed. On the fourth of March, 1871, the legislature passed a law which embodied all the old laws in relation to mechanic's liens, extended their provisions to a few objects not before included, and repealed all former laws on the subject, without any clause saving rights acquired under those laws. It is now claimed that the lien of the petitioner was lost, because he failed to file his notice with the recorder before the repeal of the laws under which it accrued.

In the case of Sabin v. Connor [Case No. 12,197], decided in this court, and recently affirmed on appeal to the circuit court, it was held that the lien given by these statutes was acquired by the performance of the labor, and that filing the notice and bringing suit within the time prescribed, were merely means to be used to preserve the lien and make it available; that where as in this case the legislature had in one act consolidated all the old laws on the subject of mechanic's liens, and repealed the former laws, the new act was to be considered as substituted for and continuing in force the provisions of the old laws, rather than to have abrogated and annulled them,—citing Steamship Co. v. Jolliffe, 2 Wall. [69 U. S.] 450, and Wright v. Oakley, 5 Metc. (Mass.) 400,—and that if it were otherwise, it must be held that the effect of the repeal was to blot out the old laws "as completely as if they had never been enacted," and the repealing act itself would be void so far as it impaired the obligation of the defendant's contract by taking away from him all remedy for its enforcement. These principles are decisive in this case. The laws in force at the time the petitioner made his contract and performed the labor under it, were part of the contract. These laws gave him a lien upon the mill as a security for the wages of his labor, and when this lien is taken from him nothing of any value remains of the obligation of his contract. McCracken v. Hayward, 2 How. [43 U. S.] 608; Bronson v. Kinzie, 1 How. [42 U. S.] 311; Smith v. Morse, 2 Cal. 524; Quackenbush v. Danks, 1 Denio, 128.

But the assignee insists that, admitting the petitioner had a lien, he has waived and surrendered it by proving his claim without reference to his security, and he relies on the cases of Stewart v. Isidor [5 Abb. Pr. (U. S.) 68], and In re Bloss [Case No. 1,562]. In both of these cases the decision turned upon the language of the twenty-first section of the bankrupt act [of 1867 (14 Stat. 526)], which declares in express terms that a creditor, by proving his claim, discharges and surrenders all unsatisfied judgments, and proceedings commenced. This case arises under section twenty of the act, which contains no language like that in section twenty-one. I presume that whenever it appears that a creditor has proved his secured claim as an unsecured one, intending thereby to share in the general assets and avail himself of his lien also, or with any other fraudulent intent, the court will compel such creditor to surrender his lien to the assignee. But in this case, any presumption of fraud is entirely overcome by the facts. The petitioner proved his claim in ignorance of the existence of his lien, and as soon as he discovered the mistake, has asked leave to amend his proof. Intending no fraud and being mistaken as to his rights, the petitioner should not be held to have waived or surrendered his lien. In re Brand [Case No. 1,809]; In re Clark [Id. 2,806]. The petition is granted.

Case No. 6,682.

In re HOPE MIN. CO.

[2 Sawy. 351;[1] 7 N. B. R. 598.]

District Court, D. Nevada. March 14, 1873.

COUNSEL FEE AS COSTS.

Where services of counsel are rendered for the benefit of a special fund of a class of creditors, and in opposition to the interests of the general creditors, a counsel fee will not be allowed out of the general fund in excess of the statutory allowance of twenty dollars.

[Cited in Platt v. Archer, Case No. 11,214.]

Petition in bankruptcy for the allowance of a counsel fee out of the fund.

Jonas Seely, for petitioners.

W. E. F. Deal, for respondents.

HILLYER, District Judge. This is a petition by counsel of certain creditors for the allowance of a counsel fee out of the fund upon this state of facts: Some fifty creditors proved claims against the estate with security, the security in each case consisting of a lien given by a statute of this state for their wages as laborers.[2] The assignee filed a petition against two of these creditors, alleging the invalidity of the liens, and praying that they might be set aside. The creditors answered; the petition, after argument of counsel, was denied; the case was then taken by the assignee to the circuit court, and there affirmed. The counsel who acted for the lien creditors in that proceeding now petition for the allowance of a fee out of the general fund, alleging that their services were really for the benefit of all the lien creditors. The register certified that $500 is a reasonable fee.

I hesitated at first about refusing to allow

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

[2] [See Case No. 6,681.]

this fee as asked, because is certainly seems equitable that, the general creditors having through the assignee put the special creditors to this expense, their fund should pay; but further examination and reflection convinced me that this is not a proper case for such an allowance. The equitable ground which exists for it is the same that is found in every ordinary suit at law or in equity, where the almost, if not quite, universal rule is, that each party pays his own counsel fee. The prevailing party is entitled to costs, and the taxable costs are fixed by the statute with particularity. The taxable costs, as a general rule, are far from recompensing the party for his actual disbursements, to say nothing of loss of time and the vexation of the suit; but the remedy for this must be applied by the legislature, not by the courts. In the court of chancery of England compensation to the successful party is, in some cases, more nearly reached by the taxation of costs "as between solicitor and client," but our courts must be governed, in all cases to which it applies, by the law of congress regulating this matter of costs.

This application ought in strictness to have been made to the court on the hearing of the original petition. That petition, under the bankrupt act [of 1867 (14 Stat. 517)], was heard and determined as in a court of equity, and was, practically, a suit in equity to avoid the liens. The question then would have been, and now really is, whether the lien creditors, the respondents, then were entitled to tax this fee as costs. It is clear that the court then could not have lawfully allowed any other fee to be taxed than the twenty dollars given by statute as solicitor's fee upon a final hearing in equity. The law is imperative that "no other compensation shall be taxed and allowed." 10 Stat. 161.

Whenever the courts of bankruptcy have allowed a counsel fee out of the fund, it has been, universally, upon the principle that the services were rendered for the benefit of the fund out of which payment is asked. The creditor who files a petition for an adjudication of bankruptcy against a debtor, if successful, raises a fund in which all other creditors share with him pro rata, and the courts uniformly allow him, out of the fund which is the result of his exertions, his costs and reasonable expenses, including a counsel fee. Such an allowance has often been made in this court, and is, I think, in accord with the practice of courts of equity in analogous cases, and also sanctioned by section twenty-eight of the act when the proceeding is for the benefit of the fund. But the services in the present case were for the benefit of the special fund of a class of creditors, and in opposition to the interests of the general creditors out of whose fund the allowance is sought; therefore, the counsel who now petition do not bring themselves within the rule stated. The language of a recent case to which I assent, is this: "In order to justify an order that the assignee pay such claim (counsel fee), it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate of the bankrupts, in the interests of the general creditors, and not in the interest of any creditor or class of creditors." In re Jaycox [Case No. 7,239]. The prayer of the petition is denied.

Case No. 6,683.

In re HOPKINS.

[2 Curt. 567.] [1]

Circuit Court, D. Rhode Island. June Term, 1856.

INSOLVENCY—STAY OF PROCEEDINGS—IMPRISONMENT.

1. That part of the insolvent law of Rhode Island which relieves from imprisonment on execution, a debtor who has, without fraud or perjury, obtained a certificate of discharge, having been in operation at the date of the process act of May 19, 1828 (4 Stat. 278), is adopted by the third section of that act, so far that a person so discharged cannot be imprisoned under final process of this court, for debts contracted prior to the filing of his petition.

[Cited in Gorham v. Wing, 10 Mich. 497, 499.]

2. If such a debtor obtain his discharge during his imprisonment on process of this court, how he is to be relieved. Quaere.

3. The provision of the insolvent law of Rhode Island, empowering the supreme court of that state, in its discretion, to grant a stay of all proceedings against the insolvent debtor, is addressed exclusively, to that court, and cannot be executed by this court.

4. Nor can this court stay an execution to which a creditor is entitled, upon a showing that the supreme court of the state, in its discretion, has granted a stay of proceedings.

5. Whether this court will, in any case, stay an execution on account of the pendency of such a petition in the supreme court of the state. Quaere.

The Dean Cotton Manufacturing Company being entitled to an execution against the person and estate of Samuel Hopkins, on a judgment recovered upon promises; at the present term, Hopkins applied to the court to stay the execution against his person, on account of the pendency of his petition for the benefit of the insolvent laws of the state, in the supreme court of the state; and he produced a certificate, which was as follows: "State of Rhode Island, &c. Washington, Sc. Supreme Court, February Term, A. D. 1856. I certify that on the second day of the present term upon the petition of Samuel Hopkins of Exeter in said county of Washington, praying for the benefit of the act entitled 'An act for the relief of insolvent debtors,' it was by said court ordered—that said petition be continued to the next term of said court, to be holden at South Kingstown within and for said county on the second Monday of August next, and that in the

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

mean time all proceedings against the person of said petitioner for the collection of debts contracted prior to the time of filing his petition be stayed. In attestation whereof I hereunto set my hand and affix the seal of said supreme court at South Kingstown this 22d day of February, A. D. 1856. Powell Helme, Clerk." No other cause was shown.

R. W. Green, for the motion.
T. A. Jenckes, contra.

CURTIS, Circuit Justice. The insolvent law of Rhode Island, substantially as it now exists, having been in operation at the date of the process act of May 19, 1828 (4 Stat. 278), the third section of this act must be taken to have adopted so much of that insolvent law as relieves the person from imprisonment on execution, by a discharge obtained without fraud or perjury under that insolvent law. Such was the decision of the supreme court in Beers v. Haughton, 9 Pet. [34 U. S.] 361, as explained and affirmed in Duncan v. Darst, 1 How. [42 U. S.] 307. But this applies only to a case where the discharge has been obtained. It is enacted in the sixth section of the insolvent law of Rhode Island [Laws 1844, p. 212] that on the reception of a petition for the benefit of that act, the supreme court shall have power in their discretion, to stay all proceedings against the body and estate or either, of the petitioner, for the collection of debts. It is manifest that this is addressed exclusively to the state court, in reference to state process; and that it is a power which cannot be executed by a court of the United States. It is one of the powers proper, and often necessary to be exercised, to enable the state court to attain the two great objects of the law, the relief of the debtor personally, and the equal distribution of his effects among all his creditors. The state court has the petition and all parties before it, and has the needful means to exercise soundly, that discretion which the law confers. But this court has nothing to do with the general question, whether the debtor shall receive his discharge, nor with the distribution of his effects. Neither has it the petition, nor the inventory of the property, nor power to examine the debtor, nor to call in the creditors to contest the honesty of his proceedings. We have not the instrumentalities needful to enable us to exercise a sound discretion in the premises.

Neither have we a right to substitute the discretion of the state court for our own. It appears by the certificate which is produced, that the supreme court of Rhode Island has exercised its discretion in favor of the petitioner, and granted a stay of proceedings until the next term of that court. But the plaintiff in this judgment has a right to require this court, before it exercises summarily its high power of staying an execution, to be satisfied judicially of the existence of a case, which in point of law and fact requires such a supervision of his rights. And we cannot delegate to any other tribunal the power to determine this question, nor act, without examination, upon the result of the exercise of the discretion of the supreme court of the state, though we feel entire respect for that court. It must be observed also, that the stay granted by that court is only until its next term. They retain their control over the proceedings, and at that time may put an end to it. While if we act upon the footing of the stay granted by them, it may have a very different effect upon the process of this court; for we may find, hereafter, that our process has been suspended, long after the stay granted by the state court has been terminated. I do not say that a case may not possibly be made, in which this court would think it proper to stay an execution to enable a debtor to complete his application for a discharge; though in view of the difficulties which would attend such an order, I am strongly inclined to think the discharge must first be obtained, before this court can safely modify its action. When obtained, if the imprisonment has been begun on an execution, application must be made here for relief; and without undertaking to say what action the court would take in such a case, I should certainly go as far as the law may permit, to relieve an honest debtor. In this opinion the district judge concurs. Motion overruled.

Case No. 6,684.

In re HOPKINS.

[18 N. B. R. 396; 26 Pittsb. Leg. J. 120.] [1]

District Court, S. D. New York. June 19, 1878.

BANKRUPTCY—PETITION—FRAUD—RIGHTS OF CREDITORS AT LARGE.

While a creditor at large cannot intervene to contest an adjudication, he may very properly make a suggestion of suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted.

[Cited in Re Lawrence, Case No. 8,133.]

[In bankruptcy. In the matter of Sidney W. Hopkins.]

W. B. Hornblower, for moving creditors.
G. H. Forster, for petitioning creditors.

CHOATE, District Judge. A petition by creditors praying for an adjudication of bankruptcy against said Hopkins was filed and an order to show cause thereon issued May 21, returnable June 1, 1878. The petition alleges that the petitioners constitute "at least one-fourth in number of the creditors" and that the aggregate of their provable debts "amount to at least one-third of

[1] [Reprinted from 18 N. B. R. 396, by permission. 26 Pittsb. Leg. J. 120, contains only a partial report.]

the debts so provable." The act of bankruptcy alleged is the suspension of and failure to resume payment within forty days of the debtor's commercial paper, "made or passed in the course of his business as a merchant or trader," and the suspended paper is specified as a note dated Nov. 1, 1877, for one thousand and twenty-two dollars and eighty-nine cents, payable to Byerson and Brown. Upon the return day the debtor made default. Thereupon certain creditors of Hopkins, not being petitioning creditors, move for leave to intervene and file an answer to the petition, in which they allege that they have no information as to whether the petitioning creditors constitute one-fourth in number and one-third in amount of all the creditors, and they therefore deny the same. They also deny, on information and belief, that Hopkins was at any time a merchant or trader, and especially that he had carried on any business as a merchant or trader within the last four years. They deny the act of bankruptcy in that the note described in the petition was not made or passed in the course of the business of said Hopkins as a merchant or trader, and they allege that it was given for a livery-stable bill, not in the course of his business, but for his own personal uses. They allege, on information and belief, that the petition was filed collusively in the interest of the alleged bankrupt, and that several of the petitioners are his relatives and friends.

The creditors moving to intervene show no interest other than that of creditors-at-large, except that prior to the filing of the petition they had commenced an action on their claim, and that since the filing of the petition they have proceeded with the action to judgment. It is settled as the rule in this district, by repeated decisions of Judge Blatchford, that a creditor-at-large, having no special interest to protect, is not entitled to intervene, as matter of right, to contest the adjudication with the petitioning creditors. I adhere to that rule as already established. And these moving creditors do not show any such special interest as gives them the right to intervene. They had not acquired a lien or equitable right in any property of the debtor at the time of the filing of the petition. They have gone on with their suit and perfected their judgment, but since the filing of the petition they cannot acquire any lien on the property by levy or execution. The court, however, is required, upon the return of the order to show cause to be satisfied that the petitioners are entitled to an adjudication, and it has been held that the court should in a suspicious case, either of its own motion or upon the suggestion of any party in interest, direct an inquiry, in order to ascertain whether the petition is not collusively and fraudulently prosecuted for the purpose of obtaining, by false averments as to the facts, a decree to which under the law the parties are not entitled. Such a suggestion may very properly be made by a creditor. In this case the fact that the debtor has made default, the alleged fact that several of the petitioners are his near relatives, and the fact, alleged upon information and belief, that he has never been a merchant or trader, do afford a reasonable ground for the suspicion that the petition is not filed in good faith, and that the petitioners may not be entitled to the adjudication. While, therefore, the right of the moving creditors to answer must be denied, the court, upon the suggestion of the matters contained in the moving papers, of its own motion directs a reference of the petition to the clerk to take proof of the matters alleged in the petition upon notice to the debtor and to the moving creditors.

Case No. 6,685.

HOPKINS v. BARNUM.

[1 MacA. Pat. Cas. 334.]

Circuit Court, District of Columbia. Sept., 1854.

PATENTS—APPEAL FROM COMMISSIONER'S DECISION—JURISDICTION OF CIRCUIT JUDGE—INTERFERENCE.

[The judge of the circuit court for the District of Columbia has no jurisdiction of an appeal by a patentee from the decision of the commissioner, in an interference proceeding, awarding priority of invention to a subsequent applicant, and granting him a patent. Pomeroy v. Connison, Case No. 11,259, followed.]

[This was an appeal by Lansing E. Hopkins from a decision of the commissioner of patents, in an interference proceeding, awarding priority of invention to Daniel Barnum, and granting him a patent.]

J. J. Greenough, for appellant.

W. N. P. Brown, for appellee.

MORSELL, Circuit Judge. On the 23d of December, 1853, Daniel Barnum filed an application in the patent office for letters-patent for improvements in making hat-bodies, which was declared to interfere with a patent granted to the said Lansing E. Hopkins in December, 1852, and for the trial of the issue so formed. The parties were allowed to take their testimony, which being done, and the said matter fully heard, the commissioner on the 16th of May, 1854, awarded priority of invention to the said Daniel Barnum; from which said decision the said Lansing E. Hopkins hath appealed and filed his reasons of appeal. The commissioner has laid before the judge the grounds of his decision in writing, with the original papers and the evidence in the cause; and a time and place being appointed for the hearing of said appeal, the parties by their counsel filed their respective arguments in writing, and submitted the case. The appellee's counsel objected to the jurisdiction of the judge, being, as before said, an appeal by

a patentee from a decision of the commissioner, not refusing or rejecting, but granting, the application for letters-patent. The arguments on each side on this point have been read and considered. The point being the same which was decided by Judge Cranch in the year 1842 in the case of Pomeroy v. Connison [supra], on very full consideration, and ever since followed by me, I feel that I ought to consider the point as settled; and am therefore of opinion that I have no jurisdiction in this case; and which I do hereby certify to the honorable commissioner, and shall return the papers to the patent office, together with this my order that the said appeal be dismissed.

[Patent No. 9,484 was granted to Lansing E. Hopkins, December 21, 1852. For another case involving this patent, see Burr v. Duryee, Case No. 2,190. Patent No. 11,805 was granted to Daniel Barnum, October 17, 1854.]

HOPKINS (BURR v.). See Case No. 2,192.

Case No. 6,686.

HOPKINS v. CARPENTER et al.

[18 N. B. R. 339.] [1]

District Court, S. D. New York. Aug. 30, 1878.

BANKRUPTCY—JURISDICTION—CONSENT OF PARTIES—RECEIVERSHIP.

1. Where the want of jurisdiction appears on the petition, the consent of the parties cannot give jurisdiction, and the court of its own motion should take notice of the point.

2. From the schedules annexed to a petition filed by one partner of a dissolved firm against his copartners for the adjudication of the firm, it appeared that the firm had been dissolved by judicial decree and all its assets transferred to a receiver, and that there were firm debts. *Held*, that the firm could not be adjudicated.

In bankruptcy. In the matter of Sidney W. Hopkins on his own behalf, and against Robert J. Carpenter and Frank H. Collins.

A. Blumenstiel, for petitioner.

W. B. Hornblower, contra.

CHOATE, District Judge. This is a petition under section 5121, brought by one partner of a dissolved firm against his two copartners. The petition shows that neither Carpenter nor Collins resides in this district, that the firm was formed in 1868, and thereupon commenced to carry on its business in this district. The petition was filed July 30, 1878. The schedules annexed show that the firm was dissolved by judicial decree and all its assets transferred to a receiver, April 30, 1878, and that there are firm debts still unpaid. On the return day the two respondents, Carpenter and Collins, appeared and consented to an adjudication. A creditor of the petitioner asks leave to intervene and moves to dismiss the petition for want of jurisdiction. It was held by Judge Blatchford in Re Crockett [Case No. 3,402] and in Re Hartough [Id. 6,164] that a firm not subsisting at the date of the filing of the petition cannot be adjudicated bankrupt if there are no firm assets, though there may be firm debts still unpaid. Although in some other districts the opinion has been expressed by the court that it is enough if there are outstanding debts, yet these cases have never been overruled and are conclusive in this court. The present case is directly within them. The entire want of assets and the dissolution of the firm appear by the schedules which are a part of the petition. It is said that the creditor intervening has no right to appear and that the respondents do not take the objection, but the question being one of jurisdiction, and the want of jurisdiction appearing on the petition, the consent of the parties cannot give jurisdiction and the court of its own motion should take notice of the point. Petition dismissed as to Carpenter and Collins and adjudication as to Hopkins.

[1] [Reprinted by permission.]

HOPKINS (FAIRFAX v.). See Case No. 4,614.

HOPKINS (HIGBIE v.). See Case No. 6,466.

Case No. 6,687.

HOPKINS v. JACKSON.

[Cited in Hovey v. Home Ins. Co., Case No. 6,743. Nowhere reported; opinion not now accessible.]

Case No. 6,688.

HOPKINS v. LEWIS.

[3 App. Com'r Pat. 222.]

Circuit Court, District of Columbia. Oct. 20, 1859.

PATENT—INTERFERENCE—POWER OF COMMISSIONER—TESTIMONY.

[The granting of an extension of time for the taking of testimony in an interference case is within the discretion of the commissioner, and no appeal lies from his refusal, except in the case of a plain abuse of discretion.]

Appeal [by John R. Hopkins] from the decision of the commissioner of patents, refusing to grant him a patent for an improvement in apparatus for evaporating fluids, and awarding priority of invention to Junius L. Lewis therefor.

MORSELL, Circuit Judge. Hopkins states his claim thus: "I claim and desire to secure by letters patent the combination of the liquid to be evaporated with endless bands, ropes, or other textile substance presenting extensive surfaces, and with mechanical devices to move them, substantially as described." The commissioner in his decision adopts the report of the examiner, and says: "John R. Hopkins made his application for a patent October 19, 1858, for an improvement

for accelerating evaporation by solar or atmospheric agency, and the nature of his invention differed in no respect substantially from that of Lewis. In place, however, of the flat band or web of cloth, Hopkins uses strands or bands of rope cloth or other textile material, and, after disclaiming the use of such for communicating motion or imparting velocity, he claimed the combination of the liquid to be evaporated with endless bands, ropes, or other textile substances presenting extensive surfaces, and with mechanical devices to move them, substantially as described. From the foregoing it may be perceived that the invention claimed by both is the same, and neither possess any point of novelty different from the other. Neither testimony nor argument is adduced on either side, and the only means possessed by the office is the examination of the records. Neither party caveated the invention. By reference to the date of filing the two applications, it is found that the application of Lewis antedates that of Hopkins by three months and sixteen days, the date of Hopkins' application being October 19, 1858, and Lewis, July 3, 1858. In view of the foregoing, it is recommended that the interference be dissolved, that a patent be directed to issue to Junius R. Lewis, priority of invention being awarded to him, and that the application of John R. Hopkins be refused." Immediately following, the commissioner says: "The above report is confirmed, priority of invention is adjudged to Lewis, and a patent directed to issue to him, dated 22d March, 1859." To this a paper writing was filed by Mr. Hopkins, called "Reasons for Appeal of J. R. Hopkins," which consists of a statement by him of the circumstances relating to the subject of his having failed to take his testimony under the authority of the commissioner, under the rules of the office, before the expiration of the time thereby limited. The facts so stated are upon the oath of said Hopkins, and, in substance, that, immediately after receiving the circular from the office designating the time of the trial of the interference which had been declared between this claim and said Lewis', he called on the attorneys of Lewis, and made appointment to meet said Lewis at their office to agree on the time and place of taking such testimony. In this, as well as in several subsequent attempts of the same kind, he was unsuccessful, until at length, when he was obliged to go to the state of Indiana and be absent several weeks, he again called on Messrs. Goddards, the counsel above alluded to, and told them that he could not wait any longer for an interview with Mr. Lewis, but must give them immediate notice to take the testimony, and would accept service of notice from them in reference to their testimony, to be forwarded to the commissioner of patents before going to Indiana, unless the matter could be put over until his return, when he would meet Mr. Lewis for the purpose above indicated. The Messrs. Goddards then informed the said Hopkins that Mr. Lewis would defer the matter until his return, and a verbal agreement was made between the Messrs. Goddards and the said Hopkins that the matter should rest, without prejudice to the interests of either party, until the return of said Hopkins from Indiana; that before the return of said Hopkins from Indiana the time expired, and the commissioner decided the case against him, etc.; also that he applied to the commissioner by letter for an extension of time, but that the same was not granted, etc.,—to which paper there are attached the depositions of several witnesses which tend to sustain his claim. The commissioner's report is not materially different, for the reasons given in the decision.

In this state of the case, according to previous notice given of the time and place of trial, the commissioner laid before me all the original papers, and the appellee, by his counsel, filed his argument in writing, in which he denies the agreement as stated in the aforegoing paper writing. I feel satisfied in this case, from the aforegoing statement, that the failure on the part of the appellant to take his testimony in time was owing to a misapprehension on his part as to the agreement which he states was made between him, and the counsel of the appellee, and his ignorance of the mode of applying to the commissioner for an extension of time for the purpose; and also that it appears from the depositions that there are merits in his claim, but that indulgence, under the rules of the office, is in the discretion of the commissioner to grant or refuse, and not a matter from which an appeal lies, unless, perhaps, for a plain abuse of discretion. As the substance of the statement is confined to the matter of refusal to extend the time for taking the testimony, which was discretionary with the commissioner, I consider the case as not regularly before me, and must therefore, and I do hereby, dismiss the said appeal, with a recommendation to the commissioner to reconsider the appellant's application for further time to take his testimony, that the ends of justice may be promoted.

HOPKINS (LIPPETT v.). See Case No. 8,380.

Case No. 6,689.

HOPKINS v. MENEDGER.

[See Case No. 9,289.]

HOPKINS (NORTHWESTERN CAR CO. v.). See Case No. 10,334.

Case No. 6,690.

HOPKINS v. ST. PAUL & P. R. CO.

[2 Dill. 396.] [1]

Circuit Court, D. Minnesota. 1872.

CORPORATE SUCCESSION—RAILROAD CHARTER CONSTRUED.

The St. Paul & Pacific Railroad Company is not in law the same corporation as the Minnesota & Pacific Railroad Company, and cannot be sued at law on the bonds and coupons made by the last named company.

[Cited in Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. 570.]

Action at law upon two hundred and seventy coupons, made by the Minnesota & Pacific Railroad Company, attached to bonds, dated July 31st, 1858, secured by deed of trust of that date to Farnsworth and others as trustees, but which were delivered to the plaintiff [Edward C. Hopkins], as alleged, June 1st, 1860. It is alleged in the complaint that the said Minnesota & Pacific Railroad Company did not construct and put into operation its road from St. Paul to St. Anthony by January 1st, 1862, as required by the act of March 8th, 1861, and that by reason of this default, and of the act of March 10th, 1862, the lawful corporate name of the maker of the bonds and coupons became changed to that of the St. Paul & Pacific Railroad Company, against which judgment is sought on the coupons in suit, on the ground that it is the old corporation acting under a new name. The action rests upon the proposition that the defendant, the St. Paul & Pacific Railroad Company, is the same corporate body formerly known as the Minnesota & Pacific Railroad Company, and hence liable for its debts. The portion of the answer demurred to sets up the legislative and constitutional history of the Minnesota & Pacific Railroad from its incorporation in 1857 down to the act of March 10th, 1862, under which the St. Paul & Pacific Railroad was organized.

Mr. Masterson, for plaintiff.

Mr. Davis, for defendant.

DILLON, Circuit Judge. I have examined the legislative and constitutional history of the Minnesota & Pacific Railroad Company from its incorporation in 1857 down to the act of March 10th, 1862, under which the defendant, the St. Paul & Pacific Railroad, was organized and is acting. The demurrer to the answer presents but one question, viz: Is the defendant the same corporation as the Minnesota & Pacific Railroad Company? And this depends upon the act of March 8th, 1861 [Laws Minn. 1861, p. 236], and of March 10th, 1862 [Laws Minn. 1862, p. 247], and mainly upon the construction of the latter act.

(Here reference was made to the deed of trust to the state, of November 27th, 1858, and its foreclosure by the state; to the constitutional amendment of April 15th, 1858; to the supplemental deed of trust of November 27th, 1858; to the act of March 8th, 1861, and of March 10th, 1862.)

Looking at sections 1, 2, 9, and 12 of the act of March 10th, 1862, in the light of previous legislation, I am of opinion that it was not the legislative intention to continue the old corporation, but to create a new corporation and to give it the property and franchises of the old corporation, so far as these were held by the state.

Substantially this view was taken in this court by Mr. Justice Miller, at the June term, 1865, in the case of McDonnell v. Railroad Co. [Case No. 8,774], and it is the view which has received the sanction of the supreme court of the state in the several decisions referred to by counsel. This is an action at law, and it is decisive of it to hold that the defendant is not the same corporate body as the one that made the coupons in suit. This is all that I now decide. What equities, if any, the creditors of the former corporation may have against the existing corporation in respect of property received by it from the state, cannot be considered in this form of action. Judgment accordingly.

NOTE. Suits in equity in favor of creditors of the old corporations against the new to assert alleged equities in respect to lands, property, and franchises of the old, transferred by the state to the new corporations, have been brought and are now pending in the court.

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

Case No. 6,691.

HOPKINS v. SIMMONS.

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

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

EVIDENCE—OPINION—HANDWRITING.

The opinion of a witness (who has seen the party sign a paper) that another paper is also in the handwriting of the same party is competent evidence, although his opinion is the result of comparison.

Assumpsit. The defendant offered in evidence an account, said to be in the plaintiff's handwriting; and Robert Ellis, a witness, testified that he saw the plaintiff sign a certain receipt; and that, by comparing the account with the signature to the receipt, he believed the account to be in the plaintiff's handwriting.

Mr. Key objected, on the authority of Peake's Law of Evidence (page 69), that comparison of hands is no evidence in any case.

But THE COURT admitted the evidence.

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

Case No. 6,692.

HOPKINS v. WESTCOTT et al.

[6 Blatchf. 64; [1] 7 Am. Law Reg. (N. S.) 533.]

Circuit Court, S. D. New York. March 9, 1868.

COMMON CARRIER—BAGGAGE—RESTRICTION OF LIABILITY—NOTICE OF, TO PASSENGER.

1. Where A., a passenger on a railroad, delivered to a carrier a metallic check, which he had received for his trunk, as baggage, so that the carrier might obtain the trunk, and deliver it at the residence of A., and received from the carrier, at the time, a paper, on which the number of the check was indorsed, and which contained a printed notice, that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for, in writing, on this check receipt, and the extra risk paid therefor," and a statement that the owner thereby agreed that the carrier should be liable only as above: *Held*, that A. was chargeable with actual notice of the contents of the paper.

[Cited in Davis v. Massachusetts Mut. Life Ins. Co., Case No. 3,642; Wertheimer v. Pennsylvania R. Co., 1 Fed. 233.]

[Criticised in Blossom v. Dodd, 43 N. Y. 268. Cited in Mulligan v. Illinois Cent. Ry. Co., 36 Iowa, 189.]

2. *Held*, also, that, by such paper, the responsibility of the carrier was qualified, to the effect stated in the paper.

[Cited in Bank of Kentucky v. Adams Exp. Co., 93 U. S. 188; Muser v. American Exp. Co., 1 Fed. 383; The Hadji, 18 Fed. 461; Hart v. Pennsylvania R. Co., 112 U. S. 342, 5 Sup. Ct. 156.]

3. The language of such a paper must, where there is any doubt as to its meaning, be construed strictly against the carrier.

4. The words "any article," in such paper, do not mean a trunk, or piece of baggage, and its entire contents, in gross, but mean any article contained in the piece of baggage.

5. Manuscript books, the property of a student, and necessary to the prosecution of his studies, are to be regarded as baggage.

[Cited in Fraloff v. New York Cent. & H. R. R. Co., Case No. 5,026.]

[Quoted in Gleason v. Goodrich Transp. Co., 32 Wis. 99.]

This was an action at law [by Archibald Hopkins against Alexander F. Westcott and others], tried before the court without a jury. The facts are sufficiently stated in the opinion of the court.

William C. Whitney, for plaintiff.
Luke A. Lockwood, for defendants.

SHIPMAN, District Judge. The defendants constitute the Westcott Express Company, and are carriers, for the public, of freight and baggage, for hire, to and from any points in the city of New York. On the 1st of October, 1866, the plaintiff passed from his home in Massachusetts, over the Hudson River Railroad, to the city of New York, together with his trunk, for which he received the usual metallic check, which, on his arrival at New York, he delivered to the defendants, to enable them to obtain the trunk at the depot, and deliver the same at his residence in the city, no rate of compensation being named. The defendants obtained the trunk, but failed to deliver it to the plaintiff, it having been lost, in some way unknown to the defendants and to the plaintiff. Upon the delivery of the metallic check to the defendants, they delivered to the plaintiff a paper, upon which the number of the check was endorsed, and which contained, also, the following printed matter: "The Westcott Express Co. will not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for in writing, on this check receipt, and the extra risk paid therefor. * * * And the owner hereby agrees that Westcott Express Co. shall be liable only as above." This printed matter the plaintiff did not read at the time it was delivered to him, nor till after notice, from the defendants, that his trunk was lost. The general custom of express companies is, to charge forty cents for every trunk, and twenty-five cents in addition for every $100 of value beyond $100. The defendant was ignorant of this custom. The defendant was a student at Columbia College, and was proceeding to New York, for the purpose of prosecuting his studies at that institution; and certain manuscript books, which formed part of the contents of his trunk, were necessary to the prosecution of his studies.

The discussion of this case, at bar, took a wide range, and a considerable number of the many cases, relating to the general question, how far, and in what manner, a carrier may limit or qualify the liability which the general rules of the common law impose upon him, were cited. I shall not here enter upon a review of the authorities touching this broad question. It has been remarked, by a learned and accurate writer, that "a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be liable for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly." 2 Greenl. Ev. § 215. But, in the case now before the court, the defence does not rest upon a general notice, with constructive knowledge of which the plaintiff is to be charged, by proof that it was generally and widely promulgated. It rests on a special printed notice, put into the hands of the plaintiff, at the time he delivered his check to the defendants. It can make no difference that the plaintiff did not choose to read it until after he had notice that his trunk was lost. He received it at the time he parted with his check, it was

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

legibly printed, and he must be charged with actual notice of its contents. By its terms, it qualified the duty or liability of the defendants, and limited their responsibility, in case of loss, to an amount not exceeding $100 for any article, unless the plaintiff should disclose such articles, and have the fact endorsed on the paper, as well as pay for the extra risk. It excluded all liability for merchandise and jewelry. Though, as will be seen in the sequel, this point is of no practical importance in this suit, in view of the construction which I shall give to this notice, yet I am unwilling to leave it to be inferred that I entertain any doubt of the power of the carrier to qualify his responsibility by special notice, actually given to the owner, under circumstances like these. In Orange County Bank v. Brown, 9 Wend. 85, 115, Judge Nelson, speaking for the court, says, of the carrier: "If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, (and courts and juries are liberal in inferring such knowledge from the publication of the notice,) is as effectual, in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium." In the case before us, we are not left to a general notice, to be charged upon the plaintiff on the ground of its general publication, and which he might have forgotten, although he had seen it; but the notice was served upon him at the time he sought the services of the carrier. I can have no doubt, therefore, that the plaintiff was bound by the notice, and that the carrier incurred no responsibility which his notice, properly construed, excluded.

But here a more difficult question presents itself. The list of the contents of this trunk, and the value of each article thereof, are agreed to by the parties; and they amount, in the aggregate, to $744.10. It was contended, on the argument, that the notice limited the liability of the carrier to $100, unless a greater value was disclosed, and that, as no greater value was disclosed, judgment should be rendered for that sum only. But, so far from giving this notice a liberal construction in favor of the carrier, I am inclined to construe it strictly against him. The rule which holds carriers to strict responsibility is founded upon high considerations of public policy and the security of the property of travelers. Every limitation of this responsibility should be expressed, in each case, in clear and unequivocal terms. Notices of this character should, therefore, be construed strictly against the carrier. They are given to travelers of all ages and sexes, in the bustle of rapid transit from one place to another, in crowded vehicles and depots, and they should be free from all doubt or ambiguity, so that their contents may be clearly apprehended at a glance. Now, some portions of the defendants' notice in this case are clear and explicit. It declares that they will not be responsible for merchandise or jewelry contained in baggage received upon baggage checks. They do not choose to engage in the transportation of such articles as baggage, no matter what their value. They further give notice, that they will not be liable for losses by fire. Where there is no question of gross or willful neglect, or recklessness, or malfeasance or misfeasance, these restrictions, being plainly expressed, and communicated to the owner at the time of the engagement, are without doubt, binding upon him. But, after designating merchandise and jewelry, and exempting them as well as losses by fire, the notice adds: "Nor for an amount exceeding one hundred dollars upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor." The question arises, whether the term, "any article," refers to a trunk or piece of baggage, and its entire contents in gross, or whether it is to be confined to each separate article contained therein. In other words, does it limit the liability of the carrier for the loss of a trunk and its contents or does it leave him liable for each article contained in the trunk, according to its value, not exceeding one hundred dollars for any single item. The terms "merchandise" and "jewelry" refer expressly to articles "contained in baggage received upon baggage checks," that is, to the contents of trunks or packages, and excludes liability upon the articles specified. When limiting the liability to one hundred dollars upon any one other article, I think it should be held also to refer to the separate contents of the trunks or packages, and not to the whole in gross. This strict construction is in harmony with the policy of the law, and essential to the protection of the community, in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unabated. Now, I can well conceive, that they are unwilling to take the risks of carrying expensive articles of dress, such as costly furs, shawls, and other valuable paraphernalia of an extravagant modern wardrobe, a single item of which is often valued at many hundreds of dollars, without notice of value, and without pay for the risk. But, it may well be doubted, whether they intend, by such notices as the one under consideration, to apprise the owner that they decline all responsibility beyond one hundred dollars on each trunk and its contents, unless a special contract is made. A good trunk is worth half that sum, and often more, and the value of an ordinary traveler's trunk and necessary contents would usually exceed that sum. But, whatever be the intentions of carriers, such intentions must be so expressed as to leave no room for doubt as to their meaning, or they cannot

be permitted to qualify their liability as fixed by the general rules of law applicable to their calling. As was remarked by Best, C. J., in Brooke v. Pickwick, 4 Bing. 218: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies to their office, and, at the same time, to place in his hands a printed paper specifying the precise extent of their engagement." And, certainly, where they make no oral communication, but merely thrust into the hand of a traveler a small printed ticket, the notice which that contains should be explicit and leave nothing to be made out by construction. Where there is any doubt as to its meaning, it should be construed strictly, as against the carrier.

As to the general custom of express companies to charge extra for every package over one hundred dollars in value, I do not think that has any bearing on this case. Even admitting that they could change their liabilities by a sweeping custom, (which may well be doubted,) no price was demanded or named in this case, and, therefore, the custom has no bearing upon the controversy.

Among the contents of this trunk were five manuscript books, no one of which exceeded in value one hundred dollars; but the defendants insist that they are not liable at all for these, on the alleged ground that they cannot properly be termed baggage. In Hawkins v. Hoffman, 6 Hill, 586, 589, Judge Bronson remarks: "An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveler usually has with him as a part of his baggage. It is, undoubtedly, difficult to define with accuracy what shall be deemed 'baggage,' within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for, some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such. This, I think, a good test for determining what things fall within the rule." Now, it may safely be said, that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But, it is said, that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed "baggage." With the lawyer going to a distant place to attend court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried, as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case, the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed to have been a part of his baggage, for which the defendants are liable.

There was one article of jewelry in the trunk, for which, of course, they are not responsible, as all jewelry was excepted by specific designation. This will, however, make no difference with the amount of the judgment, as, by the stipulation of the parties, it is not to exceed seven hundred dollars, the sum demanded in the declaration, and the aggregate of the agreed value is seven hundred and forty-four dollars and ten cents. Let judgment be entered for the plaintiff, for seven hundred dollars, with costs.

HOPKINS (WILLIAMS v.). See Case No. 17,722.

Case No. 6,693.

HOPKINS v. WOOD et al.

[14 Int. Rev. Rec. 164.]

District Court, S. D. New York. May 13, 1852.

FREIGHT—BILL OF LADING—AGENCY — QUANTITY OF CARGO.

[1. Where a cargo of coal was bought at Philadelphia, and delivered by vessel to the purchasers at New York, and upon arrival at the latter place was found to be several tons less in weight than given in the bill of lading, the master is entitled to recover full freight for the amount which was taken on board at Philadelphia, and weighed without the knowledge or concurrence of the master, and was duly delivered to the consignees at New York.]

[2. The shippers of a cargo are to be considered as agents of the consignees for the purpose of guarantying the amount and quantity of such cargo to the master of a vessel at the point of departure, and the master is not liable for a greater quantity of cargo than was actually laden on board.]

BETTS, District Judge. It appearing to the court upon the pleadings and proofs in

this case that the respondents [James E. Wood and Samuel R. Mabbitt] were the purchasers and owners at Philadelphia of 152 16/20 tons of coal, and on the 30th of October, 1850, the vendors there shipped on board the schooner Orora, of which the libellant [William Hopkins] was master, and delivered to the respondents the said coal, to be delivered to them in the city of New York, and that the libellant at the same time executed a bill of lading engaging to deliver the said coal to the respondents at the port of New York, they paying $1.25 per ton freight, which in the whole amounts to the sum of $191. And it further appearing to the court that the coal was not delivered to the libellant at Philadelphia, or received on board said vessel, by actual weight, but, after being laden on board by the said shippers, the said bill of lading was executed by the libellant on the statement of the weight of said coal given him by the said shippers. It is considered by the court that the said shippers were in this behalf the agents of the respondents, and that the libellant, as between him and the respondents, is not answerable upon the bill of lading for the delivery to them of a greater quantity of coal than was actually laden on board the said vessel. And it further appearing to the court, upon the pleadings and proofs, that all the coal laden on board the vessel at Philadelphia was duly delivered by the libellant to the respondents in New York. But it being further made to appear by the proofs on the part of the respondents, that on the weight of the said coal as delivered from the vessel to their coal yard in New York, and being there weighed by their agents, the said coal amounted in quantity only to 144 7/20 tons, leaving a deficiency of eight tons and nine-twentieths of a ton between such weight and the quantity expressed in said bill of lading, the value of which the respondents claim the right to have deducted and allowed to them out of the freight payable to the libellants. And it further appearing to the court that such weighing of the coal was without the presence, concurrence or knowledge of the libellant, and that he refused to admit the accuracy of such weight, or if correct that he was answerable for such deficiency, yet proposed and offered as a compromise with the respondents to accept freight for the quantity admitted by the respondents to have been delivered them, and relinquish his demand of freight for the residue of the cargo, but the respondents refused to accede to such offer, and proposed and tendered payment of $143, deducting and reserving from the sum of $191 (the amount payable on the quantity laded on board the vessel at Philadelphia) $38.02, the cost price of S 9/20 tons at Philadelphia, which proposal the libellant refused to accept. Wherefore it is considered by the court, that upon the pleadings and proofs, the libellant is not answerable to the respondents for the said sum of $38.02, and is in law entitled to recover his full freight for the quantity of coal laden on board his vessel at Philadelphia. It is therefore ordered, adjudged and decreed that the libellant recover in this cause $191, with interest thereon at the rate of six per cent. from the 10th of November, 1850, together with costs to be taxed. Let the decree be entered accordingly.

Case No. 6,694.

HOPKINS v. The ZEBA.

MONIRE v. The THOMAS MORGAN.

[2 Hughes, 64.] [1]

Circuit Court, D. South Carolina. 1877.

NEGLIGENCE—INJURY TO VESSEL—DAMAGES.

Where an injury or damage is caused or results to a vessel by the carelessness of those in charge of another, or from the want of skill in those navigating the other, the vessel causing the damage must bear the loss occasioned to the injured vessel as well as her own.

Appeal in admiralty from the district court.

[These were libels by George H. Hopkins, master of the steam tug Thomas Morgan, against the British bark Zeba and the Commercial Wharf & Cotton-Press Company, and by John D. Monire, master of the Zeba, against the Thomas Morgan and the Commercial Wharf & Cotton-Press Company.]

These causes coming on to be heard together, and having been argued by counsel, before

BOND, Circuit Judge. The court doth find the facts to be, that on or about the 29th day of August, 1875, the British bark Zeba arrived at the port of Charleston in ballast. That upon her arrival the Commercial Wharf Company, a corporation under the laws of South Carolina, through its agent, offered the bark free wharfage at their wharf in consideration of the ballast which the Zeba was about to discharge, and the master of the bark accepted the offer, and agreed to deliver to the company his ballast for the use of the company's wharf, and was hauled into it and lay alongside thereof discharging her ballast, being fastened in the usual way to the wharf by hawsers thrown over posts prepared for that purpose, from the thirty-first day of August, 1875, until the second day of September, 1875, about five o'clock of that day. At this last-named time the appellant, the steam tug Thomas Morgan, by agreement with the master of the bark, came alongside the vessel, and threw a line over the vessel and asked the captain of the bark if he were ready to be towed to another wharf, as the tug had been engaged by the bark to do. The captain of the bark said he was ready, and throwing his lines off the wharf which held the vessel in her upright position, she immediately capsized. And the court doth find the facts to

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

be further, that the cause of the capsizing of the said bark was the carelessness and want of the exercise of proper judgment on the part of the captain of the bark Zeba, in discharging his whole ballast and then throwing off the lines which held her to the wharf. And the court further finds the fact that in her overturn the bark fell across the tug Thomas Morgan, and without any fault on the part of the tug, sunk her, and damaged her to the amount of $3707.81, and that the bark Zeba was damaged to the amount of $4009.78. And the court doth find the following conclusions of law: That where an injury or damage is caused or results to a vessel by the carelessness of those in charge of another, or from the want of skill in those navigating the other, the vessel causing the damage must bear the loss occasioned to the injured vessel as well as her own. And the court doth dismiss the libel of said John D. Monire, master, etc., against the Commercial Wharf & Cotton-Press Company, with costs. And doth also dismiss the libel of the said John D. Monire, master, etc., against the steam tug Thomas Morgan, with costs, and doth decree in the cause of the libel of the said steam tug Thomas Morgan, against the said bark Zeba, that the libellants do recover of the said bark and her owners the sum of $3707.81, with interest from 1st of October, 1875, and with costs; and that the libel of the tug Thomas Morgan against the said Commercial Wharf Company be dismissed with costs.

Case No. 6,695.

HOPKINS & DICKINSON MANUF'G CO. v. CORBIN et al.

SAME v. PARKER & WHIPPLE CO. et al.

[14 Blatchf. 396; 3 Ban. & A. 199; [1] 14 O. G. 3.]

Circuit Court, D. Connecticut. Jan. 30, 1878.[2]

PATENT—REISSUE—PRE-EXISTING DEVICE—"SASH-LOCK."

1. The claim of the reissued letters patent, granted October 11th, 1875, to the Hopkins & Dickinson Manufacturing Company, as assignees of George McGregor and George Voll, for an "improved sash-lock or sash-fastener," (the original patent having been granted to said Voll and McGregor, as inventors, March 30th, 1869,) namely, "a vibrating lever, provided with a bolt, in combination with a striking plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified," does not include a vertically moving bolt in combination with a socket upon the base-plate.

[See note at end of case.]

2. Where a patented invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to cover by such claim the pre-existing devices; and this is true where one of the joint inventors of the junior invention is also the inventor of the senior inventions.

[These suits were brought by the Hopkins & Dickinson Manufacturing Company against P. and F. Corbin and others, and against the Parker & Whipple Company and H. J. P. Whipple, for infringement of a patent.]

Charles F. Blake, for plaintiffs.

Charles E. Mitchell and Orville H. Platt, for defendants.

SHIPMAN, District Judge. These two cases are separate bills in equity, wherein the defendants in each case are charged with an infringement of reissued letters patent [No. 6,693], dated October 11th, 1875, and issued to the plaintiffs, as assignees, by mesne assignments, of George McGregor and George Voll. The original patent [No. 88,318] to Voll and McGregor was dated March 30th, 1869. The invention is an improved sash-lock or sash-fastener. An ordinary form of sash-lock consists of a base-plate fastened to the top rail of the lower sash, a striking-plate or hook-plate fastened to the bottom rail of the upper sash, and a vibrating lever, which is pivoted upon the base-plate, and which engages with each plate so as to prevent either sash from being opened. In the invention which is described in the reissue, a bolt is mounted in and moves with the vibrating lever, which bolt slides backward and forward in a line parallel to the axis of the lever. When the lever is in proper position, as the bolt slides forward, it shoots beyond a catch segment or projection upon the base-plate, so as to hold the vibrating lever and prevent it from being turned until the bolt is retracted. When the bolt is retracted, and is disengaged from the catch segment, the vibrating lever can be turned and the sash can be opened. The improvement is one form of a self-locking sash-fastener, the object of which is to prevent the lever from being moved by a knife inserted between the sashes from the outside of the window. The claim of the reissue is "a vibrating lever, provided with a bolt, in combination with a striking-plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified."

The defendants' devices are substantially alike. Each has a base-plate, a vibrating lever mounted upon the base-plate, a bolt mounted upon and moving with the vibrating lever, a striker-plate or hook, and a socket or depression upon the base-plate, so formed as to receive the bolt which moves up and down. The difference between the plaintiffs'

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 199; and here republished by permission.]

[2] [Affirmed in 103 U. S. 786.]

and defendants' devices consists in the fact, that, in the defendants' devices, the bolt moves in a line perpendicular to the line of the lever, instead of moving in a line parallel to the line of the lever, and engages with a socket or depression upon the base-plate, instead of engaging with a projection from the base-plate. The defendants' bolt has a motion and is fastened, as a latch moves and is fastened. The main question is that of infringement; and it is practically conceded by the defendants, that the determination of this question depends upon the proper construction of the plaintiffs' reissued patent. In order to construe the claim, it is important to ascertain what was the actual invention of the original patentees.

A horizontally moving bolt, to lock the vibrating lever to the striker plate or hook, and a vertically moving bolt for the same purpose, were old in the art, and are mentioned in the specification of the reissue. In each of these devices, the bolt shot into a socket or depression upon the striker plate. In January, 1868, George Voll, one of the joint patentees, invented a sash lock, in which a horizontally moving bolt was received and was locked in a hole or socket in a "stump" or projection upon the base plate. Application was made by Voll for a patent, on February 25th, 1868, which application was rejected on August 6th, 1868, upon the ground that the invention had been anticipated in the patent of Brockseifer and Sargent, dated May 11th, 1858, one of the patents which are referred to in the plaintiffs' reissue. No appeal was taken. Twelve or eighteen of these locks were manufactured in February, 1868, by Voll, and were sent to the store of George McGregor, Voll's employer. What became of these locks does not appear. Two or three weeks after the rejection, Voll invented another sash-fastener, which consisted of a vertically moving bolt, which engaged with a catch segment or projection upon the base plate. A completed bolt of this kind was made, and the device was sent to a firm of patent solicitors, who reported that it was unpatentable. Voll and McGregor then united their skill and efforts, and invented the device which is the subject of this controversy, and for which a patent was issued to them jointly, on March 30th, 1869.

The invention of Voll and McGregor was the combination of a horizontally moving bolt and a catch segment upon the base plate. It was not broadly the transfer of a known locking device, and its equivalent, from the striker plate to the base plate. In January, 1868, Voll had transferred a socket from the striker plate to the base plate, and had connected a bolt with such socket. The second lock of Voll, viz., the combination of a vertically moving bolt and a projection upon the base plate, was a second stage in the improvement. The invention of Voll and McGregor was the final one of a series of separate inventions, in which series the prior inventions were made by one person before he was joined by his associate inventor. Each invention was distinct, and was separated from its successor by a completed, perfected and operative device. The prior inventions, although they may not have been abandoned by the sole inventor, were not included by the joint inventors in their joint invention. This is not the case of a joint invention which is the result of a progressive series of steps, which were taken by the two minds assisting each other in some degree. Neither is it the case of an invention which was completed by two acting jointly, after a series of experiments, not resulting in a perfected or an operative device, had been made by one of the inventors acting alone. In such a case, a court does not carefully dissect the invention, to ascertain what parts of the whole were furnished by each person. In this case, Voll first invented a means of locking upon the base plate. Whether this invention was patentable or not under the claim in his application, it is not necessary to consider. He next invented another combination, by which the same result was produced. It is agreed that this invention was patentable. The joint inventors thereafter invented a third device, which was the combination of Voll's horizontal bolt and catch segment. This was the only result of the joint labors and inventive skill of the two inventors.

Having thus ascertained the exact extent of the joint invention, the question next arises as to the proper construction to be given to the joint patent. The specification which was attached to the application for a reissue, evidently contained, in the description of the device, the words "socket or depression." By an amendment of the plaintiffs, these words were erased wherever they occurred, and "catch segment" were substituted therefor, before the reissue was granted. The plaintiffs seek to have their claim so construed as to include within the patent a locking device, as well by means of a socket or depression upon the base plate, as by means of a projection thereon. The invention which was actually made by the joint patentees covers a very narrow ground. It is to be noticed, that the defendants do not attack the validity of the patent, if it is confined to the joint invention. This invention was not broadly the combination of the old ingredients of socket or projection, so arranged as to lock the lever upon the base plate, because, that combination had been made by Voll; but it was an improvement upon the combination of Voll, and was subsidiary to his second invention. The joint patent, being subsidiary to the prior invention of one of the patentees, should not be extended so as to embrace the original invention. "Where a combination of machinery already exists up to a certain point, and

the patentee makes an addition or improvement to the machinery, he must confine his patent to the improvement." Barrett v. Hall [Case No. 1,047]. This limitation is sustained by the language of the reissue. If Voll had been the sole inventor and patentee of the joint invention, he might well have contended that his patent should be so construed as to embrace the different forms of locking devices upon the base plate which he invented, if such construction was not inconsistent with the language of his claim, and if he had not abandoned to the public any particular combinations, upon the principle, that "the actual invention of the party is a necessary auxiliary to the construction of the language which he has employed in describing it." Curt. Pat. § 453. But, inasmuch as the joint invention was within a very narrow compass, and the devices which are now claimed to be equivalents had anticipated it, the joint invention should not be made to relate back and include the pre-existing devices, although they were the sole invention of one of the joint patentees. "It is impossible that one person can be, at the same time, the joint and the sole inventor of the same invention." Barrett v. Hall [supra]. It is not intended to suggest any modification of the well understood principle, that the inventor of a combination is entitled to invoke the aid of equivalents (Seymour v. Osborne, 11 Wall. [78 U. S.] 516), but to simply assert, that, where an invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to the pre-existing devices, and that this is true when one of the joint inventors of the junior invention is also the inventor of the senior inventions. Under this construction of the plaintiff's reissue, the defendants do not infringe, inasmuch as they use a vertically moving bolt in combination with a socket upon the base plate.

It is insisted by the plaintiffs that Voll and McGregor are estopped to deny that they were the joint inventors of the patented invention. Neither of the joint inventors have made this denial. They have each denied that they were the joint inventors of the device which their assignees seek to have protected by the reissue, but which the inventors insist was simply an improvement of the sole and unpatented invention of one of them.

The testimony of Voll and McGregor is seriously criticised in connection with their alleged willingness to make oath, for a pecuniary consideration, to the application for a reissue, wherein the joint invention is stated so broadly as to include Voll's sole invention. I have not thought it necessary to pass upon this question of fact, as their present testimony is so corroborated by the exhibits in the case as to remove doubt in regard to the character of the sole and joint inventions. Let a decree be entered dismissing the bill, with costs.

[NOTE. From this decree the plaintiffs appealed to the supreme court, where, in an opinion by Mr. Justice Woods, the decision of the circuit court was affirmed. 103 U. S. 786. It was held that if the reissued letters were to be construed, as the plaintiff insisted they should be,—and as the court thought they must be, from several inferences,—to include the sash-locks of the defendants, they are broader than the original letters, and therefore void. The invention of Voll and McGregor was reduced to "consist solely in the fact that the bolt in the locking lever, instead of being driven by the spiral spring into a hole in the post upon which the lever is pivoted, is driven past the end of a segment raised on the base plate."]

HOPKINS & D. MANUF'G CO. v. PARKER & W. CO. See Case No. 6,695.

Case No. 6,696.

HOPKIRK v. McCONICO et al.

[1 Brock. 220.] [1]

Circuit Court, D. Virginia. May Term, 1812.

SURETYSHIP—LIABILITY—COLLECTION OF DEBTS.

1. On the 13th of December, 1790, a bond with two sureties was executed, the condition of which was, that the principal obligor should collect debts due to the obligees, and account faithfully for his transactions, as often as required, and at least on the 1st of September of every year. On the 21st of October, 1799, the collector and principal obligor, rendered an account, showing a considerable balance against him, and on the 15th of February, 1800, the collector executed a deed of trust to secure this balance, whereupon the time of payment was extended by the obligees. This deed was made at the instance of the obligees, and the obligees promised to surrender the bond, provided the deed was recorded in the spring of 1800. The deed was delivered to the obligees, who did not record it, till September 1800. In the stated account, the collector debited the obligees with a legacy, bequeathed by one of the obligees, to the son of the collector, the collector being the guardian of his son. The collector's stated account afterwards turned out to be false and fraudulent, he having received more money than he accounted for, and suit was brought to charge the sureties. The property conveyed by the deed of trust was sold, and the proceeds fell short of the amount appearing due by the stated account to secure which the deed was made. *Held*, that the promise to surrender the bond, on condition of executing the deed, and recording it in the spring, was still binding on the obligees, though the deed, in point of fact, was not recorded until the fall, the failure to record it in the spring, being the fault of the obligees, who had possession of it.

[Cited in Ashby v. Smith, 9 Leigh (Va.) 169.]

2. The sureties were exonerated from all responsibility, for so much money as appeared to have been collected, and to be due by the stated account, at the date of the deed, the deed having been made with the assent of the obligees, and indulgence having been extended to the collector, in consideration of the deed.

[Cited in Fellows v. Prentiss, 3 Denio, 521; Haskell v. Burdette, 35 N. J. Eq. 33.]

3. But the sureties were still bound for so much of the money of the obligees as had been

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

collected, prior to the execution of the deed, and not accounted for by the collector in his stated account, inasmuch as the failure to render a true account, was a breach of the condition of the bond.

4. Quaere, if the sureties were not discharged from responsibility for the legacy, as the credit was admitted by the obligees, knowingly.

This suit was brought by James Hopkirk, surviving partner of Spiers, Bowman & Co., of Glasgow, to charge the sureties of Christopher McConico, with the amount collected by McConico, as the agent of the firm, and not paid to them. The bill stated, that on the 13th of December, 1790, there was due to the firm of Spiers, Bowman & Co., in Virginia, £39,066 0s. 11¼d., and the documents were placed in the hands of McConico, who gave bond with Thomas Shore, and James Campbell, as sureties, in the penalty of £20,000, conditioned faithfully to collect the debts due to the firm, &c., and account fairly for his transactions as often as required, and, at all events, on the first of September of every year: that McConico had not performed the condition of his bond. His sureties having evinced uneasiness, he rendered an account, as he pretended, up to the 21st of October, 1799, showing a balance in favour of the firm of £3460 17s. 0½d. In that account, he debited the company with a legacy left by A. Johnson, to his son, (McConico being the guardian of his son,) of £666 13s. 4d., the said A. Johnson, being a member of the firm of Spiers, Bowman & Co. No objection to the credit was made, but the son refused to assent to it. To relieve the sureties as much as possible from this responsibility, a deed of trust was accepted from McConico, to secure the payment of this balance, bearing date the 15th of February, 1800. The balance not being paid, according to the terms of the deed, the property was sold, and the proceeds amounted to £3727 3s. 5d. The sale occurred on the 5th and 6th of March and 6th of May, 1801. The firm were compelled to pay £490 10s. 7d., to clear the trust property from prior incumbrances, leaving a balance due under the deed, on the 7th of January, 1802, of £871 9s. 10d. Besides this, it had been discovered, that McConico had received large sums during his agency, with which the company were not credited in his stated account. The bill concludes by praying, that McConico might be compelled to state on oath, the amount of his collections, and pay it to the plaintiff, or if he was unable to pay, that his sureties should be held responsible. In their answers, Conrad Webb, administrator of Thomas Shore, one of the sureties of McConico, and Campbell, the surviving surety, admit the execution of the bond as stated in the bill. They say, that on the 14th of March, 1798, they wrote to Strange, the then agent of the plaintiff, urging him to bring suit against McConico, and procure a settlement, as they would not be liable for moneys collected by him after the 14th of May, ensuing. This letter was among the exhibits in the cause. They insist, that as further credit was given till March, 1801, in consideration of the deed, they were discharged from all further responsibility. It was expressly stipulated too, that the bond should be delivered up on the execution of the deed. They deny that McConico had rendered a false account, or if he did, that they are responsible. They deny, too, that the deed of the 15th of February, 1800, was made by their advice, consent, or procurement. After its execution, Campbell was informed of its execution, and expressed gratification that the debt was secured, and the sureties exonerated. They were consulted on the terms of sale on the 3d of March, 1801, but with the express stipulation, that nothing then done should change the relations of the parties. The letter of McConico of the 3d of March, 1801, requesting an alteration in the terms of sale, and the assent of Strange, and the securities, with a reservation that it should not operate to charge, or exonerate the sureties, was filed as an exhibit in the cause. The defendants allege that the property, except the slaves, was sold for fifty per cent. below its value, and if conveyed to them, that it would be sufficient to satisfy the whole claim, and pray to be dismissed, &c. McConico, in his answer, produced a letter from Strange, bearing date the 13th of February, 1800, (just two days before the execution of the deed,) in which he says—"I now inclose you a deed of trust for you to execute, which please have done before such witnesses as will be able to attend the district court, in the event of your being out of the way, so as you cannot acknowledge it. As I am acting for others, it is my wish that it should be completed and recorded next term, and I will then, if that is done, relinquish the bond I hold." The deed was executed accordingly, and transmitted to Strange, on which he made the following endorsement. "If $5000 be paid by the 15th of September, property not to be sold sooner than October 21st, 1801, nor deed to be recorded before the district court for September, 1801, if re-acknowledged." The deed was recorded in the fall of 1800, the $5000 not having been paid by McConico.

MARSHALL, Circuit Justice. This suit is instituted to obtain a settlement of the accounts of Christopher McConico, as collector for the plaintiffs, and to obtain payment from the other defendants, who were his sureties, in a bond given for the faithful performance of his duty as collector. The securities oppose this claim, because, in 1800, McConico gave to the agent of the plaintiffs a deed of trust on all his property, to secure the balance then stated to be due, upon receiving which, the plaintiffs, by their agent, gave him further time for payment. The deed, too, was executed on the faith of a letter promising to relinquish the bond, if the deed should be

executed according to the requisition of the letter. This prolonged credit, it is urged, has entirely discharged the securities.

The two cases cited, the one from 2 Brown, Ch. 579 (Nisbet v. Smith), and the other from 2 Ves. Jr. 540 (Rees v. Berrington), do certainly establish the principle for which the defendants contend. A stipulation, without the knowledge of the surety, giving further time of payment to the principal debtor, is held to discharge the surety. But the plaintiff contends, that this case differs from those which have been cited, because the bond, from its terms, not being for the payment of a particular sum, at a specified time, but of money as it should be collected, the obligation is a continuing obligation, and, therefore, not released by suspending proceedings upon it. The counsel for the plaintiff did not appear to rely much upon this argument, as applicable to the debt, then known to be due, and the court cannot perceive its force. An action for any sum of money actually collected, accrues as soon as it is collected; and if that action be suspended, such suspension appears to the court, to release the sureties with respect to the sum so suspended, as completely as they would be released from the whole bond, if the whole money had been collected. The court feels no hesitation in declaring the sureties discharged, for so much as was known to be due, when the deed of trust was executed.[2]

But a question of much more difficulty remains to be decided. A much greater sum had been actually collected, than was reported by the defendant McConico, or known by the agent for the plaintiff to be in his hands. Are the sureties discharged for this sum also? On this question, I have felt great doubts, nor are those doubts entirely removed. I must suppose the settlement establishing the balance for which the deed of trust was taken, to have been made on an account rendered by McConico. If that account did not contain a true statement of the sums in his hands, it was a false account, and a fraud committed on the plaintiff. The agreement exhibited by the deed would not, in the opinion of the court, have restrained the plaintiff from suing, immediately, to compel a fair account, and payment of so much as had been collected and fraudulently concealed. Much less could it have restrained the sureties from instituting a suit in chancery, to compel a full settlement and payment of what was really due. But it is urged, and urged with great force, that, by this settlement, the sureties were lulled into perfect security, and prevented from taking any measures for their own safety; that this supineness was produced by the act of the plaintiff, and ought to disable him from proceeding to fix any loss, afterwards discovered, on the sureties. The court has felt the weight of this argument, but it is opposed by others which possess still greater influence.

It has been already stated, that this settlement must be considered as having been founded on the account rendered by McConico. This account is false and fraudulent. It is a breach of the condition of the bond. That condition requires, that he should account fairly for his transactions as often as he should be required so to do; and at least, once in every year, namely, on the first day of September. This condition is broken by the rendition of a false account. The securities are liable for this breach. The case is a hard one, but I cannot say, that they are discharged from this liability by an agreement produced by the fraud. The defendants rely also on the letter of Strange, of the 13th of February, 1800. I concur with them in opinion, that the promise to deliver up the bond, if the deed be recorded in the spring of 1800, does not lose its obligation by the postponement of recording the deed until the fall of that year, because the postponement was made by the plaintiff's own agent. He has himself released the condition of his promise, and the promise remains absolute. On this

[2] The principle upon which sureties are discharged, in consequence of any new agreement between the creditor and principal debtor, seems to be, that the remedies of the surety are thereby impaired (Croughton v. Duval, 3 Call, 69), and the surety's remedy is impaired, and the surety is consequently discharged, if the creditor, after the debt is due, preclude himself from proceeding against the principal for a moment (Hill v. Bull, Gilmer, 149; Bennett v. Maule, Id., 328). But if the agreement to grant indulgence is conditional, as that the principal debtor should pay a portion of the debt on a specified day, and the condition is never performed, the sureties are not discharged, for they are not thereby deprived, by the act of the creditor, of any remedy against the principal. Norris v. Crummey, 2 Rand. (Va.) 323; Hunter's Adm'rs v. Jett, 4 Rand. (Va.) 104. So, where the agreement to give time, is without consideration, or upon valuable consideration, with a stipulation that the creditor may proceed against the debtor, if required by the surety, or where the agreement to give time is made, with the knowledge and assent of the surety, in none of these cases is the surety discharged. Green, J., in Norris v. Crummey, supra; Hunter's Adm'rs v. Jett, supra; U. S. v. Nicholl, 12 Wheat. [25 U. S.] 505; McLemore v. Powell, Id. 554. It is not sufficient that the surety may sustain no injury by a change in the contract, or that it be made for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. Therefore, where an official bond was given by a deputy collector of direct taxes, under an appointment for eight townships, designated by name; and the instrument of appointment specially referred to, was afterwards altered by the collector and his deputy, but without the consent of the sureties, so as to embrace another township, the sureties were not responsible for moneys subsequently collected, and not paid over. Miller v. Stewart, 9 Wheat. [22 U. S.] 680. See, also, U. S. v. Tillotson [Case No. 16,524]. The cases decided in the courts of the United States, on the law of principal and surety, are collated by Mr. Peters, in 3 Cond. R. 394 [9 Cranch (13 U. S.) 212], in a note [to U. S. v. Giles], to which the reader is referred. See, also, Baird v. Rice, 1 Call, 18; Bullitt's Ex'rs v. Winstons, 1 Munf. 269; Winston v. Whitlocke, 5 Call, 435.

letter, the sureties contend that they are discharged at law, and as they are not bound in equity further than at law, this suit cannot be sustained against them. They are said to be discharged at law, because if suit was instituted at law against them on the bond, accord and satisfaction might be pleaded, and would bar the action. If the sureties are correct in their law, there is an end of the case. But the court is not of opinion that accord and satisfaction would bar this action. To this plea it might be replied, that the accord was obtained by the fraud of McConico, and, as at present advised, I think that a verdict found on such issue for the plaintiff, would authorise a judgment. If the defendants chose to demur to the replication, it is believed that the demurrer would be overruled, and the replication sustained. If this be correct, the sureties are not discharged at law. The question is, whether a court of equity will relieve against the bond, or decree against the defendants, or leave the parties to their action at law? I should incline to the latter course, were it not for the obvious advantage which the settlement of such an account as this, before a commissioner, has over a settlement before a jury. With respect to the sum for which McConico took credit as the guardian of his son, I rather incline to the opinion, that the securities must be discharged from it, because the agent for the plaintiff admitted it knowingly. This, however, would seem to be a question between the two securities, because one of them is security to the guardian's bond.[3]

Decree: That the defendants, Conrad Webb, as administrator of Thomas Shore, and James Campbell, are exonerated by the conduct of the plaintiff's agent from all responsibility, for so much of the money collected by Christopher McConico, as was known to that agent to have been collected, when the deed of trust of the 15th of February, 1800, was executed; but that the said sureties remain bound for so much as had been actually collected, and not accounted for by McConico, and the account is referred to a commissioner, to state the sums which had previously been collected by McConico, and were not contained in any account rendered by him to the plaintiff or his agent.

[3] "There was formerly a doubt on the question, whether a legacy due to minors could be safely paid by the executor to the father of the legatees, but the opinion latterly has been that the payment is at the risk of the executor. Dagley v. Tolferry, 1 P. Wms. 285; 1 Eq. Cas. Abr. 300, pl. 2; Cooper v. Thornton, 3 Brown, Ch. 96. In all these cases, the question seems to have been, whether a legacy to a minor could safely be paid to the father, as father or natural guardian merely. It is no where denied that a father duly appointed as guardian by the competent authority, is authorised to receive legacies, and distributive shares belonging to his ward. Kent, Chancellor, in Genet v. Tallmadge, 1 Johns. Ch. 3. See, also, Morrell v. Dickey, Id. 153; Williams v. Storrs, 6 Johns. Ch. 353." 2 Rob. Pr. 154, 155.

Case No. 6,697.

HOPKIRK v. PAGE.

[2 Brock. 20.] [1]

Circuit Court, E. D. Virginia. May Term, 1822.

BILL OF EXCHANGE—PROTEST—NOTICE—STATE OF WAR.

1. If the drawer of a bill of exchange has no funds in the hands of the drawee, and has no right to expect it will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary. But where the drawer has a right to expect that his bill will be honoured, as where there are running accounts between the drawer and drawee, he is entitled to notice, although in point of fact he had no funds in the hands of the drawee when the bill was drawn. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe that the bill will not be paid, the motives for requiring notice of the dishonour do not exist, and his case comes within the reason of the exception. Consequently, where a bill of exchange was drawn by W. B. on R. C. & Co., for £246 3s. 7d., the drawees having notified the drawer that his bills would not be honoured, although the drawees held in their hands a balance due to the drawer of 16s. 11d., notice of the non-payment and protest may be dispensed with, as such a case comes completely within the reason of the exception.

2. It is a general rule, that a long acquiescence in letters containing accounts, is prima facie evidence of the correctness of their contents.

[See Bambridge v. Wilcocks, Case No. 755; Baker v. Biddle, Id. 764.]

3. Where a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole onus probandi is thrown upon the holder. He must prove every thing, and nothing is required from the drawer.

4. A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies, payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. *Held*, that a state of war dispenses with the necessity of giving notice of the non-payment and protest to the drawer, but notice of its dishonour should be given within a reasonable time after the impediment is removed.

[Cited in Billgerry v. Branch, 19 Grat. 417; Farmers' Bank of Virginia v. Gunnell's Adm'r, 26 Grat. 138; McVeigh v. Bank of Old Dominion, Id. 806, 848.]

5. W. B., living in Virginia, draws a bill of exchange in November, 1775, on R. C. & Co., merchants in London, which was duly protested in June, 1776. W. B. died in 1777 or 1778. Payment was not demanded of the representative of W. B. till 1819, when suit was instituted on the protested bill. Quaere, does the doctrine of presumption of payment, arising from lapse of time, which is applicable to sealed instruments, apply to a bill of exchange? If it does, such presumption is merely prima facie, and the holder may rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that the debt has been paid. Should this presumption be rebutted, still the plaintiff shall only recover legal interest from the assertion of his claim.

[Cited in West Branch Bank v. Fulmer, 3 Pa. St. 401; House v. Adams, 48 Pa. St. 267.]

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

6. Bills of exchange are transferable, not by force of any statute, but by the custom of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. A deed, therefore, from A. to B., conveying a great number of bills, bonds, notes, &c., cannot be considered as a negotiation of the bills on mercantile principles, so as to authorize the holder to sue in his own name, though such an instrument may be considered as conveying an equitable interest, the right to receive the money.

[Cited in Re Gillespie, 15 Fed. 735.]

[Cited in Buckner v. Real-Estate Bank, 5 Ark. 539.]

7. It is a general rule in equity, that all persons having distinct interests must be brought into court; but where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court.

[Cited in Piatt v. Oliver, Case No. 11,115; Bryan v. Stevens, Id. 2,066a; Franklin Sav. Bank v. Taylor, 4 C. C. A. 55, 53 Fed. 868.]

[Cited in American Bible Soc. v. Price, 115 Ill. 645, 5 N. E. 135.]

This was a suit brought in 1819, on the chancery side of this court, by James Hopkirk, a subject of the king of Great Britain, and surviving partner of Spiers, Bowman & Co. merchants of Glasgow, against the defendant, William Byrd Page, executor of William Byrd, deceased, to recover the amount of two bills of exchange, drawn by said William Byrd, late of Westover, Virginia, on Robert Cary & Co. of London. The first bill was for £353 6s. sterling, payable at sixty days sight to Edward Brisbane or order, and bearing date July 19, 1774, which bill was indorsed by the said Brisbane to Alexander Spiers, and by him indorsed to Spiers, Bowman & Co. The second bill, bearing date the 26th of November, 1775, was for £246 3s. 7d. sterling, was also payable at sixty days' sight. The bills were severally presented to Robert Cary & Co., the first on the 4th of September, 1774, and the second on the 24th of April, 1776, and at those dates respectively noted for non-acceptance, the said Robert Cary & Co. having refused to accept them, and when they respectively arrived at maturity, payment being demanded and refused, they were duly protested for non-payment. The complainant avers in his bill, that notice of the protests were duly given to the drawer in his lifetime, and required his executor, the defendant in this cause, to produce, on oath, all the books and papers of his testator to the court, before the hearing of the cause, and relied on them as furnishing evidence that notice of the protests aforesaid was regularly given. Should such evidence not be supplied, however, it is further alleged, that at the time that the bills were drawn, the drawer had no funds in the hands of the drawee, and the plaintiff insists that this circumstance dispenses with the necessity of giving notice of the protest; that shortly after the first bill was drawn, the Revolutionary war between Great Britain and her colonies commenced, and at the date of the protest of the last bill, was raging so as to intercept and prevent the prosecution of any successful remedy against William Byrd: that William Byrd died in 1777, greatly indebted, though possessed of a very large estate, and appointed his widow, Mary Byrd, his executrix, who qualified as such in the same year: that the said executrix proceeded, while the war was still raging, to administer the estate of her testator, selling all the personal estate in possession, and appropriating the proceeds to the payment of other debts, so that in 1785, according to the account of her executorship then rendered, she had administered the whole of the effects of the estate of her testator, though no part of them was applied to the payment of the said protested bills: that at the date of the protests, the plaintiff and his co-partner, were, and had always continued, to the date of the institution of this suit, non-residents of the state of Virginia, and residents of Great Britain, and that before the courts of Virginia were open to an effectual prosecution of suits for British debts, the whole ostensible assets of the said Byrd were disbursed, or claimed to be disbursed, and when the impediments which had been opposed to the prosecution of such suits were removed, the prospect of a suit against an estate, ostensibly insolvent, was too discouraging to permit the institution of this suit. But it was alleged that assets to a large amount had recently come to the hands of the executor of Byrd, out of which the plaintiff prayed satisfaction of the aforesaid protested bills of exchange. William Byrd Page admits, in his answer, that the signature to the said bills is in the handwriting of his testator, but does not admit that Byrd had notice of their dishonour. He denies, that at the time the bills were drawn, the drawer had no funds in the hands of the drawees. William Byrd was for some years in the habit of shipping large quantities of tobacco to Robert Cary & Co., his merchants in London. They also sold for him his estate in England for £15,000 or £20,000 sterling. He therefore requires the plaintiff to produce evidence of the notice of the dishonour of the bills, or of such facts as will dispense with the necessity of proving notice. He further pleads the statute of limitations of Virginia in bar of a recovery, while he does not admit that all the members of the firm of Spiers, Bowman & Co. have always resided out of the state of Virginia: he insists that the fact of their having branches of their mercantile house at Petersburg and other places in Virginia, and agents and factors in this state, will preclude the plaintiff from availing himself of the exception in the act of limitations in favour of persons beyond seas. But if the act of limitations does not create an absolute bar to a recovery, he still relies on the great lapse of time as furnishing a strong presumption of their payment.

MARSHALL, Circuit Justice. This suit is brought to obtain payment of two bills of exchange drawn by the late William Byrd, of Virginia, on Robert Cary & Co., merchants of London, the one in the year 1774, and the other in 1775. These bills were regularly protested; but the defendant makes several objections to paying them. The first to be considered is, that no notice of their non-payment and protest was given either to William Byrd in his lifetime, or to his representatives, since his death. The plaintiff contends that this notice was unnecessary, because the drawer had no funds in the hands of the drawee. Although this application, in consequence of the state of the fund to which the plaintiff must resort, it consisting of equitable assets, is made to a court of equity, it is admitted to be a law case depending entirely on legal principles. It requires an attentive consideration of the question, how far the want of funds of the drawer in the hands of the drawee discharges the holder of a bill of exchange from the necessity of giving notice to the drawer of its dishonour. The rule requiring this notice was for a long time supposed to be general, and Mr. Justice Blackstone in his Commentaries (2 Bl. Comm. 469) lays it down without any exception. The first case in which an exception was admitted, is Bickerdike v. Bollman, decided in November, 1786, and reported in 1 Durn. & E. [1 Term R.] 405; in that case the court stated, that if it be proved by the holder that "from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands," notice to the drawer is not necessary. The reason given is, that he had no right to draw, and could not be injured by not receiving notice. An additional observation made by one of the judges is, that to draw in such a case "is a fraud in itself." It does not appear from the report of this case, nor is there any reason to believe, that there were any running accounts between the parties; the whole complexion of the case, and the reasons assigned by the judges for their opinions, negative the idea; it is simply the case of a debtor drawing a bill on his creditor, without a prospect of its being paid. In such a case, notice is declared by the court to be unnecessary. It is remarkable that in this case, although the principle is expressly asserted by both the judges, each declares that the case would be decided in the same way on a different principle. In Goodall v. Dolley (decided in 1787) 1 Durn. & E. [1 Term R.] 712, the judgment was against the holder of the bill, for want of notice; but in giving his opinion, Mr. Justice Buller recognises the principle established in Bickerdike v. Bollman. In Rogers v. Stephens (decided in 1788) 2 Term R. 713, the law is said to be settled, that no effects of the drawer in the hands of the drawee, excuses the holder from the necessity of giving notice, yet, it is remarkable that in this case, all three of the judges rely very much on a subsequent assumpsit made by the drawer. In Gale v. Walsh (decided in 1793) 5 Term R. 239, the principle appears to be recognised; but a rule to show cause why a new trial should not be granted for this cause, was discharged, because the fact did not exist in the case.

These are the earliest cases on this point; it has occurred very frequently in subsequent cases, and the principle seems to be firmly established; but as the question has come forward in different forms, and been viewed under different aspects, the principle has been greatly modified, and is no longer laid down in the general terms which were carelessly used on its introduction. It has been found necessary to define its extent with more precision, and to state the rule with more accuracy. It was perceived, that in the course of commercial dealing, it would frequently occur that a person might draw a bill with the best reasons for believing that it would be honoured, although, in fact, he might have, at the time, no funds in the hands of the drawee; and that all the reasons for requiring notice, would apply in such a case, with the same force as if the bill had been drawn on actual funds. In Legge v. Thorpe, 12 East, 171, Le Blanc and Bayley, Justices, stated the principle laid down in Bickerdike v. Bollman, and afterwards adhered to, in these terms: They said, "that the court in that case, looking to the reason for which notice was required to be given, laid down the rule, not generally, that where the drawer had no effects in the hands of the drawee at the time (which perhaps might turn out to be the case upon a future settlement of accounts between them), no notice of dishonour should be given; but that it need not be given where the drawer must have known at the time that he had no effects to answer the bill, and could have no reason to expect that his bill would be honoured." In Blackhan v. Doren, 2 Camp. 503, Lord Ellenborough said: "If a man draw upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonour, and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee." In Walwyn v. St. Quintin, 1 Bos. & P. 654, one of the strongest cases in the books in favour of dispensing with notice, Eyre, C. J., said: "But it may be proper to caution billholders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may pos-

sibly be many others." In Brown v. Maffey, 15 East, 216, Lord Ellenborough said: "The doctrines of dispensing with notice of the dishonour of a bill has grown almost entirely out of the case of Bickerdike v. Bollman. That decision dispensed with the notice to the drawer, where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due." "But that exception must be taken with some restrictions, which, since I sat here, I have often had occasion to put on it, as where the drawer, though he might not have effects at the time of the drawing of the bill in the drawee's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due. In such cases, I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honoured." In Rucker v. Hiller, 16 East, 43, Lord Ellenborough said: "Where the drawer draws his bill in a bona fide expectation of assets in the hands of the drawee to answer it, it would be carrying the case of Bickerdike v. Bollman farther than has ever been done, if he were not at all events entitled to notice of the dishonour. And I know the opinion of my lord chancellor to be, that the doctrine of that case ought not to be pushed farther." "The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception farther, it would come at last to a general dispensation with notice of the dishonour, in all cases where the drawee had not assets in hand at the very time of presenting the bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A bona fide reasonable expectation of assets in the hands of the drawer, has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ultimately fail to be realized." And in the same case, Bayley, J., said: "The general rule requires notice of the dishonour to be given in due time to the drawer, and it lay upon the plaintiff to show that he could not possibly be injured by the want of it. It would be somewhat hard to call upon the drawer towards the end of six years after the bill given; and when he objected that he had no notice of the dishonour, to tell him that he had no effects in the drawee's hands at the time when the bill was presented, though they might have come to his hands the very day after, and the drawee might have settled his accounts with the drawer on the presumption that the bill was paid."

The subject was considered by the supreme court of the United States, in the case of French v. Bank of Columbia, 4 Cranch [8 U. S.] 141, 2 Pet. Cond. R. 58. In that case, it was said (by Marshall, C. J., who delivered the opinion of the court) "to be the fair construction of the English cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule." When the drawer is continually making consignments to the drawee, and continually drawing on those consignments, his conduct may be essentially affected by knowing that any of his bills have been protested. He may stop in transitu, or may suspend further consignments. It may be as material to his interest to place no more funds in the hands of the drawee, in such a case, as to withdraw the funds previously placed in his hands. Notice may be as important to him in the one case as in the other, and there seems to be the same reason for requiring it—supposing the rule to be, that every person having a right to draw, or having reason to believe that his bill will be honoured is entitled to notice.[2] I will proceed to apply the principle to the facts of this case; and in doing it, I shall consider the two bills separately.

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[2] The doctrine, with its modifications, as laid down in the above opinion of Chief Justice Marshall, and in the case of French v. Bank of Columbia [supra], has been examined and re-affirmed in a recent case decided by the supreme court of the United States. In the case of Dickins v. Beal, 10 Pet. [35 U. S.] 572 (January term, 1836), in delivering the opinion of the court, and after a rapid review of the cases reported in the English books cited above, Mr. Justice Baldwin continues: "But unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law; and as he can in nowise suffer by the want of notice of the dishonour of his drafts, that it is deemed an useless form. 'Notice, therefore, can amount to nothing, for his situation cannot be changed.' In a case where he has no fair pretence for drawing, there is no person on whom he can have a legal or equitable demand, in consequence of the non-payment or non-acceptance of the bill. This is the rule, as laid down by the court in French v. Bank of Columbia, 4 Cranch [8 U. S.] 153, 164, on a very able and elaborate view of the then adjudged cases; which is fully supported by those since decided in England, and in the supreme court of New York. The case of the defendant falls clearly within the rule applicable to bills drawn without funds, or any bona fide, reasonable, or just expectation of their being honoured; and notice of their dishonour was not necessary." In truth, no principle of commercial law can be more firmly established, and it would seem that the only question which can hereafter arise with respect to it, will be, not as to the extent of the general doctrine, but in its application to the facts of the particular cases.

On the 19th of July, 1774, William Byrd drew on Robert Cary & Co., in favour of Edward Brisbane, for the sum of £353 6s. This bill was indorsed by Edward Brisbane to Alexander Spiers, and by him to the company. On the 17th of November, 1774, it was protested for non-payment. The first information that appears to have been given of this protest to Colonel Byrd, or his representatives, was the institution of this suit in 1819. The executor of Byrd resists its payment for want of notice, and the plaintiff alleges that notice was unnecessary, because the drawer had no effects at the time in the hands of the drawee. To support this allegation, he relies on several letters written by Robert Cary & Co. to William Byrd, which have been exhibited by the executor on his requisition. The defendant objects to this testimony, that the letters are the mere allegations of Robert Cary & Co., and do not contain a full statement of the correspondence between the parties, or of their accounts: that Colonel Byrd may not have acquiesced in the accounts transmitted with these letters, or in the statements they contain, although, from the loss of papers, the death of parties, and the great lapse of time, the papers cannot now be produced.

The general rule is, that a long acquiescence in letters containing accounts, is prima facie evidence of an acquiescence in their contents; and there is less reason for excepting this case from the rule, because the letters of Robert Cary & Co., from November, 1773, to October, 1775, do not notice any objection, on the part of William Byrd, to any of the accounts which, one of those letters says, were annually transmitted to him. The letter from Robert Cary & Co. to William Byrd, dated the 10th of November, 1773, incloses an account current, showing a balance due Robert Cary & Co. of £616 9s. 1d. This letter gives notice of the completion of a contract for the sale of Byrd's English estate; says the money is to be paid the 5th of April; that they shall immediately afterwards take up the whole of his bills; and says that they have referred Farrell & Jones to him, to determine whether they shall pay a debt of about £800, claimed by Farrell & Jones. The next letter is dated the 13th of May, 1774. It states the receipt of £5000 on account of the estate which had been sold, and the expectation of receiving the farther sum of £11,500 on the same account. It states the payment of debts to the amount of £5544 7s. 4d. and gives a list of other debts due from Byrd, to the amount of £11,577. The letter concludes with saying, that by Greenland's estimate, the produce of the estate will not exceed £15,500, out of which great charges are to be deducted. From this sketch the letter proceeds: "You will be able to judge how the account may stand, and what bills must be returned." It is observable, that among the debts paid, are several bills of exchange, which had been long protested, one of them as early as February, 1768. This fact shows an understanding by which bills were held up after a protest, in the expectation that they would be paid by the drawee, notwithstanding the protest. In such a case, if no notice be given, the law seems to be, that the holder looks to the drawee, not to the drawer, for payment. Townsley v. Sumrall, 2 Pet. [27 U. S.] 170. The next letter, of the 5th of August, 1774, states that there are many bills which must be returned, after paying all the money received on account of the English estate. This letter speaks of a further sum for a half year's rent, accruing before the purchaser took possession, to be received after Michaelmas. This would be £371 4s. 6d. There is, too, a subsequent letter, of the 14th of March, 1775, which mentions a farther receipt of £448 12s. 1d., on account of the English estate. Colonel Byrd appears to have drawn to the full amount of his English estate, so far as Robert Cary & Co. had stated the money to have been received; and if the transactions between the parties had gone no farther, these letters would furnish strong reasons for the opinion that, in July, 1774, he acted at least incautiously in drawing the bill under consideration. But there were transactions between the parties. Colonel Byrd held a large estate in Virginia, and the usage of the considerable planters to ship their tobacco to London merchants, and to draw on their consignments, is of general notoriety. In their letter of the 17th of November, 1774, Robert Cary & Co. say: "We shall, in the disposal of your tobacco, hope to render you a safe and pleasing tale." In a letter of the 10th of February, 1775, is an account of sales of fifteen hogsheads of tobacco, shipped in a vessel commanded by Captain Powers; and there is also notice taken of a mortgage on the estate sold to Mrs. Otway, for which no claimant had appeared, but for which Mrs. Otway had retained a considerable sum in her hands. The letter says: "We were compelled to settle the conveyance in the manner we did, yet at the same time, it no ways precluded you from receiving your part of this other mortgage, if no claimants." The letter shows that Colonel Byrd had written on this subject, and had manifested the expectation of receiving a further sum on this account. The letter mentions the payment of some small orders given by Byrd. It may be considered as probable, from these letters, that Colonel Byrd was not perfectly satisfied with the sums retained on account of charges on the estate, and expected more money from it. A letter of the 20th of June, 1775, states the payment of a draft drawn by Colonel Byrd, in favour of Hornsby, for £75, and their payment for his honour of another draft on Farrell & Jones for the same sum. The last letter is dated 2d of October, 1775. It mentions the payment of several little drafts, as desired by Colonel Byrd, "which are mentioned in an account current inclosed," but the ac-

count itself does not appear. It shows a balance, as the letter says, of 16s. 11d. in favour of Colonel Byrd.

From this review of the letters in the cause, it is obvious that Colonel Byrd was much pressed for money; that he was sanguine in his calculations of the sums to be yielded by his estate in England; that he drew upon that fund by anticipation, and to an amount greater perhaps than was strictly justifiable. It is also apparent that a considerable part of the money for which the estate sold, was retained for incumbrances, some of which were questionable, and there is reason to believe that he questioned them. It is also apparent that there were running transactions between the parties, and that the holders of his bills were in the habit of retaining them, and of receiving payment long after protest. That he made shipments of tobacco in the time, is unquestionable; but the amount of his shipments is uncertain; his letters are not produced; they would throw much light on this transaction. The letters giving notice of this particular draft, might, and probably would, show the idea on which it was drawn, and the calculations of the drawee; it might be drawn on actual consignment of tobacco, or it might be drawn on a calculation that something farther might be yielded by those items of the English estate, which the letters show had not finally been adjusted. These calculations may have been erroneous; but if they were made, the bill was not drawn with a knowledge that it would not be honoured, and therefore notice of its dishonour was unnecessary. The court will not presume that these calculations were made; the court will not presume that the letter of advice which usually accompanies a bill of exchange, did show that the drawer calculated on his bills being honoured; but the court cannot presume the contrary; and it is to be recollected that when a protested bill is held up for a great length of time without notice, the whole onus probandi is thrown on the holder; he must prove every thing, and nothing is required from the drawer. The case furnishes strong reason for the opinion, that this bill was not returned to Virginia, but was held up by Spiers, Bowman & Co. in the expectation of its being paid by Robert Cary & Co. It was drawn on the 19th of July, 1774, and protested for non-payment on the 26th day of November of the same year. Another bill for £213 15s., drawn on the 4th of July, 1774, in favour of Spiers, Bowman & Co., and protested on the 9th of November, 1774, was returned to Colonel Byrd, and was taken up; these bills drawn by the same persons, and held by the same house, at the same time, would probably have been returned by the same vessel had they been both returned. The circumstance that one was drawn in favour of Brisbane, an agent of the company, and indorsed by him to a member of the company, and by that member to the company, would not account for the appearance of one bill without the other, if both were returned. They were both the property of the same company, both due by the same person, both in possession of the company at the same time, and would probably have been both returned, if they were both returned, by the same vessel. The bill, said not originally to have been drawn in favour of Spiers, Bowman & Co., would probably have been transmitted to the same agent to whom the other bill was transmitted. The appearance of the one bill without the other, is, then, a strong circumstance in favour of the opinion that the bill retained was held up in England in the expectation of its being paid by the drawee. In estimating the probabilities of the circumstances and prospects under which the bill was drawn, this fact is entitled to some consideration. We have no regular accounts, no statements of the consignments made by Byrd to Robert Cary & Co. We know that their connexion was of long standing; that there was a considerable degree of mutual kindness and confidence; that Byrd was in the habit of shipping tobacco to Robert Cary & Co.; that there may have been a shipment at the very time this bill was drawn; that money was paid for Byrd by Robert Cary & Co., after this bill was protested; that a bill of £75 was taken up for his honour; and that in October, 1775, the balance of £616 9s. 5d., which stood against him in November, 1773, was converted into a balance of 10s. 11d. in his favour. We have not all the intermediate accounts, and we do not know how this balance may have fluctuated; add to this, that the bill is not said to have been protested for want of effects.

Under all these circumstances, I cannot say that the bill was drawn with a knowledge that it would be protested; and that notice of the protest could not be necessary. I cannot say that it was a fraud upon the payee, by giving him a bill which the drawer knew would not be paid. If the onus probandi lay on the drawer of the bill, the case would be clearly against him; but as it lies entirely on the holder, whose laches are without a precedent in a court of law or equity, I think he has not made out a case of complete justification, on which he can entitle himself to a decree for the bill drawn on the 19th of July, 1774. The second bill was drawn on the 26th day of November, 1775, for £246 3s. 7d., and was protested on the 26th day of June, 1776. It was drawn after the commencement of hostilities in Virginia; and before it was protested, all intercourse between the two countries was interdicted. Under these circumstances, notice is not to be expected, and ought not to be required. I at first doubted whether a bill, which, for a length of time, is held under circumstances which dispense with notice, does not lose its commercial character, and become an ordinary debt. But on reflection, I am satisfied that

this idea cannot be sustained: and that to charge the drawer, notice of the dishonour of his bill ought to be given within a reasonable time after the removal of the impediment. The question, therefore, on this bill, also is, were the circumstances under which it was drawn such as to dispense with notice? Was it drawn without reasonable ground for an expectation that it would be paid? It may reasonably be supposed, that on the 26th of November, 1775, the letter of the 2d of October, 1775, which came by the last packet to New York, was received. In attempting to show that notice of the dishonour of this bill was unnecessary, because the drawer had no effects in the hands of the drawee, the holder is met in limine, by the fact that this letter shows a balance in his favour of 16s. 11d., and the exception under which the plaintiff withdraws himself from the general rule, is, that the drawer had at the time no effects in the hands of the drawee. If we may depart from the letter of the exception, there is no point at which to stop; and if notice may be dispensed with when a small sum is in the hands of the drawer, it may also be dispensed with when a large sum is in his hands, provided that sum be one cent less than the bill is drawn for. I am aware of this argument, but think it more perplexing than convincing. There are many questions in which no precise line can be marked, which must depend on sound legal discretion, and where the case itself must be decided by a jury or by the court, acting on the principles which ought to regulate a jury. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe his bill will not be paid, the motives for requiring notice of its dishonour do not exist, and his case comes within the reason of the exception. Where all transactions between parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us, that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in, were he the debtor in the same sum. The true inquiry appears to me to be whether the connexion between William Byrd and Robert Cary & Co. remained such as to justify a hope that his bill would be honoured, and to afford any shadow of justification for drawing it. I think it as demonstrable as any proposition of this sort can be, that he knew that this bill would not be paid. He had no funds in the hands of the drawee except 16s. 11d., and no prospect of having any. He had made no shipment of tobacco by the last vessel, and Robert Cary & Co. speak of the fact with some resentment. In their letter of June, 1775, they had mentioned sending a vessel to Virginia chartered at a high price, in which they expected consignments of tobacco from their friends, and among others, from Colonel Byrd. In their letter of the 2d of October they say: "When Power came in, we were in hopes you would have offered him some assistance, but we observe the high price in the country was the cause of the disappointment, and no compliment to our charter. However, if we are no losers, we are not beholden to our friends for it."

With respect to the mortgage for which it had been supposed that the mortgagee was dead without a representative, he says, "it is feared the representative is found, but be this as it may," he adds, "the estate will be always liable, and therefore, without a proper indemnity, little can be expected. What indemnity you may offer we know not, but we shall not engage for our own parts." After mentioning the payment of some bills, they add, "but for paying any more, or raising money on the uncertainty of the mortgage, we shall not attempt." With this letter before him, Colonel Byrd must have drawn, I think, with a moral certainty that his bill would be dishonoured: and if in any case a holder can be excused for not giving notice, this is that case. There was an end of all consignments, of all intercourse between the parties; there were no funds to withdraw, and no remittances to stop. The want of notice would be no injury to him. This case seems to me to come within the exception of Bikerdike v. Bollman, as modified in the subsequent cases.

This brings me to the consideration of the other objections made by the defendant to the payment of this bill. He contends, that after such a lapse of time, payment must be presumed.[3] Admitting the doctrine of

[3] The statute of limitation did not apply to this case. See Hopkirk v. Bell, 3 Cranch [7 U. S.] 454; 4 Cranch [8 U. S.] 164. By the fourth article of the definitive treaty of peace, between the United States and his Britannic majesty, of 1783, "it is agreed that creditors on either side shall meet with no lawful impediment to the recovery in full value in sterling money of all bona fide debts heretofore contracted," which fourth article is recognised, confirmed, and declared to be binding and obligatory by the second article of the convention between his Britannic majesty and the United States, made on the 8th of January, 1802. By the fourth section of the act of limitation of Virginia, all actions of debt, detinue, &c., are directed to be brought within five years after the cause of action shall have accrued. By the 12th section of the same act, there is a saving of persons beyond seas, but by the 13th section, it is provided "that all suits hereafter brought in the name or names of any person or persons, residing beyond seas, or out of this country, for the recovery of any debts due for goods actually sold and delivered here, by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this act, for bringing the like suits, &c., notwithstanding the saving &c., to persons beyond the seas, at the time their causes of action accrued." The case of Hopkirk v. Bell, was certified from the circuit court of Virginia, in which the opin-

presumption to be the same in respect of a bill as of an instrument under seal, of which I am not so confident,[4] still it is not a positive rule, depending absolutely, like the statute of limitations, on length of time, but is the mere creature of reason, resting on probabilities. The creditor may meet this presumption and rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that his debt has been paid. He has, I think, met and completely rebutted it in this case. The bill was protested in England on the 26th day of June, 1776, and Colonel Byrd died in 1777 or 1778. In the meantime, war raged between the two countries; all intercourse between them was unlawful; and Colonel Byrd's circumstances were too much embarrassed to admit of a suspicion that he would be eager in his search for those creditors who could make no legal demand upon him. It is, then, almost certain that this debt was not paid by him in his lifetime.

The chief argument in support of this presumption, is founded on the time which has elapsed since his death, without any demand on his representatives. The plaintiff ascribes this to the insolvency of his estate; but to this it is answered that a suit had been brought in 1803, for a different claim, by the same agent, who was in possession of these bills; a bill was then filed claiming £70 19s. 10d.. as a debt due from William Byrd & Co. for dealings at their store in Manchester, and £10 19s. 6½d. a debt due from William Byrd for dealings at their store in Petersburg. If the insolvency of the estate did not prevent this suit, it cannot have prevented a suit on the bills. The plaintiff assigns two reasons for this suit, by which he attempts to repel the inference which has been drawn from it. One is, that though William Byrd was supposed to be insolvent, William Byrd & Co. were not so. The other, that this suit was only preparatory to an application to the British commissioners, sitting under the treaty of 1802; neither of these reasons is satisfactory; the suit does not seek for satisfaction from the

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ions of the judges, (Marshall, C. J., and Griffin, J.) were opposed upon the following question, to-wit: "Whether the act of assembly of Virginia, for the limitation of actions pleaded by the defendant, was, under all the circumstances stated, a bar to the plaintiff's demand founded on a promissory note, given on the 21st of August, 1773?" The certificate contained the following statement of facts agreed by the parties, viz: That David Bell, the defendant's testator, has considerable dealings with the mercantile house of "Spiers, Bowman & Co." of Glasgow, (of which house the plaintiff was surviving partner) in the then colony of Virginia, by their factors who resided in that colony, and on the 14th of March, 1768, gave his bond to the company, &c., and on the 21st of August, 1773, Henry Bell, the defendant, executed his promissory note to Spiers, Bowman & Co. for £437 14s. 10d. and on this note this suit was instituted, on the 4th of January, 1803. That the said Spiers, Bowman & Co., were at that time British subjects, merchants resident in Glasgow, and had never resided in Virginia, and that James Hopkirk was then, and always had been, a British subject, resident in Great Britain, and never had been in Virginia. That the company had a factor or factors resident in Virginia on the 21st of August, 1773, when the note was given, and from that time to the commencement of the American war, on or about the 1st of September, 1776. That the company had neither agent nor factor in this country authorized to collect their debts from the commencement of the war until 1784. That on or about the 10th of September, 1784, and ever since, an agent had resided in Virginia, authorized by power of attorney generally to collect all debts due to the company in Virginia. The supreme court ordered the following opinion to be certified to the circuit court: "That upon the question in this case, referred to this court from the circuit court, it is considered by this court that the said act of limitations is not a bar to the plaintiff's demand upon the said note: and this court is of opinion that the length of time from the giving the note to the commencement of the war in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States of 1783, does not admit of adding the time previous to the war to any time subsequent to the treaty in order to make a bar: and is also of opinion that the agent merely for collecting debts mentioned and described in the said state of facts, is not to be considered as a factor within the meaning of the said act of assembly so as to bring the case within the proviso of the said act." The same case went again to the supreme court (see 4 Cranch [8 U. S.] 164), when, in addition to the facts before stated, it appeared that Andrew Johnston, of the firm of Spiers, Bowman & Co., came to the United States, after the peace of 1783, viz: in the spring of 1784, and died in Virginia in 1785, but that no other partner of the firm had been here since the peace. The court ordered it to be certified as their opinion, that under all the circumstances stated, the act of limitations of Virginia was not a bar to the plaintiff's demand on the note of the 21st of August, 1773. As to the doctrine of presumption of payment in actions upon old bonds, see note to Murdock v. Hunter [Case No. 9,941].

[4] In an action of debt on a promissory note, the court, if requested, ought to instruct the jury, that, twenty years having elapsed between the date of the execution of the note and the institution of the suit, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or of part payment of the principal within twenty years Wells v. Washington's Adm'r, 6 Munf. 532. But if more than five years and less than twenty years have elapsed, the defendant cannot rely on the presumption of payment, but he must plead the statute. Tomlin's Adm'r v. How's Adm'r, 1 Gilmer, 1. In the case of Du Belloix v. Lord Waterpark (decided in 1822) 1 Dowl. & R. 16, 16 E. C. L. 12, which was an action of assumpsit by the payee against the maker of a promissory note, it was contended that the jury were bound to presume, from analogy to the case of the bond, that after twenty years, the note had been paid, although there was no proof that the payee had been within the realm; but the chief justice (Abbott) held, that the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contract debts, and were subjected to the provisions of the statute of limitations; whereas, the rule for presuming payment of a bond after twenty years, was founded on the common law, there being no statutable provision with respect to obligations of that nature; and, therefore, without some decisive authority on the point, he could not direct the jury in the way contended for.

effects of William Byrd & Co.; nor does it even charge that William Byrd was the surviving partner of that company, or even had any of its property in his hands; it charges him merely as a member of the company, and seeks for satisfaction out of his private estate, which is alleged to be in the hands of his executor, or of his trustees. But this reason, were it more consistent with the fact, would not apply to the claim against him as an individual. To account for this, we are told that it was necessary to establish the debt, in order to justify an application to the British commissioners. But surely it was not less necessary to establish the claim on this bill than on an open account. The production in 1804, or afterwards, of a protested bill without notice to the drawer of its dishonour, or proof of a single attempt to obtain payment of it, could never be received by the commissioners as a valid claim on the British government. But if these bills were held up in order to be laid before the commissioners, why were they not laid before that board? Is not the fact that no application has been made on them to the commissioners, a proof that this is not the cause which prevented the institution of suits on them in this country?

If it be said that they have been laid before the commissioners, I ask what has been the fate of the application? Has it been rejected in consequence of the laches of the holder, or has it been successful? But there is no reason to believe that the suit in 1803 was brought with any other view than to recover the money it demanded, and the question recurs—why were not these bills put in suit also? It has been said they were overlooked by the agent—but this is not credible. There is an indorsement on the envelope which contained them, in his hand writing, and it must be supposed that bonds, bills, and notes were not thrown in confusion among general books and papers, but were carefully preserved and listed, and that they would be immediately inspected by the agent to whom their collection was confided. Must it then be presumed that the agent believed them to be paid? The reasons against this presumption, so far as respects a payment made by Colonel Byrd, have already been stated. The reasons against their having been paid by his representatives are still stronger. Their accounts are all preserved, and this credit is not claimed. How could the agent have received an impression that they were paid? He must have received it from the papers themselves, from the entries on the books, or from direct communications made by Spiers, Bowman & Co. But the papers contain no indications of payment. The books, I am told, contain none; and is it reasonable to suppose that the plaintiff would send the bills to be collected, and write to the agent that nothing was due on them? We must impute negligence to the agent, or believe that he was of opinion that the debt was not recoverable at law. The last opinion, however, does not necessarily imply his conviction that it had been paid. The bills were not accompanied with any proof of notice, and he could obtain none. Without this proof, and without any evidence that the drawer had no right to draw, he might have thought the claim desperate; but this does not create a presumption that he believed it to be paid. I think, on a consideration of the circumstances of the case, that the presumption of payment is completely rebutted.

I am next to consider an objection which goes to the right of the plaintiff to sustain this action, even admitting that the right to bring it exists in some person. In 1813 a contract was entered into between the plaintiff and William C. Williams, a citizen of Virginia, by which the former conveyed to the latter all his debts in this country, and authorized him to sue for them, either in his own name, or in the name of the present plaintiff. It is contended that these bills passed by this assignment, and that the whole legal and equitable interest being in another, no suit on them can be maintained by the plaintiff. On the part of the plaintiff it is answered, that this instrument, being made flagrante bello, is void, and that no action can be sustained on it, even after peace. As this may probably become a question between the parties to the instrument, I would not give an opinion on it unless it should be necessary in this cause. I am rather disposed to think it is not necessary. Bills of exchange are transferable, not by force of any statutes, but by the custom of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. It appears to me that it would be extremely inconvenient to separate the evidence of ownership from the bill itself, and I think there is no usage to justify such a separation. Nothing can be more anti-commercial than the idea of transferring a negotiable paper by a deed transferring a vast number of bills, bonds, notes, and accounts. Such an instrument may very properly be considered as conveying the equitable interest, the right to receive the money, but cannot be considered as a negotiation of the bill upon mercantile principles, or according to mercantile usage, so as to authorize the holder to sue in his own name. The books treat of no such mode of transfer. The person to whom a bill is transferred is never denominated an assignee. He is always termed an indorsee. Upon this ground, I am of opinion, that in this case a suit could not be maintained in the name of William C. Williams. Were this even doubtful, the instrument now relied on contains an authority to sue in the name of the plaintiff, and may, therefore, fairly be considered as not being intended to have the legal effect of an assignment, but to operate as an agreement authorizing William C. Williams to

exercise all the powers of ownership in the name of the plaintiff. But I rely on the principle, that a bill of exchange is not, by the custom of merchants, transferable by such an instrument as is produced in this case. But the defendant contends, that, admitting the suit to be maintainable in the name of the plaintiff, still William C. Williams ought to be a party, because in a court of equity, all persons concerned in interest must be parties. I do not think the rule applies to such a case as this. All persons having distinct interests, must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not, I think, always necessary to bring both before the court. Thus, a trustee may sue, without naming the cestui que trust as a party,—an executor or administrator may sue, without naming legatees or distributees. And the obligee in a bond, where it is not by law assignable, may sue, or the equitable assignee may sue in his name, without being named himself as a party. This may, I think, be done in a court of equity as well as a court of law. The person having the equitable interest, if the suit be not really brought for his benefit, may insist on being made a party, and the court will direct it: but I do not think the omission of persons in this situation any objection to the suit. Had this suit been brought by William C. Williams, Hopkirk must have been made a party; but I do not think Williams a necessary party to a suit brought by and in the name of Hopkirk. I am of opinion that the plaintiff is entitled to a decree for £246 3s. 7d. sterling, with interest thereon, at the rate of ten per cent. per annum, for eighteen months, and with interest on the whole sum at the rate of five per cent. per annum, either from the expiration of eighteen months, or from the time that this claim was asserted in court, according to the manner in which the act in the Revisal (1745), which regulates this transaction, has been construed. I shall give the five per cent. only, from the assertion of the demand in court, unless by a reference to the records of the general or district court, it can be shown that the law has been expounded, to allow interest from the expiration of the eighteen months.

Case No. 6,698.

HOPKIRK v. RANDOLPH et al.

[2 Brock. 132.] [1]

Circuit Court, E. D. Virginia. May Term, 1824.

REAL PROPERTY—FRAUDULENT CONVEYANCE—LIABILITY OF DONEE.

1. It is a general principle that a voluntary conveyance, made by a person indebted at the time, is void as to the creditors whose debts existed when the gift was made. But, though the fact of the donor's being indebted at the time of such voluntary conveyance, is a strong badge of fraud, yet where the donor's fortune was ample, and a gift made by him to his daughter at her marriage was comparatively trivial, and the husband received and retained possession of the subject of the gift; though the donor afterwards became insolvent, the court refused to set the gift aside as fraudulent; a reasonable advancement, made under such circumstances, not being embraced by the statute of frauds.

[Cited in Anon., Case No. 474.]

[Cited in Huston's Adm'r v. Cantril, 11 Leigh, 159; Pomeroy v. Bailey, 43 N. H. 124; Robinson v. Boyd, 17 Mich. 134; Lockhard v. Beckley, 10 W. Va. 99, 107; French v. Holmes, 67 Me. 194.]

2. Quaere, how far the intervening marriage of the daughter would affect such a question, as between the creditors of the donor, and the husband of the daughter? Would the subsequent or contemporaneous marriage of the daughter render valid a gift which, independent of that marriage, would be void as to the antecedent creditors of the donor? It seems, that if the gift could be considered, in any fair construction, as the inducement to the marriage, the marriage would give validity to a gift, which, otherwise, would be void as to the creditors.

3. A father conveys a large portion of his estate to his sons, without valuable consideration, and directs that they shall execute bonds for a specific sum to a third person, the husband of the donor's daughter. This is virtually a charge upon the property, and is to be considered as if it was a gift from the father to his son-in-law directly, and the latter is liable to the creditors of the father, for any moneys received by him in satisfaction of such bonds.

[Cited in Dold v. Geiger, 2 Grat. 102.]

4. T. R. being possessed of a large estate, made a division of it among his three sons, A. C. R., I. R. and T. R., and in consideration thereof, directed them to execute their bonds to R. H., the husband of the donor's daughter, for £250 each. J. B. obtained a judgment against T. R., the elder, after the division of his estate. Execution on the judgment was stayed, the plaintiff entering into an agreement with A. C. R., whereby it was stipulated that A. C. R. should pay the debt in three annual instalments. T. R., the elder, and his three sons, all became insolvent before the payment of the said debt. *Held*, that the stay of execution does not discharge R. H. from his liability to pay to the creditor any money received by him in payment of the bonds, although, when the judgment was rendered, A. C. R. possessed sufficient property to satisfy it. The principle, that where any indulgence is extended by a creditor to his debtor, and the debtor subsequently becomes insolvent, the creditor loses his recourse against the security, does not apply in favour of a mere donee.

5. It seems, that where a father executes a voluntary bond to his son-in-law, the obligee will not be held responsible to the prior creditors of the father, for the money actually received in payment, in whole or in part, of the bond, such voluntary bond not being within the statute of frauds.

6. If several voluntary conveyances are made to different individuals, which are fraudulent as to creditors, the donees will not be held liable, only for the proportions which their respective gifts bear to the debts of the donor, but the whole of every such gift will be subjected to the payment of the debts of the donor.

7. T. R. conveyed lands to his three sons, without valuable consideration, who conveyed

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

them away to third persons. Quaere, are the lands in the hands of a purchaser liable to the claim of a creditor of the father? However this may be, the creditor cannot be compelled to proceed against such purchaser, and no decree would be rendered against him, in aid of a volunteer, who was able to pay the debt.

[Cited in Pratt v. Curtis, Case No. 11,375.]

[Cited in Ringold v. Suiter, 35 W. Va. 190, 13 S. E. 47.]

[See note at end of case.]

In equity.

MARSHALL, Circuit Justice. In the year 1790, the defendant, Randolph Harrison, intermarried with the defendant Mary, daughter of Thomas Randolph, deceased, who was then in possession of a maid-servant, a negro girl, and a riding-horse, which had been given her some years before by her father, who was at the time of the gift and of the intermarriage, possessed of a considerable estate. This property was, upon the intermarriage, retained by the donee, and has ever since remained in possession of Randolph Harrison. In the autumn of the year 1793, Thomas Randolph and his three sons, Archibald Cary, Isham, and Thomas, agreed on a division of his estate, and property to a large amount was conveyed to each of the sons, in consideration of love and natural affection, of certain specific debts, and also of bonds for £250, payable by each of them to their sister Mary Harrison. In the year 1795, John Bowman, styling himself surviving partner of Spiers, Bowman & Co., instituted a suit in this court against Thomas Randolph, and in May, 1796, obtained a judgment by confession for the debt in the declaration mentioned, to be discharged by the payment of $1,532 46, with interest at the rate of five per cent. per annum, from the 1st day of September, 1775, till paid, with costs. Execution on this judgment was stayed, and the judgment was to be discharged in equal instalments of one, two and three years. Archibald Cary Randolph, who transacted his father's business, made the agreement for the confession in his father's name, and engaged to pay the judgment according to its terms. To obtain his undertaking for the payment of the judgment appears to have been the principal motive with the plaintiff's agent for suspending execution. On the 25th of June, 1800, a fieri facias was issued, which was returned "no effects." Archibald Cary Randolph had wasted and misapplied the estate and crops of his father.

In 1800 or 1801, Thomas Randolph departed this life, intestate, and in the year 1803 James Hopkirk, stating himself to be the surviving partner of Spiers, Bowman & Co., filed his bill in this court, making Archibald Cary Randolph, administrator of Thomas Randolph, deceased, and the said Archibald Cary Randolph, Isham Randolph and Thomas Randolph, and Randolph Harrison, and Mary his wife, children and distributees of Thomas Randolph, deceased, defendants thereto. The bill alleges that the estate of Thomas Randolph was considerable; that the deeds to his sons are fraudulent; that his children are in possession of property which ought to satisfy his debt, and prays a decree against them in such proportions as the court may direct, or such other decree as may be adapted to his case. Several accounts have been taken, and in the progress of the cause, it appears that the estate of Thomas Randolph, Sr., is wasted, and that all his sons are notoriously insolvent. The plaintiff claims the whole debt from his son-in-law, Randolph Harrison, or so much thereof as can be satisfied out of the property he has received with his wife. On the hearing, the court was of opinion that the personal representative of John Bowman ought to be a party, whereupon the bill was amended, and John Williams, administrator, &c. of John Bowman, deceased, was made a defendant, and his answer was filed, admitting the right of the plaintiff to the debt.

The defendant rests his defence on two grounds: First, he contends that receiving a judgment with a stay of execution, with a stipulation that Archibald Cary Randolph would pay the debt, changes its character, and amounts to a waiver of his claim upon the property in the hands of Randolph Harrison. Secondly, that the gifts to Randolph Harrison are not within the statute of frauds. 1. The judgment is against Thomas Randolph, Sr., and appears by the record to have been confessed by his attorney; this was probably under the instructions of Archibald Cary Randolph; but Archibald Cary Randolph acted as his agent, and it is to be presumed, from all the circumstances, with full power. The judgment could not merge in the agreement with Archibald Cary Randolph, and was indeed a part of that agreement; it was not understood that Thomas Randolph was to be discharged, and Archibald Cary Randolph substituted in his place; but that time was to be given to Thomas Randolph, in consideration of the collateral security furnished by the undertaking of Archibald Cary Randolph to pay the debt. But the defendant insists that the plaintiff, by disabling himself from proceeding against Thomas Randolph, has discharged Randolph Harrison, upon the principle that the same act would have discharged a security of Thomas Randolph. The two cases do not, in the opinion of the court, stand on the same reason. The creditor who gives time to his debtor, hinders the security from proceeding himself against the debtor to recover the money he may have paid. But had Mr. Harrison paid this debt, he could not have recovered it from Thomas Randolph. A volunteer who loses the property given him from defect of title, has no legal recourse against the donor at any time, unless there be an express warranty. I am, then, of opinion, that the stay

of execution, and the transactions with Archibald Cary Randolph, although the debt might certainly have been satisfied, had the creditor proceeded in the usual manner, constitute no bar to the present suit. They aggravate the hardship of the defendant's case, but do not constitute a defence at law or in this court.

2. I proceed, then, to the inquiry, how far the property which came to the possession of Randolph Harrison is liable to the creditors of Thomas Randolph? The words of the statute are, "every gift, &c., had, or made and contrived of malice, fraud, covin, collusion or guile, to the intent and purpose to delay, hinder, or defraud creditors of their just and lawful actions, &c. shall, from henceforth be deemed and taken (only, &c.) to be clearly and utterly void." Were this statute now for the first time to be expounded, the court would find much difficulty in construing it as directed against voluntary gifts or conveyances, merely because they were voluntary. The language of the act comprehends such as are made of malice, fraud, covin, collusion, or guile, with intent or purpose to delay, hinder, or defraud creditors. This intent or purpose, would be supposed to constitute the contaminating principle, which would infect and vitiate the gift or conveyance, and would be required to bring the particular case within the act. But as this intent is concealed within the bosom of the actors, it would be the duty of the court to infer it from the character of the transaction, and as the equity of the creditors is generally stronger than that of mere volunteers, the court ought to lean to the side of the creditor, and to consider every gift or voluntary conveyance as coming within the statute, the fairness of which was not conclusively proved. Even, independent of the statute, gifts or voluntary conveyances, which obviously defeated the claim of a creditor, would be considered as fraudulent, so far as regarded him. The donee, therefore, would always be required to prove the fairness of his title. If he be not a purchaser for a valuable consideration, it would be incumbent on him to show a case, not only without taint, but free from suspicion. If the circumstances of the gift be such that, according to any reasonable probability, it might originate in any impure motive, or might in fact prove injurious to creditors, by withdrawing a subject to which they had just pretensions, the fair construction of the act would comprehend it. But a construction which should, under all circumstances, comprehend every gift, merely because it was voluntary, might derange the ordinary course of society, and produce much greater injustice than it would prevent. A man, for example, of great opulence, owing some debts, feels himself bound to advance his children, when they leave him to act for themselves, and to perform their own parts on the great theatre of the world. His own feelings and public opinion would equally reproach him, should he withhold from them those aids which his circumstances and their education and station in life would seem to require. A reasonable advancement, under such circumstances, so far from being considered as collusive, or made with an intent to defraud creditors, would be obviously a provision required by justice and the common sense of mankind. If, after a long lapse of time, the child, having acquired credit in virtue of the estate, in his possession, and apparently his own, should, as well as his parent, become insolvent, all would admit that the equity of his creditors would be stronger than the equity of the creditors of his father. But should he not become insolvent, but should settle in life, marry in the visible possession of property given to him in good faith, as a reasonable provision made by an opulent parent, whose circumstances were not only unsuspected, but were in truth perfectly sound, the subsequent failure of that parent, at a distant period of time, could not reasonably be connected with that advancement, so as to impress upon it the stamp of fraud. No fraudulent intent, no intent to delay, or in any manner to injure creditors, could be inferred. The consequence could not be apprehended from the act, and, therefore, the act could not be considered as constructively fraudulent. It would seem to be a fair disposition of property, a fair exercise of the power of ownership, and not, I think, within the statute of frauds, were that statute now first to be first applied to such a case. But the statute has been long in force, and numerous decisions have been made upon it, both in England and in this country. Those decisions are admitted to bind this court. They determine, that a voluntary gift is void as to creditors, whose debts existed at the time the gift was made. This is the general principle, and as a general principle, it is believed to be unquestionably a sound one. Untrammelled by precedents, this court would, at this time and in this case, establish it. But the difference between a general principle, and one which is universal in its application, which is so inflexible as to permit no case to be withdrawn from it by any circumstances, however strong, which would make this act equivalent to an act annulling all gifts or voluntary conveyances, made by a person indebted at the time, however large his fortune, and however inconsiderable his debts or his gift, must be admitted by all. The extent of the principle, then, established by these decisions, must be ascertained by a review of the decisions themselves, of the terms in which they have been expressed, and of the circumstances to which those terms have been applied.

It has been truly observed that some shades of difference appear in the cases on this subject. Some judges have shown a disposition to press the principle farther than others, and

have expressed themselves in terms more or less favourable to the creditor or donee. Questions of this sort have been most common in chancery, but as courts of law have concurrent jurisdiction, and as they have received the same construction in both courts, it may be proper to notice the opinions that have been expressed by an eminent judge in a common law court. In the case of Cadogan v. Kennett, 1 Cowp. 434, Lord Mansfield said: "These statutes (Sts. 13 & 27 Eliz.) cannot receive too liberal a construction, or be too much extended in the suppression of fraud. The statute of 13 Eliz. c. 5, which relates to frauds against creditors, directs 'that no act whatever, done to defraud a creditor, shall be of any effect against such creditor or creditors;' but then, such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction, bona fide, and where there is no imagination of fraud. And so is the common law." In the case of Doe v. Routledge, 1 Cowp. 710, the same judge says: "A custom has prevailed, and leant extremely, to consider voluntary settlements fraudulent against creditors. But if the circumstances of the transaction show it was not fraudulent at the time, it is not within the meaning of the statutes, though no money was paid." In the same case he afterwards says: "One great circumstance, which should always be attended to in these transactions, is, whether the person was indebted at the time he made the settlement? If he was, it is a strong badge of fraud." Page 711. The impression made by these declarations of Lord Mansfield is, that every gift made by a person indebted at the time, is liable to great and serious objection, and is, to use his own expression, a strong badge of fraud, but is not, necessarily, and under all possible circumstances, absolutely fraudulent.

No English chancellor has leaned more to the creditors, in questions arising on these statutes, than Lord Hardwicke. In the case of Russel v. Hammond, 1 Atk. 13, Lord Hardwicke said: "A great deal has been said on this head, but it depends on circumstances, and every case varies in that respect. There are many opinions that every voluntary settlement is not fraudulent: what the judges mean is, that a settlement being voluntary, is not, for that reason, fraudulent, but an evidence of fraud only. Bovy's Case, 1 Vent. 193; Lord Teynham v. Mullins, 1 Mod. 119. Though I have hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent." This strong expression of opinion against voluntary settlements, made by a person indebted at the time, was used in a case where the relative value of the subject settled to the estate, and debts of the settler is not indeed stated, but where there is reason to believe that it was considerable. It was made, too, in a case where the settlement was in part supported, because it was made on a valuable consideration, and in part declared void, because it was made for the benefit of the settler himself. Trivial gifts, made without any view to creditors, with intentions obviously fair and proper, do not seem, from his language, to have been on the mind of the judge. It is observable, too, that he does not lay down the principle as being universal, but says, "he has hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent." In Taylor v. Jones, 2 Atk. 600, the master of the rolls said: "I look upon it as being a standing rule as to creditors for a valuable consideration, that it" (a voluntary settlement after marriage) "is always looked upon as fraudulent, and within 13 Eliz. c. 5." This expression is certainly a very comprehensive one; but it is applied expressly to a family settlement, not to an inconsiderable gift, and is used in a case in which the settler reserved to himself an interest for his life. In the case of Lord Townshend v. Windham, 2 Ves. Sr. 11, the chancellor said: "But I know no case on the 13th Eliz. where a man, indebted at the time, makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." This language is undoubtedly very strong, but it is used in a case in which the father had, by deed, in pursuance of a general power, appointed money to be raised for the benefit of his daughter. The case was, in substance, this:—Mr. Windham, being seised for life of a large estate, remainder to his nephew in tail, covenanted that his nephew should take the profits during his life, on his permitting any person whom Mr. Windham should appoint, by deed or will, to take the profits for the same length of time after the estate should come to the nephew. The testator, by deed, appointed that his daughter should take these profits, and it being determined that they were part of the general assets, the chancellor declared them liable to the claims of creditors. This language, therefore, is applied to a conveyance which is to take effect after the death of the testator. It may well be doubted whether the nephew could have been compelled to relinquish the profits received, had the conveyance to him been purely voluntary.

In the case of Kidney v. Coussmaker, 12 Ves. 136, the general doctrine that a voluntary settlement is void as to creditors, is again recognised; but that, too, was a settlement affecting a considerable portion of the property of the settler. The books are full of cases in which the principle is acted on as one perfectly settled; but in all of them, so far as my researches have gone, there has been a conveyance of property to a considerable amount—some settlement of a thing still existing—or some bond or contract to be complied with in future. The case of

Partridge v. Gopp, 2 Amb. 596, cited by the defendant, is a case of a gift of money; but that case is obviously founded on the actual fraudulent intent of the giver. The suit was brought by the legatees of Edward Godfrey, against his executors, for an account of the personal estate of the testator, and to have a legacy of £6000 secured. An account was directed in 1736, and Joseph Sewell, one of the executors, was reported to be largely indebted. He was, in 1745, committed to the Fleet prison, for not complying with an order of court, directing him to pay into the bank £3000, part of the money in his hands, where he remained till 1750, when he died insolvent. The plaintiffs brought a supplemental bill against his children, four daughters, who had been advanced by Sewell in his lifetime. Two of the daughters were married, and the bill was dismissed at the hearing as to them, because the money they had received was given as marriage portions. The two remaining daughters were single, and stated in their answers, each of them, that she had received £500, in December, 1743, as a free gift for her maintenance and subsistence in the world. The chancellor took time to consider whether this money should be refunded. He says: "It struck me at first as a hardship to make the children refund, especially as such a gift could not be considered as a trust for the giver; but, on consideration, I think no man has such a power over his own property to dispose of it so as to defeat his creditors, unless for consideration. It is the motive of the giver, not the knowledge of the acceptor, that is to weigh. The statute extends to all cases except where there is good consideration, and bona fide; blood has been held not to be a good consideration. I have no doubt but that this voluntary gift proceeded from affection getting the better of justice." "It was done secretly and pendente lite." His lordship was asked, for the information of the bar, who thought he had laid down the position too broadly, whether he did not mean to confine it to the circumstances of the case? That, otherwise, a parent could not make any gift whatever, of ever so small value, to his child, without its being liable to be taken away in favour of creditors; to which he said "that the fraudulent intent is to be collected from the magnitude and value of the gift." The idea of the bar that the chancellor had laid down the position too broadly, must have been founded on the words: "I think no man has such a power over his own property to dispose of it so as to defeat his creditors, unless for consideration." "The statute extends to all cases except where there is good consideration, and bona fide." These words, it was supposed by the gentlemen of the bar, would extend to any present whatever, of ever so small a value, a parent might make to his child. His lordship confines their application to gifts of magnitude and value. In the case itself, the gifts were of very great value, compared with the property of the giver, and were made under circumstances which exposed them, in an eminent degree, to the charge of being made for the purpose of defrauding creditors.

The case of Chamberlayne v. Temple (decided in the court of appeals of Virginia) 2 Rand. (Va.) 384, is a case where a parent, much indebted at the time, disposed of a considerable portion of his property among his children, and afterwards died insolvent. It is true that he retained enough to pay his debts, and that his insolvency was produced by misfortunes and accident; but the property conveyed away was very considerable, and the most valuable part of that which he retained, consisted of vessels, and of the slaves who worked them. A circumstance, too, which is, I think, entitled to great consideration in that case, is, that the children were infants, residing with their father, so that the slaves given still remained in his possession. The gifts were not made to advance his children in the world, and it is difficult to conceive any motive for making them at the time, other than a desire to secure them for his children from the claims of his creditors. That case is a construction by the highest tribunal of our country of a statute of this state, and undoubtedly complete authority as far as it goes; but it does not, I think, go at all beyond the English decisions. I should not, I think, even before the case of Chamberlayne v. Temple, have hesitated to have determined such a conveyance to be fraudulent under our statute. It was a voluntary conveyance of a very large portion of the donor's estate, made by a person in embarrassed circumstances, to infants who were not at the time in need of any immediate provision, and who were not in a situation to take the property out of his possession. In the case of Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229, 5 Cond. R. 425, cited in [Hinde v. Longworth] 11 Wheat. [24 U. S.] 199, 6 Cond. R. 270,[2] the supreme court of the United States has said "that in construing the statute of 13 Eliz., the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors." This is a gen-

[2] In this last case, the supreme court say, that "a deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances: but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side." See, also, Ridgway v. Underwood [Case No. 11,815]; Gilmore v. North American Land Co. [Id. 5,448]. See, also, the case of Land v. Jeffries, 5 Rand. (Va.) 211, where the doctrine of fraud per se is very elaborately discussed.

eral proposition concerning the extent of the English divisions, not a decision of the court itself declaring that every gift, however trivial, is at any distance of time, and under any circumstances, to be avoided by a creditor. The term "conveyance" indicates property of considerable value, as respects the situation of the parties, since it is chiefly in such cases that voluntary donations of personal chattels assume the form of conveyance. The general proposition was all which could be in the mind of the court, since the case was one of a subsequent purchaser, and did not lead to any minute investigation of the distinctions which might possibly exist in cases of gifts made by persons indebted at the time. As a general proposition, it is unquestionably true. No voluntary conveyance of property has been sustained against creditors whose debts existed at the time, but no gift of such inconsiderable value as to come under the denomination of a present, made under circumstances entirely free from suspicion, has ever, so far as I am informed, been hunted up by a creditor, and claimed as a part of the donor's estate.

I will now proceed to a particular consideration of the several items which constitute the subject of the present controversy. The first is, the gifts made by Thomas Randolph to his daughter, prior to her intermarriage with Randolph Harrison, which, on the marriage in 1790, were taken into the possession of her husband as her property. These were two negro girls, one of them an attendant on her person, and a riding-horse. Thomas Randolph was a gentleman of ample fortune, not embarrassed in his circumstances, nor so much indebted as to create any suspicion of difficulty in the payment of his debts. The idea cannot be admitted for a moment, that any apprehension concerning his creditors was, in any manner, connected with the motives to this gift. That of the waiting-maid and that of the riding-horse especially, are usual in this country, and come strictly, when made by a parent of unquestionable solidity, within that class of gifts which are denominated presents. They do not much differ from wedding-clothes, if rather more expensive than usual, from jewels, or an instrument of music, given by a man whose circumstances justify the gift. I have never known a case in which such gifts, so made, have been called into question. These gifts come, I think, completely within that class of presents, which, according to the case reported by Ambler, (page 596, see supra), ought to be excepted from the general rule in favour of creditors. The gift of the other girl is not, I think, so perfectly clear; but I find great difficulty in separating it from the waiting-maid, both having been given with intentions perfectly fair, and both having passed together to the husband at the time of the marriage, and having remained in his possession ever since. This case bears no resemblance to that of Chamberlayne v. Temple. If it did, I should not hesitate to follow the opinion of the court of appeals. But the distinction between them is too obvious to require that I should contrast them. In the case of Jacks v. Tunno (decided in South Carolina) 3 Desaus. Eq. 1, a trader, supposed to be in good circumstances at the time, though considerably in debt, purchased a house and lot, which was conveyed to the plaintiffs, his infant daughters. A few years afterwards he became bankrupt, and this bill was brought by the donees to restrain the defendants, who are not stated to be, but I presume were, the assignees of the bankrupt, from selling the property. The injunction was made perpetual; and, in giving his opinion, Chancellor Rutledge said: "Suppose, for instance, a person in this state being indebted, though to a considerable amount, is possessed of a large estate in houses in the city, gives a small part of that property to his child or children; or one, similarly circumstanced and indebted, possessed of a considerable estate in land and negroes, gives a few negroes and some land to his children, and either the accident of fire in the city, or the death of his negroes, should reduce his estate so considerably as to occasion his insolvency—would this court, under such circumstances, merely because the person was largely indebted at the time of the gift, consider such gift as fraudulent, and set it aside, because creditors were interested? I should apprehend not." In the case of Salmon v. Bennett, 1 Conn. 525, the court says: "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his estate and condition in life, comprehending but a small portion of his estate, leaving ample funds, unemcumbered, for the payment of the grantor's debts, then such conveyance will be valid against creditors existing at the time."

These cases are cited, not as having the authority which the decisions of our court of appeals would have in this court, but as containing a great deal of good sense, and being entitled to great respect. If the two girls and this riding-horse are to be considered as given before the marriage, so as to have become ostensibly the property of the young lady to whom they were given, there would be some difficulty, the perfect fairness of the gift being shown, in setting aside the rights of the husband. In East India Co. v. Clavell, Finch, Prec. 377, Sir Edward Lyttleton, being appointed by the East India Company president at Bengal, entered into articles of agreement, on the 16th of January, 1698, for the faithful execution of the trust; and also gave his bond, binding his

heirs in the penalty of £2000, conditioned for the performance of the covenant. Afterwards, on the 21st of the same month, he made a settlement on his daughter of £5000, to be raised out of land, and sailed for the East Indies. Some time after the departure of Sir Edward, Mr. Clavell made an application to the young lady in the way of marriage, and she placed the settlement in his hands. Being advised that it was valid, the marriage took effect, sometime after which Mrs. Clavell died without issue. Mr. Clavell administered on her estate, and brought his bill to have the money raised as directed by the settlement. Sir Edward Lyttleton had embezzled the effects of the company to the amount of £26,000, and they claimed this money, the settlement being voluntary. The counsel for Mr. Clavell contended, that if the settlement was voluntary in its creation, yet being the motive and inducement to Mr. Clavell to marry her, this had now made it valuable. The lord chancellor thought the settlement a reasonable provision, without colour of fraud. The articles did not bind the real estate, and the bond bound it only to the extent of the penalty. He directed the amount of the settlement, except as to the £2000, the penalty of the bond, to be paid to Mr. Clevall. There is some difficulty in ascertaining the principle of this case. Most probably, the decision turned upon the point that the debt to the East India Company could not affect the subject out of which the £5000 were to be raised. Yet, in argument, the circumstance that the settlement might have influenced her marriage was considered important. I cite it, because it was mentioned in a subsequent case as deserving consideration on that account. In George v. Milbanke, 9 Ves. 190, the case was this: In July, 1797, Sir Ralph Milbanke directed, by deed poll, that £500 should be raised immediately after his decease, out of certain trust premises, for the benefit of his natural son, George Milbanke, and died in January, 1798. In February, 1798, George Milbanke, in consideration of £400, assigned this money to Frederick Glenton and Thomas Peacock, subject to redemption on the payment of £400 with interest. The bill was brought by a specialty creditor of Sir Ralph Milbanke, to subject this fund to his debt. The case was decided, as it respected the £400, in favour of Glenton and Peacock, because their equity being to the specific article, was superior to that of the general creditors. In the argument of the case, the Case of the East India Company and Clavell was cited from Bacon's Abridgment. The lord chancellor said: "If the doctrine is rightly collected from the authorities, it imports all this: that if a man is indebted, and makes a provision for his child by a pure voluntary settlement, and that child afterwards marries, the circumstance of its leading to the marriage makes the settlement good against creditors, though it would have been bad if no marriage had taken place. I doubt whether it will not be found in the circumstances of that case, that the child was not a pure volunteer. If it can be supported, as here stated, it goes a great way to decide this case; for though this is the case of a stranger, it makes no difference between a voluntary settlement, made good by a subsequent marriage, and one made good by a subsequent advance of money." Undoubtedly neither of these cases establishes the principle, that a subsequent marriage will make a voluntary settlement good, and yet the chancellor treats that point as if such subsequent marriage was not without its weight.[3]

If the gift was made at the time of the marriage, the claim of the husband will not be weakened by that circumstance. A reasonable gift, made contemporaneously with a marriage, and accompanied with a delivery of possession, has strong claims to being considered as a gift in consideration of the marriage. Where the circumstances of the party exclude the idea of any interference on the part of creditors, it is not usual to convey, by deed, property which passes by delivery, nor to use the solemnity of delivery expressly in consideration of marriage, although that may be the real consideration. I do not, however, place this case on that ground. I think a customary and inconsiderable gift from a parent to a child, which may properly be denominated a present, and which is free from all suspicion of an intention to defraud or injure creditors, cannot, if by subsequent mismanagement the estate of the parent be wasted, be considered as a fraudulent gift at common law or under the statute. There was also a negro girl sent on the birth of Mrs. Harrison's first child. But this girl was sent as a present to the child. In 1793 Thomas Randolph divided the greater part of his estate among his sons, stipulating that each of

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[3] A voluntary deed of settlement to a child of the grantor is void, as against a subsequent purchaser for a valuable consideration (under 27 Eliz.), with only implied notice of the previous deed, but any intervening valuable consideration will render the deed valid. As where the grantee in the voluntary deed gains credit by the conveyance, and a person is induced to marry her, on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary, and becomes good against a subsequent bona fide purchaser for a valuable consideration. Nor does it matter whether any particular marriage was in contemplation at the time of the settlement or not. Kent, chancellor, in Sterry v. Arden, 1 Johns. Ch. 261. But a settlement after marriage in pursuance of a parol agreement entered into before marriage, is not valid: aliter, if the agreement was a written one, entered into prior to the marriage. And a voluntary settlement after the marriage, by a person indebted at the time, is fraudulent and void against antecedent creditors; and that, without regard to the amount of the existing debts, or the extent of the property settled, or the circumstances of the party. See Chancellor Kent's opinion in Reade v. Livingston, 3 Johns. Ch. 481.

them should pay certain debts, and should execute a bond to Randolph Harrison for £250. Randolph Harrison took no part in this arrangement, but afterwards parted with the bonds to persons, and for a sum not mentioned in the proceedings. The estates given by Thomas Randolph to his children, were of much greater value than the debts or money they were directed to pay, and no provision was made for the debt due to Spiers, Bowman & Co. Where a conveyance is made to children of property to a large amount, charged with debts bearing no proportion to its value, the children cannot be considered as purchasers of the whole, but must take the clear surplus value of the property as volunteers. With respect to this debt, for which no provision was made, such voluntary conveyance, according to all the cases, must be considered as fraudulent. But the property thus conveyed is wasted, and is beyond the reach of the creditor. How are the bonds given by the sons to be considered? This question is not without its difficulties. They were given by the sons, in part payment for the property conveyed to them by their father, not to their father, but directly to Randolph Harrison. I have felt some doubt whether such bonds were within the statute, but upon the best consideration I can give the subject, the opinion I have formed, is, that as they are in fact the gift of the father to his daughter, they are in substance equivalent to a charge upon the property, conveyed to the sons, which charge would be as liable to creditors as the property itself. I therefore consider Mr. Harrison as liable for these bonds, but liable only for the amount actually received on them. Had they never been paid, it cannot be pretended that he would be accountable for their amount to the creditors. If it cannot, then he will, I think, be at liberty to show what was the amount actually received.[4]

The subject which remains to be considered is the bond given to Mr. Harrison by Mr. Randolph himself. Supposing this to be an obligation which bound Mr. Randolph to the payment of money, the question is, whether Randolph Harrison is liable for the money actually received upon it? I think the cases of Stiles v. Attorney General, 2 Atk. 152, Gilham v. Locke, 9 Ves. 613, and Ex parte Berry, 19 Ves. 218, decide this question in the negative. They decide that satisfaction by bond, and I think, by payment, of what is due on a voluntary bond or conveyance, is not to be considered as a voluntary act within the statute. If, then, this bond is to be considered as binding in its terms, I do not think Randolph Harrison accountable for the amount received upon it. If it is not binding, it is nothing, and Randolph Harrison can only be charged with the amount actually paid by Thomas Randolph, of which there is no evidence before the court. It is, however, a subject into which an inquiry would be useless, because the bonds given by the three sons would, on any probable estimate of their value, exceed the amount of the debt due the plaintiff.

According to the former course of this court, founded on what was supposed to be the course of the state courts, Randolph Harrison would be accountable only for such proportion of the debts of Thomas Randolph, as the property received by him bore to the property received by the sons. But that principle is completely overturned by the case of Chamberlayne v. Temple, and I conceive it as now settled, that the whole sum is liable to the claims of creditors. If it be, then the decree must be, that the defendant pay to the plaintiff the sum of $3064 92; to be discharged by the payment of $1532 46, the debt in the declaration mentioned, that being the amount of the judgment rendered in this court against Thomas Randolph in favour of John Bowman, as surviving partner of Spiers, Bowman & Co., in May, 1796.

Upon a re-argument of this case at the same term, the Chief Justice delivered the following opinion:

MARSHALL, Chief Justice. A re-argument of this case having been granted at the request of the counsel for Randolph Harrison, it has been re-considered by the court. The argument has turned chiefly on two points: 1. That the whole estate conveyed to the sons, is chargeable with this debt. 2. That a gift of money by a parent to a child, not really made with a fraudulent intent, is not constructively fraudulent under the statute.

1. That the whole debt should be paid by the sons, were they now solvent, and before the court, will be readily admitted; but two of them are dead insolvent, and the third, who is now alive, is admitted to be insolvent. The creditor can receive nothing from that source. It is insisted that the land is liable in the hands of the purchasers. Of this I am not confident; but were it to be admitted that a person who holds by purchase from a volunteer, takes the property subject to the creditors of the original donor, I should still be of opinion that the creditor would not be compellable to proceed against such purchaser, and I should also think that no decree could be made against him, in aid of a volunteer who was able to pay the debt. Eppes v. Randolph, 2 Call, 183.[5]

[4] The defendant, Randolph Harrison, admits in his answer, that he had collected the bonds executed by the three sons of Thomas Randolph, but does not state the terms on which those negotiations were effected. The depositions filed in the cause, however, show that the bonds were, at a fair valuation, worth more than the amount of the debt due by Thomas Randolph, the elder, to the firm of Spiers, Bowman & Co.

[5] [See note at end of case.]

2. It is true, that few cases are to be found in the books, in which a child has been decreed to refund money actually received from a parent. From the nature of the transaction, such gifts would not frequently be the subject of inquiry. Where they are inconsiderable in amount, they are seldom made the subject of inquiry; and, were they even looked into, would, perhaps, not be deemed fraudulent; and where large advances are made, they most generally consist of money in the funds, or charged on lands; but in the case of Partridge v. Gopp, reported in 2 Amb. 596, a gift of money to a child was declared fraudulent as against creditors, and the chancellor founded his opinion on the magnitude and value of the gift. That case was, it is true, tainted with circumstances leading strongly to the opinion, that the gift was made for the purpose of providing for his family at the expense of a creditor, but the chancellor places his decree chiefly on the magnitude of the gift; the fraud was inferred, in a great degree, from that circumstance. In the case at bar, the gift to Randolph Harrison forms a part of a more considerable transaction, and cannot easily be separated from it. That transaction was the division of the estate of Thomas Randolph among all his children; though only a small portion was allotted to Randolph Harrison, that small part must, I think, partake of the character of the whole transaction. It would be very difficult to relieve this whole family arrangement entirely, from the taint of being made, at any rate, without sufficient regard to the claim of a creditor not provided for. It has been said at the bar, that there was a general promise on the part of the sons to pay any debts which might appear; but there is no proof of such promise; and had any debt, not mentioned in the conveyances, formed a part of the consideration, a stipulation to that effect ought to have been inserted. It has been said with some probability, that this debt was forgotten; but however satisfactory this excuse may be in an inquiry into the morality of the arrangement, it would be dangerous to admit it in an inquiry into its legality. The cases of Gilham v. Locke, 9 Ves. 612, and Ex parte Berry, 19 Ves. 218, from which it is inferred, that money paid in discharge of a voluntary bond is not within the statute, rather support the opinion, I think, that money given in the first instance, not under the obligation of such bond, would be within the statute. The validity of such payment would not, I think, have been placed on the obligation which a voluntary bond creates between the parties, if the advance of the money, independent of such prior obligation, had been considered as beyond the reach of the statute. This case is one of extreme hardship, which ought not to be carried beyond express authority; but I think myself bound to adhere to the decree in favour of the plaintiff.

NOTE. The question how far purchasers from a debtor (or his voluntary grantee) are entitled to protection in a court of equity from the claims of the creditors of the grantor, has frequently been the subject of laborious investigation in our courts, and it may not be amiss here to present a brief review of some of the leading cases in which it has been discussed. The question depends upon the construction of the proviso in our statute of frauds, which declares that the act shall not extend to any estate or interest in any lands, goods, or chattels, or any rents, common, or profits out of the same, which shall be upon good consideration, and bona fide, lawfully conveyed or assured to any person or persons, bodies politic or corporate. 1 Rev. Code 1819, p. 373, § 3. This is substantially the same proviso contained in the English statute of 13 Eliz.,—Green, J., in Garland v. Rives, 4 Rand. (Va.) 305; and the term "good" consideration has been interpreted to mean "valuable" consideration,—Twyne's Case, 2 Coke, pt. 3, p. 80; Hodgson v. Butts, 3 Cranch [7 U. S.] 157; 1 Cond. R. 476. In Eppes v. Randolph [2 Call, 183], the court of appeals (by Pendleton, president), "laid down this general proposition, that where a creditor takes no specific security from his debtor, he trusts him upon the general credit of his property, and a confidence that he will not diminish it to his prejudice. He has, therefore, a claim upon all that property whilst it remains in the hands of the debtor, and may pursue it into the hands of a mere volunteer; but not having restrained the debtor's power of alienation, if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditors." This proposition is cited and recognised as the true exposition of the doctrine by Coalter, J., in Coutts v. Greenhow, 2 Munf. 368. And a grantee claiming under a deed made by his father (the debtor), in consequence of a marriage agreement between the father of the grantee and his wife, is a purchaser for valuable consideration, and not a volunteer. Eppes v. Randolph [supra]. Under the proviso of the 13th Eliz., the purchaser, whether from the debtor himself, or his voluntary or fraudulent grantee, was protected, if he had not notice of the fraud of his own grantor; so that the bona fides was required only of the purchaser. And this is the just construction of the Virginia statute. Green, J., in Garland v. Rives, 4 Rand. (Va.) 305. But in the lasts case, the purchaser having had full notice of the fraud, and of the invalidity of the grantee's title, it was *held*: that upon general principles of equity, he could acquire no better right than they had; and upon the terms of the statute (13 & 27 Eliz., adopted in our Code) he could not be protected as a bona fide purchaser, but must stand, to all intents and purposes, in the shoes of the grantees. In Coleman v. Cocke, 6 Rand. (Va.) 618, a father purchased land, and took, and retained for several years, possession as the beneficial owner thereof, but the purchase-money was not paid, and the lands were not conveyed to him; and when the purchase-money was paid, the father being greatly indebted, directed the vendor to make the conveyance to his son. The lands were accordingly conveyed to the son, no valuable consideration moving from the son, and the son sold them to a fair and bona fide purchaser, without notice of any fraud. The purchaser was held to be protected from the claims of the creditors of the father by the proviso in the statute.

From the above summary it is clear that the doctrine is firmly settled in Virginia, that a fair, bona fide purchaser, for valuable consideration, without notice, is entitled to protection from the claims of creditors, whether the purchase was from the debtor himself, or his voluntary or fraudulent grantee. Some discrepancy of opinion seems, however, to have prevailed between learned judges elsewhere on the con-

struction of these statutes of 13 & 27 Eliz. Thus, in Roberts v. Andersons, 3 Johns. Ch. 377, Chancellor Kent recognises the rule as settled, that a purchaser for a valuable consideration, without notice, from a voluntary or fraudulent grantee, shall be preferred to a subsequent purchaser for valuable consideration, without notice, from the original grantor (under 27 Eliz.). But in relation to 13 Eliz., which was made to protect creditors from fraudulent conveyances, Chancellor Kent said that a different rule of construction prevailed: that the proviso in the act applied only to the original conveyance, and saved it, when made to a bona fide purchaser for a valuable consideration, however fraudulent the intent of the grantor might be, but did not extend to a purchase, however fair, on the part of the purchaser, from the voluntary or fraudulent grantee. Chancellor Kent concurred herein with the supreme court of errors of Connecticut, in Preston v. Crofut, 1 Conn. 527, in the construction of their statute of frauds, which, he said, "was substantially the same as the statutes of Elizabeth." In Bean v. Smith [Case No. 1,174], Judge Story reviewed the cases of Roberts v. Andersons, and Preston v. Crofut, and expressed the opinion that the proviso in the statute applied to estates derived from the fraudulent grantee, precisely as it did to those derived from the fraudulent grantor; that the statute of frauds had been universally considered as an exposition of the common law, and he regarded his construction of the proviso as in accordance with the principles of the common law. Judge Story's construction is supported by the opinion of Chief Justice Parsons, in Gore v. Brazier, 3 Mass. 541, and that of Chief Justice Parker, in Trull v. Bigelow, 16 Mass. 418, 419, and seems to be supported by that of Judge Spencer, in the case of Sands v. Hildreth, 14 Johns. 498.

Case No. 6,699.

HOPNER v. APPLEBY.

[5 Mason, 71.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.

BILLS OF EXCHANGE—FRAUD IN PROCURING—RECOVERY.

Where a Spanish vessel was captured by a Colombian privateer, and by collusion between the captors and an American citizen she was purposely wrecked on a key on the coast of Florida, within the territory of the United States, and the cargo was there landed, and the duties regularly paid; and afterwards the cargo was sold, and the American citizen became a purchaser thereof, and gave bills of exchange drawn by himself on a house in Charleston, South Carolina, which were dishonoured; it was *held*, that the party was liable to be sued on such bills in an American court, and that the collusion between him and the captors, in procuring the shipwreck, was no bar to a recovery in such suit, as there was no fraud intended, or perpetrated on the laws of the United States.

Assumpsit on sundry bills of exchange drawn by the defendant [Joshua Appleby], payable to the plaintiff [C. C. Hopner], or order, on Thomas Street & Co. of Charleston, South Carolina, and protested for non-acceptance and non-payment. The declaration contained the usual averments. Plea, the general issue. Some of the bills were drawn at Key Vaccas, Port Monroe, on the 28th of May 1823, payable at sight, at thirty days' sight, and at sixty days' sight; and others, at Long Key, on the 15th of June of the same year, payable at thirty days' sight, and at sight. At the trial it appeared, that the bills of exchange were given for certain wrecked goods purchased by the defendant of the plaintiff. The plaintiff was commander of a privateer, called Le Cintella, sailing under the flag of the republic of Colombia, and in the course of his cruise he captured some Spanish vessels laden with goods, which were brought into Key Vaccas and Long Key, on the coast of Florida, and within the territorial limits of the United States, and there wrecked. The goods were duly landed, the duties thereon duly paid and secured, and afterwards sold to the defendant, who is an American citizen. The principal grounds of defence urged at the trial were, (1) that the privateer was not regularly commissioned; (2) that the wreck of the prizes was procured by collusion between the plaintiff and defendant, for the purpose of landing and selling the goods at Key Vaccas and Long Key, and to avoid the necessity of carrying the prize into the ports of Colombia, and there procuring a regular condemnation.

Searle & Hunter, for defendant, contended, that if these facts were made out, the contracts were wholly illegal. If the wreck was by collusion, it was a violation of belligerent rights and duties, and against the law of nations. Assuming the original capture to be good, still the rights acquired under it might be forfeited by misconduct. No sale could be justified in a neutral port without absolute necessity. Here it was by fraud. The prizes ought to have been carried into a port of Colombia, and a regular condemnation obtained before any title could pass under the captures.

But the privateer was not regularly commissioned, and if so, there is no pretence of a recovery. It is a mere piratical act. The conduct of the parties is strongly presumptive of fraud. The defendant was known to be an American citizen. It was an unneutral act in him to assist in collusively procuring a wreck of the prize. The plaintiff has no right to take advantage of such unneutral act. The wreck was within our neutral territory.

Hazard & Robbins, for plaintiff, è contra, contended: (1) That the privateer was regularly commissioned; (2) that the wreck was not procured by collusion; (3) if collusive, still this was no defence. The captures were legal. The wreck, if fraudulent, was by the lawful possessor and owner of the property as prize. The government of Colombia might complain of the act, and enforce a forfeiture against the captors for misconduct by violations of its own laws. But neutrals had nothing to do with such violations. Whether the captors sell rightly or not must be decided in the first instance by the captors themselves, and ultimately, by the courts of their own country. The courts of a neutral coun-

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

try have no right to meddle with the question of prize, or the sale of prizes, as between belligerents, where their own rights are not violated. Here, the duties were regularly paid, and the goods regularly landed. The captors have done us no wrong. It would be unjust to allow the defendant to pocket these proceeds.

The jury, in pursuance of the direction of the court, found the facts specially, that the captured vessels and property were Spanish, and captured as enemy's property by the privateer, which was duly commissioned by the government of Colombia; and that the prizes were wrecked by collusion, and previous concert between the plaintiff and defendant at Key Vaccas, within the territorial jurisdiction of the United States. And subject to these facts, the jury found a verdict for the plaintiffs of $7111.56. The question of law was reserved at the trial; and a motion was subsequently made by Hunter and Searle, for a new trial, which was argued at the last November term by Hunter for the defendant, and by Robbins and Hazard for the plaintiff; and the cause was then continued nisi for advisement. The main ground of argument was the same as relied on at the trial.

STORY, Circuit Justice. There is no longer any question, that the privateer was regularly commissioned, and that the property captured was Spanish, and lawfully taken as prize of war, the republic of Colombia and Spain being at that period and still at war with each other. It is as clear, that the wreck of the prize property was procured by collusion and previous concert between the plaintiff and the defendant, for the very purpose of selling the same within our territorial jurisdiction; and that the bills of exchange were given in consideration of the purchases made of the wrecked goods by the defendant. No fraud has been pretended or proved, upon the municipal or revenue laws of the United States. The goods were regularly landed; the duties on them duly paid or secured; and the sale made at the instance of the captors. The whole defence then turns upon the single point, whether a purchase, made under such circumstances, is such a violation of the law of nations by an American citizen, as infects the whole transaction with the taint of illegality in an American court. There is no statute of our government, which prohibits the sale of prizes in our ports, or that declares wrecks, procured collusively in our ports to evade the rights or duties of foreign belligerent cruisers, civilly or criminally wrong. If such acts be illegal or criminal, that character attaches to them from the principles of the law of nations, which this country is bound to recognize and enforce, as a just assertion of its own neutrality and sovereignty.

No case has been cited, which bears out the argument urged in support of the defence; and ably and even eloquently as it has been pressed upon the court, it proceeds upon reasoning, which admits of great question in every step of its progress. Some principles are extremely clear, and indeed are so well settled, that nothing more is necessary to command approbation, than a simple annunciation of them. Neutral nations are bound equally by their duty and their interest to consider the existing state of things between belligerents as rightful. The right of capture by the law of war cannot be disputed, and the lawfulness of the possession thereby acquired cannot be inquired into by the tribunals of a neutral nation, with the single exception of cases, where the capture itself is an infringement of the jurisdiction or rights of the neutral nation itself. In all other cases, the question of prize or no prize exclusively belongs to the cognizance of the courts of the capturing power. The possession of the captors is to be deemed a possession bonae fidei, and inviolable; and as was said by the supreme court in the case of The Mary Ford, 3 Dall. [3 U. S.] 188, 198, immediately upon the capture the captors acquire such a right as no neutral nation can justly impugn or destroy. The Josefa Segunda, 5 Wheat. [18 U. S.] 338, 357. The original ownership of the enemy is entirely devested by the capture; and though a title, good against all the world, may not be conveyed to a neutral vendee by the captors, unless there be a regular condemnation as prize, or a treaty of peace, which confirms, by implication, the existing title and state of things; yet this does not interfere with the general right of the captors to sell the property, or dispose of it as rightful proprietors jure belli, and possessors de facto. If they act in disobedience to the rules prescribed by their own sovereign, they may be personally responsible to him for their misconduct, and justly incur a forfeiture of the rights of prize. But that is a question altogether between the captors and their sovereign, and no neutral nation has either the authority or duty imposed upon it to take cognizance of, or punish civilly or criminally any such misconduct, or any irregularities, or even wanton wrongs of the captors, not invading its own neutrality. Even in cases of the violation of neutral jurisdiction the tribunals of the injured country content themselves with a simple restitution of the property brought within its territory, and do not interfere to give damages, or inquire into the manner, in which the belligerent may have exercised his power, however harshly, upon the conquered. Strictly speaking, there can be no such thing as a marine tort between belligerents; and at all events, neutral nations have no authority to entertain any judicial cognizance of them. See La Amistad de Rues, 5 Wheat. [18 U. S.] 385. They must be redressed, if at all, by the sovereign, to whom,

as subjects bearing his commission, the captors are responsible for every abuse of their power.

This court, upon these principles, is bound to disclaim any right to control the captors in the management and sale of their prizes. The capture was lawfully made in war between belligerents, recognized by our own government. It must be deemed rightful. Whether the property was ever carried into a proper port for adjudication or not, or properly condemned or not, and whether the captors have been guilty of a fraudulent breach of their duty to their own sovereign or not, are questions, upon which we have not the slightest right to pass judgment. Spain has no right to complain of any extent of the exercise of belligerent power on the part of her enemy. The captors had a plenary dominion over the property by the capture, and might, so far as she was concerned, have burnt it, or destroyed it, or disposed of it in any other manner, which they pleased. If, indeed, by recapture or otherwise it had again come within her reach, it would have been a very different question, whether, under the law of postliminy (see 2 Wheat. [15 U. S.] Append. p. 40; The Flad Oyen, 1 C. Rob. Adm. 135; The Cosmopolite, 3 C. Rob. Adm. 333), she would have acknowledged the validity of the title of a neutral vendee, acquired by a fraudulent effort to escape from her reach, when the property had never been subjected to condemnation by a regular prize tribunal. If, under such circumstances, her courts should have chosen to restore it to the original owners, and dispossess the neutral vendee, he at least would have had no just ground of complaint, for he took his title with his eyes open, and knew and assisted in the device. Nor could he have had any just right of compensation from the captors, because he bought the title with all its infirmities, and if there was any fraud, it was not upon him, or his rights acquired by the purchase.

Was there, then, in the present case any violation of our neutrality? It has not been asserted, that captors violate our neutrality by the mere sale of their prizes in our ports. In general, neutral nations allow them an asylum in their ports. They may, indeed, prohibit their entry into their ports, or the sale of their prizes there, from motives of policy or public convenience. But unless they do so, where is the principle of the law of nations, which prohibits such a sale? I cannot find any such principle laid down in the most approved elementary writers, or justified by the general practice of nations. It is one of those points, which every neutral nation arranges according to its own sound discretion and policy. It is free to refuse, or grant it. If there be no prohibition, the right to sell arises silently from the general operations of commercial intercourse. A bonâ fide possessor of property may traffic with it in every country, where the sovereign does not choose to establish a different rule. The permission results necessarily by implication from the omission of any interdicting expression of the sovereign's pleasure. Unless I have greatly misconceived the general result of the doctrines advanced on this subject by jurists of high character, that is their settled conclusion. See Grotius, bk. 3, c. 9, § 14, and Barbeyrac's note; Vattel, Law Nat. lib. 3, c. 7, § 132; Bynk. c. 15 (Duponceau Ed. pp. 113, 120); D'Abreu Traité sur les Prises, pt. 2, c. 2, §§ 3, 5–7, and Bonnemant's note; Id. pt. 1, c. 3, § 2; Valin, Traité des Prises, c. 7, and particularly section 24, and 2 Valin, Comm.; Ord. de la Mar. arts. 14, 15, pp. 272, 273, etc.; Wheat. Mar. Capt. c. 9, p. 260, § 6; Lee, Capt. p. 193, c. 16; Findlay v. The William [Case No. 4,790]; Consul of Spain v. Consul of Great Britain [Id. 3,138]. I am aware, that at an early period, in one of the circuit courts, a modification of this doctrine was insisted on, viz. that the permission of the government must be express, and could not be implied. That modification has not, to my knowledge, received elsewhere any recognition. I feel myself constrained to doubt, whether it can be supported upon the footing of the law of nations. Perfect neutrality is entirely consistent with allowing the sale of prizes in our ports in the most ample manner, if it be equally granted to all the belligerents. The only just ground of complaint in such cases would be, that, what is allowed to the one, is denied to the other. Many acts of a far more direct operation upon the success of war are not deemed unneutral, where they are granted with sincerity to all the belligerents; for equality, in such cases, is not only in a liberal sense equity, but is neutrality. Permission to sell prizes in our ports may sometimes involve the dangers of fraud, and even of piracy; but mere danger of such consequences does not establish the fact, that a prohibition is created by the law of nations, or that a positive act of the government is required to remove it. If, then, the sale of prizes in a neutral port is not prohibited by the law of nations, what is there in the present case to taint the present transaction with illegality? No fraud has been practised upon our government or our laws. The fraud, if any, was a fraud either to evade the regulations of prize of the republic of Colombia, which we are not called upon to enforce, or the chances of recapture by Spanish cruisers, which we are as little called upon to aid. The wreck of the prize property did not disturb the operation of our revenue laws, or infract our police. The duties have been duly paid; and the custom-house regulations have been sufficiently obeyed. An American citizen now calls upon the court to enable him to pocket the proceeds of the prize, which he has purchased with a full knowledge of all the circumstances, and a full participation in all the intermediate acts, not because he has sustained

any loss, or is willing to restore those proceeds, but because he has aided the captors in a fraud, which touches the sovereign rights of Colombia, or Spain, or both. It appears to me, that an American court has no authority to intermeddle in such controversies. The title to the property was regularly acquired by the captors; they have sold that property to the defendant; he has had possession of the proceeds. There is no moral wrong in compelling him to pay the consideration of the purchase. Our judgment will not touch in the slightest degree the authority of either sovereign to seek his own redress for any wrong done to him in these proceedings. The law of nations has not pronounced a title so acquired to be an absolute nullity; and it has been long settled, that our tribunals do not sit to enforce the mere municipal regulations, or vindicate the injured sovereignty, of foreign nations. For aught that we know, a proper sentence of condemnation may already have passed on this property. It may hereafter be passed by the prize courts of the government of Colombia; for a sale of prizes, however irregular before condemnation, is such a proceeding as does not oust the prize jurisdiction; but the proper court may still in its discretion interfere, and confirm the title by its definitive sentence of condemnation. See The L'Eole, 6 C. Rob. Adm. 220, 224; The La Dame Cecile, Id. 257, 260; The Falcon, Id. 194, 200; The Arabella [Case No. 501].

It has been said, that our law upon general principles prohibits a citizen from colluding with foreigners to procure a wreck. If by this is meant a wreck, which is a fraud upon the laws or rights of our government, or upon the private rights of property of our citizens, the doctrine may be admitted; but its application to the facts of the present case is not perceived. Here, the captors were the owners and possessors of the property; and it will scarcely be pretended, that a wreck, procured by the connivance and consent of the owner, and not intended to cheat or defraud any third person, but merely to escape belligerent risks, falls exactly under the like considerations. Upon the whole, my opinion is, that the verdict is right, and that judgment ought to pass against the defendant.

HOPPE (UNITED STATES v.). See Case No. 15,388.

HOPPER (BUTLER v.). See Case No. 2,241.

Case No. 6,700.

Ex parte HOPPOCK.

[The case reported under above title in 2 Ben. 478, is the same as Case No. 1,912.]

HOPPOCK (BROCK v.). See Case No. 1,912.

HOPPOCK (HYSLOP v.). See Cases Nos. 6,988 and 6,989.

Case No. 6,701.

HOPPOCK v. WICKER.

[4 Biss. 469.] [1]

Circuit Court, N. D. Illinois. March, 1866.[2]

CONTRACTS—CONSIDERATION—CLAIM NEED NOT BE A VALID ONE—MEASURE OF DAMAGES.

1. Where A held a claim against B and C, a promise by B to A that if he, A, would sue C, obtain judgment and levy on his property, he, B, would bid the amount of the claim, is a valid consideration upon which an action will lie by A against B for refusing so to bid.

[See note at end of case.]

2. It is not necessary that the claim be a legal or valid claim against B. It is sufficient that he desired it to be prosecuted against C, and not against himself.

[Cited in Hewett v. Currier, 63 Wis. 395, 23 N. W. 884.]

3. It seems that full damages could not be recovered unless the debt was lost in consequence of such failure to bid, or it appeared that C did not have other property from which the judgment could be made.

[This was an action at law by S. Hoppock against Joel C. Wicker.] Demurrer to declaration.

McCagg & Fuller, for plaintiff.

Chas. H. Reed, for defendant.

DRUMMOND, District Judge. The substantial ground of the action in this case is, that the plaintiff had a claim consisting of a debt or demand, as alleged in the declaration, against J. P. Chapin & Co., and against the defendant, for the rent of divers lots of land in the county of Fulton, which claim amounted to sixteen or seventeen hundred dollars, and that the defendant promised the plaintiff that if he would bring suit or suits against J. P. Chapin & Co., and obtain a judgment against them, and offer for sale certain property, that he would bid for that property the amount of the claim; and the declaration further avers that he promised to pay the taxes on the property and the premium for the renewal of two policies of insurance which were then held; and that the plaintiff, relying upon this promise of the defendant, commenced suits against J. P. Chapin & Co. for this claim, and recovered judgment against them for the amount; that execution was taken out and levied upon the property, and that it was offered for sale and defendant was notified and had due notice of all these facts, and was requested to comply with his promise and undertaking, by bidding the amount of the judgment or claim; that he failed to do this, by which the plaintiff has sustained damage. This is substantially the ground of the action set forth in the declaration.

Objection is taken that it is not a good

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

[2] [Affirmed in 6 Wall. (73 U. S.) 94.]

and valid consideration upon which a promise was binding. I am inclined to think that it is. The allegation is that there was a claim against defendant and Chapin & Co., and in consequence of there being this claim, and if the plaintiff would prosecute it to judgment, that the defendant would come in and make these bids. It is unnecessary that the declaration should allege that it was a valid or legal claim against the defendant. It is sufficient that there was a claim against him and others, and that he apparently desired this claim to be prosecuted against the others, and not against him, and certain property to be levied upon, and if it was, he promised to make the bid. It is an unusual case, I admit, but I am inclined to think that the consideration is sufficient to support the promise of the defendant.

The first and second counts of the declaration allege substantially the contract as I have stated it. The demurrer would apply most strongly against these two counts. The third and fourth counts set forth with more particularity the circumstances attending the promise and the reason why the arrangement was made between the parties, and of course the demurrer would be less available to these counts than to the first and second, but I think that all the counts are substantially good.

It may be a question whether the plaintiff can recover all the damages which he sets forth. That I cannot decide upon the demurrer. That would come up more in the form of an instruction to the jury as to the measure of damages in the particular case. There is no allegation that the debt was lost in consequence of the defendant not bidding the amount of the judgment. There is no allegation negativing the fact that the plaintiff could levy upon other property and thus realize the judgment which he had recovered against J. P. Chapin & Co. The only allegation is that the defendant made this promise, if the plaintiff would do certain things. Plaintiff has done them, and he has not complied with his promise. Now, it is clear that the plaintiff has been damnified in consequence of the defendant's neglect to keep his promise. To what extent, is another matter. It is sufficient that he has been damnified, that in consequence of the promise of the defendant, he has prosecuted these suits, has been obliged to employ counsel, and has himself been subject to more or less labor, expense and trouble. This is sufficient to show that the plaintiff is entitled to maintain this action. It would come up as an after consideration whether the plaintiff was damnified to the extent which is claimed in the declaration or which the court is asked to infer from the nature of the declaration. That point I do not feel inclined to decide now.

Demurrer overruled and leave to plead.

On trial before a jury verdict and judgment was rendered for plaintiff for the full amount claimed, which judgment and the charge of the court to the jury were, on writ of error, sustained by the supreme court (6 Wall. [73 U. S.] 94); [Mr. Justice Swayne holding that an agreement to bid at a judicial sale is not void, as against public policy.]

Case No. 6,702.

The HORACE E. BELL.

[3 Ware, 236.] [1]

District Court, D. Maine. Sept., 1859.

SEAMEN—VOID CONTRACT—VOYAGE—SMUGGLING.

1. A contract for a voyage which has no terminus is void by law. A voyage must terminate at a certain time or a certain port.

2. Smuggling on the part of seamen is a grave offence, but it is not imperative on the part of the court to forfeit their whole wages, and the law may be satisfied with a fine.

[In admiralty. Libel for wages.]

Fessenden & Butler, for libellants.

Shepley & Dana, for respondent.

WARE, District Judge. The schooner Horace E. Bell was built at Pembroke, in this state in 1857, and owned, when built, one-fourth by Joshua E. Clarke and three-fourths by other parties. On the 10th of June of that year she sailed from Eastport to Philadelphia on a general freighting voyage, under the command of Joshua E. Clarke, and was taken by him on shares, he to receive a certain portion of her earnings after paying the expense of victualling and manning her, and to pay the other part to the owners. Frederick Clarke as mate and Henry E. Clarke as cook and steward, went in her. She performed several voyages from Philadelphia and Baltimore under this contract, Henry E. Clarke continuing in her until June 18, 1858, when he was discharged on account of ill health, and Frederick Clarke until Sept. 15, 1858. This suit is brought against the vessel for their wages. The libel was served upon her as soon as her return to Eastport and before any transfer, and, therefore, the assignees took equitably as well as legally only the rights of the assignors. The mate and cook, who have joined in this libel, are both brothers of the master and part owners, and, therefore, may be supposed to know the terms on which this vessel was taken; that by this condition of the contract it was the duty of the master to furnish the crew with provisions and pay them. I am aware of the decisions of the courts of this state and Massachusetts, that under such a contract the material men lose their claim against the general owners and can look to the master only. In the case of Skolfield v. Potter [Case No. 12,925], I had occasion to review those decisions, and my opinion there was, that this construction of the maritime law ought not to be extended to seamen unless they were plainly told at the time that for their

[1] [Reported by George F. Emery, Esq.]

wages they were to look to the master only. That was a libel in personam against the owner, and this is a libel in rem and much stronger than that case. The law is so well understood, and the men are so much in the habit of looking to the vessel as their best security, that I feel no difficulty in allowing their lien in the present case.

The defence in this action assumes a different basis. The first ground of defence is that the seamen are in delay, and that they ought to have brought their libel against the ship at the end of each voyage. But when did the voyage end? In the first shipping articles signed, the voyage is described as one "from Eastport to Hillsboro and thence to Philadelphia via Eastport, and thence back to a northern port of final discharge at Eastport." So that by the actual terms of the contract, the voyage did not end until her arrival back to Eastport, and the libels were sued out as soon as she returned. But if we take the voyage according to the understanding of the parties, as a general freighting voyage, when, in the understanding of the parties, did the voyage terminate? The enterprise was that of seeking employment, and when she had discharged her cargo at Philadelphia she might as well go to Baltimore, Norfolk, or any other southern port, as to that to which she did go. She had her choice of ports. If we recur to her original shipping articles, the voyage ended only on her return to Eastport. If we consider the voyage as a general trading and freighting voyage, as there was no limitation of time the contract was void for indefiniteness, for the vessel might never return to Eastport. The seamen might leave the vessel and demand their wages when they pleased. But there being no limitation in the articles, if it should be construed for reasonable time, then the voyage would not be ended and the wages demandable, according to the French law, until the voyage had come to a conclusion, that is, until her arrival in Eastport. Emerig. Ins. c. 13, § 3. In any view of the case I think the seamen have seasonably commenced their suit.

The second objection is that they forfeited their wages by smuggling at Baltimore, at the end of the voyage from Porto Rico. This, it is alleged, is an act of dishonesty, or as it was called in the argument, an act of barratry, by which all antecedent wages were forfeited. That there was smuggling is admitted, and I think that the evidence in the case sufficiently proves that the libellants were concerned in it. But the smuggling was not sufficient to forfeit the vessel, which, if it had been over $400 in value, it would have done. Laws U. S. (Stat. 1797, § 5). The master alone was arrested, and he paid a fine of fifty dollars. If this suit had been against him, this would have been an equitable as well as a legal defence. It is admitted, that on the part of seamen, this is a grave offence and ought not to be lightly passed over. But if the vessel had been arrested, it would not have been imperative in the court to inflict the highest penalty. The case cited in the argument—Scott v. Russell [Case No. 12,546]—is an authority for this. The law might have been satisfied with an abatement from the wages instead of an entire forfeiture. In that suit the vessel was delayed in consequence of the seizure, but the court did not forfeit the whole wages and inflicted a fine of twenty-five dollars, only. In this case, as the vessel did not suffer, I think it is not for the master to take advantage of this defence.

The third point made in the case relates to the amount of the wages. It is contended in the answer that, if any are due, there ought to be an abatement at least. Ordinarily the rate of wages is fixed by the shipping articles, and the statutes render this conclusive. Law of the U. S. But the articles may be always impeached for fraud or mistake. But in this case there is difficulty in believing that there was either fraud or mistake. The only evidence beyond that of the declaration of the parties in the libel, is the testimony of the master. It was his duty to see that the rate of wages was correctly entered; and without entering on the question how far he is to be believed against them, and he appears to be a fair witness, I feel disposed to allow wages according to the written record. The whole of this enterprise from the beginning, appears to have been unfortunate without faults imputable to any one. But, as the seamen would have no benefit from its being prosperous, so they ought to suffer nothing from its being unprosperous. And in finding the wages at the price in the articles, I do not forget the attempt at smuggling. The decree will be for the sums found according to the rates stipulated in the articles for the periods of service, deducting advances.

HORE (SCOTT v.). See Case No. 12,535.

Case No. 6,703.

HORMAN PATENT MANUF'G CO. v. BROOKLYN CITY R. CO.

[15 Blatchf. 444; 4 Ban. & A. 86; 7 Reporter, 295.] [1]

Circuit Court, E. D. New York. Jan. 10, 1879.

PATENTS—INFRINGEMENT—EQUITY PLEADING.

1. A bill in equity, on two patents, alleged that the defendant was using machines containing, in one and the same apparatus, the inventions secured by each of the two patents. The defendant demurred, on the ground that the bill did not allege that the devices were used conjointly or connected together in any one ap-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 86; and here republished by permission.]

paratus: *Held*, that the demurrer must be overruled.

[Cited in Hayes v. Dayton, 8 Fed. 704; Griffith v. Segar, 29 Fed. 707.]

2. Equity permits the joinder of several causes of action in a single bill, but not when the effect would be to embarrass the defendant, or introduce unnecessary confusion.

[Cited in Hayes v. Dayton, 8 Fed. 705.]

[This was a bill in equity by the Horman Patent Manufacturing Company against the Brooklyn City Railroad Company to recover damages for the alleged unlawful use of reissued letters patent Nos. 8013, and 8014, granted to W. H. Horman December 25, 1877, and July 25, 1877, respectively. The original letters patent Nos. 165,832 and 171,133 were granted July 20, 1875, and December 14, 1875, respectively.]

John Van Santvoord, for plaintiff.

Frost & Coe, for defendant.

BENEDICT, District Judge. This is an action for an injunction and to recover damages for the use by the defendant of certain machines employed for the purpose of registering fares in railroad cars. The bill, after describing two separate patents owned by the plaintiff, being reissues Nos. 8,013, and 8,014, charges that the defendants are using some registering machines, some of them containing, in one and the same register or apparatus, the inventions, or substantial and material parts of the inventions, described and secured in and by, each of the said reissued letters patent Nos. 8,013 and 8,014. To this bill the defendants demur, and allege, as ground of demurrer, that the several devices described in the two patents referred to in the bill are not alleged to have been made, sold, or used by the defendants conjointly or connected together in any one fare register.

It may be open to question whether the bill charges a single cause of action. when it sets forth the use of devices secured by separate patents, although such use is stated to occur in one and the same machine. But, the bill, if it be considered to set forth two causes of action, may, nevertheless, be good, for equity permits the joinder of several causes of action in a single bill. Such joinder is not, however, permitted when the effect will be to embarrass the defendant, or introduce unnecessary confusion into the cause. Whether that will be the effect in any particular case must depend, in a great measure, upon the nature of the controversy, and no general rule has been laid down by which all cases can be determined. In the present instance, as the question is raised by demurrer, the point to be decided is, whether the averments of the bill show the controversy to be of such a character that prejudice to the defendant will result from permitting the joinder, in one action, of the two transactions set forth. The argument made in behalf of the defendant requires the inference, that prejudice will result to the defendant, if he is called on to answer to a charge of infringing two patents, by the use, in a single machine, of devices that are not necessarily used in connection with each other. But no such inference can be drawn. On the contrary, in the absence of any other fact, the circumstance that the two transactions complained of are the use, in a single fare registering machine, of two patented devices connected with the mechanism of the machine, warrants the inference that no prejudice will result to the defendant from the joinder of the two transactions.

A bill similar to the present was upheld in Nourse v. Allen [Case No. 10,367], and I do not find the authority of that case shaken by the case of Nellis v. McLanahan [Id. 10,099], upon which the defendant relies; for, it seems, that, in that case, the bill would have been held good if it had averred, as this bill does, that the machine made and sold by the defendant contained devices covered by each of the patents set forth in the bill. The case of United Nickel Co. v. Manhattan Brass Manuf'g Co. [Id. 14,410], decided by Judge Blatchford, furnishes no support to this demurrer, for the reason, that the bill in that case was essentially different from the bill in the present case, and no opinion was delivered.

Nor can the defendant find support in the case of Seymour v. Osborne, 11 Wall. [78 U. S.] 516, 559, which simply decides, that, where the bill sets forth several patents, all appertaining to the same general subject, and all required to constitute a complete machine, and all embodied in the machines which the complainants furnish, the bill will be upheld.

I am unable, therefore, from the bill itself, to say, in this case, that any prejudice will result from the joinder of the several transactions therein described, and there must be judgment for the complainant upon the demurrer, with leave to the defendant to answer, on payment of costs.

Demurrer overruled.

HORN (LOCKHART v.). See Cases Nos. 8,445 and 8,446.

HORN (UNITED STATES v.). See Case No. 15,389.

HORNER (ALEXANDER v.). See Case No. 169.

Case No. 6,704.

The HORNET.

[Abb. Adm. 57.] [1]

District Court, S. D. New York. Aug., 1847.

NOTICE—VENDITIONI EXPONAS.

1. Under Act Cong. March 2, 1799 (1 Stat. 696, § 90), the notice of sale in cases of condemnation under the act must be published

[1] [Reported by Abbott Brothers.]

every day for fifteen days, in the newspapers directed by the act.

2. Under rules 47 and 48 of the district court, notice of sale under venditioni exponas (except on condemnation of property on seizure by the United States) must be published for six days; and the sale will be set aside if this full number of publications is not made.

[Cited in Daily v. Doe, 3 Fed. 912.]

This was a libel in rem, by Nathaniel Finney against the schooner Hornet, to recover wages as pilot. A decree was entered in favor of the libellant, by default, and a sale of the vessel upon venditioni exponas was made under the decree. Thomas T. Sturgess and James S. Sturgess, as attorneys in fact for the owners, who were residents of Maine, now filed a claim and moved to set aside the sale made, on the ground of irregularity in the notice of sale, and to open the decree rendered by default, and to allow the claimants to come in and defend the case. The grounds of the motion appear in the opinion.

BETTS, District Judge. All the proceedings in court, on the part of the libellant, up to the notices of sale, were regular. The claimants failed to show any fraud or collusion on the part of the master, in respect to the attachment of the vessel, or in respect to his admissions of the demand set up by the libellant. If, therefore, relief was afforded them against the proceedings in court alone, it could only be upon terms which would fully reimburse the libellant, and save him harmless against defences merely formal in their character.

It being, however, the judgment of the court that the sale of the vessel was irregular, and that it cannot be sustained, the setting it aside will place the cause in a condition where the libellant will incur no delay or injury by letting in a full defence, beyond what he would have been subjected to if the claimants had intervened and filed their answer upon the return of process, since it does not appear that any opportunity to try the cause will have been lost by the proceeding.

The main question considered by the court is that raised as to the irregularity of the sale. The venditioni exponas was issued the 20th of July, and the marshal made sale of the vessel under it the 27th following. The advertisement of the notice of sale was first published the 21st of July, and was published but five times in all, previous to the sale.

The rules of this court direct that notices of sale, &c., shall be six days, and that all such notices shall be published in the manner directed by the act of congress, in cases of condemnation under the revenue laws. Dist. Ct. Rules 47, 48.

The act referred to (Act March 2, 1799, c. 22, § 90; 1 Stat. 696) prescribes that ships, &c., condemned under the act, shall be sold at auction, giving at least fifteen days notice, in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto.

The terms of the act are very explicit and definite. No less than publication for the required number of days is sufficient, and it appears to me that the language admits of no construction or practice which shall fail exacting the entire complement of days in the publication of these notices. It seems intended to exclude the supposition that any other than a continued notice for the required number of days was allowable. If any number of insertions, less than the whole, will satisfy the statute, then a single one must have all the efficacy of a notice repeated from day to day, up to the period of sale. There is a difference between the rules of this court and the act of congress, in respect to the number of days' notice required, the one prescribing six only and the other directing fifteen,—the statute regulating the proceeding only in cases of seizure by the United States,—but there is no ground for considering a full publication for the entire number of days required as less necessary under the one provision than the other. The rule of this court adopts the direction of the statute as to the manner of publication, and not the period; and the reasonable construction of the rule and the act, and the one conducing to the preservation of good faith between suitors, and the rights and interests of all concerned in the ownership of vessels subjected to sale, requires that the notice of sale shall continue to be published every day, to the completion of the full number.

At least six publications of the notice were necessary, and as five only were made, the sale must be set aside. The claimants are also let in to defend the action upon its merits. No costs are awarded to either party against the other.

Case No. 6,705.

The HORNET.

[2 Abb. U. S. 35; [1] 11 Int. Rev. Rec. 6.]

District Court, D. North Carolina. 1870.

Scope of Judicial Power—Questions as to Existence of Foreign Government.

1. When a question arises, in judicial proceedings, relative to the existence or validity of an organization claiming to be the lawful government of a foreign country, the courts of the United States are bound by the decision of the executive power. Such a question is political, and not judicial, in its nature.

2. When a civil war is pending in a foreign country, between a portion of the people who adhere to a long established government, and another portion who assert a new government,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

the courts of the United States cannot recognize such new government, or admit it or its agents or representatives to a standing as parties in judicial proceedings, until the executive power has publicly recognized such new government.

Application to interpose a claim, in admiralty. The steamer Hornet was seized upon a libel of information, founded upon a charge of violating the neutrality laws. J. Morales Lemus, as agent of the so-called "Republic of Cuba," now applied to be allowed to intervene and interpose a claim and contest the suit. The only question now made was as to the propriety of allowing such agent to claim.

BROOKS, District Judge. The question submitted to the court is—can this court recognize as existing, any government or organized body of people, or element known as the "Republic of Cuba," to the extent of allowing that as a body politic, or government to come through an agent into court, and be admitted as claimant of the property libeled in this cause?

The capacity of this struggling element in Cuba, styling themselves the "Republic of Cuba," to take and hold property is not a question for consideration. But it is now simply for this court to declare to what extent it may properly go (if to any extent), in declaring how far any revolutionary element or people have succeeded in their efforts to separate and free themselves from any established and acknowledged government.

I feel that I have been aided materially in coming to a correct conclusion upon this question, by the very clear and able arguments of the counsel who addressed the court—both for the United States and for the individual who styles himself the "agent of the Republic of Cuba;" yet I am embarrassed by the importance of this question, in its connection with this cause. Were I satisfied that my opinion would be revised by the supreme court, and be by that body corrected if wrong, I would announce the conclusion to which I have come with less reluctance than I do.

It was contended by Mr. Phelps, the counsel who submitted the argument on the part of the United States—that this court would exceed its power in recognizing to any extent, or for any purpose—the existence of any mere revolutionary body, such as that styling itself the "Republic of Cuba," in the absence of any act, resolution, proclamation of the legislative or executive department of our government, declaring or admitting to any extent, the existence of such a government. That there is no authority to show that such power was designed to be allowed the courts, or was ever exercised by the courts of the United States, but on the contrary there is abundant and conclusive authority—both of our circuit and supreme court, to show that they have not only declined to claim or exercise such power—but declared it to exist with and to have been exercised by the political departments of the government alone. That a power or government must necessarily be recognized to have existence before they can be admitted as claimants to defend or be in any way heard in the court.

Other objections were urged by the counsel to the sufficiency of the evidence offered by J. Morales Lemus, to show that he was authorized to represent and claim for the Republic of Cuba. This, like the question of title, the court regards as not now necessary to be considered.

I listened with care and much interest to the argument of the learned counsel who addressed the court in behalf of the party who asks to be admitted as agent, for the purpose of interposing a claim, and to the authorities read and commented upon by him. I have examined the authorities cited on both sides, and considered these authorities and the arguments with care, and have been forced to the conclusion that this question is with the United States, and I must so declare.

I confess to some degree of hesitancy in so declaring, because, partially considered, it may seem as if it recognized to some extent, a right in the strong to deny justice to the weak. But, if anything should be yielded for such a consideration, it would be altogether unjustifiable on my part. Less defensible for me would such a course be for the reason that I entertain so clearly the opinion that courts have no right to consider any question of law submitted to them, in a policy view. Courts should construe the law—ascertain, and declare the law, as it is, without reference to any opinion of the judge, as to what the law should be. Though no case parallel to this case has been cited, yet cases have been referred to and commented upon by the counsel for the government, which, in my opinion, conclusively settle this question.

I will first refer to the case of U. S. v. Palmer, 3 Wheat. [16 U. S.] 610. This was an indictment against the defendant and others, under the act of congress, for robbery upon the high seas—in the circuit court for the district of Massachusetts. The judges were not agreed, and certified eleven questions for the opinion of the supreme court. That eminent judge, Chief Justice Marshall, delivered the opinion of the court. I will only refer to the remarks of the learned chief justice upon the tenth question so certified.

The question was certified in the following language. "Whether any colony, district, or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed in any court of the United States an independent or sovereign nation or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act, resolution, or statute of congress, or by some public proclamation or other pub-

lic act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving or acknowledging an ambassador or other public minister from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, where no public acknowledgment has ever been made; and whether the courts of the states are bound judicially to take notice of the existing relations of the states as to foreign states and sovereignties, their colonies and dependencies."

That great judge and the supreme court, declare as follows: "Those questions which respect the rights of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such sections of an empire who may be brought before the tribunals of this country are equally difficult and delicate. As it is understood that the construction which has been given to the acts of congress will render a particular answer unnecessary, the court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their judgment may seem wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests the nation may engage itself with one party or the other—may observe absolute neutrality—may recognize the new state absolutely, or may make a limited recognition of it. The proceedings in courts must depend so entirely on the course of the government that it is difficult to give a precise answer to questions which do not refer to a particular nation. This court is of opinion that, when a civil war rages in a foreign nation—one part of which separates itself from the old established government and erects itself into a distinct government—the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States."

Then the same learned judge, in the case of The Divina Pastora,' 4 Wheat. [17 U. S.] 52, decided at the next term of the supreme court, says that "the decision at the last term, in U. S. v. Palmer [supra], establishes the principle that the government of the Union having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new government in South America may direct against their enemy." Hence I conclude that for the reason that the government of the United States had recognized the existence of a civil war between Spain and her colonies, the courts were forbidden to say that the act of capturing The Divina Pastora was unlawful. That the court could not say, after such an acknowledgment, if the capturing ship had come within the jurisdiction of the United States, that she was a piratical vessel, and treat her as such. That the effect of this acknowledgment was to accord to the new power belligerent rights, so far as the United States were concerned; one of which is to grant letters of marque and reprisal, one of the important advantages arising from which (to such as act under them), is exemption from the penalty for piracy. This is but saying to such a people that we see and understand that you are struggling to separate from the mother country.

That whether a revolted colony is to be treated as a sovereign state, even de facto, is a political question, and to be decided by the government, and not the court, has been decided in effect in several other cases than those before mentioned, as in Kennett v. Chambers, 14 How. [55 U. S.] 38; Clark v. U. S. [Case No. 2,838].

And in the great case of Luther v. Borden [7 How. (48 U. S.) 1], than in the argument of which the great American constitutional lawyer rarely if ever displayed more learning, the supreme court unmistakably declared, against the view urged by Mr. Webster, that the federal courts have no jurisdiction of the question whether a government, organized in a state, is the duly constituted government in the state. That is a question which belongs to the political, not to the judicial power. In that case any disposition of that question could not have disturbed our relation with any established foreign power. No power with whom the United States was at peace or to whom our government was solemnly pledged to a just and clearly prescribed course, as by our neutrality acts, could or would have complained of a contrary decision in that case—and still that was held not to be a question with the court.

How much the more reason in the conclusion to which our courts have come, and on which they have acted in relation to this subject, where even by possibility their action might involve our country in war with foreign powers. There are other cases to which I might refer establishing in my view this principle.

I do not deem it necessary to refer to the other cases cited by the counsel for the government. It cannot be intended that such power should be vested in the courts. It would be a power dangerous to our government to be so vested, and one which judges could not so well exercise as congress or the executive.

If the courts have the power to do any act which would in effect accord to this new government advantages, I do not see what limits there would be to the benefits which they might so confer, and the result might be that our nation would be involved in a war from the action of one judge, when the people and those who represent the people were disposed to peace.

If the courts, before the political departments had spoken, have the right to take one step in this direction, I do not see any limit to their power, short of declaring perfect freedom and independence. What act has been performed, what resolution, declaration, or proclamation has been made by congress or the executive, indicating an intention on their part to acknowledge, at any time or to any extent, the existence of the Republic of Cuba?

This court knows of no such act, and nothing of that character has been shown or alleged by counsel. Then this court cannot know of the existence of such a government. Such knowledge is essential to the admission of this agent, as claimant for his government.

My time for the examination of this question has not been so ample as I could have desired.

Application denied.

HORNET, The (BOON v.). See Case No. 1,640.

HORNIBROOK (UNITED STATES v.). See Case No. 15,390.

HORNUM PATENT MANUF'G CO. v. BROOKLYN CITY R. CO. See Case No. 6,703.

HORR (BAUENDAHL v.). See Case No. 1,113.

HORRELL (UNITED STATES v.). See Case No. 15,391.

Case No. 6,706.

The HORTENSIA.

[2 Hask. 141.] [1]

District Court, D. Maine. Jan., 1877.

COLLISION—FAULT—EVIDENCE—WITNESS.

1. A vessel sailing close-hauled, upon being overtaken by another sailing the same course slightly to windward, is at fault by luffing so as to cause collision.

2. The overtaking vessel must keep clear; but has a right to assume that the forward vessel will hold her course.

3. The rule, that the testimony of those on a vessel should prevail as to what takes place on board her, does not obtain in all cases.

[See The Hope, 4 Fed. 89.]

4. The interest of witnesses in the result of the cause should be considered in judging of the value of their testimony.

In admiralty. Libel by the owners, officers, crew and underwriters of the schooner Equal, against the Hortensia for collision, whereby the former and her cargo and the effects of the officers and crew were lost. The cause was heard upon libel, claim, answer and proof.

Almon A. Strout and John C. Dodge, for libellants.

George Walker and Bion Bradbury, for claimants.

FOX, District Judge. This libel was instituted in behalf of the owners, officers and crew of the schooner Equal of Rockland, and of the insurers of her cargo, to recover damages sustained in a collision with the Hortensia on the night of November 27th, at 7.30 p. m., off Cape Cod, in which the Equal was sunk and her master lost.

The Equal was a small schooner of about fifty tons; was from New York bound for Winterport with a full cargo of corn, having on board three men, master, mate and a third, who acted as cook and seaman. At the time of the collision she was on the port tack, close-hauled, about six miles from the shore of the cape beyond Nauset, and was making for Thatcher's Island. The wind is said by those from the Equal to have been about west by north, a wholesail breeze, the night somewhat hazy, and a choppy sea; but it was light, as there was nearly a full moon shining, and a vessel could have been seen a mile distant.

The Hortensia is a schooner of one hundred and seventy-eight tons, with a crew of six men, was bound from Hoboken to Boston with coal, and is owned in Boston and Machias in this district. She was astern of the Equal, close-hauled on the port tack.

The answer admits that the collision occurred at the time and place described in the libel, and alleges that the night was somewhat hazy, and denies that it was so light that a vessel could be seen a mile distant, or that the moon was shining brightly. It alleges that the wind was west by south. In this respect there is a difference of only two points in the statement of the parties; but this is immaterial, as it is conceded that both vessels just previous to the collision were on their port tack, close hauled and within five points.

Some matters are admitted by both parties —such as the locality; the state of the wind and sea; the course of each vessel; and that the Equal with her master was lost. The attention of the court, therefore, will be confined to the matters in controversy, and to the evidence bearing thereon.

As to the darkness of the night, from the whole testimony, I conclude that it was somewhat hazy with the moon at times obscured by clouds, but that one vessel could have been seen from the other at the distance of half a mile, and their regulation lights for more than double that distance.

Each vessel had proper lights and competent lookouts forward; both were sufficiently

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

manned; all on board the Equal were on deck with the master at the wheel. She was sailing about four, and the Hortensia about six knots an hour; and each vessel was seen from the other when they were at least half a mile distant.

The libel alleges that when the Hortensia was first seen from the Equal, she was a long distance astern of the Equal, but pursuing the same course and following directly after; that the Equal had her four lower sails set, but the wind being fresh, the master, desiring to take in some sail, luffed her up a little into the wind, but not enough to shake the wind out of her sails; that the Hortensia was sailing faster than the Equal and gaining upon her, and at the time the Equal luffed as above stated, the Hortensia was a long distance behind her, and having a proper lookout might easily have seen and avoided her by passing on either side of her, but that instead of so doing, although the master and crew of the Equal repeatedly shouted to those on board of the Hortensia, directing them to keep off, she came straight on, first luffing somewhat, and then, falling off a little from the wind as she approached the Equal, struck the Equal on her port quarter, cutting into her so that she filled and sank with her cargo; that there was no proper lookout on the Hortensia, and that she sailed away without attempting to render any assistance to save the master.

The answer sets forth that the Equal was to the leeward of the Hortensia and astern a short distance from the Equal and sailing faster, and that when the Hortensia came near the Equal, expecting to pass her to windward, as she might have done with safety, provided the Equal had not changed her course suddenly and without warning to those on board the Hortensia or hailing them in any way, the person at the wheel of the Equal luffed her up into the wind so as to shake the wind out of her sails whereby her course was changed, and ranging ahead, she came into the course the Hortensia was sailing; that as soon as the Equal began to come up into the wind, the lookout on the Hortensia shouted to the master that the Equal was changing her course and coming into the wind, whereupon the master of the Hortensia ordered the wheel to be put hard to port, and to cast off the main-sheet so that the Hortensia could pass the Equal to leeward, which order was immediately executed; that the Hortensia did not luff as alleged by the libellants, but immediately fell off; yet, notwithstanding every exertion made by those on board the Hortensia to avoid the collision, the Hortensia struck the Equal on the port quarter without any fault or neglect of those sailing the Hortensia, carrying away under her bow the mainmast, mainsail and main-boom of the Equal; and that so soon as these could be cleared away and the vessel controlled, the Hortensia tacked and made search for the Equal and her master; that there was a good lookout on the Hortensia; that all hands but one were on deck; and that they had no notice from the Equal, or reason to believe that she intended to change her course.

Rules 22 and 23 for preventing collisions are applicable to and must control the decision of this cause. These rules declare that every vessel overtaking any other vessel shall keep out of the way of the last mentioned vessel, and the latter vessel shall keep her course, due regard being had to all dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from the rules necessary in order to avoid immediate danger. Nothing in the present case is in evidence to justify a departure from these rules.

The charges made by the libel against the Hortensia are that she failed to discover the Equal for want of a proper lookout, that she luffed only a point when she was a long distance ahead, and that there was ample time and space for the Hortensia to have passed on either side of the Equal, but that she first luffed and then fell off and run into and sunk the Equal.

The answer alleges that the Hortensia being near to, but astern and to windward of the Equal, and far enough to have passed by to the windward in safety if the Equal had held her course, the Equal luffed so that she came up into the wind, and was head to the wind with the wind out of her sails; that as soon as this was done, it was seen by the lookout of the Hortensia, and the master was informed of it; that the wheel was at once put to port and the main-sheet cast off that she might go to leeward of the Equal; and that all was done that could be, but without success.

As the libel admits that the Equal changed her course somewhat in violation of her duty to the ship astern, the burden is upon the Equal to satisfy the court as to the extent of such change, and whether it occasioned the collision.

Upon this branch of the case, as to how great was the change of the Equal's course, there is the usual conflict of testimony from those on board the two vessels, and their testimony is utterly irreconcilable on this point. The witnesses were all examined in the presence of the court, were all residents in the eastern portion of this district, most of them were of more than the usual intelligence of persons in their positions, and there was nothing in the conduct and appearance of any of them which, of itself, would lead the court to distrust their statements.

Rowell, the mate of the Equal, was only nineteen years of age and had held that position but six weeks. He was on the lookout, and says the Hortensia was a mile distant

when he first saw her astern, slightly to windward; that the captain directed him and Bennett to lower the flying-jib, the deck being buried up in water; that finding they could not accomplish it, he told the captain to luff, so he could get it down; that the hanks caught and they got it only about halfway down when the captain of the Equal called out to the Hortensia to luff; that he ran aft and "all of us cried out so," but there was no reply from the Hortensia; she was then three hundred yards astern; the wind was not out of the Equal's sails, and she had not luffed more than a point at the time of the collision. This statement is sustained in all respects by the testimony of Bennett, who says the Equal came up a point, not more.

The testimony of the master of the Hortensia is that he first saw the Equal about twenty minutes after seven, about half a point on his lee bow, and as he should judge, about two hundred and fifty feet in advance, when she began to luff; that Averill, the lookout, was at the time on the forecastle deck, and sung out that the Equal was coming into the wind; that he then gave orders to put the helm hard up and let go the main-sheet, in order to go to leeward of the Equal; that he assisted the man at the wheel, but that, although all was done in this respect that could be, the Hortensia struck the Equal a square blow about ten feet from the stern on her port quarter; that while at the wheel he saw the jib and foresail of the Equal out by the port bow, her sails shaking, she lying about head to the wind, within two points, having first seen her on the lee bow about a hundred feet to leeward under the fore-boom.

Averill, the lookout, confirms the statements of the master, and says he kept the Equal in view from the time he first saw her until she luffed, and that as soon as she luffed he informed the captain who gave his orders as stated; that he, Averill, let go the main-sheet; that the Equal was in the wind with her sails shaking, and that before the vessel struck, he saw the Equal off their weather quarter, her bow and jib-boom, and that the Hortensia's course was not changed until after the Equal had luffed.

Joseph Proctor was at the wheel of the Hortensia and corroborates the master's statements, and says that he saw the Equal's jib to windward of their mainmast before the collision, and that the Hortensia held her course until the Equal luffed up under her bows.

Holmes, the mate of the Hortensia, says that he was in his berth, heard the captain's orders and went on deck to let go the main-sheet; found it was off and unrove; then saw that the Equal was hard to the wind; could see her jib and foresail; wind was out of her sails; first saw her on the port bow.

F. O. Larrabee, the steward, testifies that he was on deck and first saw the Equal about half a mile ahead on their lee bow; that their lookout afterwards cried out, she was luffing, and that the captain gave his orders as is before stated; that he afterwards saw the Equal luffing. "She was head to the wind at the time we struck, and the wind was out of her sails."

The testimony of the two men from the Equal is directly opposed on this point by that of the five men from the Hortensia, all of whom swear that, instead of the Equal luffing a single point, she was, in fact, head to the wind, and her sails were shaking before the collision.

It is urged that those on the Equal had the best opportunity of knowing what took place on board of her at that time, and therefore their testimony is the more reliable. This rule has frequently been adopted by courts of admiralty, and I cannot but believe that sometimes it has not been without its effect on the statements of witnesses, inducing them to think that a falsehood persistently reiterated by all on board a ship, as to what happened thereon, will outweigh the testimony of those from the other ship, even if it should be sustained by facts and circumstances about which there can be no question.

In the present case, the five witnesses from the Hortensia swear, not to opinions, but to facts: to wit, to the position of the sails of the Equal as they were actually seen by them previous to the collision, that they were then visible on the port side of of the Hortensia, loose and without wind, and that she was heading up to the wind; I am aware of no reason why the testimony of these five men on this point should be discredited, and reliance placed upon that of the two men from the other vessel.

In determining what evidence should be given to the crews of the respective vessels, it will perhaps aid us, if we recall some circumstances presented in the case, about which there can be but little controversy.

I. The libel is instituted as well in behalf of the crew of the Equal as of the other parties. They are, therefore, parties to this controversy, having a direct interest in the matter, claiming to recover from the Hortensia the value of their clothing, &c., lost by the collision. The amount claimed, fifty dollars, is but small, but to them it is undoubtedly of considerable consequence, from their appearance, probably their all. Experience is daily teaching us how slight dependence can be placed in similar cases upon this class of witnesses, and if by the decree, they are to gain even a small amount, it is a circumstance which the court cannot but consider in coming to a conclusion as to the degree of credit which should be reposed in them.

II. The principal purpose to be accomplished by the luffing of the Equal and the lowering of the outer jib was to relieve her

decks from the water by bringing her up on an even keel, so that it would be discharged through the scuppers. She was deeply loaded within 1½ streaks of the sea, and it is quite apparent that luffing a single point would not have speedily accomplished the contemplated purpose. The jib could not be got down, nor would the scuppers have risen above the sea, unless she had changed her course very much more than she did, either by luffing pretty fully into the wind, or running off before it. If the master attempted to accomplish this purpose, we cannot believe but that he would be likely to do all that was necessary therefor, and therefore, that she must have come up very much beyond a single point as stated by these witnesses. It may be said that he had not luffed up enough to allow the jib to run down. It is true, it did not come but part way, but these men say that they were about it four or five minutes, and they ascribe the trouble to the hanks catching, which might have been the case, even if she was head to the wind.

III. It is not questioned that the course of the Hortensia was changed after the luffing of the Equal was discovered by the lookout, the vessels being then more than two hundred and fifty feet apart, as I think, with the Hortensia a little to the windward. In my view, at that distance, in that position, and in such a night, it would have been impossible for the lookout of the Hortensia to have discovered the change in the course of the Equal, if it did not exceed a single point, her sails being full and not shaking, and she making headway. A greater deviation from her former course, which was substantially on a parallel line with the Hortensia, was requisite for a lookout to have detected it.

IV. Some aid may be gained from the character of the blow received by the Equal. Those on board the Hortensia represent it as having been nearly at right angles, but the men from the Equal describe it as much more acute. The learned counsel for the libellants understood the models to be placed on the compass card by them as at an angle of about forty-five degrees, as I gather from his remarks. My own impression is that they approximated somewhat nearer to the right angle; but if the blow was in that direction, the Equal must have luffed more than a point for the vessels to have thus come in contact, as the mate of the Equal says the Hortensia's course was changed only one point.

V. There is another matter testified to by the two men from the Equal about which there could certainly be no mistake, and in relation to which, I regret to believe that they have designedly testified to a falsehood. At the time of the collision, the master of the Equal continued on board of her, and it is conceded by the crew of both vessels that he cried out to those on board the Hortensia in the most persuasive language for relief, and that his appeals were heard by those on board that vessel. These two vessels were together but for an instant, and both of the men from the Equal swear that after they had separated they asked the captain of the Hortensia to lower his boat and return in search of their captain, but that he declined and continued on his course for an hour and a half, and then tacked ship and stood back for the place of the disaster. The master of the Hortensia denies that any such appeal was made to him. He admits that he heard the cry of the master of the Equal for assistance, and he and every other witness from the Hortensia swear that at this time the bow of the Hortensia was fouled up with the wrecked stuff from the Equal, and that as soon as it could be done, it was cut adrift, which did not exceed ten minutes, and the vessel was then put about and search for the Equal and her master was made by them for more than an hour and a half, cruising around as near as they could judge in the vicinity of the disaster until, as is testified, one of the crew of the Equal gave up all hope and advised the master of the Hortensia to resume her course. The master of the Hortensia swears that, by acting as he did, he saved time, and that he believed, by so doing, he could return to the Equal sooner than if the boat had been cleared and lowered in the darkness; that a boat could not have reached the Equal in the darkness, if she was afloat, so soon as the schooner could; and all who have been examined from the Hortensia testify that, instead of its being an hour and a half that the Hortensia continued on her course, it did not exceed ten minutes before she had tacked and was returning towards the Equal.

The court cannot believe that a Maine shipmaster would thus deliberately sail away and abandon to certain death an unfortunate fellow-being appealing to him in God's name to aid him as his vessel was sinking; and if one should ever be found so destitute of humanity as to attempt it, I trust that his crew will so manifest their horror of his barbarity as to at once induce him to a different line of conduct, and compel him to render the required aid. It is intimated that the master of the Hortensia, having destroyed the Equal, was not unwilling that the testimony of her master might perish with his vessel; but the court can not yield to the suggestion, and can not believe that a master can be found so devoid of every spark of humanity, but is the rather of opinion that the two witnesses from the Equal are so reckless in their testimony that it is not safe to rely upon their statements, either in this behalf, or in the other matters where they are in direct conflict with five other witnesses.

VI. It is claimed that the cause of the collision was the proximity of the Hortensia, and that if both vessels had kept their

course, the collision would have been unavoidable. The first reply to this suggestion is, that this ground is altogether inconsistent with the libel, which alleges that the Hortensia was a long distance behind the Equal, and having a proper lookout might easily have seen and avoided her by passing on either side of her at the time the master undertook to take in the jib. The witnesses from the Equal give the distance of the two vessels from each other at this time as three hundred yards.

It must be conceded that this objection finds some support in the answer and the testimony of those from the Hortensia, the answer alleging "that the Equal was to leeward of the Hortensia, which was a short distance astern." The witnesses in defense all substantially agree in the statement that, when they first saw the Equal, she was something to leeward, a number describing it as about half a point in their judgment, and giving the Hortensia as from one hundred and fifty to two hundred and fifty feet astern; some calculations have been made by the learned counsel for the Equal to demonstrate that under these conditions the Hortensia must have struck the Equal astern, if both vessels had kept their course; but it must be remembered that these distances and courses are matters of opinion, while those on board the Equal say she was three hundred yards ahead when she began to luff; and the witnesses from the Hortensia also state that, their vessel at the same time, was more than one hundred feet to windward of the Equal, and if the two vessels had held their course, the Hortensia would have passed more than one hundred feet to windward of her. This statement, therefore, is to be kept in mind in determining whether the Hortensia was sailing dangerously near to the Equal if each had complied with the rule of the road. Moreover, the mate of the Equal, in response to an inquiry by the court, stated that he thought if the Equal had held her course, the Hortensia would have passed the Equal quite close, within three to five yards.

I am therefore of opinion that the Equal was in fault, luffing as she did, and that the Hortensia would have passed her in safety if she had not changed her course. Under the rules, I think the Hortensia had the right to approach near to the Equal if the master saw fit, but charged all the time with the responsibility of avoiding a collision by overtaking her if she complied with the requirements of the law, and that she had a right to presume its rules would be obeyed and to regulate her own movements accordingly. In my view, if the Equal had not violated her duty, but had kept her course, the Hortensia, having discovered her seasonably, could have gone either side of her as the master of the Hortensia might have deemed it expedient.

VII. It is urged, these proceedings on the part of the Equal were necessary to relieve her decks from water; but it is not made to appear that at that precise moment there was any urgency for this being done. The water had been over her deck for some time, and if the Equal had held her course for five or six minutes longer, the Hortensia would have passed her without difficulty; or if a necessity existed for immediate action, the Equal could have gone off before the wind, and thus on an even keel allowed the water to pass off.

VIII. It is said, the forward vessel is under no obligations to notify a vessel astern of her presence, or of her intended change of movements, or to pay any regard to her. I agree that there is nothing to be found in the regulations prescribed by congress on this subject; and I do not think that the exhibition of a light from the stern of the forward vessel is ordinarily requisite, or that perhaps it could be sustained under ordinary circumstances, as it might tend to deceive other vessels; but I can not admit that the ship ahead is justified in throwing herself directly under the bow of the hinder vessel without notice, or any precaution to discover and guard herself against the danger to which she is thereby subjected.. Where there is apparent danger, a necessity arises to do the best we can for our safety; and a ship ahead, if the danger is apparent, should look out for the ship behind her. The City of Brooklyn, 1 Prob. Div. 276.

In our conduct, both on land and at sea, we are all bound to the exercise of prudence in our actions, and until I am differently instructed, I must hold that the conduct of the Equal, as I find it to have been, was without excuse or justification, and that the Hortensia is not to be held chargeable for this unfortunate disaster. Libel dismissed with costs.

Case No. 6,707.

In re HORTON et al.

[5 Ben. 562.] [1]

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

BANKRUPTCY—ASSIGNMENT WITHOUT PREFERENCES—FRAUD.

The assignee named in a general assignment executed by a bankrupt without preferences, but in fraud of the bankruptcy act [of 1867 (14 Stat. 517)], is not, although he accepts such assignment, prohibited from proving a debt which he has against the estate, when bankruptcy proceedings have been taken.

[Cited in Re Lloyd, Case No. 8,429.]

[In bankruptcy. In the matter of Joseph H. Horton and others.]

The register in this case certified to the court that an objection had been made before him, by the assignee in bankruptcy, to the proof of debt of Aaron D. Hopping, but that he considered the proof satisfactory, and he

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

certified the question to the court, with his opinion, as follows: The assignee objects to the proof of the debt of the claimant, Aaron D. Hopping, on the ground of a preference, fraudulent under the bankruptcy act. On the 20th day of December, 1869, the bankrupts, copartners in trade under the name and firm of Horton, Hopping & Company, being unable to pay their debts in full, made a general assignment for the benefit of creditors, appointing and making the claimant their assignee. The claimant accepted the trust, and entered upon the duties of assignee under the assignment. The assignment did not make any preferences, but proposed the equal distribution of the property of the debtors pro rata among their creditors. The petition to have the debtors adjudicated bankrupts was filed within six months after the assignment. The assignment was made by the debtors with the intent, by that disposition of their property, to defeat or delay the operation of the bankruptcy act. Aaron D. Hopping, the person receiving the assignment and conveyance, had reasonable cause to believe that a fraud on the bankruptcy act was intended, and that the debtors were insolvent. The 39th section of the bankruptcy act declares that any person, &c., who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer, of money, or other property, estate, rights or, credits, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to defeat or delay the operation of the act, shall be deemed to have committed an act of bankruptcy, and shall be adjudged a bankrupt on the petition of one or more of his creditors, provided such petition is brought within six months after the act of bankruptcy shall have been committed; and, if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to the act, provided the person receiving such payment or conveyance has reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy. The creditor contemplated by the last clause is a creditor who has received a payment or conveyance, giving him a preference. If the assignment in the present case had been made to a stranger, it would not have affected the claimant's right to prove his debt. He would have stood on an equality with all the other creditors of the debtors. The assignment did not give him any preference. Under the assignment he stood on an equality with the other creditors. For the administration of the trust, he might be entitled to commissions, but commissions are only wages earned for services rendered. A preference, within the meaning of the act, is an advantage in the payment of the debt due to him, acquired by one creditor over the other creditors of the debtor. The creditor appointed an assignee by a voluntary assignment of the debtor's property, for equal distribution pro rata among all the creditors of the debtor, has the administration of the trust committed to him, but he administers the trust under the eye of the creditors, and the law will not acknowledge that, in executing such an assignment, the creditor-assignee acquires any advantage over his fellow-creditors. A provision which would forfeit the debt in such a case, where a creditor was appointed assignee, could easily be evaded by making a person not a creditor, but in the interest of a particular creditor, the assignee. It is not to be regarded as the intent or policy of the law to promote such a result. There not being a preference in the present case, the creditor has not forfeited his right to prove the debt due to him by the bankrupts, against their estate in bankruptcy.

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

Case No. 6,708.

In re HORTON.

[5 Law Rep. 462.]

Circuit Court, D. Connecticut. Sept. 17, 1842.

BANKRUPT ACT—ASSIGNMENT—LIEN OF.

The bankrupt law did not go into operation until the 1st day of February, 1842; it can have no influence upon, or control over, any party or transaction before that day. See Hutchins v. Taylor [Case No. 6,953], and Matter of Chadwick [Id. 2,569]. *Held*, that an assignment made in Connecticut, before the 1st day of February, 1842, under the state insolvent law of 1828, constitutes a lien upon the property in the hands of the trustee under the assignment.

[Cited in Day v. Bardwell, 97 Mass. 255; Chamberlain v. Perkins, 51 N. H. 342.]

Before the district court of Connecticut, at a recent term, Abner Hendee, the county assignee in bankruptcy, filed his petition against Lorin P. Waldo, setting forth, that the latter was in the possession of a large sum of money and goods belonging to Eli Horton, at the time his petition was filed in the district court of the United States; and that the same were assets of the said Horton, praying that the same be restored to the county assignee for the benefit of the general creditors of said Horton. Notice was served on the parties interested, and Lorin P. Waldo, Esq., came into the district court and made answer to the application, substantially as follows: That in December, 1841, Horton made an assignment, under the insolvent law of Connecticut, passed in the year 1828, for the benefit of all his creditors, that the said Waldo was the trustee under

said assignment, which had been duly returned to the probate court in the district of Stafford, where proceedings were immediately commenced and were then in progress, under the state law above mentioned, and that on the 1st day of February, 1842, when the bankrupt law went into operation, he was managing said trust according to the provisions of the act of the general assembly of the state of Connecticut, and now claims the right to administer thereupon, according to the provisions of said act of 1828, denying the right of the county assignee in bankruptcy, to take said goods and moneys out of his hands, for that the said petition of Eli Horton was not filed in the district court until the 15th day of March, 1842. These facts having been agreed to, the question arising on the same was adjourned unto the circuit court of the United States to be held at Hartford in the second circuit, on the 17th of September, 1842.

Before THOMPSON, Circuit Justice, and JUDSON, District Judge.

JUDSON, District Judge. The facts in this case present the question, how far proceedings under the state insolvent law of Connecticut are valid, since the enactment of the bankrupt law of August 19th, 1841 [5 Stat. 440]. In order to determine this question, it is necessary to recur to the last proviso to the second section of the act of congress, which reads as follows: "And provided also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act." Was the assignment made by Horton to Waldo as trustee in December, 1841, and the proceedings upon that assignment in the probate court a lien on this property, such as the bankrupt act does not annul? We think it was. The bankrupt law did not go into operation until the 1st day of February, 1842, and must be considered the same as if it had been enacted on that day. The seventeenth section provides, that the act shall take effect from and after the 1st day of February. By this we are to understand that the act is to have no effect until that day. It is therefore to have no influence upon or control over any party or transaction up to that day. The words "no effect" are significant, and cannot be construed to reach any proceeding anterior to the 1st day of February. The assignment in question was made in December, 1841, and being then valid by the laws of Connecticut, must be held valid now. The consequence is, that all assignments under the state insolvent law, commenced before the 1st day of February, 1842, constitute a lien within the terms of the last proviso to the second section of the act, but that all assignments under the state insolvent law, commenced after the 1st day of February, 1842, are inconsistent with the second and fifth sections of the bankrupt act, and are rendered void by proceedings in bankruptcy. The assignee in bankruptcy cannot claim this property, but it must be left in the hands of the trustee under the state law.

HORTON (BISSELL v.). See Case No. 1,448.

Case No. 6,709.

HORTON v. SMITH et al.

[6 Ben. 264.] [1]

District Court, E. D. New York. Nov., 1872.

PILOTAGE—CHANNEL OF HELL GATE—TENDER OF SERVICE.

A pilot tendered his services to a vessel to pilot her to New York by way of Hell Gate, the vessel being then to the eastward of Hart's Island. The tender of service being refused, he brought an action against the owners of the vessel to recover half pilotage under the act of the state of New York of 1865 (Laws 1865, p. 197). The respondents excepted to the libel, as not alleging that the vessel was navigating the channel of Hell Gate when the tender was made. *Held*, that the act was applicable to vessels bound to New York, to whom the tender of service was made as far east as Sand's Point, and that the exception was untenable.

[Cited in The Traveller, Case No. 14,147; The Georgia D. Loud, Id. 5,353; The Glaramara, 10 Fed. 679; The Whistler, 13 Fed. 298.]

[This was a libel in admiralty by George W. Horton against Bennet Smith and others, owners of the bark David McNutt, to recover compensation for services as pilot.]

F. A. Wilcox, for libellant.

Benedict, Taft & Benedict, for respondents.

BENEDICT, District Judge. This case comes before the court upon exceptions to the libel. The action is brought by a Hell Gate pilot to recover half pilotage of the owners of the bark David McNutt. The libel alleges that the libellant, a duly licensed pilot, at a point in the East river, on Long Island Sound, to the eastward of Hart's Island, and in the channel, tendered his services to pilot the bark David McNutt to the port of New York, by way of Hell Gate, which service was refused; that the libellant was the first pilot who offered the service, and the bark was, at the time, bound to New York, by way of Hell Gate, and was a foreign and registered vessel drawing fourteen feet of water. To this libel exception is taken on the ground that it does not appear that the libellant tendered his services in "the channel of the East river commonly called Hell Gate," nor that the bark was "navigating the channel of Hell Gate" when spoken by the pilot. The statute

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

of the state of New York, which fixes the rate of compensation to be paid Hell Gate pilots, in the 6th section provides certain rates of pilotage to be paid Hell Gate pilots for piloting any vessel through "the channel of the East river commonly called Hell Gate," and then, in the same section, declares that "any pilot who shall perform any additional pilotage, besides that of piloting through the channel of the East river commonly called Hell Gate, and pilot the same to Execution Rocks or Sand's Point lighthouse, or who shall board any vessel at or to the eastward of Execution Rocks or Sand's Point lighthouse, in Long Island Sound, on her inward passage through Hell Gate, shall be entitled to an additional compensation of seventy-five cents per foot for every foot of water the vessel may draw." And in section 7 it is provided that "any of said Hell Gate pilots who shall first tender his services may demand and receive from the master, owner or consignee of any vessel, of the burden of 100 tons and upwards, navigating the said channel of Hell Gate, and by whom the same shall have been refused, whether inward or outward bound, one half pilotage for every foot of water such vessel may draw, which half pilotage shall be the one half of the rates of compensation established by the sixth section of this act."

On the part of the defence it is contended that, by virtue of these provisions, the liability to pay half pilotage attaches only to such vessels as are boarded and refuse the pilot, when navigating the channel of Hell Gate; and that, while the libel may be considered to aver a tender and refusal to the westward of Execution Rocks and Sand's Point, it locates the place of tender and refusal to the eastward of Hart's Island, and therefore discloses, on its face, that the vessel was not at the time navigating the channel of Hell Gate, within the meaning of the act. I cannot agree to the construction of the statute upon which this argument is based. The 6th section, above quoted, provides for pilotage services by Hell Gate pilots at and to eastward of Execution Rock or Sand's Point, and the act, by its terms, describes a vessel at Sand's Point and bound inward, as on her inward passage through Hell Gate. Moreover, it offers an inducement to pilots to go on board inward bound vessels as far to the eastward as Sand's Point, and it would require clear and positive words to warrant the conclusion, that it was not intended to compensate for services rendered in making a tender at any place westward of that point, as well as for services rendered in piloting the vessel, when the pilot is taken in that part of the Sound. The words "navigating the channel of Hell Gate," where used in the seventh section, do not refer to an actual present navigation of the Gate, but are to be taken as intended to cover any vessel which, approaching the Gate, on a voyage which carries her through it, has reached a point as far to westward as Execution Rock or Sand's Point. Such a vessel is, according to the words of the sixth section of the act, on her inward voyage through Hell Gate, and is a vessel navigating the channel of Hell Gate, within the meaning of the seventh section. It is unnecessary to go further in this case, and determine what would be the effect of a tender made to eastward of Sand's Point, but it may be remarked, as tending to confirm the construction I have given to the statute under consideration, that it is the policy of most pilot laws to induce the pilots to make an early tender of their services to inward bound vessels. The ordinary provision, therefore, is, that extra compensation shall be given if the tender be made as far out as a designated line, without fixing any limit, beyond which an effective tender may not be made. See the statutes of New York, and also those of Massachusetts. State boundaries have been sometimes considered as furnishing the outward limit (1 Daly, 185), although Sandy Hook pilots are sought for, and their services taken, much farther out than a marine league. In France it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship although she was at the time in English waters, as at the Downs. Cour. Cass. D. 1866, p. 303; Caumont, Traité Pilote, 31. The present case does not, however, call for any determination as to the effect of a tender made to eastward of Sand's Point, and no opinion is expressed as to the law of such a case. Here the tender was made to westward of Sand's Point, where simple pilotage would have been due if the pilot had been taken, and for the tender which was so made half pilotage is due. The exceptions are overruled, and a decree will be entered in favor of the libellant, with liberty to answer within ten days, on payment of costs of the hearing.

Case No. 6,710.

HORTON v. SQUANKUM & FREEHOLD MARL CO.

[8 Am. Law Reg. (N. S.) 179.]

Circuit Court, D. New Jersey. Nov. Term, 1868.

TAKING PRIVATE PROPERTY—WHAT IS PUBLIC USE—APPEAL.

[The legislature only can determine when and in what cases private property shall be taken for public use, and there is no appeal therefrom. The legislature must first determine what is such a public use, which determination is not final.]

This was a bill to enjoin the defendants from taking the plaintiff's land on the ground that the railroad which the charter authorized the company to build was a mere private road, and that private property could not be taken without the owner's

consent except for public use. The constitution of New Jersey provides that private property shall not be taken for public use without just compensation. The act of incorporation of defendants is entitled "An act to incorporate the Squankum and Freehold Marl Company." It authorizes the company to purchase, hold, and convey such marl-beds as they may deem proper, in the county of Monmouth, and to open and work the same, and to transport the marl, and to vend the same, and to build and use the railroad thereafter mentioned, and to lay and maintain drains through the adjacent lands for the benefit of their said marl beds. It further authorizes them to construct a railroad in the county of Monmouth, to run from some convenient point on the line of the Freehold and Jamesburg Agricultural Railroad at or near the village of Freehold, to the said marl beds, at or near the village of Farmingdale, with such branches as may be deemed proper, not exceeding three miles in length, and to run engines and cars on said railroad for the transportation of their said marl. And it then authorizes them to enter upon, take possession of, occupy and excavate, any lands that may be necessary for the construction of their said railroad, and, if they cannot agree with the owners thereof, that application may be made to a judge of the circuit court, for the appointment of commissioners to view and examine the said lands, and to make a just and equitable appraisement of the value of the same. It was claimed by plaintiff that this road so authorized was merely for transportation of the company's marl, and was therefore a private road. It appeared, however, that by another act of the same session of the legislature, the Freehold and Jamesburg Railroad, with which the new road was to connect, were authorized to run their cars over the latter for the transportation of passengers and general freight.

FIELD, District Judge, delivered the opinion, holding that: "When and in what cases private property shall be taken for public use, is a question for the legislature alone to determine. From their decision there can be no appeal. What is such a public use as will justify the taking of private property, is also a question, which the legislature must in the first instance determine. But upon this point their determination, although entitled to respectful consideration, is not final and conclusive;" citing Tidewater Co. v. Coster, 3 C. E. Green [18 N. J. Eq.] 518. See abstract of this case, 7 Am. Law Reg. (N. S.) 760, 761. Upon the latter point, he was of opinion that the facts showed such a public use as would support the act. The acts relating to the connection between the proposed road and the Freehold and Jamesburg road, he thought might be construed as supplementary to each other, whether so entitled or not, and the bill and answer showed that the two companies had so accepted them, and the acts and the contracts under them brought the new road into the class of railroads which were undoubtedly a public use for which land might be taken. Even if the act in question had stood alone, the use which it contemplated was so general and public in its nature, he doubted whether he would have felt authorized to declare the act invalid; citing as an analogous case Scudder v. Trenton Delaware Falls Co., 1 Saxt. [1 N. J. Eq.] 694.

HORTON (UNITED STATES v.). See Cases Nos. 15,392 and 15,393.

Case No. 6,711.

In re HOSIE.

[7 N. B. R. (1873) 601; [1] 5 Leg. Op. 89.]

District Court, E. D. Michigan.

BANKRUPTCY OF BANKER HOLDING FUNDS FOR SPECIFIC PURPOSE.

A delivered to B, a banker, money to pay a certain note and mortgage as soon as they should be sent to him. B credited the money to A in his book and used it in his general business. About two days before the failure of B, the mortgage and note were sent to him, and while waiting for instructions how to remit the amount he failed. A petitioned the United States district court for an order directing the assignee to pay him this money, alleging it to have been in the hands of the bankrupt as his bailee or trustee at the time of the bankruptcy. *Held*, that this was, in reality, a claim for damages against B for not having retained and withheld the money from his general business, as a special deposit, and that there was no relief for the petitioner beyond taking his chances with the other creditors.

[Cited in Neely v. Rood, 54 Mich. 137, 19 N. W. 920; Edson v. Angell, 58 Mich. 337, 25 N. W. 307; Wisconsin Marine & Fire Ins. Co. Bank v. Manistee Salt & Lumber Co., 77 Mich. 81, 43 N. W. 907.]

Petition of James Morrison for an order directing the assignees to pay to him certain moneys alleged to have been in the hands of the bankrupt [Robert Hosie] as his bailee or trustee at the time of the bankruptcy.

LONGYEAR, District Judge. This is a hard case all around. Hosie, an honest, upright and thriving banker of this city, possessing the full confidence of the business public was suddenly plunged into insolvency, and obliged to go into bankruptcy, which he did voluntarily, by the disastrous failure of another for whom he was endorser to a large amount. About six weeks before his failure, and while he was still in active business, the petitioner, who had formerly kept a deposit account with Hosie, but had no open account with him at the time, delivered to Hosie eight hundred dollars in money to pay a certain note and mortgage owing

[1] [Reprinted from 7 N. B. R. 601, by permission.]

by the petitioner, so soon as the same should be sent to Hosie for that purpose, which the petitioner undertook to have done. It does not appear, by the petition, that anything was said between them whether Hosie should receive the money as a sort of special deposit, and hold the same as such while awaiting the arrival of the note and mortgage, and until paid over to the holder thereof, or whether the same should be placed to the credit of the petitioner on Hosie's books, and then the amount necessary to redeem the note and mortgage charged to the petitioner when the same should be paid. As a matter of fact, Hosie credited the money to the petitioner upon his books at the time it was delivered to him, and, of course, it entered into his general business; and it had not been accounted for in any manner at the time of the bankruptcy. About two days before Hosie's failure the note and mortgage were received by him but unaccompanied by any instructions as to how the proceeds were to be remitted, and while awaiting instructions the misfortune before mentioned befell him, and he immediately went into bankruptcy.

With this state of the facts, the court is now asked to decree that Hosie became a bailee for petitioner, of the eight hundred dollars, and that the same, or if the same identical money cannot be traced to the assignees, then an equal amount in money be paid over to the petitioner by the assignees. There is no allegation or charge in the petition that the same identical money came to the hands of the assignees, but, on the contrary, the assignees aver in their answer that such was not the case. If Hosie had not credited the amount to petitioner, and had retained and withheld it from his general business as a special deposit, or even with the credit, as a mere memorandum of the transaction, he had so retained and withheld it, there would be but little difficulty in the case, because then petitioner's claim would be for the specific money deposited by him, instead of being, as it is, a claim for the same amount as damages for Hosie's not having so retained and withheld it payable, of course, out of his general assets. I cannot see that it can make any difference whatever with petitioner's rights in the premises as against the estate, whether Hosie had or had not a right to credit the money to petitioner and use it as his own, and thus become petitioner's debtor, because the question of right to do as he did affects only the nature or character of the cause of action which accrued to petitioner on account of the act and Hosie's subsequent failure to pay over as agreed. In the one case the action would be ex contractu only, while in the other it would be either ex contractu or ex delicto, at the option of petitioner; in either of which, however, the recovery would be, not of the specific money deposited—that, of course, had become impossible—but general, and would, if bankruptcy had not intervened, have had to be collected out of Hosie's general property or assets. Such would have been the case if bankruptcy had not intervened, and it was exactly the condition of petitioner's rights in the premises at the time the bankruptcy did intervene. It certainly needs no argument to show that the intervening of the bankruptcy cannot have any effect to place petitioner in any better position as against the estate than what he occupied as against Hosie when the bankruptcy occurred. Neither does it need argument to show that in the bankruptcy claims ex contractu and claims ex delicto, not within any of the classes to which priority is given by the act, stand upon a perfect equality with each other, and with the debts of all the other creditors, so far as payment out of assets is concerned.

The equity powers of this court are invoked for the relief of the petitioner. But it is to be observed that equity never affords relief by disregarding or overriding well settled principles of law, but always acts in conformity to them so far as they constitute rules of decision. Especially is this the case where, as in the present case, the question is one of a purely legal character, and the case one in which petitioner had, as against the bankrupt, (and he can have no greater privilege as against his estate in bankruptcy), a full, complete and adequate remedy at law. As remarked in the outset, this is a hard case, but I cannot see that this court has the power legally to relieve the petitioner; or that there is any relief for him beyond taking his chances with the other creditors, among whom, I have no doubt, he will find many whose cases are even harder than his own. It results that the prayer of the petitioner must be denied.

Case No. 6,712.

Ex parte HOSKINS.

[Crabbe, 466; [1] 1 Pa. Law J. 287.]

District Court, E. D. Pennsylvania. May Term, 1842.

BANKRUPT ACT—IMPRISONMENT FOR DEBT.

1. A party arrested on a ca. sa. from a state court petitioned for the benefit of the bankrupt law [of 1841 (5 Stat. 440)], and was decreed bankrupt, the creditor at whose suit he was arrested not proving his debt; before discharge could be decreed a rule was taken in this court to show cause why the bankrupt should not be released from custody under the ca. sa., but, after argument, it was dismissed.

[Cited in Ex parte Rank, Case No. 11,566.]

2. Winthrop's Case [Case No. 17,900], and U. S. v. Dobbins [Id. 14,971], dissented from.

This was a rule to show cause why Edwin A. Hoskins should not be released from the custody of the sheriff of the city and county of Philadelphia. It appeared that Hoskins

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

was a resident of Philadelphia, and, having been arrested on a ca. sa. issued from one of the state courts in that city and county, petitioned for the benefit of the bankrupt law. On the 6th May, 1842, he was decreed bankrupt, but had not yet been discharged; subsequently to the decree of bankruptcy this rule was taken. The creditor at whose suit Hoskins was arrested did not prove his debt in this court.

The rule was returnable on the 19th of June, 1842, and was then argued, before RANDALL, District Judge, by Mr. M'Call for the rule, and by J. W. Wallace against it.

Mr. M'Call, for the rule.

Hoskins has been disabled from paying his debts himself, by the action of the bankrupt law, and he asks this court, as the one by which that law is carried into effect, to interfere and prevent his being imprisoned and taken in execution because he has obeyed the demands of the law here enforced. The district courts elsewhere have not hesitated to exercise this power. Winthrop's Case [supra]; U. S. v. Dobbins [supra]. The decree has done all which imprisonment is intended to do.

J. W. Wallace, against the rule.

Up to the discharge the bankrupt law affords the debtor no protection from his creditors, and till the discharge we are not justified in assuming that it will take place, while such an assumption is necessary in order to justify what this rule asks for.

RANDALL, District Judge. The great respect entertained by me for the opinion of the courts whose decisions have been cited by the petitioner's counsel, has induced me to hesitate in deciding this question, and to doubt the correctness of my own judgment, which tended to a different conclusion. Subsequent examination and reflection have, however, only strengthened the opinion which I entertained at first, and as the decisions cited are not authoritatively binding on me, I cannot submit to them against the convictions of my own judgment. The petitioner has, on his own application, been decreed a bankrupt, but no other or final decree has been made by the court. The first section of the bankrupt law provides that all persons whatsoever, residing in any state, district, or territory of the United States, owing debts which they are unable to pay, and which have not been contracted in certain specified capacities, who shall present a petition containing prescribed statements and details, shall be deemed bankrupts, and so declared by decree of the court. The effect of this decree is to divest all property and rights of property out of the bankrupt, and to vest the same in an assignee, to be appointed by the court, for the equal benefit of all the creditors, and thus guard against any future judgment or execution against, or transfer by, the bankrupt. Whether this decree be obtained on the petition of the debtor, or, as it may be in certain cases, on the application of his creditors, it affects only the property of the bankrupt and not his person. The proceeding so far is for the benefit of the creditors, not of the debtor. The fourth section of the act provides that any bankrupt who shall, bonâ fide, surrender all his property and rights of property, and otherwise comply with the provisions of the law, shall be entitled to a discharge from all his debts, to be decreed by the court which declared him a bankrupt; but this discharge is not to be granted until ninety days after the decree of bankruptcy, nor until seventy days' notice to the creditors who have proved their debts, or other parties in interest, to show cause why such discharge should not be granted; and it cannot be obtained if the bankrupt has been guilty of any fraud, or wilful concealment of property or rights of property, or has preferred any of his creditors over others, contrary to the provisions of the act, or has wilfully omitted or refused to comply with any order or direction of the court, or admitted a false or fictitious debt against his estate, or, being a merchant, factor, broker, underwriter or marine insurer, has not kept proper books of accounts after the passage of the act, or if, after the passage of the act, he has applied trust funds to his own use.

It is evident from these sections that a discharge does not follow as a consequence of the decree of bankruptcy. A man who has committed a fraud, concealed his property, or preferred one creditor over another, may, even on his own application, be decreed a bankrupt, but he will not, if this be proved, be entitled to a certificate and final discharge. The creditors may, at any time before the final hearing, urge these objections against him, and they are allowed at least ninety days from the decree of bankruptcy to produce their proofs. In this case that time has not yet expired; and, for aught that appears to the court, the creditors may, when the proper time arrives, be able to show that the petitioner has committed one or more of the prohibited acts. It is to be recollected that the plaintiff in the execution has not, either by proving his debt or otherwise, made himself a party to the proceeding in bankruptcy. If he had done so, the consequence might, perhaps, have been different; but as the petitioner claims to be released from arrest solely on the ground that he has been decreed a bankrupt, I am of opinion that he has failed to establish his right to such an interference by this court in his behalf, and this rule should be dismissed.

HOSKINS (GRAHAM v.). See Case No. 5,669.

Case No. 6,713.

HOSMER v. JEWETT.

[6 Ben. 208.] [1]

District Court, N. D. New York. Oct., 1872.

EQUITY PLEADING—RE-INSURANCE—PROPERTY HELD IN TRUST—COSTS.

1. A bill in equity was filed against the assignee in bankruptcy of the B. Insurance Company, alleging that such company had insured the complainant's vessel for $10,000; that the B. Company obtained a re-insurance for $5,000 of the S. Insurance Company; that there was a total loss of the vessel, and a right to recover the whole loss of the B. Company; that the B. Company applied to the S. Company for payment of the $5,000, and, as a condition of receiving it, promised and agreed to and with the S. Company that it had paid, or thereupon immediately would pay the $10,000 to the plaintiff; and thereupon the S. Company, relying on that promise and agreement, paid the $5,000 to the B. Company, in trust to immediately pay the same over to the plaintiff; and the B. Company received the $5,000 from the S. Company, in trust for the plaintiff, and in trust to immediately pay it over to him; and that the B. Company, proposing and intending to pay to the plaintiff the said sum of $5,000 received from the S. Company, caused a letter to be written to him, wherein was inclosed the said sum of $5,000, and delivered the same to their secretary to send to the plaintiff, which the secretary did not do, but delivered the letter and the $5,000 to the defendant, who received it in trust for the plaintiff. The assignee demurred to the bill for want of equity. *Held*, that a demurrer admits all relevant facts stated in the bill, but does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill.

2. A demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded on, the allegations of the bill, would make the subject-matter of the suit a proper case for equitable interference.

3. Money, delivered to the bankrupt in trust, if ear-marked, or separately kept and retained as trust property to be delivered or paid over in the same bills or coin in which it was received, would not pass under the assignment in bankruptcy, but would be considered as "trust property;" but an amount of money due from the bankrupt, as a trustee, and which could not be distinguished from any other moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes, could not be considered as "property" held by the bankrupt in trust.

4. The plaintiff could only maintain this suit on the ground of an express trust, and not because a trust in his favor had been created by the mere operation of law.

5. The allegations of the bill as to a trust must be held to be allegations of fact, and not of conclusions of law; and, under the allegations of the bill, the plaintiff would be allowed to prove that the $5,000 was paid by the S. Company, and received by the B. Company, under an express trust.

6. The plaintiff would also have the right to prove that the identical money so received by the bankrupt was retained as trust property, separate and distinct from the proper estate of the corporation.

7. The demurrer must, therefore, be overruled, and the defendant must answer, but, as the case was one of serious doubt, without payment of costs.

[This was a bill in equity by John Hosmer against Sherman S. Jewett, assignee in bankruptcy of the Buffalo Fire and Marine Insurance Company.]

HALL, District Judge. This case comes before the court upon a demurrer to the plaintiff's bill, for want of equity. The bill sets forth the making of a policy of insurance by the bankrupt, by which the plaintiff was insured in the sum of $10,000, against certain perils of navigation, upon an undivided half interest in a vessel called the C. H. Hurd, and her subsequent total loss; by which the bankrupt became liable to pay the plaintiff the said sum of $10,000. It also sets forth that after such policy was made, the bankrupt corporation, "in order to indemnify and save itself harmless from the risk it had so taken, and to the end that it might provide greater security for itself and your orator" (the said plaintiff) "in case of the loss of said ship or vessel, the C. H. Hurd, and for its and his indemnity," did apply to the Security Insurance Company of New York for, and did procure from it, a policy by which the last-named company "did insure the said Buffalo Fire and Marine Insurance Company in the sum of $5,000 upon the ship or vessel the C. H. Hurd, whilst said ship or vessel should be upon the waters of lakes Erie, Michigan, St. Clair, or Huron, against and upon the risk and insurance so taken by it, the Buffalo Fire and Marine Insurance Company," * * * "and did promise and agree thereby that, in case said Buffalo Fire and Marine Insurance Company should thereafter lawfully pay, or cause to be paid said sum of $10,000 to" the plaintiff, "for any loss of said ship or vessel so insured" under the first-named policy, the said Security Insurance Company would pay to said Buffalo Fire and Marine Insurance Company the sum of $5,000.

The loss of the vessel, and the furnishing of the proofs of loss, and the other facts necessary to show the liability of the Buffalo Fire and Marine Insurance Company, are then properly stated. The bill then further sets forth, that afterwards the Buffalo Fire and Marine Insurance Company, through its secretary, applied to the Security Insurance Company for the $5,000 so by it insured on said policy of insurance secondly referred to; that said Security Insurance Company demanded, as a condition of the payment of said money, proof that the Buffalo Fire and Marine Insurance Company had paid the plaintiff the said sum of $10,000, for and on account of the loss of the C. H. Hurd; and then states that "thereupon the said Buffalo Fire and Marine Insurance Company through its said secretary, as a condition of receiving said sum of $5,000, did assure, promise, and agree to and

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

with the said Security Insurance Company, that it then had, or thereupon immediately would pay the said sum of $10,000 unto your orator upon and for said loss; and thereupon the said Security Insurance Company, relying upon the said assurance, promise, and agreement, did pay the said sum of $5,000 to the said Buffalo Fire and Marine Insurance Company, in trust to immediatelv pay the same over unto your orator; and the said Buffalo Fire and Marine Insurance Company, well knowing that it had not paid the said sum of $10,000, or any part thereof, unto your orator received said sum of $5,000 from said Security Insurance Company, in trust for your orator, and in trust to immediately pay the same over unto him." The bill then further alleges that the Buffalo Fire and Marine Insurance Company, through its proper officer, professing and intending to pay the plaintiff the said sum of $5,000 received from the said Security Insurance Company as aforesaid, did, after the receipt thereof by it, as aforesaid, and on or about the 9th of October, 1871, write, or cause to be written to the plaintiff a letter, directed to him at Detroit, wherein was by it enclosed the said sum of $5,000, and did deliver the same unto its then secretary, with intent that he should send, deliver, and transmit the same to the plaintiff, through the United States mail; which letter, it is alleged, is in the possession or under the control of the defendant; that said secretary did not send, deliver, or trans mit said letter, and the said $5,000, to the plaintiff, as he should have done, but afterwards delivered said letter, and said sum of $5,000, to the defendant, as receiver appointed in this proceeding; and that said defendant, as such receiver, and, subsequently, as such assignee in bankruptcy, received the said sum of $5,000, so paid to the bankrupt, in trust for and to the use of the plaintiff, and now holds the same; and that the plaintiff has demanded the said sum of $5,000 from the said defendant. The bill also makes the proper allegations in respect to the proceedings in bankruptcy, and the appointment of the defendant as receiver, and subsequently as assignee therein. The defendant interposed a demurrer to the whole bill for want of equity, and the case has been heard upon the bill and demurrer.

The main difficulty, which has been felt in the disposition of this case, is that of determining what must be deemed admitted by the demurrer. This difficulty results from doubts arising upon the attempted application of the established rules of pleading, rather than from the difficulty of determining what rules are applicable to this case, or the form of language by which such rules have been authoritatively expressed. A demurrer admits all relevant facts that are well pleaded, but denies that upon such facts the plaintiff is entitled to relief (Welf. Eq. Pl. 261; Mitf. Eq. Pl. 211; Story, Eq. Pl. § 452); but it does not admit the conclusions of law, or supposed legal inferences drawn therefrom, although they are also alleged in the bill (Id. and cases and authorities there cited; Welf. Eq. Pl. 261; Coop. Eq. Pl. 111).

The bill is founded upon the allegations that the bankrupt, in the first instance, and the defendant subsequent'y, received the sum of $5,000 in trust for the use of, and to be immediately, or within a reasonable time, paid over to the plaintiff; and the 14th section of the bankruptcy act [of 1867 (14 Stat. 522)] expressly provides that "no property held by the bankrupt in trust, shall pass by" the assignment made to the assignee in bankruptcy proceedings. Money delivered to the bankrupt in trust, if earmarked or separately kept and retained as trust property to be delivered or paid over in the same bills or coin in which it was received by the bankrupt, would not pass under such assignment, but would be considered as "trust property;" but an amount of money due from the bankrupt as a trustee, and which could not be distinguished from any other moneys in his possession, or under his control; or which was only due from him because he had used trust funds for his own purposes, or otherwise misapplied them, could not be considered as "property," held by the bankrupt in trust.

All debts and claims, arising out of a misapplication of trust funds, or for a general balance of moneys due upon the accounts of a bankrupt as a trustee, must, therefore, be considered as debts provable against the estate of the bankrupt like any other debt; but such debts, being debts of a fiduciary character, are not discharged or impaired by the discharge in bankruptcy. Section 33, Bankr. Act; In re Janeway [Case No. 7,208]; Ungewitter v. Von Sachs [Id. 14,343].

As a general rule, a demurrer for want of equity cannot be sustained unless the court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations of the bill, can make the subject-matter of the suit a proper case for equitable cognizance. Bleeker v. Bingham, 3 Paige, 246.

Assuming the accuracy of the propositions of law above stated, the allegations and substance of the bill will now be considered. It is not alleged by the bill that the reassurance was obtained by the bankrupt as the agent of, or even by agreement with, the plaintiff; and there is nothing in the bill upon which the allegation of a trust can be sustained, except that which is alleged to have occurred at and after the time the application to the Security Insurance Company, for payment, was made by the bankrupt corporation. Up to that time nothing had occurred giving the plaintiff any right, except the strictly legal right he had against the Buffalo Fire and Marine Insurance Company, under the policy of insurance issued by that company;—a right which was not a subject of

equitable cognizance. Nor would the plaintiff have had a right to sustain his bill, upon any supposed necessary implication of a trust arising upon the facts and circumstances alleged, independent of the allegations which expressly state that the $5,000 was paid by the Security Insurance Company, and received by the bankrupt, in trust for the purposes in the bill alleged. In other words, the plaintiff can only have relief in this suit upon the ground of an express trust, and not because a trust in his favor has been created, or exists, by the mere operation of law.

It was insisted by the counsel for the defendant, that the facts alleged did not furnish either any ground for equitable relief, or for any preference against the assets of the bankrupt; and the plaintiff's counsel very properly conceded that no equitable claim nor preference was created or exists in favor of the plaintiff simply by reason of the reinsurance made by the Security Insurance Company; but he claimed that the bankrupt received the $5,000 in controversy in trust for the plaintiff, as alleged in the bill, and upon the trusts therein stated, and that the plaintiff was, therefore, entitled to the relief sought.

In determining the proper construction of the allegations of the bill in regard to the alleged trust, and in respect to the moneys in controversy having been kept by the bankrupt as trust property, separate and distinct, and distinguishable from the individual moneys or general funds and property of the bankrupt, and especially in respect to the statements that the $5,000 in controversy was paid and received under an express trust, it is proper to consider, to some extent at least, the relations between the said insurance companies, and between the plaintiff and each or both of them, at the time when the bankrupt applied to the Security Insurance Company for payment.

At that time there was no privity between the plaintiff and the Security Insurance Company, and as against the bankrupt he had no claim or demand except the purely legal right which he had under the policy issued to him by the bankrupt. The bankrupt had, in fact, no present right to demand the payment of $5,000 from the Security Insurance Company, because, by the terms of its policy, it was liable to be called upon for such payment only after the bankrupt had paid the plaintiff his loss; and such loss had not been paid. The Security Insurance Company, so far as the bill shows, had no direct pecuniary interest in the payment of the loss to the plaintiff, for although the bankrupt was not entitled to demand the $5,000 until payment to the plaintiff had been made, it is very clear that the payment of $5,000 to the bankrupt, upon and in discharge of its policy, although the payment was not then presently and legally demandable, would fully discharge the liability of the Security Insurance Company, as much as though the bankrupt had previously paid the plaintiff's loss. Nevertheless, I cannot say that the Security Insurance Company may not have considered that it had a pecuniary interest in securing the payment of the full amount of the plaintiff's loss, either because it hoped thereby to secure from the plaintiff and others the business of insurance which he had, or might control; or to gain business from others upon the increased reputation for liberality and promptness which the public knowledge of the transaction might give it. And it is not impossible that there were other motives for imposing an obligation on, or reposing a trust and confidence in, the bankrupt; and the Security Insurance Company was certainly in a position to prescribe the conditions, upon which it would make the payment before it was legally demandable.

Now, the allegations of the bill, expressly and directly made, are, in substance, that the Security Insurance Company paid and the bankrupt received the $5,000 mentioned in the bill, in trust for the plaintiff and in trust to immediately pay the same to the plaintiff;—an allegation which in substance states such payment and receipt under an express trust. Such would surely be its proper construction and effect were it not accompanied by the allegations of the bill, which give a history of the relations and transactions of the plaintiff and of the insurance companies; and, it is very clear that, under these allegations, the plaintiff would be allowed to prove an express trust to the effect stated in the bill. It is not a mere allegation that the bankrupt held the money in trust for the plaintiff, but that it was paid and received under the trust stated;—a proper form of allegation to show such payment and receipt under an orally expressed trust. I shall therefore hold, though not without some hesitation, that these allegations of a trust are allegations of fact, and not of conclusions of law; and that the demurrer must be overruled unless some other and sufficient objection can be urged against the plaintiff's bill. Assuming, then, the existence of an express trust, the question whether the $5,000 in controversy must, under the allegations of the bill, be deemed "trust property held by the bankrupt," and which did not, therefore, pass to the defendant as assignee, will now be considered. The bill affords no entirely solid and certain ground upon which to determine this question. It does not aver that the $5,000 was received in bank-bills or Treasury notes, or give any other description of the money received; nor does it aver that it was kept by the bankrupt in the same form, or in any special manner as trust property; or that the money, inclosed in the letter referred to, was in fact the same identical money or currency received from the Security Insurance Company; but it does aver in connection with the averment of the payment and receipt of the money, that it was so paid and received in trust to pay (not

to deliver) "the same" over to the plaintiff; that the said sum of $5,000 was inclosed in the letter so written and directed to the plaintiff; that the same was delivered to the secretary of the bankrupt; and it is fairly to be understood from the allegations of the bill that this letter and its contents were afterwards received by the defendant as receiver and as assignee.

Under these allegations the plaintiff would have the right to prove that the same identical money so received by the bankrupt was in fact retained and kept by the bankrupt as trust property, separate and distinct from the proper estate, assets and property of the corporation (Bleeker v. Bingham, ubi supra);[2] and it is therefore held, under the authority of that case, that the demurrer for want of equity should not be allowed on account of the apparent uncertainty of these allegations; such uncertainty arising from their general character and broad scope, which will authorize, as well as require, special and definite proof not in conflict with, but in direct affirmance of, such general allegations.

The demurrer is overruled, but the doubts arising upon the construction of the very general and in some respects vague and uncertain allegations of the bill, are so serious, that I do not feel at liberty to charge the bankrupt's estate with costs as the condition of allowing the defendant to answer. The defendant must put in his answer to the bill within twenty days after the entry of the order herein, or the bill may be taken as confessed.

HOSMER (UNITED STATES v.). See Case No. 15,394.

HOSSACK (UNITED STATES v.). See Case No. 15,395.

Case No. 6,714.

HOSTETTER et al. v. VOWINKLE et al.

[1 Dill. 329;[1] Cox Manual Trade-Mark Cas. 207.]

Circuit Court, D. Nebraska. 1871.

TRADE MARKS—ILLEGAL IMITATIONS—DAMAGES.

1. Equity will protect, by injunction, the rights of one who has adopted and appropriated a trade mark to distinguish his goods; and if his rights are invaded, the originator or proprietor of the trade mark may also recover his damages (ordinarily the loss of profits) from the wrong-doer.

[Cited in Liggett & Myers Tobacco Co. v. Hynes, 20 Fed. 884.]

[Cited in Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. 61, 15 S. W. 853.]

2. The imitation of the trade mark of another to be unlawful need not be in all particulars exact and complete; it is sufficient if it be of a nature to mislead and deceive: accordingly, an imitation of a manufacturer's label in every respect like the original, except that "Hostetter" was altered to "Holsteter," and the words "Hostetter & Smith," were changed to "Holsteter & Smyte," was *held* to be illegal, and ground for an injunction and for damages.

[Cited in Glen Cove Manuf'g Co. v. Ludeling, 22 Fed. 826.]

3. There being proof that the plaintiff had an established trade in the city where the imitated bitters were made and sold by the defendants, and that their sales fell off, in that place, in an amount at least equal to sales made by the defendants of the imitated article, the court gave the plaintiffs as damages the profits they would have made on the number of bottles which the defendants actually sold of their own manufacture, being satisfied that the plaintiff's sales had been reduced to that extent by this cause.

[Cited in Hall v. Stern, 20 Fed. 789; El Modelo Cigar Manuf'g Co. v. Gato (Fla.) 7 South. 28; Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co. (Mo. Sup.) 15 S. W. 844.]

[Cited in Godillot v. Harris, 81 N. Y. 267.]

[See Apollanaris Brunnen v. Somborn, Case No. 496.]

Bill in equity for an injunction and relief. The plaintiffs, David Hostetter and George W. Smith, are the proprietors and manufacturers of "Hostetter's Celebrated Stomach Bitters," at Pittsburg, Pennsylvania, and the defendants, three in number, are residents of Omaha, in Nebraska. The bill charges an infringement of the plaintiffs' trade mark, invented and adopted to distinguish these bitters, and asks for an injunction and for damages. The bill avers that the defendants, in Omaha, adopted and used for a time, bottles, labels, devices, and boxes in exact imitation of the plaintiffs', and after that made a slight alteration in the labels, but leaving them substantial copies of the plaintiffs', and calculated to deceive the public. The district judge allowed a temporary injunction. The answers, though not denying all the statements of the bill, do so sufficiently to put the plaintiffs upon proof of the case made. The case was submitted upon the pleadings, exhibits, and proofs. No defence was made on the ground that the article in question was not such as the law would protect.

Kennedy & Townsend, for complainants.
John I. Redick, for defendants.

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

DILLON, Circuit Judge. The proofs show that as far back as 1853, Dr. Jacob Hostetter and the complainants (one of whom is his son), commenced the manufacture in Pittsburg, of what is known as "Hostetter's Stomach Bitters," and that the business of making and vending these bitters has been carried on by them, and by the complainants, as their successors ever since. These bitters are made after a recipe of Dr. Jacob Hostetter. The annual sales have increased from thirty thousand dollars at first, until

[2] And see Getty v. Campbell, 2 Rob. (N. Y.) 664.

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

they reached, in 1869, the sum of over one million dollars. These bitters are extensively advertised by the plaintiffs in nine different languages in the newspapers of this country and by circulars, labels, and otherwise. It is testified that the plaintiffs employ in publishing almanacs etc., to advertise this article twelve steam presses and several hand presses at an annual expenditure of over three thousand dollars. In 1858, Doctor Jacob Hostetter retired from the business, leaving it to be conducted by the present plaintiffs, David Hostetter and George W. Smith, and assigning for a valuable consideration his interest in the firm and in the right to use the recipe to his said son. Since then the plaintiffs have continued the manufacture and sale of the article in question. The proofs show beyond dispute, that for years the plaintiffs have used a certain trade mark, consisting of the designation on the bottles and on the labels of "Hostetter's Celebrated Stomach Bitters," in connection with directions on the label for the use thereof, and a device representing the conflict of St. George and the dragon, and the likeness of Dr. Hostetter, and a fac simile signature of the firm of Hostetter & Smith.

It is established by the testimony that from August 10th, 1869, until October 1st, of the same year, the defendants adopted and used, in the sale of bitters of their own manufacture, the plaintiffs' trade marks, labels, and devices in every respect. After that and down to the filing of the bill in the cause, the defendants slightly altered the trade mark in certain particulars. "Hostetter" was altered to "Holsteter," and the fac simile signature of the plaintiffs was changed from "Hostetter & Smith" to "Holsteter & Smyte," and the place of manufacture was stated as Pittsburg instead of New York. But the size of the labels and the devices, the appearance, the directions for the use, the size and shape of the bottles, mode of packing, etc., were in exact imitation of the plaintiffs, and the boxes or cases intended for sale were marked "Dr. Hostetter's Bitters," the same as the genuine.

The fact of infringement is too obvious to be disputed and is not seriously controverted by the respondents' counsel. But he claims in the first place that the plaintiffs have no title to the trade mark because they have not shown a regular assignment from Dr. Jacob Hostetter to them. And the precise point is that this assignment was in writing and that a copy thereof is annexed to the deposition of the witness and no reason is given for not producing the original.

Without stopping to inquire whether such an objection could be made available for the first time by way of argument after the cause is submitted, it is a sufficient answer to say that since the evidence is clear and undisputed that the present plaintiffs have been in the exclusive use of this trade mark since 1858, they are not obliged to show, as against wrong-doers, that they have a written assignment from one of their former partners.

The law is well settled that a party who has appropriated a particular trade mark to distinguish his goods from other similar goods, has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it, by injunction, from invasion, and if it has been invaded the wrong-doer is liable for the damage he has thereby caused the party whose trade mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. Candee v. Deere [54 Ill. 439]; Motley & Downman, 3 Mylne & C. 1; Millington v. Fox, Id. 338; Eden, Inj. c. 14, p. 314; Story, Eq. Jur. § 951; Taylor v. Carpenter [Case No. 13,785]; Walton v. Crowley [Id. 17,133]; Coffeen v. Brunton [Id. 2,946]; Seixo v. Provezende, 1 Ch. App. 194; Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 606; Filley v. Fassett [44 Mo. 168], and cases cited; Gillott v. Esterbrook, 47 Barb. 469; Burnett v. Phalon, 9 Bosw. 192; Croft v. Day, 7 Beav. 89; Edleson v. Vick, 23 Eng. Law & Eq. 53. These cases and others, also, show that it is not necessary to constitute an illegal infringement that the trade mark of the originator should be copied in every particular; it is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator or make it pass with the public as his.

Applying these principles to the present case, the defendants are liable to the plaintiffs not only in respect of the bitters which they sold prior to October 1st, using the plaintiffs' trade mark in full, but for those which they sold after making the alterations above mentioned, such as changing the name "Hostetter" to "Holsteter," etc.

From the evidence of one of the defendants, I find that he admits sales at least to the extent of two hundred dozen bottles. The evidence shows that the sales of the plaintiffs, in Omaha, fell off during the time the defendants were manufacturing and selling their imitation bitters to even a greater amount than this.

I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen bottles, the sum of four dollars; which would make in all the sum of eight hundred dollars. A decree will be entered for this amount, and also making perpetual the injunction heretofore allowed. Decree accordingly.

[For other cases involving this trade mark, see Hostetter v. Adams, 10 Fed. 838; Same v. Fries, 17 Fed. 620; Hostetter Co. v. Brueggeman-Reinert Distilling Co., 46 Fed. 188.]

Case No. 6,714a.

HOTALING v. The TITAN.

[23 Betts, D. C. MS. 42.]

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

COLLISION—NEGLIGENCE—LIGHTS.

[It is an act of blamable misconduct for a vessel to run through a harbor at night time without exhibiting the lights prescribed by law.]

[This was a libel in admiralty by Jasper K. Hotaling against the steamboat Titan.]

BETTS, District Judge. The libellant's barge was in tow of the steamer Marshall, passing up the East River on a moonlight night, displaying her lights according to usage, when a collision occurred between her and the steamer Titan, running down the river without any lights exhibited, about opposite Fulton ferry, but nearest the Brooklyn side. The conflict of testimony common to these actions, respecting the doings and omissions of the respective vessels, pervaded the statements of the witnesses on the opposing vessels. The evidence for the libellant that owing to a haze upon the water, or some other condition of the atmosphere, at the moment the vessels were nearing each other, the Titan was not discoverable from the Marshall, is corroborated by the testimony of witnesses outside the two vessels who were in a situation to notice the fact. Here was, then, an act of blamable misconduct in the Titan, to run through the harbor in the night time without exhibiting lights in the manner prescribed by law, and as she does not succeed in outweighing the evidence given by the Marshall and barge that they committed no fault in the transactions leading to the collision, the wrongful cause of the collision must be held to be with the Titan. Decree for damages, with order of reference.

Case No. 6,715.

In re HOTCHKISS.

[7 Ben. 235;[1] 9 N. B. R. 488.]

District Court, S. D. New York. March, 1874.

LEASE—JOINT OCCUPANCY—SUBROGATION.

Premises were leased to four persons jointly, for the purposes named in the lease, viz., the first floor for the tailoring business, and the residue for a first-class hotel. The four covenanted jointly to pay the rent, and the lease provided that, if any part of the rent should remain unpaid, the lessor could re-enter and dispossess the lessees from the whole premises. By a sub-agreement between the four, it was agreed that three of them should have the exclusive use of the first floor, and that the other, H., should have the exclusive use of the rest of the premises, each of them to pay certain specified parts of the rent, and perform the covenants of the lease as far as related to the several portions of the premises occupied by each. The interest of the three subsequently became vested in B. H. not paying the share of the rent which he had thus agreed to pay, B. paid part of it. H. was put into bankruptcy, and a trustee was appointed. B. applied to the court for an order that the trustee should deliver up all the premises to B., unless he paid the arrears of rent which should have been paid by H.: *Held*, that B. was not entitled to the exclusive possession of the premises in question until the arrears of rent should be paid by the trustee, but was entitled to as full a use of them as the trustee until such payment should be made.

[This was a petition by a tenant in common against the trustee in bankruptcy of his cotenant, Elias Hotchkiss, that the trustee pay all arrearages of rent for which the bankrupt was liable, or surrender the premises.]

F. N. Bangs, for Braisted.

J. E. Ludden, for the trustee.

BLATCHFORD, District Judge. By the lease from King, to the four, of the whole premises, the four had a joint right to the use and occupation of each and every part of the premises for the purposes set forth in the lease, that is, the first floor for the merchant tailoring business, and the residue for the purpose of a first-class hotel. By the lease, if any part of the rent should remain unpaid on the day of payment, the lessor could re-enter and dispossess the lessees from the whole premises. By the lease, the four covenanted jointly with the lessor to pay the entire rent on the prescribed days.

By the sub-agreement between the four, Hotchkiss, of the one part, covenanted with the other three, of the other part, and they with him, in consideration of the mutual agreements between the firm, contained in the sub-agreement, that the first floor and the vault in front thereof, with right of access to said vault, should be exclusively used, during the term, by the three, and for which they should bear a specified aliquot part of the rent reserved by the lease, and that the residue of the premises should be exclusively used, during the term, by Hotchkiss, and for which he should bear the entire residue of the rent reserved by the lease, such rent to be paid to the lessor. The lease provided that the lessees should pay the Croton water rent. The sub-agreement provided that Hotchkiss should pay that. As to the other covenants in the lease, the sub-agreement provided that the three should perform all such covenants in respect to the first floor, and that Hotchkiss should perform all such covenants in respect to the entire residue of the premises.

Braisted, one of the four, represents, by assignment, all the rights in the lease and the sub-agreements which are not represented by Hotchkiss, the bankrupt, or by

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

his trustee in bankruptcy. On the 1st of November, 1873, $1,875 of rent became due under the lease. Under the sub-agreement Hotchkiss was to pay to the lessor, as his share of this, $1,187 50. He did not pay it. Braisted, besides paying his share of the $1,875, paid $500 of the $1,187 50. For the residue, $687 50, Braisted remains liable to the lessor. The adjudication of bankruptcy was made December 4th, 1873. On the 1st of February, 1874, $1,875 more rent became due on the lease, for the rent for the three months next preceding. Of this amount, Braisted paid his share, but the trustee paid the proper share of Hotchkiss, according to the sub-agreement, only for the period from December 4th, 1873, to February 1st, 1874. Braisted remains liable for what was so not paid.

Braisted claims to be entitled to an order that the trustee, unless he pay such arrears of rent, deliver possession of the entire premises to Braisted. It is contended that Braisted, by paying a part of Hotchkiss' share, and being liable for the remainder, is subrogated to the rights of the lessor, and to the securities held by the lessor, one of which rights and securities, under the lease, was to dispossess the lessees for non-payment of any of the rent. The basis of the application of Braisted is the fact that the lessor has notified Braisted that he will take proceedings to dispossess Braisted and the trustee from the entire premises unless the arrears of rent shall be paid.

If no sub-agreement had been made, Hotchkiss would have had, under the lease, no right to the exclusive use of any part of the premises as against the other three, and no right to exclude any one of the three from a joint use with himself of every part of the premises. The good sense of the sub-agreement, in its provisions for the exclusive use by Hotchkiss of a specified part of the premises, and for the exclusive use of the residue by the other three, is, that, in view of the rights of the lessees under the lease, with respect to each other, such rights are modified by the said provisions of the sub-agreement, only to the extent of declaring that the exclusive use provided for shall be dependent upon the payment of the specified share of rent named in respect of such exclusive use. The words of the sub-agreement are "for which"—that is, for the exclusive use, by Hotchkiss, of the specified part of the premises—he is to pay the specified part of the rent. He is not to have such exclusive use, as against the other three, unless he pays the specified part of the rent. He and the trustee have failed so to pay. Therefore, Braisted is entitled to as full a use of the hotel part of the premises, as the trustee, until the trustee shall pay in full what, by the sub-agreement, Hotchkiss was to pay in order to enjoy, as against the other three, the exclusive use of such hotel part. To this extent the application of Braisted must be granted. But I do not think he is entitled to the exclusive possession of the entire premises until the trustee shall pay the arrears of rent. Under the lease the lessor could not dispossess one without dispossessing all. To dispossess one and leave the others in possession would be, in effect, a new letting by the lessor. Therefore, exclusive possession now by Braisted, of the hotel part, would not be the result of the exercise of any right of dispossession by the lessor under the lease.

Case No. 6,715a.

HOTCHKISS v. ADRIANCE.

[Betts, Scr. Bk. 269.]

District Court, S. D. New York. May 20, 1853.

LIABILITY FOR LOSS OF ANCHOR AND CABLE—COSTS.

[1. The master of a steamer drifting in an ice field with a disabled engine, and in danger of colliding with a schooner at anchor, hailed the latter to slip her anchor cable, which she did, and both anchor and cable were lost. *Held*, that the steamer and schooner were each liable for a moiety of the loss.

[2. The steamer should be charged with costs for refusing to compensate the schooner.]

[This was a libel by Russell Hotchkiss and others, owners of the schooner Morelle, against John S. Adriance and others, owners of the steamboat William Young, for loss of the schooner's anchor and cable.]

Before BETTS, District Judge.

The steamboat William Young, in attempting to get through a field of ice, was fastened in it, and, her engine catching upon the center, she could not be worked clear of the ice. The schooner Morelle was anchored in the river above, and the ice was carried by the flood tide up the river with the steamer, and in such manner as to endanger the destination of the latter, by drifting her sidewise on the bows of the schooner. The captain of the steamer hailed the schooner to raise anchor and drift out of the way. The anchor was fast and could not be raised. He then ordered those on the schooner to slip the cable or he should be sunk. The cable was accordingly slipped, and that and the anchor were both lost.

Held, there was no fault of the steamer which compelled the loss; she was in a place of danger by accident, and not blamably; the loss sustained by the schooner was not occasioned by any tort of the steamer, but being incurred on the demand of the captain of the steamer, and for her safety, her owners are equitably bound to bear a portion of the loss. Held, that the schooner was also interested in taking the measure of her own protection against probable injury to herself in having the steamer press-

ed upon her in that manner. Ordered, that the respondents be charged with a moiety of the value of the anchor and cable, and actual expenses of dragging and searching for it; costs also to be imposed on respondents, because they refused making any compensation. References to ascertain value and expenses.

Case No. 6,716.

HOTCHKISS v. FLOYD.

[4 Quart. Law J. 134.]

District Court, W. D. Virginia. Oct., 1858.

BOND—BURDEN OF PROOF.

A bond expresses upon its face that it is given for the purchase money of land; and to an action on such bond there is an equitable plea that the plaintiff had no such land, and would not make title to any such land. By an issue joined on this plea, the onus is upon the plaintiff to prove that he has the land, and can make title thereto.

Archibald Hotchkiss, for the benefit of B. Dubois, brought an action of debt against Wm. P. Floyd, upon a single bill for $2,428, due January 15, 1838. On the face of this paper it was expressed to be "the amount due for the final payment for one league of land situated on Red river, in the republic of Texas, which the said Hotchkiss has this day sold to W. P. Floyd and W. L. Lewis," "as will more fully appear by the bond of said Hotchkiss this day given to said Floyd and Lewis." There was a special plea under the statute concerning equitable set-offs, in which, after taking oyer of the single bill, it was alleged that "when the said writing obligatory was executed, the plaintiff did not own any land on Red river in the republic of Texas, to which he could make any good title;" whereupon the consideration had wholly failed. To this plea there was a general replication. The case was submitted to the court upon this question, "On whom is the burden of proof upon this issue?"

B. R. Johnston, for plaintiff.

Mr. Fulton and R. B. Floyd, for defendant.

BROCKENBROUGH, District Judge. This cause does not come on regularly for trial; the counsel desiring to hear the opinion of the court upon a preliminary question; which opinion, however, as I understand, will probably decide the case. As a general rule, the party holding the affirmative of an issue must sustain that affirmative by proof. There are various exceptions to this rule, some of the more important of which are mentioned by President Tucker in his judgment in Hinchman v. Lawson, 5 Leigh, 695. A number of cases are there mentioned in which the party holding the negative was required to give proof of that negative. But it will be observed that in all or nearly all of those instances, the propositions, though in a negative form, really involved affirmative propositions. How does this rule, then, apply itself to this case?

This is a plea which could not have been filed at common law, which never allowed the consideration of a deed to be inquired into. But the statute of 1831, copied into the Code of 1849, permits the defendant, in an action upon a contract under seal, to plead and prove the failure of the consideration, and the damages resulting from such failure are to be set off against the demand. This plea has been filed under that statute, and is in strict conformity thereto. To such a plea the statute allows only a general replication; but directs that any matter which might furnish ground for a special replication may be given in evidence under the general replication. Then it would be necessary for the plaintiff to show such matter in evidence as would amount to a good special replication to this plea. Now, I suppose, the statute permitted a special replication to this plea. What must that replication necessarily have been? Surely it could only be, in substance, that "the plaintiff did own land on Red river, in Texas, to which he had and could make good title, according to the obligation and effect of his said title bond." Now, this is really what the issue would be, if made up in a complete form? Upon this issue the defendant could not be called upon to sustain the negative. He could not prove that the plaintiff had no such land. But it would be easy for the plaintiff, if the facts are really with him, to adduce the proof. If he has any such land, his title papers will settle the question.

In form this is a plea in confession and avoidance, because it admits the execution of the bond, and confesses that it was once a void obligation. But it is such a plea only in form, and it assumed that form only in accordance with the requisitions of the statute which makes it a plea of set-off, or rather of recoupment. Now, it is a general rule that the defendant must always assume the onus of proving any matter in confession and avoidance. By this plea he admits the cause of action, and it devolves upon him to make good the matter which avoids that cause of action. But I do not think this rule applies to this case; because this plea, though in form (and necessarily so) one in confession and avoidance, is really a plea in bar. I understand a traverse in bar to be a plea denying the original cause of action: one that shows that the plaintiff never had any right to claim what he demands in his declaration. Now, this plea really has this very effect. The consideration for which this single bill was given is expressed upon its face; being a certain quantity of land, located in a particular region, on a given stream. The plea alleges that this consideration never did exist, because the plaintiff never had such land; and therefore the single bill never had any oblig-

atory force. I hold that the plaintiff must rebut every plea in bar; that when the original obligatory force and validity of the instrument is questioned, he must be prepared to maintain it. Here that validity is questioned, and the plaintiff must repel the plea denying that original validity. In every point of view the onus in this case is on the plaintiff.

On this announcement of the court's opinion, the plaintiff suffered a non-suit.

Case No. 6,717.

HOTCHKISS v. GLASGOW et al.

[5 McLean, 424.] [1]

Circuit Court, D. Ohio. April Term, 1853.

DEED—JURISDICTION—EVIDENCE—CERTIFIED COPY.

1. A deed, fair upon its face, is not objectionable, as a colorable conveyance to give jurisdiction, unless proof be shown aliunde.

2. A certified copy of a deed, not anthenticated by the seal of the recorder, is not admissible in evidence.

[This was a bill in equity by the lessee of H. O. Hotchkiss against Glasgow and others.]

Mr. Taft, for plaintiff.

OPINION OF THE COURT. To sustain the title a deed was offered for the premises from Nathaniel Sawyer to Hotchkiss, which was objected to, as the conveyance was only colorable, to give jurisdiction to the court. Hotchkiss is the son-in-law of Sawyer. The consideration named in the deed is the sum of ten dollars. THE COURT held the deed was good upon its face, as between the parties. In his correspondence with the counsel (Mr. Taft), Mr. Hotchkiss claimed the land as his own. A patent was then offered, to John Lee and Rebecca Greenwood. A deed was then offered from the heirs of Lee to Nathaniel Sawyer, and proof was given that the grantors were the heirs of Lee. A patent to Sawyer and Baylor was then read in evidence. A proceeding was then read in chancery, decreeing the title of Baylor's heirs to Sawyer. A deed, dated 18th June, 1839, was then read from Rebecca Greenwood to N. Sawyer. The copy of the original deed from R. Greenwood was offered, certified by the recorder, but not authenticated by the seal of that officer. THE COURT held that the copy was not authenticated as the statute required, and a nonsuit was, consequently, suffered. A motion to set aside the nonsuit was submitted, but THE COURT overruled the motion.

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

Case No. 6,718.

HOTCHKISS v. GREENWOOD et al.

[4 McLean, 456; [1] 2 Robb. Pat. Cas. 730.]

Circuit Court, D. Ohio. July Term, 1848. [2]

PATENTS—NEW MATERIAL—KNOWN MODE—OLD ARTICLE.

1. A patent right can not be sustained for making an article of a new material, according to a known mode.

[Cited in Slemmer's Appeal, 58 Pa. St. 164.]

[See note at end of case.]

2. If the material be new, as a compound invented, a patent right may be claimed for that.

[Cited in Butler v. Bainbridge, 29 Fed. 143; Page Woven-Wire Fence Co. v. Land, 49 Fed. 937.]

3. The invention must relate to something new, in structure or material.

4. Door knobs having been made of glass, wood, brass, and other materials, the making of the same of potter's ware, or porcelain, a material long known, will not entitle any one to a patent. And if the mode of fastening the shank to the knob be the same as has been done in fastening the shank to knobs made of other materials, there is no invention to sustain an exclusive right. And this is the case, although the porcelain knob may be more valuable than knobs made of any other materials.

[See note at end of case.]

[This was an action at law by Julia P. Hotchkiss, executrix of John E. Hotchkiss, John A. Davenport, and John W. Quincy against Miles Greenwood and Thomas Wood, partners in trade under the name of M. Greenwood & Co., to recover for the alleged infringement of letters patent No. 2,197, granted to J. E. Hotchkiss, July 29, 1841.]

Mr. Ewing, for plaintiffs.

Fox & Chase, for defendants.

OPINION OF THE COURT. This action was brought against the defendants, to recover damages for the infringement of a patent right obtained by John E. Hotchkiss and others, for an improved method of making knobs for locks, doors, cabinet furniture, and all other purposes for which wood and metal, or other material, for knobs are used, etc. The defendants pleaded not guilty, and gave notice that the improvement claimed was known and practiced, and that such knobs were made, used, and sold by others, before his patent, in different parts of this country, and also in Great Britain and Germany, etc. The patent was given in evidence, and the schedule which constitutes a part of the patent, in which the patentees claimed that they "had invented an improved method of making knobs for locks, doors," etc. "And that the improvement consists in making said knobs of potter's clay, such as is used in any species of pottery; also of porcelain; the operation is the same as in pottery, by molding and burning, and glazing; they may be plain in surface and color,

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

[2] [Affirmed in 11 How. (52 U. S.) 248.]

or ornamented to any degree in both; the modes of fitting them for their application to doors, locks, furniture, and other uses, will be as various as the uses to which they may be applied, but chiefly founded on one principle, that of having the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in form of a dovetail, and a screw formed therein, by pouring in metal in a fused state. In the annexed drawing A represents a knob with a large screw inserted, for drawers and similar purposes; B represents a knob with a shank to pass through and receive a nut; C the head of the knob calculated to receive a metallic neck; D a knob with a shank, calculated to receive a nut on the outside or front." "What we claim as our invention, and desire to secure by letters patent is, the manufacturing of knobs, as stated in the foregoing specifications, of potter's clay, or any kind of clay used in pottery, and shaped and finished by molding, turning, burning and glazing; and also of porcelain."

Evidence was given to the jury, conducing to show the novelty and utility of the invention by the patentees, as claimed by them, and that it was their joint invention. Some evidence was given by the defendants tending to show that the said alleged invention was not originally invented by any one of the said patentees; and that, if said invention was original with any of the patentees, it was not the joint invention of all of them; and other evidence tending to show that the mode of fastening the shank or collet to the knob, adopted by the plaintiffs and described in their specifications, had been known and used in Middletown, Connecticut, prior to the alleged inventions of the plaintiffs, as a mode of fastening shanks or collets to metallic knobs. And the evidence being closed, the counsel for the plaintiffs insisted in the argument that, although the knob, in the form in which it is patented, may have been known and used in the United States, prior to their invention and patent, and although the shank and spindle, by which it is attached, may have been used and known in the United States prior to said invention and patent, yet if such shank and spindle had never before been attached to potter's clay or porcelain, and if it required skill and thought and invention to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly and make a solid and substantial article or manufacture; and if the said knob of clay or porcelain so attached, were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid, and asked the court so to instruct the jury. This instruction, gentlemen of the jury, the court refuse to give, in the form requested. The plaintiffs claim no invention in regard to the material of which the knob is composed. In their specifications, they say, "the improvement consists in making said knobs of potter's clay, such as is used in any species of pottery; also of porcelain," etc. These materials have been known for ages, nor was there any novelty in the knob itself, as knobs of a similar form, made of other materials, had long been in use. They had been constructed of brass, silver, glass, wood, iron, etc. The shank and spindle were not claimed as new. There was nothing left, then, but the attaching of the spindle to the knob. And on this point the instruction is made to turn. "Yet if such shank and spindle had never before been attached to a knob made of potter's clay or porcelain, and if it required 'skill and thought and invention' to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly and make a substantial article or manufacture," etc. It is true this part of the instruction is founded upon the supposition, that to attach the spindle to the knob of clay or porcelain, "required skill and thought and invention," leaving the invention, without designating it in any form, or saying that it must be different from any known mode, open to the jury. Now it requires skill and thought to attach a spindle to any kind of knob. Such skill as an individual acquainted with mechanics, only, can exercise; and no skill can be exercised without more or less of thought. And where skill and thought are united, two of the requisites to sustain the right of the plaintiffs, unless the mind of the jury were brought distinctly to the point of invention, which is the hinge of the case, they might infer its existence from the two preceding requisites.

To give an exclusive right, there must be, what is called a new principle, invented. Not a new principle in an abstract sense, for none such is likely to be discovered; but a new combination or mode, for instance, of attaching the spindle to the knob. If in this there is nothing different from a known mode, there can be no invention which gives a new right to the plaintiffs. And yet the mind of the jury, by the instruction asked, is not drawn to this consideration. This instruction, therefore, in the form asked, is rather calculated to mislead the jury to bring to their minds, distinctly, what the invention must be. Another part of this instruction, as asked, is objectionable. "And if the knob of clay or porcelain so attached, were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid," etc. Now, here, the "cheapness" and "quality" of the article are relied on as giving, or contributing to give, the plaintiffs an exclusive right. But these afford no ground whatever for a patent. The words "so attached," are used referring to the preceding part of the sentence, requiring skill, thought and invention, but not so as to bring the mind of the jury to what must be invented to sus-

tain the patent; and the quality and cheapness of the article are so connected as to have an influence on the jury, to which they are not entitled. In an action of this kind, the comparative value of the thing invented, so far as the exclusive right is concerned, it is not necessary to show beyond the fact that it is useful, or of some value. An article made according to a known method, may be better than other articles made in the same manner, on account of its superior mechanism. But this is no foundation of an exclusive right. And if a material not before used in the same structure be used, that gives no claim to a patent, though the article be more valuable than any other of the kind. If a compound be made, not before known, of different ingredients, that is a ground for a patent, not for the thing constructed, but for the compound of which it is made.

The ground on which a patent may be claimed is, that something new and useful has been invented. A thing which did not before exist. A machine, for instance, differing from all other machines in its structure, movement or effect, by reason of the introduction of some new mechanical combination or principle. The court will, therefore, instruct the jury, "that if knobs of the same form and for the same purposes with that described by the plaintiffs in their specifications, made of metal of other material, had been known and used in the United States prior to the alleged invention and patent of the plaintiffs; and if the spindle and shank, in the form used by the plaintiffs, had before that time been publicly known and used in the United States, and had been theretofore attached to metallic knobs by means of the dovetail and the infusions of melted metal, as the same is directed in the specification of the plaintiffs, to be attached to the knob of potter's clay or porcelain, so that if the knob of clay or porcelain is the mere substitution of one material for another, and the spindle and shank be such as were theretofore in common use, and the mode of connecting them to the knob by dovetail be the same that was theretofore in use in the United States, the material being in common use, and no other ingenuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business, the patent is void and the plaintiffs are not entitled to recover."

The counsel for the defendants asked the court to instruct the jury, that if they should be satisfied that any one of the patentees was the original inventor of the article in question, and that the same was new and useful, yet if they should be satisfied from the evidence that all the patentees did not participate in the invention, the patent is void, and the plaintiffs can not recover. And the court gave the instruction, modified by the remark, that the patent was prima facie evidence that the invention was joint, though the fact might be disproved at the trial; and the court said, there was no evidence, except that of a slight presumption, against the joint invention as proved by the patent.

The jury found for the defendants, and the case being taken to the supreme court, on points excepted to, was affirmed. 11 How. [52 U. S.] 248.

[NOTE. The plaintiffs then took the case on writ of error to the supreme court, where the judgment was affirmed in an opinion by Mr. Justice Nelson, who said that it may well be that, by connecting the material mentioned in this patent with the metallic shank, an article is produced which is much better and cheaper than where a metallic or wooden knob is used, but this does not result from any new mechanical device. No patent can be granted for the manufacture of an old article out of some other material, which is better adapted to the purpose than the one now in use. Such difference is formal, and merely affords evidence of judgment and skill in the selection of materials. Unless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain knob than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of ingenuity which is an essential element of every invention. In other words, the improvement is the work of a skilful mechanic, not that of the inventor. Mr. Justice Woodbury dissented. 11 How. (52 U. S.) 248.]

HOTCHKISS (MANCHESTER v.). See Case No. 9,004.

Case No. 6,718a.

HOTCHKISS v. NEW YORK & V. S. S. CO.

[22 Betts, D. C. MS. 41.]

District Court, S. D. New York. 1853.

COLLISION—SIGNAL LIGHTS.

[A schooner standing on her starboard tack in the James river discovered the lights of a steamer 15 minutes before the collision, and did not change her course. She was discovered by the pilot of the steamer in ample time to have avoided the collision. *Held*, the night being clear, that she was not in fault in not exhibiting a signal light, and the steamer should be held liable.]

[This was a libel by George Hotchkiss against the New York & Virginia Steamship Company for collision.]

THE COURT (BETTS, District Judge) held: (1) That the steamer, in the nighttime, was going up the James river at moderate speed where the channel lay east and west, and on her course W., ½ N., by compass, and the schooner, with the wind baffling from S. & E. & W. of S., was keeping her course down the river, steering by points of land. (2) That at the time of the collision the schooner was on the wind, on a course down the James river, near the middle of the channel, having recently tacked, and was inclining towards the south side thereof, on her starboard tack, with the wind

about two points free. (3) That the steamer was at the time near the middle of the channel. There were light clouds in the atmosphere, but it was starlight, and sufficiently clear to enable the steamer, with a careful watch properly placed, to have seen the schooner a sufficient distance off to avoid her. (4) That the schooner saw the lights of the steamer approaching 15 minutes or more before the collision. She did not change her course to the northward, or interfere with the movement of the steamer, after taking her starboard tack as aforesaid; and that the steamer when she discovered the schooner ported her helm supposing herself a-larboard and to leeward of the schooner, but in the collision she was on the starboard side of the schooner and to windward of her. (5) That the schooner was in fault in not exhibiting a signal light when she found the steamer approaching upon her, but that omission was not the cause of the collision, because the steamer made out the schooner and ascertained that she was under way descending the river, when ¼ of a mile or more from her, and in time, if proper measures had been properly taken, to stop her own progress or keep out of the way of the schooner. (6) That the steamer does not prove she had a lookout stationed forward who was attentive to his duties, nor but that, if one had been exclusively engaged there in that business, that the schooner might have been discovered a far greater distance up the river than she was actually seen at the time. Testimony, not taken from the schooner, proves that she could have been seen at the time a mile or more off, down or across the river, and no impediment to an equal range of sight up the river is shown by this proof. (7) It is not proof of due diligence on the part of the steamer merely to give evidence that a lookout was stationed ahead, without further evidence that he was diligently and faithfully occupied in the business of a lookout, particularly when the vessel collided with was discovered by the man at the wheel of the steamer before any report or warning was given by the lookout of her approach. To exonerate the steamer from blame in this respect it must be made clearly to appear that her crew were so stationed and observant of their duty that she could, but for inevitable accident, have prevented the collision. (8) That the attention of the first mate, who was also pilot, was at the time chiefly occupied with the soundings, and with the compass, and the course of the ship, and that he did not descry the schooner under those circumstances until within ¼ of a mile from him, affords slight evidence that she was so hid by the state of the atmosphere as not to be discernible sooner. (9) That whilst the general arrangements on board the ship, for her own safety and that of other vessels, in case of meeting in the nighttime, and the moderate speed at which she was running, were all judicious and commendable, the decided weight of proof is, that in this instance, the steamer came upon the schooner, through the omission of those conducting the steamer to exercise a proper degree of prudence and vigilance in looking out ahead, or in the maneuver made when the schooner was discovered.

The court is accordingly bound to hold the steamer responsible for the damages sustained by the schooner in the collision. The usual reference ordered.

HOTCHKISS (PARKER v.). See Case No. 10,739.

Case No. 6,719.

HOTCHKISS v. TRADESMEN'S NAT. BANK et al.

[10 Blatchf. 384.] [1]

Circuit Court, S. D. New York. Jan 22, 1873.[2]

BONDS—BONA FIDE HOLDER FOR VALUE WITHOUT NOTICE—NEGOTIABLE PAPER.

1. The mortgage bond of a railroad corporation, bearing a number, and payable to bearer, with coupons attached, payable to bearer, contained, on its face, a statement, that the corporation agreed "to make the scrip preferred stock attached to this bond full paid stock," at specified times, upon surrender to the corporation, of the bond and the unmatured coupons, and that it was issued in conformity with the articles of association of the corporation. H., the owner and possessor of such bond, was also the possessor of a certificate for ten shares of the scrip preferred stock of the corporation, certifying that he was entitled to such shares, and declaring, that, on the surrender of such certificate, and of such mortgage bond, designated by its number, and of all unmatured coupons thereon, at specified times, he would be entitled to ten shares of full paid preferred stock. The bond and the certificate of stock, attached together by a pin, were stolen from H. The bond, unaccompanied by the certificate, went into the hands of T., who, in good faith, and without any other notice than was imported by the bond, advanced money on the bond: *Held*, that T. had notice of whatever was contained in the articles of association, in respect to the bond.

2. Neither the articles, nor the bond, nor the certificate, required the bond to be registered, or to be transferable solely on the books of the corporation, or that the debt evidenced by the bond and the coupons should be transferable otherwise than by delivery.

3. H. could part with the bond by delivery, without transferring the scrip stock.

[See note at end of case.]

4. The promise, in the bond, to pay money, was a separate obligation from the agreement in regard to converting the scrip stock into full paid stock.

[Cited in De Voss v. City of Richmond, 18 Grat. 338.]

[See note at end of case.]

5. T. was entitled, as against H., to retain the bond, as having taken, before maturity, for a

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

[2] [Affirmed in 21 Wall. (88 U. S.) 354.]

valuable consideration, in the usual course of business, without notice of any defect of title, a coupon bond, payable to bearer.

[See note at end of case.]

[This was a bill in equity by Charles B. Hotchkiss, against the Tradesmen's National Bank, the National Shoe and Leather Bank of the City of New York, and the Milwaukee and St. Paul Railway Company.]

Francis N. Bangs, for plaintiff.

Henry N. Beach, for Shoe and Leather Bank.

Smith & Woodward, for Tradesmen's Bank.

BLATCHFORD, District Judge. On the 30th of November, 1868, the plaintiff, at Bridgeport, Connecticut, was the owner and in possession of three bonds, for $1,000 each, issued by the Milwaukee and St. Paul Railway Company, and numbered respectively 1,947, 2,070 and 2,425. There were then annexed to each of the bonds 48 coupons or interest warrants, each for $35, and payable each successive six months from and including the 1st day of January, 1869, to and including the 1st day of July, 1892. The bond and its coupons were all of them printed on the face of one and the same sheet of paper, and none of such 48 coupons had then been cut off. Bond No. 1,947 read thus: "Know all men by these presents, that the Milwaukee and St. Paul Railway Company are indebted to Isaac Seymour, Horace Galpen, William Gould, Fred. P. James, D. M. Hughes, George Smith and Francis Vose, citizens of the state of New York, or bearer, in the sum of one thousand dollars, for the purchase money of their entire corporate property, which sum said company promise to pay to the bearer hereof on the first day of January, A. D. 1893, at the office or agency of the company in the city of New York, with interest thereon from the first day of July, A. D. 1863, at the rate of seven per centum per annum, payable semi-annually, at its office or agency in the city of New York, on the first day of January and July in each year, on the presentation and surrender of the annexed coupons, as they severally become due, and, in case of non-payment of interest for six months, then, without demand or notice, the principal of this bond shall become due and payable. The said company also agree to make the scrip preferred stock attached to this bond full paid stock at any time within ten days after any dividend shall have been declared and become payable on said preferred stock, upon surrender to the company, in the city of New York, of this bond and the unmatured interest warrants. This bond is one of a series of bonds, amounting to $2,200,000, and, if the company acquire the road known as the Eastern Division of the La Crosse and Milwaukee Railroad, then this issue of bonds may be increased $2,000,000, and, if the company acquire the Milwaukee and Western Railroad, and extend it from Columbus to Portage, then this issue may be increased $2,000,000, and, if the company acquire the Milwaukee and Horicon Railroad, this issue of bonds may be increased $400,000. All of which bonds are executed and delivered in conformity with the laws of Wisconsin, the articles of association of the company, the vote of the stockholders, and resolution of the board of directors. And the bearer hereof is entitled to the security derived from a mortgage or deed of trust duly executed and delivered by said company to Isaac Seymour and N. A. Cowdrey, trustees, conveying the entire property of this company, real and personal, and all its rights, franchises and annuities, dated May 6th, A. D. 1863, and, also, to the benefits to be derived from a sinking fund established by and in said mortgage or deed of trust, of all such sums of money as are received from the sales of lands donated or granted to this company by the United States or by the state of Wisconsin. This bond shall not be valid until it shall have been authenticated by a certificate endorsed hereon, and duly signed by both of said trustees, or their or his successor or successors, and is issued, received and held subject to the terms and conditions contained in said mortgage. In witness whereof, the said company have caused their corporate seal to be hereto affixed, and their president and secretary to sign the same, this sixth day of May, A. D. 1863." On the face of the bond were the number of the bond, in two places, and, also, the words: "Sixty coupons attached. Last six months interest, $35, payable with bond." Each coupon was in this form: "The Milwaukee and St. Paul Railway Company promise to pay to the bearer, thirty-five dollars, on the first day of ——, 18—, in the city of New York, for interest due on bond No. 1,947. Coupon No. ——. H. E. Glasford, Agent." The blanks in the coupons were properly filled.

The face of the bond being uppermost, if the bond was folded over from right to left, by a fold in the middle of its width, and running from top to bottom, so as to bring one-half of the back of the bond uppermost, that half was found to be divided, by two up and down lines, into three columns, each with a printed heading, the first column being headed, "Date of Transfer," with the figures "186–" a short distance below, to the left, the second column being headed, "To Whom Transferred," and the third column being headed, "Attest by Transfer Agent;" and, in each column, were fourteen horizontal lines. There were no entries in any of these columns when the bond left the possession of the plaintiff, as hereafter mentioned.

On the other half of the back of the bond were these words: "$1,000 Bond, No. 1,947. First Mortgage, Milwaukee & St. Paul Railway Company. 7 per cent. Convertible. In-

terest, January & July. Due, 1893. This is to certify that this bond is included in a first mortgage of the entire corporate property, real and personal, rights, franchises, and immunities, of the Milwaukee and St. Paul Railway Company, in trust to the undersigned, to secure the payment of $2,200,000; and, if the company acquire the road known as the Eastern Division of the La Crosse and Milwaukee Railroad, then it may be to secure the payment of $2,000,000 additional, and, if the company acquire the road known as the Milwaukee and Western Railroad, then it may be to secure the payment of $2,000,000 additional, and, if the company acquire the road known as the Milwaukee and Horicon Railroad, then it may be to secure the payment of $400,000 additional. I. Seymour, N. A. Cowdrey, Trustees."

Bonds Nos. 2,070 and 2,425, when they left the possession of the plaintiff, as hereafter mentioned, read in the same way, and were, in all respects, in the same condition, as to themselves, and the contents of their backs, and their coupons, with the proper changes of numbers, as bond No. 1,947, except that bond No. 2,425 contained the words "indebted to Isaac Seymour and N. A. Cowdrey," instead of the words "indebted to Isaac Seymour, Horace Galpen, William Gould, Fred. P. James, D. M. Hughes, George Smith, and Francis Vose."

The "articles of association of the company," referred to in the bonds, declare, in their third article, that the capital stock shall be divided into "preferred stock" and "common stock," and that a part of the "preferred stock" shall be known as "scrip preferred stock." On the scrip preferred stock one dollar per share is declared and acknowledged to have been paid. On the rest of the preferred stock, and on the common stock, one hundred dollars per share are declared and acknowledged to have been paid. The preferred stock is fixed at not exceeding $3,450,000, or 34,500 shares. The articles say: "Of the said $3,450,000 preferred stock, an amount not exceeding $2,200,000 at par, or 22,000 shares, shall be set apart and designated as 'scrip preferred stock.' The scrip preferred stock here named, or hereafter named, shall not at any time exceed the amount of outstanding mortgage bonds hereinafter named. The scrip preferred stock shall not be subject to any assessment, and shall entitle the person in whose name it stands upon our books to all the rights and privileges of other stockholders, except that it shall not entitle the holder to any dividend, or other profit or increase, from the income or assets of this company. It shall be issued in certificates of five and ten shares each, and shall accompany each mortgage bond of the company. The holder thereof shall have the right, at any time within ten days after any dividend shall have been declared and become payable on the preferred stock, to make the scrip preferred stock attached to this bond full paid stock, upon the surrender to the company of the mortgage bond named by its number in his scrip certificate, and, upon surrendering said scrip certificate and bond, he shall be entitled to receive therefor the same number of shares of preferred full paid stock, and entitled to dividends. The said preferred stock, except said scrip stock, shall be entitled to a dividend of seven per centum per annum, from the net earnings of each current year, after payment of interest on all the mortgage bonds, if the company earn so much during the current year, and before the payment of dividends to any other class of stockholders; but the company may reserve a reasonable working capital or surplus before the dividend shall be declared or paid on said preferred stock, which surplus shall not exceed at any time the aggregate sum of $250,000, over and above the floating or unfunded debt, and the accrued interest on the mortgage bonds. If the net earnings of the company are not as much as seven per cent. in any one year, then the said preferred stock shall receive, for that year, a dividend of whatever the said net earnings are, after the payment of interest on the mortgage bonds, and the reasonable reserve for a working capital, as above described. Said preferred stock shall not have any claim upon the earnings of any other year, for the non-payment of dividends of any preceding year. And, whenever the company earns sufficient, over and above the payment of interest on the bonds, and the reserve above named, to pay a greater sum than seven per cent. on outstanding preferred stock, and seven per cent. on the common stock, then the said preferred stock shall share pro rata with the common stock, in such earnings." The sixth article provides as follows: "The corporation shall have power to issue bonds in sums of $500 and $1,000, to an amount not exceeding two millions two hundred thousand dollars. * * * All of said bonds shall bear an interest not exceeding seven per centum per annum, the principal and interest payable in the city of New York, the interest semi-annually, the principal within thirty years from date. They shall also contain a provision, that, if the company make default in the payment of interest, or in the application of the sinking fund, as hereinafter provided, for six months, the principal shall thereupon become due without demand or notice. The said corporation shall have power to secure the payment of all the bonds above authorized to be issued, by a mortgage or trust deed upon this franchise, and all the real and personal property of the company, now owned or hereafter to be acquired by them, and to embrace the entire corporate property, and all its franchises and privileges. The mortgage shall also contain a provision for a sinking fund for the payment of said mortgage bonds, by which the new

company shall obligate themselves to pay to the trustees of said mortgage bonds, all such sums of money, less the expenses of sales, as shall be derived from the sale of any lands which may have been, or shall hereafter be, donated or granted by either the United States or the state of Wisconsin, to aid in building this road, or that shall in any manner be acquired by this company. And said lands shall be fairly and equitably valued and classified by the company, or by such persons as they together shall appoint; and, upon sale of said lands, said mortgage bonds may be received at par and accrued interest, in payment therefor, and the bonds thus received in payment shall be immediately cancelled. The company shall keep a proper registry or account of all the bonds thus paid by them, and the number or amount of bonds thus cancelled shall be reported by said company to the stockholders at each annual meeting, and said bonds shall be presented and shown at said meeting. And said trust deed shall contain all other reasonable and proper provisions for making said lands the most productive and available to the company, as a sinking fund for the payment of said bonds. The bonds secured by said mortgage shall be convertible, at the option of the holder, into the preferred stock, at any time within ten days after any dividend shall have been declared and become payable on said preferred stock. The said mortgage deed and bonds shall be signed by the president or vice-president and secretary, and the seal of the company shall be affixed thereto. * * * The said mortgage or trust deed may also contain covenants and agreements authorizing the bondholders to vote in all stockholders' meetings, as follows—each one hundred dollars of the principal of the outstanding bonds shall be entitled to one vote —and giving the bondholders the same pro rata voice in the management of the company with, and as if they were, stockholders to the amount of their bonds." The seventh article provides as follows: "The preferred stockholders shall elect the directors until a dividend shall have been earned, declared, and paid on the common stock, and, until then, the common stockholders shall have no vote or voice in the election of directors." The tenth article provides as follows: "Upon the dissolution of this corporation, after the payment of its debts, the remaining assets shall be divided among the different classes of stockholders according to their preferences, that is to say, the preferred stock, except the scrip stock, shall be first paid in full, and the balance divided among the common stockholders, pro rata."

Up to the time the said three bonds left the possession of the plaintiff, he owned and had in his possession three certificates issued by said company to him, each for ten shares of the scrip preferred stock before mentioned, which certificates were numbered, severally, 7667, 7668 and 7669, and were all of them issued September 17th, 1864. Certificate No. 7668 read as follows, on its face: "Certificate for Scrip Preferred Stock, Issued Septr. 17th, 1864. No. 7668, Ten Shares. This is to certify, that Charles B. Hotchkiss, of New Haven, Conn., is entitled to ten shares of the capital stock of the Milwaukee and St. Paul Railway Company, designated as 'scrip preferred stock' in the articles of association of the company. This stock is not entitled to any dividend. It has one dollar per share paid thereon, and is not liable or subject to any assessment. Upon the surrender of this certificate, and mortgage bond No. 1947 of the company, and all unmatured coupons thereon, at any time within ten days after any dividend shall have been declared and become payable on the full stock of the preferred stock of the company, the said Hotchkiss is entitled to receive ten shares of said full paid preferred stock. This stock is transferable only on the books of the company, at their office in the city of New York, in person, or by attorney, on the surrender of this certificate. This certificate and the stock represented hereby is issued and received subject to all the terms, conditions and limitations of this company, and is not valid until countersigned by the transfer agent of the company, and by the registrar of transfers. In witness whereof, the company have caused this certificate to be signed by the president." The certificate was signed, on its face, by the president and the transfer agent, and countersigned by the registrar of transfers, and had printed on its back a blank power of attorney, in this form, the blanks not being filled: "Know all men by these presents that —— for value received, have bargained, sold, assigned and transferred and by these presents do bargain, sell, assign and transfer unto —— shares of the scrip stock of the Milwaukee and St. Paul Railway Company, standing in —— name on the books of the said company, and hereby constitute and appoint —— true and lawful attorney, irrevocably, for —— and in —— name and stead, but to —— use, to sell, assign, transfer and set over, all or any part of the said scrip stock, and, for that purpose, to make and execute all necessary acts of assignment and transfer, hereby ratifying and confirming all that —— said attorney shall lawfully do by virtue hereof. In witness whereof, —— have hereunto set —— hand this —— day of —— one thousand eight hundred and sixty ——. Sealed and delivered in presence of ——." Certificate No. 7667 was, in all respects, like certificate No. 7668, except that it contained the figures "7667," instead of "7668," and "2070," instead of "1947." Certificate No. 7669 was, in all respects, like certificate No. 7668, except that it contained the figures "7669," instead of "7668," and "2425," instead of "1947." The three bonds, and the three certificates, when

they left the possession of the plaintiff, were not, any one of them, attached to any other one or more of the rest of them, in any other manner than by pins.

The company, on the 2d of November, 1863, issued to Russell Sage bond No. 1947, and, at the same time, issued to him certificate No. 1947, for ten shares of scrip preferred stock, which certificate was like, in form, to certificate No. 7668, except that it contained the words, "Novr. 2d, 1863," instead of "Septr. 17th, 1864," and the figures "1947," instead of "7668." Sage, by a written transfer on the books of the company, dated December 23d, 1863, transferred to F. P. James & Co., "subject to all the terms, conditions and limitations of the articles of association of the company," ten shares of scrip preferred stock, (but not bond No. 1947,) and surrendered to the company the said certificate No. 1947, and it issued to F. P. James & Co. certificate No. 7086, which certificate was like, in form, to certificate No. 7668, except that it contained the words, "Decr. 23d, 1863," instead of "Sept. 17th, 1864," and the figures "7086," instead of "7668." The company, on the 2d of January, 1864, issued to F. P. James & Co. bond No. 2070, and, at the same time, issued to them certificate No. 2070, for ten shares of scrip preferred stock, which certificate was like, in form, to certificate No. 7668, except that it contained the words, "Jan. 2d, 1864," instead of "Septr. 17th, 1864," and the figures "2070," instead of "7668," as the number of the certificate, and the figures "2070," instead of "1947," as the number of the bond. F. P. James & Co., by a written transfer on the books of the company, dated September 17th, 1864, transferred to the plaintiff, "subject to all the terms, conditions and limitations of the articles of association of the company," twenty shares of scrip preferred stock, and, also, bonds Nos. 1947 and 2070, and surrendered to the company the said certificates Nos. 2070 and 7086, and it issued to the plaintiff the said certificates Nos. 7667 and 7668. The company, on the 7th of July, 1863, issued to Alfred Noxon bond No. 2425, and, at the same time, issued to him certificate No. 2425, for ten shares of scrip preferred stock, which certificate was like, in form, to certificate No. 7668, except that it contained the words, "July 7th, 1863," instead of "Septr. 17th, 1864," and the figures "2425," instead of "7668," as the number of the certificate, and the figures "2425," instead of "1947," as the number of the bond. Noxon, by a written transfer on the books of the company, dated September 17th, 1864, transferred to the plaintiff, "subject to all the terms, conditions and limitations of the articles of association of the company," ten shares of scrip preferred stock, and, also, bond No. 2425, and surrendered to the company the said certificate No. 2425, and it issued to the plaintiff the said certificate No. 7669. The plaintiff never transferred, on the books of the company, any of the shares of scrip stock represented by certificates Nos. 7667, 7668 and 7669, and those certificates are now outstanding and have not been surrendered to the company. The plaintiff never signed any of the transfers on the backs of said certificates. The three bonds and the three certificates issued to the plaintiff were stolen from his possession, by robbery, on the 30th of November, 1868.

On the 20th of February, 1869, the National Shoe and Leather Bank, one of the defendants, received from a firm called Waterhouse, Midgley & Co., the said bond No. 1947, and loaned to that firm, on its note, with the said bond as collateral security, the sum of $800, the bonds being then quoted in the market as worth 92 per cent. Such note was renewed several times, and the bank now holds, in renewal, a note of said firm, dated October 5th, 1869, at two months, for $800, with the said bond No. 1947 as collateral security, which bond now has on it three less coupons than it had when it left the possession of the plaintiff, the coupons due January 1st, 1869, July 1st, 1869, and January 1st, 1870, being now gone, and there being now on it 45 coupons, beginning with the one due July 1st, 1870, which is No. 16. But, coupon No. 15, due January 1st, 1870, is in the possession of the bank, cut off from the bond. When the bank received the bond, it had on it only 47 coupons, beginning with the one due July 1st, 1869, No. 14, which one it afterwards allowed the said firm to have.

On the 22d of January, 1869, the Tradesmen's National Bank, one of the defendants, received from one B. Starr Midgley one of the said two bonds, Nos. 2070 and 2425, and loaned to him on his note, with the said bond as collateral security, the sum of $800. On the 29th January, 1869, the last-named bank received from Midgley the other one of the said two bonds, Nos. 2070 and 2425, and loaned to him $800 more, giving up to him his note for $800, and taking from him his note for $1,600, and thereafter holding the two bonds as collateral security for the last-named note. Such note was renewed several times, and the bank loaned to Midgley $150 more on the bonds, and now holds a note of his, dated February 4th, 1870, on demand, for $1,791 75, with interest, with the said two bonds, Nos. 2070 and 2425, as collateral security, each of which two bonds has now on it two less coupons than it had when it left the possession of the plaintiff, the coupons due January 1st, 1869, and July 1st, 1869, being now gone, and there being now on each of said bonds 46 coupons, beginning with the one due January 1st, 1870, which is No. 15. But, coupon No. 14, due July 1st, 1869, from each of the two bonds, is in the possession of the bank, such coupons having been cut off by it, and presented for payment to the company, which was refused. When the bank received the two bonds, each had on it only 47 coupons, beginning with No. 14. When the bonds were received by

the banks respectively, no certificates of scrip preferred stock, or other papers, accompanied them.

The bill in this case, which was filed in April, 1870, claims that the bond and the certificate of scrip stock constituted but one instrument; that the several parts thereof are not capable of separation and division, in such way that the title to one part thereof can be transferred to one person, and the title to some other part thereof to another person; that the owner or holder of the certificate cannot get the benefit thereof without possession of the remaining part of the obligation; that the holder of the remaining part of the obligation cannot get, and is not entitled to, a performance of the same, as against the company, without possession of the certificate; and that, on the face of the obligation, reference is expressly made, in the several parts thereof, to other parts of the same obligation, so that the holder of one portion thereof is chargeable with notice of the rights of the holder of the other portion thereof. The bill prays for a decree, declaring that the plaintiff is, as against the banks, the true and lawful owner of the said contracts and obligations, and of every part thereof, and directing that the banks respectively deliver up to him such parts of the said obligations as they have, and respectively account to him for all moneys which they have collected thereon, and that the company be enjoined from making any payment, on account of said obligations, to any other person than the plaintiff, and that it issue to the plaintiff new certificates in the place of those so stolen from him, and admit him to all the rights contracted for by it in the said obligations, notwithstanding any claim on the part of the banks. The bill was taken pro confesso as against the company, it having voluntarily appeared in the suit.

It is contended, for the plaintiff, that it is apparent, by the bonds, that it was not intended that possession alone of them should be proof of ownership; that they are not, by their terms, performable in favor of the holders of them, that they are not transferable by delivery; that there is, in respect to each bond, a single contract, evidenced by the bond and by the scrip certificate, the two being a unit; that there is not an agreement to pay money to one person, and an agreement to permit another person to take preferred stock by conversion; that no person can hold any part of the contract, as against the company, who is not, at the same time, a transferee of the scrip stock as well as a holder of the bond; that, as the scrip stock, and its certificate, could not be transferred merely by delivery, the bond could not be transferred separately by delivery; and that the banks, by what appears on the bonds, and by the articles of association, to which the bonds refer, must be held to have had notice that no person could own the bond who did not produce a certificate for scrip preferred stock, as the badge of his ownership, not only of the stock, but of the bond.

For the banks, it is contended, that the bond and the certificate of scrip stock do not constitute only a single instrument; that, by the articles of association, the bond is made one contract, and the certificate is made another contract; that the bond is transferable by delivery, while the stock is transferable only on the books of the company; that the plaintiff, if he had retained the bond, and were to keep it till it matured, could collect all the coupons and also the principal, without producing or surrendering any certificate of stock; that the ownership of the stock, and the possession of the certificate thereof, is only necessary to the exercise of the privilege of conversion; and that the banks are entitled to be recognized as the parties to whom the principal and interest of the bonds are payable, although they claim no privilege of converting the bonds into preferred stock.

The statement, on the face of the bond, that it is executed and delivered in conformity with the articles of association of the company, is notice to the party taking the bond, of whatever those articles contain, in respect to the bond. By the sixth article, the bond is to be convertible, at the option of its holder, into preferred stock, at any time within ten days after any dividend shall have been declared and become payable on the preferred stock. The endorsement on the bond speaks of the bond as a convertible bond. The face of the bond makes the bond convertible, only by the declaration, that the company agrees to make the scrip preferred stock attached to the bond full paid stock at any time withir ten days after any dividend shall have been declared and become payable on the preferred stock, on the surrender to the company of the bond and the undue coupons. In the articles of association, the third article provides, that the scrip preferred stock shall be issued in certificates of five and ten shares each, (each share being $100, if full paid,) and shall accompany each mortgage bond, (the bonds being $500 and $1,000 each,) and that the holder of the bond shall have the right, at any time within ten days after any dividend shall have been declared and become payable on the preferred stock, to make the scrip preferred stock attached to the bond full paid stock, on the surrender to the company of the bond named by its number in his scrip certificate, and that, on surrendering such scrip certificate and bond, he shall be entitled to receive therefor the same number of shares of full paid preferred stock. The bond says nothing about converting the bond, other than what is to be implied from what it does say, and from the endorsement, nor does it say anything about surrendering the scrip stock or the certificate. The bond, in speaking of the scrip preferred stock attached to it, refers, necessarily, to the cer-

tificate of scrip preferred stock mentioned in the articles of association. That certificate provides that, on the surrender of itself, and of the bond designated by number in it, and of the undue coupons on such bond, the person to whom the certificate is issued shall be entitled to the like number of shares of full paid preferred stock, and that the scrip stock is transferable only on the books of the company, "in person or by attorney," on the surrender of the scrip certificate. The scrip certificate spoken of in the bond as attached to the bond, must be regarded as present to the view and knowledge of any party taking the bond.

Construing the bond and the certificate and the articles of association together, it is apparent, that the company intended to issue its bonds, and secure them by mortgage, and also to allow such bonds to be convertible into full paid preferred stock, at the rate of one share of stock for each $100 of the principal of the bonds. Why not, then, have adopted the simple plan, of declaring that the bond should be convertible into such stock, at the time designated, on the surrender of the bond? Manifestly, because it was desired that the holder of the bond, in addition to being such, and thus being a secured creditor, and in addition to being allowed to have the option of converting his bond into full paid preferred stock, should also, before exercising such option, be allowed certain rights of a stockholder. But, the bond being made payable to bearer, with coupons also payable to bearer, and thus transferable and negotiable by delivery, it would be impossible for the company to know what persons were to exercise these rights of a stockholder, unless it kept a record of such persons. It undoubtedly found that it would be impracticable to adopt the suggestion made in the sixth article of the articles of association, that the bondholders might be authorized to vote in all stockholders' meetings, each $100 of the principal of outstanding bonds to have one vote, and to have the same pro rata voice in the management of the company as if they were stockholders to the amount of their bonds. It found that all who were to exercise any of the rights of stockholders must be stockholders. It, therefore, devised the scheme of scrip preferred stock and the person in whose name such stock should stand on its books was to be entitled to all the rights and privileges of other stockholders, except that he should not be entitled to any dividend, or other profit or increase, from the income or assets of the company. One of those rights and privileges, and, probably, a valuable one, was, that holders of scrip preferred stock, equally with the holders of full paid preferred stock, were entitled to vote in the election of directors of the company; and this, too, to the exclusion of the holders of the common stock, until a dividend should have been earned, declared and paid on the common stock. For these purposes, the company adopted the plan of the scrip preferred stock, transferable only on its books.

The registered owner of the scrip preferred stock could have these rights of a stockholder. If, in addition, he should continue to hold the bond designated in his certificate, he could, by surrendering such bond, convert it, and, at the same time, convert his scrip preferred stock, into full paid preferred stock. But, the company did not require that the bonds should be registered, or that they should be transferable solely on the books of the company, or that the debt evidenced by the bond and the coupons should be transferable otherwise than by the delivery of the same. There is nothing to that effect in the articles of association, or in the bond, or in the certificate of scrip preferred stock. The third article says, that the certificate is to accompany the bond, implying, that the bond, as an obligation for the payment of money, is a complete instrument without the certificate; and that the holder of the bond shall have the right to make full paid stock out of the scrip stock attached to, or accompanying, the bond, on surrendering the bond and the scrip certificate, implying, that to hold the bond as an obligation for the payment of money is one thing, and to obtain full paid stock, by surrendering the bond and the scrip certificate, is another thing. Most unquestionably, the holder of the bond could, at all times, collect his coupons without producing his certificate of scrip stock. So, at maturity, he could demand payment of the principal, without producing such certificate. The certificate is required to be produced only when it is to be surrendered on a transfer of stock, or when it is to be surrendered on a conversion. There is nothing which requires the bonds to be transferred on the books of the company. It is true, that the two transfers to the plaintiff transferred to him the three bonds in question, as well as the thirty shares of scrip preferred stock. But, bond No. 1,947, issued to Sage, was not transferred by Sage to James & Co. on the books of the company, although James & Co. transferred it to the plaintiff on such books. Whatever it may have been intended should have been inserted in the blanks under the headings in respect to transfers on the back of the bond, nothing was inserted therein in any of the bonds in question, nor does it appear that anything was ever inserted therein in any bond that was issued, or that any bond was ever required to be produced to the company when scrip preferred stock was transferred, or that any regulation was ever prescribed respecting the transferring of bonds otherwise than by delivery.

It is, undoubtedly, true, that the register-

ed owner of the scrip stock cannot exercise an option of converting his scrip stock into full paid stock, without producing and surrendering his bond, although he might vote for directors without producing his bond. But, there is nothing to prevent his parting with his position as a mere mortgage creditor, by passing the title to the debt by delivery, by manual tradition of the bond, without transferring the scrip stock. The new holder of the debt will not acquire the right to vote as a stockholder, or any other right of a stockholder, or the right to convert the scrip stock into full paid stock. But, he will be a creditor, entitled to payment of the coupons and of the principal, and to the security of the mortgage. In the bond, the acknowledgment of indebtedness to the persons named, "or bearer," in the sum named, with the promise to pay that sum, and the interest named, on the presentation and surrender of the coupons annexed, is a distinct and separate obligation from anything else in the bond. The agreement in regard to making full paid stock out of the scrip stock attached to, or accompanying, or issued with, the bond, is an additional and supplementary agreement. The articles of association, while they speak of paying interest on the bonds, do not require that the principal of the bonds shall be made payable to bearer, and make no reference to coupons or interest warrants. The bonds might, therefore, have been made registered bonds, and the interest might have been made payable otherwise than by coupons, and otherwise than to the bearers of the coupons. The adoption of the plan of making the principal of the bonds payable to bearer, and of paying the interest by means of coupons payable to bearer, was a deliberate act of choice on the part of the company. It might have made the principal and interest payable only to the person in whose name the scrip preferred stock stood, instead of making them payable to bearer.

From these considerations, it follows, that, if the scrip certificates and the articles of association had been before the officers of the banks who took these bonds, when they took them, no information would thereby have been conveyed to them, that the bonds were not transferable by delivery. There was nothing to prevent the plaintiff himself from parting with the bonds, and thus parting with the right to convert the scrip stock into full paid stock, because he would be unable thereafter to surrender the bonds, while still retaining all other rights incident to the ownership of the scrip stock. It appears, that such right of conversion had, in some cases, been exercised, but, manifestly, the desire to exercise it would be dependent upon the fact whether the full paid preferred stock was worth more in the market than the bonds with the convertible privilege. It might very well be that the plaintiff himself, or any other person who had been the holder of the bonds offered to the banks, had elected to part with the bonds for what they were worth, unaccompanied by the scrip stock. There was nothing in the bonds, or the scrip certificates, or the articles of association, regarded as before the officers of the banks, to indicate to them the contrary of this, or to make it possible to impute to them that mala fides which it is necessary should exist in the case of coupon bonds, payable to bearer, like these, taken before maturity, for a valuable consideration, in the usual course of business, without notice of any defect of title, in order to impeach the title to them in the hands of the person so taking them. The plaintiff has suffered the bonds to pass into the hands of bona fide holders of them, and fails to impeach their title. In his bill, he alleges bad faith; but none is shown. The principles applicable to the facts of this case are too well settled by authoritative decisions, state and federal, to make it necessary to refer to such decisions, or to the considerations of public policy on which they are founded.

The relief prayed for as to the banks cannot be granted, and the bill must be dismissed, as to them, with costs. As to the railway company, in so far as the bill asks for a decree that the company issue to the plaintiff new certificates of scrip preferred stock, in place of those stolen from him, and admit him to all the rights and privileges which such certificates contract for, the plaintiff is entitled to such relief. He can make such certificates fully available for the purposes of conversion, by purchasing the bonds designated in them.

[NOTE. An appeal was then taken by the complainant to the supreme court, where the judgment of the circuit court was affirmed in an opinion by Mr. Justice Field, who said that the agreement respecting the scrip preferred stock did not affect the negotiability of the bonds, as it was independent of the pecuniary obligation of the company. The absence of the certificates, at the time the bonds were received by the defendants, was not of itself a circumstance sufficient to put the defendants upon inquiry as to the holder's title. The holder might abandon the privilege conferred by them, and rely solely upon the company's obligation to pay the amount stipulated. The defendants, being holders for value of negotiable instruments, before maturity, and without notice, were entitled to retain them. 21 Wall. (88 U. S.) 354.]

HOTCHKISS (WHEATLEY v.). See Case No. 17,483.

Case No. 6,720.

The HOTSPUR.

[3 Sawy. 194;[1] 7 Chi. Leg. News, 65.]

District Court, D. Oregon. Nov. 5, 1874.

RESCISSION OF SEAMAN'S CONTRACT — CONTRACT AND SERVICES OF MINOR—BRITISH SHIPPING ACT.

1. Where, on a voyage from Glasgow to Buenos Ayres, from thence to Portland, Or., and back to a port in the United Kingdom, the cook and steward, who is not a seaman, is disrated a few days out from B. A. on a charge of wasting provisions, and put before the mast, it amounts to a rescission of the contract by the master, and the steward may, when he arrives at Portland, accept such rescission, and claim his discharge; but what compensation, if any, he shall have for his services depends upon the particular circumstances of the case.

[Cited in The Mary C. Conery, 9 Fed. 223; The Topsy, 44 Fed. 634.]

2. A contract by a minor to serve as a seaman is a voidable one, and may be avoided by such minor at any time before its completion, and thereafter he is not bound by it in any manner, neither can he sue upon it for his services, but may recover the value of such services, allowing for any injury which the owners may sustain by reason of the avoidance of the contract.

[Cited in The Topsy, 44 Fed. 636.]

3. Where, under the British merchants shipping act of 1854 (17 & 18 Vict. c. 104), the duration of a voyage is described in the shipping articles as probably twelve months, a seaman signing the articles engages absolutely to make the voyage, whether the duration of it be more or less than that period, provided the master in good faith endeavors to accomplish the voyage within the time mentioned.

Suit for seaman's wages.

David Goodsell, for libellants.

William H. Effinger, for claimants.

DEADY, District Judge. The libellants, Thomas M. Stewart, John Brown, William McMasters, Llueling Griffiths, Archibald Crawford, Charles Freund, and John McFarlane, on March 10, 1874, signed articles for a voyage on the British bark Hotspur, "from Glasgow to Buenos Ayres, and, or if required, to any port or ports in South America, North or South Pacific, Australian colonies, Indian or China seas, Mauritius, West Indies, British North America, or states of America, until the ship returns to a final port of discharge on the continent of Europe or the United Kingdom, with liberty to call at any port for orders. Probable period of engagement, twelve months."

The vessel arrived at Buenos Ayres on May 28, and left there in ballast, about July 13, for this port, where she arrived on October 20. A short time out from Buenos Ayres, the master put Stewart, who shipped and served up to that time as cook and steward, in irons for three hours, and then disrated him and put him before the mast, upon a charge of wasting provisions. From thenceforth Steward was made to do sailor's duty on deck and aloft, besides being often selected to do drudgery and disagreeable or unnecessary work about the ship, even, sometimes, when it was his watch below. He was not a seaman, and when aloft was subject to dizziness, on account of which his life was in danger.

Apart from the charge of "wasting the provisions," no complaint is made of his conduct either before or after being disrated. He has three certificates of discharge from service on British vessels since 1872, in which his capacity and character as "cook and steward" are marked "very good." His appearance upon the witness stand indicated that he is an intelligent, well-behaved and industrious man.

At this port, libellant demanded his discharge of the master, and being refused, he brought this suit for his discharge and wages. The evidence upon the charge of wasting the provisions is very meagre and unsatisfactory. The master carried the key of the locker, and was always present when the stores were weighed out. The log-book is not produced, and it does not appear that any entry of the transaction was ever made therein. I am inclined to the opinion, that the master, in putting libellant in irons and disrating him, acted without sufficient cause, and that in sending him before the mast, and treating him as he afterwards did, he acted harshly, if not cruelly.

But admitting that libellant was properly disrated, I think he is entitled to his discharge. By disrating him, the master abrogated the contract to serve as cook and steward, as far as he is concerned. This contract being thus terminated, the master ought not to be allowed to hold the libellant to other service against his will. True, if the libellant desires it, he may be bound to keep him on board, and return him to the final port of discharge; and in such case he might lawfully require libellant to do such duty on the vessel as would be reasonable under the circumstances. But where the person disrated is unwilling to longer remain on board, I do not think the master has any power to compel him to remain, and serve in a capacity totally different from that in which he engaged. The master, so far as appears, not intending to restore him to his position as cook and steward, the libellant is entitled to his discharge. No authority has been cited upon this question, but this conclusion seems to follow from the application of general principles to the case.

As to the question of wages, I am not clear that the libellant is entitled, under the circumstances, to recover according to the rate stipulated in the shipping articles—four pounds five shillings per month. Deducting one month's advance, and from the remainder one-third of the same, will leave about ninety dollars, for which sum the libellant must have a decree.

Crawford, Brown and Griffith, as appears

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

from their testimony and the shipping articles, are minors. On this ground they now avoid this contract, and seek their discharge. This is a voidable contract, and may, therefore, be avoided by these minors at their pleasure. Having elected to avoid it, it is abrogated, and the master has no longer any authority over them or demand upon them by reason of it. The result is they are discharged. The law of both Great Britain and the United States allows an infant the personal privilege of avoiding such a contract at any stage of the voyage, and the owners must be supposed to have contracted with him on this basis. They were to be bound, but the infants were at liberty to avoid the agreement. 1 Pars. Cont. (3d. Ed.) 262; Vent v. Osgood, 19 Pick. 572; Nickerson v. Easton, 12 Pick. 110; Moses v. Stevens, 2 Pick. 334.

Upon avoiding the contract, the minor cannot sue upon it, but is entitled to recover a reasonable compensation for his services, as though no such contract had been made. Medbury v. Watrous, 7 Hill, 111; Moses v. Stevens, supra. In ascertaining the value of libellants' services, a deduction must be made for any injury which the owners will suffer by reason of the sudden termination of the contract. Pars. Cont. 263, n. f.; Moses v. Stevens, supra.

Crawford shipped as an able-bodied seaman for the wages of three pounds ten shillings per month. Griffith and Brown shipped as ordinary seamen, the former for the wages of three pounds, and the latter two pounds per month. It appears that the bark is loading with wheat for a port in the United Kingdom. The wages out of this port for such a voyage, for able-bodied seamen is from thirty dollars to forty dollars per month, and for ordinary seamen twenty dollars to thirty dollars. Allowing the vessel five months to return in, the owners will have to pay to persons employed to take the place of these libellants, in addition to the wages paid them, a sum equal to one hundred per centum of such wages for that period. So far they are directly injured by the avoidance of this contract under the circumstances stated.

Deduct, then, this sum from each of the libellants' wages for seven and one-half months, and also the one month advance, and the remainder is the amount for which they are entitled to recover. [According to this, Crawford is entitled to $70, Griffith $60, and Brown $40.][2]

It is objected on the part of the claimant, that this court ought to decline jurisdiction of a suit by a seaman against a foreign vessel, unless it be a case of hardship. Not admitting, but that this court, in time of peace, ought to take jurisdiction of any suit brought by a seaman against a foreign vessel, except where otherwise provided by treaty, and referring to what this court said upon this subject in The Hermine [Case No. 6,409], it is sufficient in this case to state the fact, that unless this court takes jurisdiction of this libel, there will be a failure of justice. By avoiding their contracts, as they lawfully might do, these minors became separated from the vessel in a foreign port, and if not allowed to maintain a suit in this court against her, for the compensation to which they may be entitled, they will be without remedy.

Freund and McFarlane, as well as Stewart, Brown and Crawford, also claim that they were discharged on the morning of October 29, because the mate, having, by the previous direction of the master, ordered them to go on the wharf and truck sacks of wheat to the vessel, and they having refused, on the ground that such work was not ship's duty, said to them, with many opprobious and obscene epithets, "Don't want you any more, go below," and ordered the cook not to give them any breakfast. A few minutes after this scene, the master came out of the cabin, the mate in the mean time having told him what had occurred, and went ashore. The men saw him go off, but nothing passed between them. The men went ashore in the course of an hour and met the master, who asked them what was the matter. They gave him their account of the transaction, and said the mate had knocked them off, and they had come ashore to get their breakfasts and a place to stay. The master replied that the mate had no authority to knock them off, to go back on ship-board, and they should be fed, whether they worked or not. The men declined to go, and seemed to think they were then at liberty to do as they pleased about the matter. The master then asked them to go with him to the British consul. They replied as if they might meet him there, but did not. On the following Friday evening they went aboard and got their chests and left the vessel.

By the custom of this port seamen are not required to lade the vessel. Unless, then, the libellants have expressly agreed to lade the vessel, the order to truck wheat was unlawful. But the simple order did not discharge the men nor justify their leaving the ship. If they were willing to assist the stevedore, so as to speed the lading and departure of the ship, they might do so, and if not, there was no harm done in asking them. Neither is it at all clear that the mate intended to knock the men off. The direction to "go below"—into the forecastle—was a lawful one, and may have been intended and understood in connection with what preceded it, as a declaration—if you won't truck wheat, there is nothing else for you to do, go below.

But be this as it may, the mate had no power to discharge the libellants, and if he attempted to do so, instead of clutching at

[2] [From 7 Chi. Leg. News, 65.]

the circumstance as an excuse to leave the vessel and recover their wages, they should have appealed to the master the first opportunity. In any case, after meeting the master on the shore and being informed by him that the mate had no authority to knock them off, and being directed by him to return on board, with the assurance that they should have their meals and need not work, they ought to have returned to duty at once.

Their refusal to do this, taken in connection with all the circumstances of the case, indicates that the libellants were seeking an excuse to leave the vessel, with the law on their side, so that they could recover their wages for the outward voyage, and be discharged in a port where wages are much higher than the final port of discharge to which the vessel was bound.

For the reason suggested, the libellants were not discharged by the action of the mate on the occasion in question, and therefore they are not entitled to recover anything for their services. Unless this contract is substantially violated by the master, no wages are due upon it to the seamen, until the final completion of the voyage. In some respects the mate's conduct was very reprehensible and his testimony equally unsatisfactory. If the libellants, after time for reflection, had gone back to the ship and proffered to return to duty, and been refused, in a suit for wages the court would have probably excused their temporary absence, although a legal desertion, on account of the mate's conduct towards them in the first instance. But being, as I suppose, desirous to quit the ship, and at the same time thinking they had a technical advantage by which they might recover their wages, notwithstanding the non-completion of the voyage, they refused to return to duty even when informed by the master that the mate had no authority to knock them off, and that they would not be required to handle cargo. It turns out that they were mistaken in their scheme, and must lose the wages earned unless they return to duty and complete their contract.

It is also insisted by counsel for libellants that the barque will not be able to reach a port in Europe or the United Kingdom within a period of twelve months from the date of leaving Glasgow, and that therefore the sailing to this port was a substantial deviation from the voyage described in the articles, on account of which all the libellants are entitled to be discharged and recover the wages earned up to this time.

These articles were executed under section 149 of "the merchants' shipping act, 1854" (17 & 18 Vict. c. 104), which provides that the articles, among other things, shall contain "the following particulars as terms thereof: (1.) The nature, and as far as practicable, the duration of the intended voyage or engagement."

Of course it was impracticable to state the exact duration of the voyage contemplated in these articles. Therefore it was sufficient to approximate to it. Accordingly it was not agreed that the voyage should not extend beyond or fall within twelve months, but only that its duration would probably be twelve months. From Buenos Ayres, the master was at liberty to go to a port or ports in any of the countries or divisions of the globe mentioned in the articles, but only to one of them. This option he has exercised in coming to this port. From here he is bound to proceed directly and with all convenient dispatch to a port of final discharge in Europe or the United Kingdom. If in so doing, more than twelve months are consumed, it is a part of the engagement of the libellants that they will remain by the vessel. They have contracted to serve for the voyage absolutely, and for the necessary time to make it in, be it more or less than twelve months.

Of course, if the voyage was negligently or wantonly delayed for any considerable period over twelve months [say, six months],[3] the engagement of the libellants would be at an end, whether the voyage was or not. The implied undertaking of the master is that there will be an honest and intelligent effort to make the voyage within the time mentioned. If this is done, the libellants took the risk of all unavoidable delay when they contracted for the voyage.

Certainly, it must have been expected by libellants, when they signed these articles that the length of the voyage might be at least two months over or under twelve months. Subject to this contingency, at least, they made this agreement. It is quite certain that the Hotspur will complete her voyage inside of fourteen months. This calculation allows six and a half months for the return trip. But it is also probable—and that is all the certainty the articles require—that she will make it inside of the twelve months.

[Let a decree be entered for Stewart for $90, for Crawford for $70, for Griffith for $60 and for Brown for $40, with costs of suit; and as this calculation is made upon a gold basis, let ten per cent. be added to these amounts, upon the supposition that the decree will be satisfied with currency; and as to Freund and McFarlane that the libel be dismissed with costs to the claimant.][3]

Case No. 6,721.

HOUGH v. FIRST NAT. BANK.

[4 Biss. 349.][1]

District Court, D. Indiana. June, 1869.

BANKRUPTCY—PREFERENCE.

1. A few days before an adjudication of bankruptcy, the defendant, a creditor by note of $1000, aware of the insolvency of the bankrupts, and having in the bank a general deposit

[3] [From 7 Chi. Leg. News, 65.]

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

of $772, previously made by the bankrupts, received from them a check for said amount, deposited and applied the same on the note in satisfaction of $772 thereof, and at the same time received from the bankrupts $228 in payment of the residue of the note. *Held*, that the transaction as to the check on the deposit was a mere adjustment of mutual debts, and not a fraudulent preference within the meaning of the bankrupt law [of 1867 (14 Stat. 517)].

[Applied in Robinson v. Wisconsin, M. & F. Ins. Co. Bank, Case No. 11,969.]

2. The receipt of the $228 by the bank in payment on the note was a fraudulent preference; and the assignee was entitled to recover it back from the bank.

[This was a suit by John Hough, assignee in bankruptcy, against the First National Bank of Ft. Wayne, to recover certain money paid with intent to give illegal preference.]

Porter, Harrison & Fishback, for plaintiff.

Morris & Gordon, for defendant.

McDONALD, District Judge. This is an action of assumpsit. The plaintiff sues as an assignee in bankruptcy. The substance of the case made by the declaration is, that in May, 1868, a few days before the parties represented by the plaintiff were adjudged bankrupts, and being indebted to the defendant in the sum of one thousand dollars, they paid this debt to the defendant with intent to give the defendant a preference over their other creditors; and that the defendant received this payment knowing that the bankrupts were then insolvent, and in fraud of the bankrupt law. The object of the suit is to recover back the money thus paid. The defendant has pleaded the general issue, and the parties, waiving a jury, have submitted the issue to a trial by the court.

The facts in proof are substantially these: The bankrupts had executed a note of one thousand dollars, payable at the banking house of the defendant, on the 15th of May, 1868. The note was payable to the order of a third person, who had indorsed it in blank, and thus perfected, it was negotiated to the defendant. By the law, the note had days of grace, the last of which was May 18, 1868. On the 15th of that month the bankrupts had a general deposit in the defendant's bank to the amount of seven hundred and seventy-two dollars. On that day an officer of the bank requested them to pay this money to the bank on said note. The bankrupts thereupon delivered to the officer a check on the bank for the amount of their deposit; and this was credited on the note. A few days afterwards and before the adjudication of bankruptcy (which occurred on the 27th of May, 1868), the bankrupts paid to the defendant two hundred and twenty-eight dollars, the residue of the note. At the time of these transactions, the officers of the bank well knew that the bankrupts were insolvent. And from their conduct it is evident that the officers of the bank demanded the application of said deposit to said note on its first day of grace, under an apprehension that if it was delayed till the third, other creditors of the bankrupts would obtain the deposit in the meantime.

Such is the evidence. Is it sufficient to justify a finding for the plaintiff? The 35th section of the bankrupt law provides that, if any person, being insolvent or in contemplation of insolvency, shall, with a view to give preference to any creditor, make any payment to such creditor within four months next before the filing of a petition by or against such person in bankruptcy, the creditor receiving the payment, having at the time reasonable cause to believe such person to be insolvent, shall be liable, in an action by the assignee, for the amount of the money so paid.

Under this provision of the law, there can be no doubt of the liability of the defendant for the two hundred and twenty-eight dollars, paid on the note as aforesaid. For, as to this amount, the evidence brings the case both within the letter and spirit of the law.

But as to the seven hundred and seventy-two dollars credited on the note, there is much more doubt. If, in substance, this was a payment, the bank is liable to repay it to the assignee. But if it was substantially merely an adjustment of mutual debts, the bank is not liable.

The 20th section of the bankrupt act declares that in all cases of mutual debts or mutual credits between the bankrupt and his creditors, the account shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid. This the law allows to be done after the debtor has been adjudged a bankrupt. And if the adjustment may be made after the adjudication, surely it may lawfully be made before. The only question, therefore, is, was the checking on the deposit in the bank and the crediting of the amount on the note in substance such an adjustment, or must it be regarded as a payment? I think it was not, either technically or virtually, a payment; and I think that in substance it was an adjustment of mutual debts. The bankrupts owed by note a debt of one thousand dollars to the bank. By the general deposit, the bank owed a debt of seven hundred and seventy-two dollars to the bankrupts. These were in every sense "mutual debts." The operation, performed by means of a check on the bank and the credit entered on the note, whatever the parties may have called it, was really and virtually nothing more nor less than setting off the deposit of seven hundred and seventy-two dollars against that amount of the debt evidenced by the note. It was not, therefore, in any legal sense a payment, but a set-off. And if so, was it any violation of the bankrupt law? We have already seen that such a set-off may lawfully be made after the adjudication of bankruptcy. And there can be no doubt that, even without the act or consent of the

parties concerned, the court should, in such a case, itself decree the set-off. Consequently the transaction in question could not have been unlawful.

We may test the legality of this matter in another way. Suppose that the adjustment of these debts had not been made till after the adjudication of bankruptcy, we have seen that by the very words of the act it could then be made. And the result would be exactly the same in either case. Shall the court condemn a man for doing what the court itself does?

Again, whom does this arrangement of these mutual debts injure? The gravamen of the present action is a supposed fraud effected by the attempt to give a preference to the defendant over other creditors of the bankrupts. Now, there can be no fraud without an injury. But if this transaction had never happened, and these mutual debts had remained in statu quo till the debtors were adjudged bankrupts, then, as we have shown, the court would have applied this seven hundred and seventy-two dollars on the note of one thousand dollars by way of set-off precisely as the parties have done; and the assets to be distributed among the creditors would have been exactly the same as they will be if we allow the transaction under consideration to be valid. In either case, the distributive share of each creditor will be precisely the same, consequently, no creditor can be injured by the transaction, and no fraud can be perpetrated by it.

It has been urged that this transaction cannot be a set-off of mutual debts, because the note was not due at the time. By the face of the note it was due on the very day on which the check was drawn. But it was governed by the law merchant; consequently, it had three days of grace, and was not demandable till the third day thereafter. But the note was mature on the first day of grace; and the makers had the right on that day to settle or pay it. And they did settle it by way of part payment and part set-off on that and a subsequent day.

Moreover, since by the statute of Indiana a debt may be set-off though it matures after action brought, it is certain that in any action brought by the assignee against the bank for the deposit, the bank might have pleaded the note as a set-off; so that in no event could this deposit have become assets in the hands of the assignee, even though the adjustment of these debts had never been made by the parties. But I do not concede that if the note had not matured, the adjustment would have been unlawful as preferring a creditor.

With this view of the case, I cannot find that the bank ought to refund the seven hundred and seventy-two dollars which it held on deposit. But as to the two hundred and twenty-eight dollars, that was a payment, and nothing else; and it plainly gave the bank a preference in violation of the law. I must therefore find that sum with interest against the bank. Accordingly, I find the issue for the plaintiff, and assess his damages at two hundred and twenty-eight dollars and interest.

NOTE. A depositor in bank may, before its bankruptcy, have his deposit credit set off against his indebtedness as indorser upon a note held by the bank and duly protested. If the parties before bankruptcy do what the law allows, and the indorser take up the note, it cannot be recovered against him. Winslow v. Bliss, 3 Lans. 220.

HOUGH (MANCHESTER v.). See Case No. 9,005.

HOUGH (MOORE v.). See Case No. 9,766.

Case No. 6,722.

HOUGH v. RICHARDSON et al.

[3 Story, 659.] [1]

Circuit Court, D. Maine. May Term, 1845.

FALSE REPRESENTATIONS — RESCISSION OF CONTRACT—EQUITY PLEADING—PRINCIPAL AND AGENT—CAVEAT EMPTOR.

1. Where, in a treaty for the sale of property, the vendor makes material misrepresentations, by which the purchaser, having no knowledge, or means of knowledge, in relation thereto, is actually deceived to his injury,—a court of equity will rescind the contract in pursuance thereof, although it do not contain the misrepresentations; and it matters not, in such a case, whether the misrepresentations be the result of mistake or fraud.

[Cited in Ferson v. Sanger, Case No. 4,752; Seeley v. Reed, 25 Fed. 365.]

[Cited in Pratt v. Philbrook, 41 Me. 138; Smith v. Countryman, 30 N. Y. 671; Clark v. Potter, 32 Ohio St. 61; White v. Sutherland, 64 Ill. 191; Durkin v. Cobleigh, 156 Mass. 112, 30 N. E. 474; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16.]

2. But where a purchaser relies upon his own judgment, uninfluenced by any misrepresentations, and has full means of knowledge within his reach, a court of equity will not relieve him from his bargain.

[Cited in Warner v. Daniels, Case No. 17,181; Ferson v. Sanger, Id. 4,752; Marsh v. Whitmore, Id. 9,122.]

[Cited in Port v. Williams, 6 Ind. 222; Gatling v. Newell, 12 Ind. 142; Shaddle v. Disborough, 30 N. J. Eq. 381.]

3. An answer in equity to facts charged in the bill is to be taken to be true, until the contrary is clearly established.

[Cited in Seeley v. Reed, 25 Fed. 364.]

4. Where A and B gave a bond to C, conditioned to make a conveyance of certain timber land, provided C should elect to buy the same on certain terms, within thirty days,—or should make a sale thereof within the same time, in which case, only one half of the excess over a certain price was to be paid to A and B,—and C did make sale of the land, and A. and B received one half of the excess of the price over the stated sum, and made a deed of conveyance thereof to the purchaser,—it was *held*, that C was the agent of A and B in the sale, and they were bound by his representations.

[Applied in Henderson v. San Antonio, etc., R. Co., 17 Tex. 560.]

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[1] [Reported by William W. Story, Esq.]

5. Where C gave a certificate, that certain lands, which he had "partially explored," contained, "as far as my knowledge extends," a certain average of timber, and it appeared that the purchasers, to whom it was given, had as full means of knowledge as C,—it was *held*, that they were not entitled to place implicit reliance thereon, and make it the basis of their contract; but that they should have investigated the grounds of the opinion therein expressed, and the extent of the exploration by C.

6. Where a bill in equity was brought to set aside a sale of certain timber lands seven years after the purchase thereof, during which time the agent of the purchaser had made two explorations of the land, and had caused a large quantity of timber to be cut therefrom—it was *held*, that the purchasers had full knowledge or means of knowledge of the condition of the lands, through their agent, which they were bound to exercise, before cutting down timber, and locating the property as their own; and that the bill was not maintainable after so great a lapse of time,—particularly as it set forth no new discoveries in relation to the quantity and value of the timber, which might not have been obtained in a single year, and as the evidence was obscured as to material points.

[Cited in Warner v. Daniels, Case No. 17,181; Fisher v. Boody, Id. 4,814.]

[Cited in Dodge v. Essex Ins. Co., 12 Gray, 67.]

7. Whatever is known to an agent is, in contemplation of law, known to the principal, and the latter cannot aver his ignorance thereof.

[Cited in Veazie v. Williams, 8 How. (49 U. S.) 156; Goodenough v. Warren, Case No. 5,534.]

[Cited in Brannon v. May, 42 Ind. 101.]

Bill in equity, to rescind a contract respecting land in Carmel, Maine, and for other relief. The bill in substance stated, that Joshua Richardson, of Portland, in the state of Maine, merchant, and a citizen of the said state of Maine, and of the United States, Charles Mussey, of the said Portland, merchant, and a citizen of the said state of Maine, and Nathaniel F. Deering, also a citizen of the said state, and of the United States, at a time prior to the twelfth of June, A. D. 1835, were the owners of and seized of, as tenants in common, of certain lots of land, situated in the town of Carmel, in the county of Penobscot, and state of Maine, aforesaid, (here follows a description of the lot), the number of acres in the whole being three thousand seven hundred and ninety-two and one-half acres, more or less. And also being seized of all the ministerial and school lands in said town of Carmel, containing eight hundred and eleven and one-eighth acres, particularly bounded and described in Elijah Hilliard's deed, as treasurer of the trustees of the said fund, dated June 19, 1833. And being so thereof seized, were desirous of selling the same at a great price. And the better to effect the said object, at some time previous to the thirtieth day of June, 1835, and at what particular time being unknown to the plaintiff [Benjamin K. Hough], he prays that the said Richardson, Mussey and Deering may be holden to disclose and make known, did give to William Moulton, of Portland aforesaid, merchant, a citizen of the said state of Maine, and of the United States, a bond or obligation, conditioned to convey the said lots of land on certain terms and conditions therein set forth and expressed; and the plaintiff charges, that if such were not the fact, that such bond or obligation was given to the said Moulton, (which fact he prays the said Richardson, Mussey, and Deering may be held to disclose), the said Moulton was by them employed, on some terms, as their agent, either for some specific reward, or such sum as the said Moulton could dispose of and contract to sell the same, over and above a fixed stipulated price, to sell and dispose of the said lots of land to the plaintiff and others, or some other persons: That the said Richardson, Mussey, and Deering, combining with the said Moulton, to sell such lots of land or a portion thereof, to the plaintiff or others, at a greatly inflamed price, and well knowing that the said lots of land were, in fact, of little comparative value, and had not standing and growing thereon more than two thousand of sound pine timber to the acre, on an average of the whole quantity of land contained in the said lots, suitable to be sawed and cut into boards, and exclusive of a large quantity of small growing timber, not fit for that purpose; or else being grossly ignorant of the quantity of timber on the said lots, being sound pine timber, and being also grossly ignorant of the actual value of the said lands and the quantity of timber thereon, did, on the twelfth day of June, 1835, procure one George R. Herrick, (who, as the plaintiff charges, either never did partially explore said lands, or else was grossly ignorant, or fraudulently combining with said Richardson, Mussey, Deering, and Moulton, to aid in selling the said lands at a greatly inflamed price), to give a certificate of the following tenor and effect, to wit: "This is to certify, that I have partially explored the lands in the town of Carmel, which are bonded to Mr. William Moulton, and, as far as my knowledge extends, there is an average of eight thousand feet or more of sound pine timber per acre, exclusive of a large quantity of small growing timber, hard wood, cedar, mixed growth, &c. This timber is on good water for driving logs, and the land is good farming land. (Signed) George R. Herrick."

And the plaintiff charges, that the said William Moulton, acting as well as the agent of the said Richardson, Mussey, and Deering, as for himself, and on his own behalf, having thus possessed himself of the said bond or obligation in writing, from the said Richardson, Mussey, and Deering, to himself, and being furnished also with the aforesaid certificate of the said George R. Herrick, did apply to the plaintiff, to become, with others, the purchaser of the said lots of

land, so as aforesaid described; and to induce the plaintiff to become such purchaser, with others, did with the full knowledge, consent, and assent of the said Richardson, Mussey, and Deering, and at their request, exhibit to the plaintiff the aforesaid certificate, as containing a true description of the quality of the said lots of land, of the quality, kind and quantity of timber standing and growing on the said lands; and in addition to exhibiting the said certificate, did then and there represent to the plaintiff, and assure him, that the said lots of land were in all respects equal to what the said Herrick had, in the said certificate, affirmed. And that in truth and in fact, the timber exceeded in quantity the amount specified in the said certificate; and that it would amount to ten thousand, on an average, to the acre, of such timber as was specified in the said certificate. Whereas the plaintiff charges the contrary, and that in truth and in fact, the quantity of timber, such as is specified in the said certificate, and as represented by the said Moulton, did not exceed two, or at most three thousand on the acre, on an average of the whole of the said tract or lots of land, such as specified in the said certificate; and that the said lots of land were in no respect equal to what the said certificate represents, and such as the said Moulton represented and assured to the plaintiff. That the said Richardson, Mussey, Deering, and Moulton, at the time aforesaid, were well knowing, or might by proper and careful inquiry and examination, have well known, that the said lots of land did not, in fact, have standing and growing thereon any such quantity and quality of timber as the said certificate purported, and as the said Moulton represented and assured the plaintiff; and that the said land was, in fact, of a much poorer quality in all respects. That the said Richardson, Mussey, Deering, and Moulton, either did, fraudulently combining to defraud the plaintiff and others, who might become purchasers, falsely and fraudulently obtain said certificate; and through the said Moulton, represent the said certificate to be true, and that in fact there was more timber on the said lots than the said certificate purported; or else, from gross and culpable negligence, and want of proper inquiries and investigation into the capacity and honesty of the said Herrick, and of the facts in the said certificate stated, did impose on the plaintiff as true in relation to all the particulars relating to the said land, and from which a fair and just estimate of its value might be formed, what in fact was wholly untrue. And that relying implicitly and fully, and wholly on the said certificate, and the representations and assurances of the said Moulton, as to the quantity and quality of the timber and other growth on the said land, and of the quality of the said land, and the facility of getting the said timber to a market, the plaintiff did consent and agree to become the purchaser of five-eighths, in common, of the said lots and tracts of land before described and set forth, at a great and enormous price, to wit, within a fraction of seven dollars and fifty cents per acre. And that on the 30th day of June, A. D. 1835, the plaintiff did, in good faith, carry into full effect the bargain and agreement, so as aforesaid made, through said Moulton, for five-eighths of the said lots of land, and together with one Joseph H. Cotton, one David Kimball, and one Samuel Kimball, who, as the plaintiff avers and charges, under like representations, assurances and inducements, which influenced the mind of the plaintiff, became the purchasers, each of one-eighth of the said lots of land, did pay, and secure to be paid to the said Richardson, Mussey, Deering, and Moulton, the sum of thirty-four thousand five hundred and twenty-seven dollars eighteen one-hundreths as a consideration for the said lots and tracts of land so as aforesaid described; of which said sum the plaintiff did pay and secure five-eighths, amounting to twenty-one thousand five hundred and seventy-nine dollars, and a fraction; and did then and there receive a deed from the said Richardson, Mussey, and Deering, conveying to the plaintiff and the said Cotton, David Kimball and Samuel Kimball, the afore-described lots and tracts of land, to hold to them and their heirs in the proportions of five-eighths to the plaintiff, and one-eighth each to the said Cotton and Kimballs. And thus, as the plaintiff charges, he has been induced and persuaded, (either by a fraudulent combination of the said Richardson, Mussey, Deering, and Moulton, to procure to be made, or to make, a false and fraudulent certificate of the quantity and quality of the said lands, and to fortify it by the assurances of the said Moulton; or, by a gross and culpable mistake on the part of the said Richardson, Mussey, Deering, and Moulton, together with the said Herrick, as to the quantity, kind and quality of the said timber, and the quality of the said land, imposed on the plaintiff as the truth), to purchase five-eighths of the said lots and tracts of land, so as aforesaid described, at three or four times their just and actual value; and to pay and secure to be paid the amount of the said inflamed and imaginary value. All which actings, doings and omissions, by and on the part of the said Richardson, Mussey, Deering, and Moulton, the plaintiff charges to be against equity and good conscience, and tending to the total subverting of the plaintiff's just rights in the premises, and defrauding the plaintiff of his property, and bringing the plaintiff to poverty and ruin. The bill prays, that the said defendants may be required and commanded, on receiving a deed reconveying the title to the said lots and tracts of land, that they may be holden to pay back to the plaintiff the

money he has paid, with interest; and that the said notes and securities given by the plaintiff, and now held by the said defendants, may be given up to the plaintiff, to be cancelled. And that the said defendants may be prohibited and restrained from negotiating the same, and that the plaintiff may be restored to all he has lost by means of the said purchase of the said lands, under the circumstances aforesaid; and that such further relief in the premises may be granted to the plaintiff, as to your honors may seem meet and just, according to the course of courts of equity, and as justice in the premises requires.

The answer of Richardson and Deering in substance stated, that on the first day of May, 1835, these defendants and one Charles Mussey purchased of Isaac Frye, Daniel Brown and David Webster certain lots of land in the town of Carmel, and county of Penobscot, being the same described in the complainant's bill, and received a deed thereof, dated May 1, 1835. That, being seized and possessed of the said land, these defendants and the said Mussey, on the thirteenth day of the same May, made and executed a bond to one William Moulton, then of Scarborough, now of Portland, of which a copy is hereunto annexed, and marked "A," and which these defendants pray may be taken as a part of this answer. That at the time of the said purchase by the defendants, and of the execution and delivery of the said bond, the defendants knew nothing of the value and character of the said land except from report, having never examined the same, or caused it to be examined; but they believed it to be valuable, partly on account of pine timber which they supposed to be upon it, of which, however, they did not suppose there was a very large quantity; and their belief of the value of the said land was further and principally founded upon the large quantity of wood which they supposed it to contain, and its nearness to the Bangor market, and to navigable waters. That the aforesaid bond was executed by the defendants, at the suggestion of the said Mussey, and in accordance with what they understood from the said Mussey to be the wish of the said Moulton, and without any representations, or declarations of any kind or description, to the said Moulton, or any other person, touching the character or value of the land, the said Moulton neither requiring nor requesting any information upon the subject, and these defendants, in fact, supposing that the said Moulton knew more about the said land than they did, or could know, he being practically acquainted and conversant with such matters, and they being merchants and having no experience therein. That the defendants made no other bargain or contract at that time, with the said Moulton, than is set forth in the said bond; and that by reason of the non-performance, by the said Moulton, of the conditions thereof, within the time therein limited, all obligation, on account of the said bond, entirely ceased on the part of the obligors therein named.

And the defendants further answering, say, that the bond aforesaid sets forth truly and wholly, all and every kind of bargain and agreement between the defendants and the said Moulton, touching the subject matter thereof; that the said Moulton was never, in any way, the agent of the defendants, or by them employed, in reference to the said land, or for the purpose of disposing of, or selling the same, in any way whatever, or on any terms, other than as appears by the said bond; that the original terms of the said bond were agreed on between the said Mussey and the said Moulton, by the said Mussey communicated to the defendants, and by them assented to, and the said bond executed accordingly. But the defendants aver, that they were no farther interested in the said contract than to receive the sum of five dollars and fifty cents per acre for their interest in the said land, in case the said Moulton should purchase the same, under, and by virtue of the same, that the provision inserted therein, with regard to the further amount of one half of the excess of such sale, over and above five dollars and fifty cents an acre for said land, was for the sole and entire benefit of said Mussey, with which these defendants had nothing to do, in which they had no interest, from which they never received, or expected to receive, any benefit whatever, and of the existence of which provision, if they ever knew it, these defendants lost all recollection—and they aver that no sale was ever effected under said bond, or by virtue thereof, but the same afterwards became wholly ineffectual, and inoperative, as is herein before set forth. And whether the terms of the said bond, with all the circumstances attending the same, from its inception to the time when it became inoperative as aforesaid, made and constituted the said Moulton their agent, these defendants will not undertake to say—but certain it is, these defendants never intended so to constitute the said Moulton, or contemplated any thing more than a sale to him or his assigns, of the interest of these defendants in the land aforesaid, at the price of five dollars and fifty cents per acre, should the conditions of the said contract be complied with on the part of the said Moulton; and these defendants respectfully submit whether, in reference to the facts herein set forth, and those herein after stated, constituting all the transactions between these defendants and the complainant and his associates, the said Moulton can in law, or equity, be considered as in any manner the agent of these defendants, for whose acts they can be held responsible, or as in any greater degree their agent than he was the agent of this complainant and his associates.

And these defendants further answering, say, that afterwards, and before the thirtieth

day of June, A. D. 1835, they were informed either by said Moulton, or by said Mussey, that the said Moulton had contracted to sell the said land, and that he, the said Moulton, was ready to complete the said sale, and to purchase the same of these defendants and the said Mussey, and to pay them therefor the sum of five dollars and fifty cents per acre, if they would consent to sell the same, as was named and set forth in the bond aforesaid, which had then become inoperative, and was in no degree binding upon these defendants and said Mussey. And these defendants were then further informed that said Moulton had agreed to sell the said land to the complainant and others, his associates, and of his, the said Moulton's desire that a deed of the said land might be made and executed to the said complainant and others, and the notes of the said purchasers received in payment therefor, according to the terms of the bond aforesaid, to the said Moulton, in so far as related to the said sum of five dollars and fifty cents per acre. That the defendants agreed so to sell their interest in the land aforesaid, and afterwards, on the thirtieth day of June, 1835, they, with the said Mussey, executed a deed of the said land to the said complainants and others, and these defendants suppose it to be rightly set forth, as annexed to the complainant's bill, but pray that the said complainant may be held to produce the original. That they never did procure the said land to be explored, or assent to the exploration of the same, by any person; that they never knew or heard that the said land had been, or was to be, explored by the said George R. Herrick, nor did they hear of any certificate given by the said Herrick, concerning the said land, until after the service of the subpoena in this case, when they read the statement touching the same in the complainant's bill, to which this is an answer, and when, for the first time, the fact of such supposed explanation and certificate was intimated to them; that they never, until that time, heard of any representations touching the same, made by the said Herrick, or the said Moulton, either verbal or written, and never saw the certificate set forth in the complainant's bill, or heard that any such had been exhibited to the complainant, or any other purchaser, and they were never in any manner conversant of, or assenting to, any such certificate, or the exhibition thereof to any person whatever; and if any such certificate existed on the said thirtieth of June, 1835, the defendants were entirely ignorant thereof. That they have understood, and believe the fact to be, that the said Herrick, in whatever examination he might have made of the said land, or any part thereof, was employed by the complainant and other individuals associated with him, to examine and explore the same, and report thereon to them; and that whatever exploration or examination might have been made by the said Herrick, was not made until after the complainant, or some one or more of his associates, had examined the said land, or a portion of it, in person, and had contracted with the said Moulton to purchase the same, expressing his or their perfect satisfaction therewith. And whatever report and certificate were made by the said Herrick, the defendants have understood and believe the same were made in consequence of his employment by the said complainant and his associates, and not until after they had contracted to purchase the said lands, and had made a personal examination of the same. That the said certificate, if any such exist, though it purports to be dated on the twelfth day of June, was not in fact made until long after that day. And if any such certificate exists, these defendants believe that the same was given by the said Herrick, by the procurement of the complainant and his associates, for the purpose of enabling them to sell the said lands. That the defendants knew nothing of the said certificate, and of the employment of the said Herrick, if he was so employed, and gave any such certificate. And if any such certificate were given, these defendants do not believe that the complainant or his associates were influenced thereby in the purchase of the said lands, but that the same were purchased on a personal examination by the complainant, or one or more of his associates, and in consequence of his or their perfect satisfaction, derived from such examination, as to the true quality, situation, and value of said lands; for which examination the said purchasers had full power and opportunity, and which examination and inspection the defendants believe, to have been made before the said purchase, to the entire satisfaction of the said purchasers. And the defendants do not believe, that either the said Moulton, or the said Mussey, either made any representations to the said purchasers, or any one of them, concerning the said lands, by which they were induced to purchase the same, or used any artful means to bring about such a result, or were guilty of any of the fraudulent practices set forth in the bill. Certain it is, that these defendants never knew of or suspected any such, or were in any manner conniving thereto. That they originally purchased said lands as hereinbefore stated, without any examination thereof, and relying wholly on report. That they never made any representations to said complainants, or any other persons, as to the value, quality, or situation of said lands, or knew that any such were made by any person, or caused any such to be made, or assented thereto; and that they never saw said Herrick, or his certificate, or heard of any such, until the time hereinbefore stated. And the defendants insist that the said complainant can have no good reason to be dissatisfied with the said purchase, as by his bill of complaint it appears that the said land does contain at least two thou-

sand feet of good merchantable pine timber to the acre, which of itself renders the said lands well worth the amount paid therefor by the said purchasers; in addition to which, the defendants have understood and believe that the said lands contain large quantities of valuable wood, near a market and to navigable water, and also of great value for purposes of cultivation. And the defendants further answering, say, that from time to time as the notes aforesaid became payable, they, by the request of the complainant and his associates, renewed the same in part, and extended the time of payment at their request and for their accommodation, and never knew or suspected that the said purchasers were dissatisfied, or considered themselves injured in the premises, until the service of the subpoena in this case upon the defendants; but, on the contrary, the defendants had every reason to suppose, and did suppose, that the said purchasers were content with their said purchase, inasmuch as they were, and as the defendants have understood and believe, carried on lumbering operations on the said lands, and taken large quantities of valuable wood and timber from the same.

The answer of Moulton in substance stated: That this defendant, being at Bangor in the month of May, 1835, met the said Charles Mussey named in said bill of complaint, who informed this defendant that he, said Mussey, together with Joshua Richardson and Nathaniel F. Deering, also named in the said bill, owned some lands in the town of Carmel, near that city. And whether the said Mussey then proposed to give, or this defendant then requested a bond for the conveyance of those lands for some certain time, he cannot now, at this distance of time, well remember. That this defendant was not then acquainted with the said lands, which he understood were divided in lots, and lay scattered in different parts of the place; and he had no sufficient means of forming any judgment of their condition, growth and value, beyond his having occasionally passed through that town, upon the travelled road; and as he had been led thereby to form a favorable opinion thereof. That the said Mussey thereupon assured this defendant that he was going to Portland, where he should see the said Richardson and Deering, and that if they should agree, this defendant should have such a bond to be given or sent to him by mail. And this defendant accordingly soon afterwards received such a bond, bearing date May 13, 1835. That by the terms of that instrument this defendant was to have the pre-emption of those lands for the time of thirty days, upon payment therefor of five dollars and fifty cents per acre, and one half of all he should receive from any purchaser within that time over that price. And the defendant supposes, that the said lands and lots so agreed to be conveyed, are properly and sufficiently described in the said bill of complaint, and that there is the number of lots and quantity of acres therein set forth; but of this he has no certain and positive knowledge, other than from information received and taken to be true. And he further says, that he had no doubt that the said lots and lands had a certain real value in the soil, and from their situation, beside what they might also have from the wood or timber on the same, and apart, too, from such circumstances depending on judgment and opinion, as might influence the views of purchasers in the then state of the times, speculating upon the prospect of disposing of such property at advanced prices; and the more so from the circumstance that the said lands were divided off into lots for the purpose of improvement and settlement; and that he did in truth believe, that the said lots had a real value from the growth thereon other than timber trees, from the fact that wood lots in the vicinity of Bangor generally, were in demand and commanded a high price. He further also says it is true, that he was led to suppose and believe, that there was some considerable quantity of timber, with other wood on the said lands; but that he had no other or better means of judging, than other men of business like himself, whose attention was drawn to those subjects, and that he did not undertake to form any definite opinion, nor have any fixed and absolute belief in regard to the actual quantity of timber there might be thereon; nor as to the comparative value of the said lots of land in respect to the soil and situation, or various advantages which might give value to the property, in the view of general purchasers. That he did not well know that said lots of land were of little comparative value, and that the same had not standing and growing thereon more than two thousand feet of sound pine timber on an average to the acre of the whole quantity of land contained in the said lots, suitable to be sawed and cut into boards, and exclusive of a large quantity of small growing timber not fit for that purpose. And that true it is, he may have been ignorant of the whole quantity of timber on the said lots being sound pine timber, and that he may have been likewise ignorant of the actual value of the said lands, and the quantity of timber thereon: and he further says, that this complainant, and others connected with him in the purchase hereinafter stated, well enough knew that he was ignorant of the premises, and that he did not pretend to certain knowledge thereof, and that if his ignorance were so gross as alleged in the said bill of complaint, no one knew it to be so, better than the complainant.

And this defendant further answering says, that some time, to the best of his remembrance within the first week of June, 1835, he became acquainted at Bangor, with William Phipps and Henry I. Holbrook, of

Boston, who were inquiring for lands in that quarter, and afterwards with Samuel Kimball, of Boston, who wished to purchase lots in the vicinity of Bangor, and learning that this defendant had such a bond of lands, as he informed them, of four or five thousand acres in Carmel, they all concluded to go and look at them. That on the following morning, the said Phipps, Holbrook, Kimball, one James McLaughlin and this defendant went to Carmel, which was the next town but one to Bangor, for this purpose. It was on the county daily travelled road, and then contained a considerable village, and was increasing in settlement. That they had a small map or plan of Carmel, on which all the lots in that town were laid down and numbered; the lots included in the said bond lay scattered over the town, about a third part of which was then settled; and these lots were at wide distances from each other, varying from a half mile to six or eight miles, as appeared by the said map. And this defendant believes, that the same were without fences, and that their boundaries were not distinguishable by marked lines, but only upon their being ascertained by means of spotted trees; the same being generally uncleared land and much covered with wood. That they made inquiries of persons whom they met, but did not know, as to the character and quality of the land. And they were directed to one lot situated near the road, which they understood to be one of those included in the bond. That they went upon that lot and found some pine, hemlock, cedar, spruce, and many kinds of growth on it. That this defendant then stated to the other persons, with whom he went out, that this was the first time he had ever been upon the land, although he had passed the road, and that they then knew as much about the lots of land as he did. They all returned to Bangor that evening. But nothing more took place in relation thereto until the day after the great land sale, at Bangor, on the 10th day of June, 1835. That on the forenoon of that day, viz., June 11th, 1835, this defendant was again applied to by the said Phipps, Holbrook, and Samuel Kimball, who introduced him to David Kimball, Coffin, and the complainant. These all said that they wanted to purchase land, and that they should wish to buy some as near as they could to Bangor. That this defendant stated to them, that the bond which he had of the Carmel lots before mentioned, was about expiring without leaving sufficient time there for the fulfilment of its conditions, as some of them knew; and that he therefore could not engage to sell unless he could obtain a renewal of the bond. That it was thereupon proposed by them to go out to Carmel to look at the land, and that afternoon they together with this defendant went from Bangor to that place, and went upon the same lot of land that a part of them had been on before, as above mentioned. And this defendant then stated to the others then present, that it was the same lot that part of them had been on with him during an afternoon before; that they now saw the same that he had seen, and that whether the other lots were better or worse this defendant had no means of knowing; that the complainant and others appeared to be pleased with the lot, and estimated that the wood upon it was worth more and would probably pay all the price of the land from being so near Bangor; that they were together upon the land in this manner about two or three hours, and they all returned to Bangor the same evening; that this defendant was not then prepared to enter into an absolute agreement or bargain for the sale of the said lands, of which he had himself seen so small a portion, as his bond was then expiring, and lands had risen in price, and he did not know whether the owners would give another: and he was also obliged to go up the river at any early hour upon the following morning upon a previous arrangement with the said David Kimball, and Holbrook, and some others. That the complainant and others before mentioned invited this defendant to come to the Bangor House that evening, which he accordingly did, and they then were desirous to effect the purchase; that this defendant told them that he could only engage that they should have the same upon the terms then proposed, provided he could obtain a renewal of the bond from the said Richardson, Mussey and Deering; that they then accordingly entered into an agreement upon that condition, by which the complainant and others aforesaid were to purchase the said lots for seven dollars and fifty cents per acre. And that the bargain or agreement so made on that evening was finished and reduced to writing and signed on the following morning by this defendant, the complainant, William Phipps, the said Samuel and David Kimball, Holbrook and Coffin. That it has been his impression, though he is not now able to recollect so as to state the same with any certainty, that there was some stipulation on his part to pay the said purchasers a certain sum of one or two thousand dollars in case he should not be able to make or procure such conveyance; but that the said paper, if produced, would show whether there was any such stipulation. And whether this defendant was constituted the agent of the said Richardson, Mussey and Deering by virtue of the transaction above described, or whether he became so upon the subsequent agreement between himself and them in regard to the sale of the said land as hereinafter set forth, is a matter which he respectfully submits to the judgment of this honorable court. That he was not otherwise their agent, and if he did act in any manner on behalf of the said Richardson, Mussey and Deering, it was in good faith, and without any fraud-

ulent intent or combination with the said Richardson, Mussey and Deering, as charged in the said bill of complaint; that is to say, to sell said lands at a greatly inflamed price, and with sufficient knowledge that the same were of little comparative value; and he denies that he had in fact any such motive, design or knowledge, as is thus untruly and unjustly imputed.

And the defendant further answering says, that this was all and the only bargain or contract that was ever made or entered into between himself and the complainant and others, parties in relation thereto; and that an appointment was then made by the parties to meet at Portland on the ensuing thirtieth day of June, for the purpose of carrying the same into effect. That at this time he is sure he made no statements of what there was on the said lands, unless it may have been to express his opinion from what he then saw, as he had no knowledge of the same further than he has already mentioned by seeing the same with those who went out with him as stated, and he had no further means of judging than they had, and did not undertake to make any representations other than he has already set forth, of which they knew the grounds as well as he did, and had the same opportunities for observation. That this defendant told them at that time, that they must look and judge for themselves, and that they could bargain upon no other condition; and he denies that the said bargain was made with exclusive or especial reference to the same being timber lands, and says that if such had been the sole object of the purchasers, they would rather have sought elsewhere and in some other and more remote section. But that regard was had in making the said bargain and in all their conversation respecting the same, while they were looking at the land and throughout the transaction, to the general value thereof from its situation and vicinity to Bangor, and its suitableness for settlement and other advantages, as well as the wood and timber thereon. That the contract was made and the arrangements were completed in the course of that evening and the following morning; and on the same morning, to wit, June 12, 1835, at an early hour after this transaction was concluded, this defendant and the said David Kimball and Holbrook, with some others, proceeded up the river according to their previous agreement before mentioned. And the defendant denies that the said Richardson, Mussey, Deering or himself, did, on the said 12th day of June, procure the said George Herrick to give a certificate, such as is alleged and set forth in the said bill of complaint, in regard to the said lands, or that the said Herrick had any thing to do in or with regard to the said transaction, or in making any such certificate, prior to the said bargain and agreement. And the defendant denies, that the complainant or any of the said parties named in the bill of complaint, at or prior to the time of making such bargain and agreement, had or could have had any knowledge or idea of such pretended certificate. And the defendant denies, that the matter thereof, as therein expressed and as pretended in the said bill of complaint, had any influence upon the minds of any of the said parties proposing to purchase as aforesaid, to induce them to enter into any such purchase, and in particular upon this complainant. And he further says, that no such certificate was then produced or exhibited as therein pretended, or even in fact existed. And that the said David Kimball and Holbrook, and the defendant, who went up the river as aforesaid on the 12th of June, proceeded to a considerable distance and were gone ten or eleven days; and that no such certificate was made or could have had any existence in any manner with the agency or knowledge of this defendant, during that time, or until after their return to Bangor. That the first conversation respecting the procurement of any certificate in relation to the said lands, to his knowledge, took place between the said David Kimball, or the said Holbrook, and the defendant, in coming down the river on their return, or soon afterwards; and that it was then suggested by one of them, and as the defendant thinks by the said David Kimball, that it would be of use for future sale to have a certificate of that kind, and the defendant was accordingly requested to aid in procuring one. That he objected that he should not have sufficient time to go upon and explore the said lots properly; but that at their request the defendant employed the said George Herrick to go to Carmel for that purpose. That the said Herrick lived within a few miles of the town, and was supposed to have some acquaintance with the said lots, and went out accordingly, accompanied by the defendant. That they left Bangor in the morning, and partly explored the said lots, and returned to Bangor the same day; the said Herrick at that time only partially exploring two of the said lots; and he was paid for his services by the defendant the sum of five dollars, and no more, with the understanding on the part of the defendant, that he was to be repaid the same by the said purchasers.

And the defendant further answering says, that the certificate of the said George Herrick set forth in the said bill of complaint, as purporting to be dated on the twelfth day of June, 1835, if so dated, could only have been so by mistake, or at the instance and wish and with the intention signified as aforesaid, and after the completion of the defendant's contract with them as before mentioned; that the further exploration or examination by the said Herrick aforesaid was only so made at the instance of the said purchasers and the certificate so made on their procurement and behalf as aforesaid; that they or some of them, as the defendant was informed and believes, made further in-

quiries and examination for their own proper satisfaction, after their separation at Bangor on the said twelfth of June and before their meeting at Portland on the thirtieth, and in fact before the making of the said certificate by the said Herrick. And that the complainant and the said Samuel Kimball afterwards severally at different times told the defendant, that they had been upon the land together part of two days, at some time between the twelfth and twenty-second days of the said June, and being asked by the defendant how they found it, said, better than they expected, or to that effect. And the defendant further denies, that in any intermediate disposition made by the said parties and purchasers, or any of them in respect to the proportion they should take of the said lands, after making the said contract with the defendant, and before carrying the same into effect, to wit, on the said thirtieth day of June, there was any exhibition or use made of such alleged certificate, either to the complainant or others.

And the defendant further says, that it was but a few miles from Bangor to Carmel, on the common stage route to Augusta; and that several of the lots did not lay more than ten miles off; and that the character of the land and growth was equally open to observation by all who had the opportunity to visit the spot and would take pains to look or inform themselves; that it was well understood by those who went out with the defendant to Carmel to see the land as aforesaid, that it was a mixed growth of various kinds, and this corresponded with their observation so far as they saw, as well as with that of the defendant so far as he went on and examined; that the said Herrick only partially explored and examined the same, and made the same general observation, and expressed the result in terms according to the extent of his knowledge, and to his means of judgment, and no farther; nor did the defendant pursue any farther observations or inquiry. That the defendant did not and could not undertake to form any positive judgment or opinion of his own in regard to the quantity of pine timber on said lands, of which he could only form a very imperfect estimate or idea from the opportunities which he has before mentioned, in which respects he could judge no better than others who had the same opportunities, or than those who went with him. And he had no certain knowledge or opinion and belief in the premises, nor did he ever undertake to represent and guarantee that said lands contained eight thousand feet or more of pine timber to the acre, exclusive of all other growth; and he further says that he never did intend to assure the said purchasers or any of them that there was such a large quantity of pine timber on the said lands, as is now set forth and pretended in the said bill of complaint. That the defendant, after making the said agreement with the complainant and others, and after his return down the river, applied to the said Mussey, to know if he could have a renewal of the pre-emption, and informed him that he, the defendant, had made an agreement to sell the lands mentioned in the bond upon that condition. That the said Mussey was at first unwilling to renew the said bond, as he said he had been offered more for the land; but understanding that the defendant had actually made such conditional agreement, the said Mussey consented to sell the same at six dollars an acre, provided the said Richardson and Deering would also assent.

And the defendant further says, that, agreeably to the appointment made on the twelfth of June as aforesaid, at Bangor, the complainant, the said Samuel Kimball and William Phipps, on behalf of the persons so agreeing to purchase, met the defendant on the thirtieth day of June, when the said agreement was carried into effect; the consideration or price was paid or secured in money and notes with mortgage, as previously agreed upon, and the lands were conveyed by the said Richardson, Mussey and Deering to the said purchasers at their request, in the following proportions, instead of the proportions expressed in the memorandum aforesaid. The said David Kimball and Cotton not being themselves present, but sending their money and notes for their respective proportions by the complainant, who received the deeds for them. That the said Richardson, Mussey and Deering conveyed five eighths of the said land to the complainant, and one eighth to the said David Kimball, one eighth to the said Samuel Kimball, and one eighth to said Cotton, at the price agreed, and it was paid for by the said purchasers in their respective proportions. That the defendant received of the said purchase money, six thousand nine hundred and five dollars and sixty cents in money and notes, and from the complainant the defendant received four thousand three hundred and sixteen dollars, one fourth part in money and the rest in three notes for one thousand and seventy-nine dollars each, which have since been paid. And the defendant denies, that he ever did exhibit the aforesaid certificate made by said Herrick as containing a true description of said lots of land—of the quantity, kind and quality of the timber standing and growing on the said land, nor make the representations and assurances in addition to the same, as stated and set forth in the said bill of complaint. And he further says, that he did not use the said certificate with the knowledge, consent and assent of the said Richardson, Mussey and Deering, or either of them, as therein alleged and inquired of; and says that he did not express and declare to the complainant, the said Samuel and David Kimball and the said Cotton, or either of them, that the facts said to be certified in the said certificate in relation to the said

lots or tracts of land were true, or that they were true to the best of his knowledge, understanding or belief, either in terms, effect or substance—or that there was in fact more timber than was specified in the said certificate, as inquired of; and that he did not represent to the complainant and the other purchasers as aforesaid or either of them that full reliance might be placed on the certificate of the said Herrick, or on the correctness thereof as therein set forth and inquired of. And the defendant further denies that the complainant was grossly or in any wise deceived and defrauded by relying on the said certificate, and the said representations of the defendant in relation thereto, or touching the same as aforesaid; for he says that the said certificate did not exist at the time of the said agreement, nor until after the complainant left Bangor, on his return, as the defendant understood and believes, to Boston; and that the defendant did not again see him until the said thirtieth day of June, when the said contract was carried into effect, and the business finally completed; and that the said certificate was in the mean time in the hands of the defendant, and that the purport thereof was not communicated to the complainant by him, nor by any one else, as he believes. That after the said conveyances were executed on the thirtieth of June, as above mentioned, the defendant delivered the said certificate to one of the said purchasers, and as he thinks to the complainant; and that before this time neither the complainant nor either of the said purchasers saw any such certificate, so far as the defendant knows and believes, or had any knowledge of the contents thereof. And the defendant further denies, that he ever represented to the complainant and assured him that the said lots of land were in all respects equal to what the said Herrick had affirmed in the said certificate, and that the timber exceeded the quantity or amount specified in the said certificate, and that it would amount to ten thousand on an average to the acre of such timber as was specified in the said certificate. That if there were, in truth and fact, only two or three thousand feet of pine timber on an average to the acre of the said lands, all together, as now set up by the complainant; and if the said lots of lands were in no respect equal to what the said certificate represents, of which the defendant denies that he made any such assurance, the said complainant had at the time mentioned as good means as either himself or the said Mussey, Richardson or Deering had of knowing the truth thereof, and might as well by proper and useful examination and inquiry have known whether the said lots of land did, in fact, have any such quantity and quality of timber standing and growing thereon as pretended, and that the said lots of land were of a much poorer quality in all respects, if, in fact, they were so. That all the proper import and intent of the said Herrick's certificate was on behalf of the said complainant and those who became purchasers by the said agreement in offering the said lands again for sale, to induce those to whom it might be exhibited, respecting such favorable account of a partial exploration, to extend their examination so as to ascertain how far such estimate and supposition was correct; and no farther or otherwise. And the defendant further says, that he was not present at the time the said certificate of the said Herrick was made, nor did he know the purport of the same before receiving the same from the said Herrick, which was about the twenty-fifth day of June, 1835, immediately after the same was made, and before the defendant left Bangor for Portland, which he did soon after, bringing the said certificate with him; and that he retained the same until he delivered it to the complainant after the completion of the business, as before mentioned, on the thirtieth of June. And the defendant further says, that he then knew no reason to doubt the correctness of the estimate or judgment of the said Herrick, so far as it went, as it was expressed; but that he did not consider it of any importance as to the bargain, which had already been made, and well denies that the matter therein set forth existed as matter of belief in his own mind or that of the said purchasers, at the time of making the said agreement, or that any mistake or misapprehension then existed, founded on the matter set forth in the said certificate, or any further representations or statements in relation thereto, or could by any possibility exist.

And the defendant further answering says, it may be that the complainant and others, purchasers, have been disappointed in their expectation of making a profitable and advantageous resale and disposition of the said lots, and in the result of their purchase for that purpose, and that the same may have happened in consequence of a great subsequent depression of business and depreciation of property from causes of general notoriety; and that the complainant might now be glad to annul and rescind the transaction, if it were in his power, and recover back the money he has paid. But the defendant further says, that he was not aware that the complainant wished to rescind the said contract and transaction, or was willing and desirous to reconvey the said lots and tracts, or that he expected any such restoration from the defendant and others, as he pretends in his said bill of complaint, and denies that the complainant had any ground therefor. And he further says, that the subsequent payments or settlements were all made by the complainant and his associates in the said purchase, without making any complaint of injury, imposition, or deception of any kind. And the defendant further expressly declares, that he never heard of any

cause of dissatisfaction and complaint in regard to the circumstances of the said sale and purchase, until he was surprised by the commencement of this present and other accompanying suits of the said Samuel and David Kimball and the said Cotton. And he denies that he ever received any previous notice or intimation from the complainant or others, that he or they considered themselves in any manner aggrieved, or that any undue advantage had been taken, or imposition practised in the premises. And he further says that the said payments were not completed until more than five years after the time of the said transaction, and that it was not till afterwards, that this and the other aforesaid suits were brought, and that, in the meantime, the said purchasers had ample opportunity to have further explored, or ascertained and made known to him and his co-defendants the causes of their complaints. And he further says, that he is not informed when the complainant and his co-purchasers first discovered or pretended to discover the alleged difference in the quantity and quality of timber on the said lots, and the other circumstances on which they pretend to ground their petition for relief.

And the defendant well believes, that whatever there may have been in the manner complained of by the complainant and others therein associated with him, which they now set forth as true, and as entitling them to the relief prayed for in this and their several other bills of complaint, might as well have been known to him and them at some or any former time within the last six years, if due diligence were used to ascertain the same; if the same were not actually known to the complainant, of which the defendant has no knowledge or information, and prays that proper proofs of such diligence, as well as of the truth thereof as aforesaid, may be required of the complainant. And the defendant prays the judgment of the honorable court, whether, after the lapse of so much time and after such changes as may or actually have taken place in the circumstances and value of the said property, by taking off the timber and otherwise, it will set aside the said agreement and conveyance; and inasmuch as the defendant denies that any such fraud as alleged, stated and charged in the said bill was, in fact, practised; and he further denies that either he or any of the defendants, to his knowledge or belief, have concealed or attempted to conceal from the complainant and his co-purchasers, or used any means whatever to conceal from him or them any matter or thing material to his allegations in the premises. That he has faithfully endeavored to answer the allegations and circumstances stated in the said complainant's bill of complaint, fully, directly, explicitly and truly, and according to his best knowledge, recollection and belief thereof; and that if there should be any mistake in any part of his statements, (of which he is not aware,) the same is not owing to any carelessness or inconsideration on his part, but that it is mainly attributable to the lapse of time, and undisturbed reliance upon the substantial truth of what he has herein stated, in the absence of any occasion that he was sensible of for the more diligent and careful preservation of facts and papers, and particular memory of circumstances.

A cross bill was filed by the defendants, Moulton, Richardson and Deering, against the plaintiff, but the important facts stated therein so fully appear in the previous bill and answer, that it is here unnecessary to repeat them.

The general replication was filed; and evidence was taken and the cause now came on for a hearing at this term upon the bill and cross bill.

Deblois & Fessenden, for plaintiff.
William P. Fessenden, for Richardson.
C. S. Daveis, for Moulton.

Mussey being out of the state did not appear; and Deering having been discharged under the bankrupt act [of 1841 (5 Stat. 440)], no farther proceedings were had against him.

STORY, Circuit Justice. This cause has been very fully and ably argued, and is not unattended with difficulties. The bill is, in substance, a bill to rescind a contract made or asserted to be made with the defendants, for the purchase of certain lots of land in the town of Carmel, in Maine, and for other consequent relief. Several points have been made at the bar; and among those most material to be considered are the following questions: (1) Whether the defendant, Moulton, in making the sale of the lots in question, acted as the agent of the other defendants, or as principal on his own account. (2) Whether there was any material misrepresentation made by Moulton to the plaintiff at the time of sale, on which the plaintiff relied as a true representation, and which constituted the basis of the sale. (3) Whether the lapse of time since the sale, and before the bringing of the bill, connected with the other circumstances of the case, furnish a sufficient ground, upon which this court, sitting in equity, ought to deny the relief asked by the bill.

Upon the first of the questions, I cannot say, that I perceive any reasonable ground for doubt. It appears to me, that, taking the circumstances together, the sale was made by Moulton, not as a principal on his own account; but as the agent of the other defendants. The bond given to Moulton by the other defendants, in the condition, after reciting; "And whereas we have agreed to sell and convey the same (lots) to said Moulton, or his assigns, provided he shall, within thirty days from this date, elect to purchase the same at the rate of five dollars and fifty cents for each and every acre thereof, payable one quarter part thereof in cash on the delivery

of the deed, and the remainder by good notes, in three equal payments, with interest annually from this date, secured by mortgage or otherwise, to the satisfaction of said obligors, and also in case of a sale of the same by the said Moulton within the said thirty days, the further amount of one half of the excess of such sale over and above five dollars and fifty cents an acre,"—proceeds to state: "Now, if the said Moulton shall elect to purchase said land, or shall make a sale of the same within the said thirty days, and shall perform the several conditions aforesaid, and said obligors shall and do thereupon execute and deliver to the said Moulton or his assigns, a good deed of general warranty of the premises, then this obligation shall be void, otherwise shall remain in full force and virtue." It is plain, from this language, that the vendors (the obligors) contemplated two alternatives, one a sale to Moulton himself at his election, to be made within thirty days, at a fixed price, the other a sale to be made by him to other persons or purchasers, at a higher price, of which, if made, they were to receive one half of the excess beyond the fixed price. It is very certain, that Moulton did not make any such election to purchase at the fixed price on his own account. The sale actually made by him was to other persons as purchasers, and among them the plaintiff; and one half of the excess was to be, and was actually accounted for to the plaintiffs. The sale was, therefore, manifestly made by Moulton for the other defendants, as their agent, since he did not elect to become himself the purchaser; and they had an interest in the sale co-extensive with the purchase money, he, Moulton, receiving the one half of the excess only, and that as in the nature of a compensation for his services. It is no answer to suggest, that the other moiety of the excess was received by and was for the sole benefit of Mussey, one of the vendors—for, if so received, it was a mere private affair between Mussey and his co-vendors—with which the purchasers and Moulton had nothing to do; and the interest in the sale was the same in all the vendors, and through one and the same agent. And besides, the bond itself treats the moiety of the excess as belonging to all the vendors, and they cannot be permitted now to aver their ignorance of this clause in the bond. It is also wholly immaterial, whether the sale was made within the thirty days or afterwards; for if made afterwards, it was adopted by all the vendors, and bound them as a sale through their agent; and they, and not Moulton, gave a deed of conveyance to the purchasers accordingly.

The sale, then, being made by Moulton, not as himself the owner—which he was not—but as the agent of the owners, it follows, that they are bound by his representations made at the time touching the sale, as a part of the res gestae, and as to the purchasers, it makes no difference whether these representations were made by the authority of the owners or not, if they were material to and constituted the basis of the sale, and it was made by the purchaser on the faith and credit of these representations. Under such circumstances, the sale is good in the entirety, or not good at all. The owners have no right to insist upon the validity of the sale independent of the representations. The whole must be taken together as a part of one and the same transaction. It cannot be adopted in part and rejected in part. It must be taken as good for the whole or not at all. I have on several occasions expressed my opinion upon this point; and especially in the case of Daniel v. Mitchell [Case No. 3,562], and in another case recently argued,—Doggett v. Emerson [Id. 3,960],—and decided in favor of the plaintiff. The case of Small v. Attwood, Younge, 407, and the same case on appeal (Attwood v. Small, 6 Clarke & F. 232), go far to support the same doctrine, although somewhat distinguishable in its circumstances.

Let us then proceed to the consideration of the second question, and that is, whether any false or material representations were made upon the sale, and which constituted the basis of the sale on the part of the purchasers, and by which they were, in fact, misled in the purchase. And here it is important to state, that both facts must concur, there must be false and material representations, and the purchaser must have purchased upon the faith and credit of such representations. It is not necessary, that he should have solely relied on these representations. It is sufficient if they constituted a part of the res gestae, upon which he relied, and without which the purchase would not have been made. There is another consideration, applicable to the circumstances of the present case, which is fully sustained by the case of Attwood v. Small (in the house of lords), 6 Clarke & F. 232, and which, perhaps, cannot be more briefly expressed, than it has been, with a slight addition, in the marginal note of the reporters. If, upon a treaty for the sale of property, the vendor makes representations (touching the nature and character and value of that property) which he knows to be false, the falsehood of which the purchaser has no means of knowing, but he relies on them, a court of equity will rescind a contract so entered into, although it may not contain the misrepresentations. But it will not rescind without the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say, that he was deceived by the vendor's representations, the rule being caveat emptor, and the knowledge of his agents being as binding upon him as his own knowledge. Now, this doctrine is, in both its aspects, just as true as to

gross misrepresentations, made by mistake, going to the essence of the bargain, as it is to the misrepresentation founded in fraud;—I do not say morally, but in construction of law. If the purchaser relies on them, and is deceived, he does not buy what he intended, and he is misled to do what he would not otherwise have done. But, then, on the other hand, in cases of mistake, the bargain must have been made in strict faith and reliance upon such gross misrepresentations; and if the purchaser has acted upon his own judgment, uninfluenced by such misrepresentations, and has within his immediate reach full means of knowledge, and has declined to use those means, then he has no right to complain of his bargain. And here again the proof should be clear, that there has been gross misrepresentation, and that the purchaser has been seduced into the bargain by them.

Now, keeping this whole doctrine in view, in its various aspects, one is obliged to pause in the present case, and cannot escape from the consciousness that there are difficulties about it. In the first place, what were the misrepresentations made by Moulton? I do not understand, that there is any satisfactory proofs to overcome the full denials of his answer, that he made any positive representations of the nature, and extent, and value of the timber on the lands—as within his own knowledge. On the contrary, if he is to be believed, he made no representations, which ought to have been relied on by any one; he expressed to the purchasers, who went on the land with him, that he had no previous knowledge thereof, and had no better means or opportunities of knowledge than they had, at the time when they partially explored a part of the lots. The general rule in equity is, that an answer responsive to the facts alleged and charged in the bill is to be taken to be true until the contrary is established It is not necessary in the present case to say that Moulton's answer is placed beyond all doubt or question. It is sufficient to say, that it is not absolutely overcome by full, clear and positive testimony, or by controlling circumstances. There are some circumstances in the case, which go to corroborate it; and, at all events, I cannot say, that its credibility is satisfactorily impeached. It is also to be taken into consideration, that some portion of the opposing evidence comes from sources not altogether disinterested—since it is given by persons who are co-purchasers, and whose claims are yet subject to litigation. In the next place, what is the misrepresentation complained of? It is alleged in the bill, that, at the time of the purchase, a certificate was shown by Moulton to the plaintiff and his co-purchasers, as containing a true description of the land, and upon the faith of which the purchase was made, and that it was false in substance. The certificate was as follows:· "June 12, 1835. This is to certify that I have partially explored the lands in the town of Carmel, which are bonded to Mr. William Moulton, and, as far as my knowledge extends, there is an average of eight thousand feet or more of sound timber per acre, exclusive of a large quantity of growing timber, hard wood, cedar, mixed growth, &c. This timber is on good water for driving logs, and the land is good farming land. George Herrick." Now, upon this certificate there are several observations forced upon the court by the evidence. The very date—whether it was the true date, is a matter of controversy. The plaintiff insists that it was actually made and dated on the 12th of June, 1835, before the sale, and then shown to the purchasers. On the other hand, the defendants contend, that it was not made until the 23d of June, at least two days after the purchase, and then was made at the suggestion of the purchasers. Undoubtedly the actual date on the face of the paper is prima facie evidence, that that is its true date; and there is much evidence in the case in support of this view of the matter. But it is encountered by very strong circumstantial evidence on the other side, and of the most unexceptionable nature. It is certain, that the purchasers went with Moulton on the land and made some partial exploration of some of the lots on the day before, or the very day of the purchase, and before it was completed. It is as certain, that Herrick did not go on the land on the same day with them. It appears from the testimony of McLaughlin, an inn-keeper at Bangor, that, by his memorandum book, Moulton went up the river on the morning of the 12th of June, and that he did not return to Bangor until the 22d of June, and that Moulton and Herrick went out to Carmel together on the 23d of June. And Herrick states, that he was only once on the lands with Moulton, and that his certificate was made after his return from that exploration. If this be true, then it is clear that the certificate was antedated; and that it was actually made ten days after the purchase was completed. Herrick, indeed, states, that he believes the certificate is truly dated, because he was in the habit of giving the true date to papers signed by him. It is to be recollected, that the testimony of Herrick was not taken until November, 1842, seven years after the transaction. But the memorandum book of McLaughlin is a written memorandum made at the time, and therefore more likely to be correct, it being made in the course of his business, than the mere recollections of Herrick at such a distance of time. I confess myself to be in no small degree embarrassed by the state of the evidence on this point, looking at all the circumstances, and if my judgment were compelled to decide one way or the other, I should incline rather to think, that the certificate was antedated. But the way in which I wish to put the point is, that it is a matter of grave doubt, and necessarily obscured by the lapse of time, upon which a court of equity can have no

security, that it can act either safely or wisely in granting relief upon such a ground.

Then, again, as to the terms of the certificate. Herrick is the plaintiff's own witness; and I do not understand, that his good faith in giving the certificate is impeached, or that he has not truly stated what was his real opinion and judgment so far as the explanation went. Now, what is the just purport of his certificate? Upon its very face it states that he had but "partially explored" the lands; and he cautiously adds that "as far as my knowledge extends" there is an average of timber as stated in the certificate. Now, although the certificate is dated on the very day when the purchase was made, and, if truly dated, Herrick must have then been at Bangor with the plaintiff and his co-purchasers, they did not make any inquiries of him on the subject; what exploration he had made, its extent, its thoroughness, and his means of knowledge—or what he meant by a partial exploration. Yet these inquiries were most important to the purchasers, if they relied on his certificate as the basis of their purchase. If, indeed, the certificate was not given until the 23d of June, that would explain the omission to make any inquiries; but then it would be fatal to the claim set up by the plaintiff. But if the certificate is truly dated, how can we account for the total omission of any inquiries of Herrick by the plaintiff and his co-purchasers, otherwise than upon the supposition, that it had not any decisive influence upon the purchase. Indeed, it would be strange, if a certificate, so vague and indefinite, referring only to a partial exploration, and not affecting to state any adequate means of knowledge, and assigning no extent of examination, could have had any great influence in the purchase of fourteen lots, amounting to 3792 acres of land in a township like Carmel, which had been settled many years, and where there must have been inhabitants engaged in farming, capable of giving precise information. Besides, the township was but a short distance from Bangor, where the bargain was made. It was easily accessible; and, in point of fact, the plaintiff and his co-purchasers went on some of the lots with Moulton, for the purpose of an exploration, before the purchase was made; and partial as their examination was, they did not, by what they saw, decline to make the purchase. Here, then, the purchasers had a full opportunity of exploring for themselves, of making satisfactory inquiries upon the spot from the inhabitants, and of deliberately ascertaining the true value of the land, and the amount of timber thereon. Here, then, we have a case falling within the line of the reasoning in Attwood v. Small, 6 Clarke & F. 232, where the purchasers do not choose to avail themselves of the knowledge or the means of knowledge open to them as to all the material circumstances of the value of the land and the amount of the timber thereon, and yet ask the court to grant them the same relief as if they had possessed no such means of knowledge, and had availed themselves of all reasonable diligence. Under such circumstances in the case of Attwood v. Small, the house of lords thought, that the purchasers ought not to be heard to say, that they were deceived by the vendor's representations.

There is another consideration applicable to this part of the case. It is, that the plaintiff and his co-purchasers had no right to rely upon the statements of a certificate so vague and indefinite, so partial and so inconclusive. In Trower v. Newcome, 3 Mer. 704, Sir William Grant held, that when a representation made upon a purchase was vague and indefinite, its only effect ought to be to put the purchaser upon making inquiries respecting all the circumstances previous to his becoming the purchaser. In Scott v. Hanson, 1 Sim. 13, Mr. Vice Chancellor Shadwell fully recognized the same same doctrine, and said that a representation, that the premises sold were "uncommonly rich water meadow land," applied to the quality of the land, and not to its being perfectly watered; and that the representation must be deemed a loose opinion in which the vendee ought not to have placed and could not be considered to have placed any reliance, that it was perfectly watered. Now certainly nothing could be more vague and indefinite as to the extent of knowledge and the extent of the exploration of the premises by Herrick, than this certificate. It should have stimulated and not lulled farther inquiries. And if it contained truth so far as Moulton and Herrick then knew or believed as to the state of the land, but was too indeterminate and loose reasonably to have become the basis of the bargain, or actually at the time to have misled the purchasers, it surely ought not now to affect any of the defendants. Besides, the plaintiff and his co-purchasers went on the land themselves with Moulton, and explored for themselves as far as they chose; and they could not but know from the very form of the certificate, that Herrick had made but a partial exploration, and, therefore, that they had as good means to judge as he. If Moulton is to be believed, he had no more knowledge of the land than the purchasers, and he went on the same for the first time with them, and so told them. It is nowhere satisfactorily shown by the evidence, either that Moulton knew more, or had any peculiar means of knowledge beyond that of the purchasers, as to the state of the land.

But the great and grave question in the cause is, after all, the lapse of time connected with the other circumstances of the case. It is clear from the plaintiff's own statement, that he did not buy the lands on speculation for an immediate sale, for he says in his answer to the cross bill, that he bought "with

a design to keep the lands, as he supposed lands so well timbered, in the vicinity of Bangor, must be very valuable to be preserved for the timber and wood." The conveyance was made on the 30th of June, 1835, and a mortgage given back to the grantors on the same day, to secure the purchase money by three annual payments by the grantees of their respective proportions of the purchase money. That the plaintiff and his co-purchasers took possession of the lots is none doubted. Agents were employed by them, and among others, William Loker, an inhabitant of Carmel, was employed, as agent for the lands, from 1835 to 1840. During this time about 33,000,000 feet of pine timber were cut off of the land under the direction of the agents. But what is most important in this part of the case, Loker had been employed for about two years before as agent of the then proprietors of the land, and in 1834, at their request, he made an exploration of the lands. He began his examination in the autumn of 1834, and completed it in March, 1835; and he then estimated the pine timber on the lots at 13,000,000 feet. Since his agency ceased in 1842, he made an exploration of the lots with one Joseph Maddocks, and he then estimated the pine timber thereon at 6,120,000 feet; and in his testimony he states as his opinion, that since 1835 there had been as much pine timber cut off of the lots, which had not been accounted for (part I presume by trespassers) as had been accounted for; that is, as I suppose, an amount equal to 33,000,000. I am aware, that Maddocks and Usher make a lower estimate, from 4,752,000 to 4,970,000 feet; and Fuller and Heald as low as 2,218,000 feet. But I do not rely upon any of these estimates as decisive of the cause. What I proceed upon is, that the plaintiff had through his agent, Loker, full knowledge and means of knowledge of the state of the lots and the probable quantity of timber on them during the period of Loker's agency from 1835 to 1840. I say the plaintiff had knowledge and means of knowledge through Loker, for what the agent knows in the course of his agency, the principal is presumed in law to know, and cannot be heard to aver his ignorance. This doctrine was clearly laid down in Attwood v. Small, 6 Clarke & F. 232, 233, 351. The plaintiff and his co-purchasers having full means of knowledge within their reach, were bound to make due inquiries (and their agent had the fullest means of knowledge;) they had no right to go on and cut down the timber year after year, and proceed to treat the property as their own, and then, at the distance of six years, when the value of the property had been essentially changed, by the state of the market, by depredations upon the property, and by the public reverses growing out of the extravagance of timber speculators, to turn round and insist, that the defendants, Richardson, Mussey and Deering, the two latter having become insolvent, shall take back all the property and bear all the losses incident to such a bargain, after such a lapse of time. If the plaintiff had come earlier, the defendants might have had far better means of meeting the exigencies of the case, and of repelling the allegations of the bill. We are also to take into consideration the circumstance, that Carmel was a township in the course of settlement for agricultural purposes, and not a township composed merely of what is expressly called wild lands, and bought solely for the sake of the timber thereon, as a matter of immediate speculation and sale; and the plaintiff and his co-purchasers do not appear to have expressed any dissatisfaction with the purchase during the whole time of Loker's agency. Neither does the bill state or affect to state any new discoveries made as to the quantity and value of the timber, which might not by reasonable diligence have been obtained within a single year after the purchase. Indeed, the bill is silent as to any time when, or means by which the discovery of the supposed misrepresentation was first brought to the plaintiff's knowledge. Yet it is most manifest, that the very lapse of time since the purchase and the change of circumstances must constitute a strong objection to the maintenance of the suit. I have had occasion to consider this subject with a scrupulous attention in several recent cases; and especially in Sanborn v. Stetson [Case No. 12,291], and Veazie v. Williams [Id. 16,907], at the present term. The case of Vigers v. Pike, 8 Clarke & F. 562, in the house of lords, furnishes much wholesome instruction to assist us in the administration of relief in equity in cases of this sort. Upon that occasion, Lord Cottenham said: "In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence, or raise a more effectual bar to the plaintiff's case, than by showing, that the plaintiff was, from the beginning, cognizant of all the matters complained of, or, after full information concerning them, continued to deal with the property and even to exhaust it; as by working mines."—And again: "The doctrine of carrying equities by acquiescence I consider to be one of the most important to be attended to; for otherwise there is great danger of the principles of a court of equity, thus improperly exercised, producing great injustice. A man who, with full knowledge of his case, does not complain, but deals with his opponent, as if he had no case against him, builds up from day to day a wall of protection for such opponent which will probably defeat any attack upon him." Every portion of this language is strictly applicable to the present case; and if we simply add that ample means of knowledge is equivalent to actual knowledge, and that knowledge of the agent is knowledge of the

principal, the doctrine would seem conclusive upon the merits of the present suit. Upon the whole, my judgment is, that the plaintiff's bill ought to be dismissed, with costs for the defendants.

Case No. 6,723.

HOUGH v. SMOOT.

[2 Cranch, C. C. 318.] [1]

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

ATTACHMENT—ACTS MD. 1795, C. 56.

An attachment under the Maryland act of 1795 (chapter 56) will lie against lands and tenements in Alexandria county.

[Action at law by George S. Hough against James H. Smoot.]

This was an attachment issued by CRANCH, Chief Judge, out of court, and in vacation, against the lands and tenements in the county of Alexandria, of the defendant, under the act of Maryland of 1795, c. 69, and the act of congress of the 24th of June, 1812, § 4 (2 Stat. 755).

Mr. Swann, for defendant, stated that if the court should be of opinion that the process would lie, the defendant would give bail and set aside the attachment.

THE COURT (nem. con.), upon an examination of the act of congress of the 24th of June, 1812, § 4 (2 Stat. 755), and the acts of Maryland of 1715, c. 40, and 1795, c. 56, was of opinion that this process was extended to the county of Alexandria, so far as regards the attachment of lands and tenements.

There was no argument of counsel upon the point

Case No. 6,724.

HOUGH v. WESTERN TRANSP. CO.

[1 Biss. 425.] [2]

Circuit Court, N. D. Illinois. Jan., 1864.

REMOVAL FROM STATE COURT—CANNOT REVIEW DECISION OF STATE COURT.

1. The United States circuit court has no power to issue a writ of mandamus to a state court for the removal of a cause. Congress undoubtedly could give them such power, but it has not done so.

[Cited in Stone v. Sargent, 129 Mass. 506.]

2. Under the 12th section of the judiciary act of 1789 [1 Stat. 79], it is for the state court to decide the questions arising under the petition and this court cannot review its decision.

3. The remedy is by appeal to the supreme court of the state, and thence by writ of error to the United States supreme court.

[Cited in White v. Holt, 20 W. Va. 812.]

4. The cases of People v. Judges of New York, 2 Denio, 197; Spraggins v. County Court [Case No. 13,246], disapproved.

Application for a writ of mandamus against the superior court of Chicago.

O. S. Hough commenced two suits in the superior court of Chicago against the Western Transportation Company, a corporation created and existing by virtue of the laws of New York, and doing business in Chicago. The corporation filed a plea to the jurisdiction of the court; plaintiff filed replication, and defendant filed general demurrer to replication. The court sustained the demurrer, and held that the replication was no answer to the plea. Thereupon the defendant filed a petition under the 12th section of the judiciary act of 1789, which provides that "if a suit be commenced in any state court by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, * * * and offer good and sufficient surety for his entering in such court on the first day of its session, copies of said process against him, and also for his there appearing, &c., it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, &c." Surety was tendered and the other provisions of the law complied with. No objection was made on that ground, but the state court decided that the application was not made in apt time, the defendant having previously entered an appearance, and therefore refused to grant the prayer of the petition. The defendant's counsel contended that the plea to the jurisdiction was not an appearance within the meaning of the statute, and that a petition for removal filed as soon as the state court had decided that the defendant was properly in court and subject to its jurisdiction was in apt time.

Hosmer, Beckwith & Higgins, for plaintiff.
Hooper & Clements, for defendant.

DRUMMOND, District Judge. An application is now made to this court for a mandamus against the superior court, requiring it, in the language of the statute, to proceed no further in the case, and to certify the case to this court, so that this court can take jurisdiction of it.

The question is whether under the circumstances of the case the mandamus will lie. I think it will not. Of course, in expressing this opinion it is not necessary for the court to determine whether the state court decided properly in refusing the application made by defendant.

The only provisions of law, I believe, upon the subject of mandamus by courts of the United States, are contained in the 13th and 14th sections of the judiciary act of 1789. The 13th section provides that "the supreme

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

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

court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizen of other states, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. * * * The supreme court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or person holding office, under the authority of the United States."

The 14th section provides that "all the before-mentioned courts of the United States," which, of course, includes circuit courts, "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," &c.

It is under this last clause that it is contended that the circuit court of the United States has power to issue a writ of mandamus in this case as being a writ agreeable to the principles and usages of law, and necessary for the exercise of its jurisdiction.

It is a little singular that throughout our judicial history there has been, so far as we have been able to ascertain, but one application made to the circuit court of the United States for this writ, where a state court has refused to comply with the 12th section of the judiciary act. That case was the case in Tennessee, and is referred to in the case of People v. Judges of New York, reported in 2 Denio, 197. This case grew out of the case of Kanouse v. Martin, 15 How. [56 U. S.] 198, which was commenced in a state court of New York, and where the application was made to the state court to remove the cause to the circuit court of the United States. After the application was made, the plaintiff amended his declaration so as to make the amount in controversy less than five hundred dollars, and thereupon the application was refused. The case went to the highest court of the state, and thence to the supreme court of the United States. The supreme court of the United States reversed the case, on the ground that the application should have been granted, and that whenever it was made, the statute interposed, and declared that, if it was within the meaning of the 12th section of the judiciary act, it was not competent for the state court to take any other step in the case, and that it did, after the application was made, by allowing this amendment, and that was an erroneous act. Judgment was therefore reversed, and it was held that it was the duty of the court to look into the whole record and to determine whether the case was within the provision of the 12th section of the judiciary act.

That was a case, as I understand it, in which the counsel for defendant, instead of applying to the circuit court of the United States for a mandamus, applied to the supreme court of the state for a mandamus. The opinion of the court was given by Bronson, Chief Justice, denying the application, on the ground that the 14th section of the judiciary act gave the circuit court of the United States power to issue the writ of mandamus, and therefore the application should be made to that court, and not to the supreme court. In this opinion they refer to the only case to which the notice of this court has been directed, which is the case of Spraggins v. County Court [Case No. 13,246]. The judge says: "I am not aware that any of the federal courts have questioned their power to act in the same manner. If they have power, there is no reason why this court should interfere." He says, also, "I am aware that the court of appeals in Virginia, awarded a mandamus to an inferior court in that state, to compel the removal of a cause into the circuit court of the United States. Brown v. Crippin, 4 Hen. & M. 173. But," he says, "until it shall be settled, that the federal courts want the power to issue all such writs as may be necessary for the exercise of the jurisdiction conferred upon them by the constitution and laws, this court cannot act without the appearance of making an officious tender of its services." It was for this reason that the motion for mandamus was refused.

I admit that the case proceeds upon the ground that the proper source to apply to for a writ of mandamus was the circuit court of the United States, and not to the state court. The question then is whether that is a proper source. I think that the view of the judge was incorrect.

The rule laid down in relation to writs of mandamus by the supreme court of the United States is that it shall issue only to an officer, or to a judge, or to a court where the duty to be performed is a ministerial one simply and where the judge or officer has no discretion. When he has a discretion, the only thing the court will do by writ of mandamus, is to compel him to exercise that discretion by deciding the question or case without telling him how it shall be decided. It is only where it is a ministerial duty that the court will compel him, by writ of mandamus, to perform that duty, as by signing a bill of exceptions, or in relation to any other mere ministerial act to be performed by an officer. Life & Fire Ins. Co. v. Wilson's Heirs, 8 Pet. [33 U. S.] 291; Life & Fire Ins. Co. v. Adams, 9 Pet. [34 U. S.] 573; Ex parte Hoyt, 13 Pet. [38 U. S.] 279; Ex parte Whitney, Id. 404; Ex parte Many, 14 How. [55 U. S.] 24; Commissioner of Patents v. Whiteley, 4 Wall. [71 U. S.] 522; Decatur v. Paulding, 14 Pet. [39 U. S.] 497; U. S. v.

Guthrie, 17 How. [58 U. S.] 284; U. S. v. Commissioner, 5 Wall. [72 U. S.] 563.

I have no sort of doubt that it is entirely competent for the congress of the United States to give this power to the courts of the United States, but I think that they have not yet done so. In the case of Kendall v. U. S., reported in 12 Pet. [37 U. S.] 524, which was very elaborately argued and fully considered, the supreme court of the United States, after adverting to various cases, says: "The result of these cases is that the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States is within the scope of the judicial powers of the United States, under the constitution, but that the whole of that power has not been communicated by law to the circuit courts, or, in other words, that it was then a dormant power not yet called into action and vested in those courts." The question arose there in relation to the power of the United States court in the district of Columbia, and it was as to the exercise of the power by that court that the question came up, but they refer to power existing in the circuit courts of the United States in states, and say that the whole judicial power has not been delegated to the circuit court in the states. So that it seems to be clear that it is competent for congress to vest this power in the circuit courts of the United States.

The case in Denio is the only case to which the attention of the court has been directed. The question is, whether it is binding and conclusive. I think that it is not, and that the absence of not only all decisions other than this, but of all applications to circuit courts of the United States, is a very strong argument against the exercise of this power.

It may be seen by an examination of the various decisions made by the supreme court of the United States, that it is only in peculiar cases that they have exercised this power by writ of mandamus. I think that considerable light may be shed upon this case by an examination of the statute, which was passed at a very exciting period of our history,—I mean the act of 2d March, 1833 (4 Stat. 633). The third section of that act provided "where suit or prosecution shall be commenced in a court of any state against any officer of the United States, or other person, for, or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right authority, or title set up, or claimed by such officer or other person under any such law of the United States, it shall be lawful for the defendant, in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit or prosecution and verifying the said petition by affidavit, together with a certificate signed by an attorney or counselor at law of some court of record of the state in which such suit shall have been commenced, or of the United States. * * * It shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of certiorari to the state court, requiring said court to send to the said circuit court the record and proceedings in said cause. * * * And thereupon it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution upon delivery of such process or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court shall be wholly null and void." Of course the statute giving the right to the court also gives, as a necessary consequence, the necessary means to compel compliance with the writ.

So the congress of the United States could have done in this case. They have not seen fit to do so. They have given certain legal discretion to the judge of the state court, not that thereby the defendant is deprived of the right which the statute gives him, but that it is competent for the appellate state court to redress the wrong, if wrong has been done to the defendant, by correcting the error of the state court in which the suit was brought. If the highest court of the state will not do that, the defendant has his remedy by writ of error to the supreme court of the United States, which would have jurisdiction in such case. All the cases in which the question has arisen have gone to the supreme court of the United States in this way, and the error of the state court, where any existed, has been rectified in the supreme court.

There is a remark made by Judge McLean in the case of Gordon v. Longest, 16 Pet. [41 U. S.] 97, which also gives color to the application which is made in this case. That was a case where the writ was originally brought in a state court. Application was made for its removal to the circuit court of the United States. It was refused. The case went to the court of appeals of Kentucky, and was sent back. It then went again to the court of appeals, and finally to the supreme court of the United States. That court held that the application for the removal of the cause ought to have been granted, and reversed the judgment of the court of appeals for that reason, and directed that the cause should be remanded with instructions that it should be transmitted to the circuit court of the United States. In giving his decision in this case, Judge McLean says, "A more summary redress might have been pursued by the defendant than the one which this court can now give to him."

I concede to the counsel for the application in this case that there can be but little doubt that Judge McLean thought that it was competent for a circuit court of the United States

to issue the writ of mandamus to the court of the state. That, I think, must be the "more summary" remedy to which the judge refers, but this is a mere dictum of the judge; it was not necessary to the decision of the case, and of course is not binding upon any other court as a decision. I have thought, on examining the various cases, that it would not have been the opinion of the supreme court if the point had been made before it.

It will be seen from what has been said, that there is a remedy for the party: he is not without redress; he can take his exception; the supreme court of the state can give him redress if the lower court has decided wrong, and if that court will not, the supreme court of the United States may. It is true this is a circuitous way to have any supposed wrong remedied, but still, I think it is the only way in which it can be done. The congress of the United States have not seen fit to give this summary remedy by writ of mandamus, if it was competent for them to do it, and until they have done that, either by express language or by necessary implication, I do not think that this court ought to exercise a doubtful power. The application will therefore be dismissed.

NOTE. See In re Cromie [Case No. 3,405], where it is also held that the act of July 27, 1866 [14 Stat. 306], made no change as to the power of the circuit court to issue a mandamus to a state court. See, also, Fisk v. Union Pac. R. Co. [Case No. 4,827]; Sweeney v. Coffin [Id. 13,686]; Sands v. Smith [Id. 12,305]; McBratney v. Usher, [Id. 8,661]. Practice on removal to U. S. Courts: Hatch v. Chicago, R. I. & P. R. Co. [Case No. 6,204]; Winans v. McKean Railroad & Navigation Co. [Id. 17,862].

Case No. 6,725.

Ex parte HOUGHTON et al.

In re FORTUNE.

[1 Lowell, 554.] [1]

District Court, D. Massachusetts. March, 1871.

BANKRUPTCY—LANDLORD AND TENANT—EVIDENCE.

1. The bankrupt was sub-lessee of a shop, and was to pay a certain rent and all taxes assessed during the term; he took possession June 1, 1868, and failed and went into bankruptcy early in September, 1869. The lessors had a right to enter and terminate the tenancy in case of the lessee's bankruptcy, or breach of covenant, but without prejudice to any remedy for arrears of rent or preceding breach of covenant. They entered soon after the bankruptcy and relet the premises at a loss. *Held*, the loss of rent accruing after the bankruptcy cannot be proved either as a debt or as unliquidated damages.

[Cited in Bailey v. Loeb, Case No. 739; Re Hufnagel, Id. 6,837; Ex parte Pollard, Id. 11,252.]

2. The lessors terminated the bankrupt's estate by their entry, and cannot prove for the loss sustained by reletting at a lower rent.

[Cited in Ex parte Lake, Case No. 7,991.]

[Cited in Abbott v. Stearns, 139 Mass. 169, 29 N. E. 379; Bowditch v. Raymond, 146 Mass. 114, 15 N. E. 285.]

3. They may prove for the arrears of rent and for any damages sustained by a breach of the covenant to repair.

[Cited in Treadwell v. Marden, 123 Mass. 391; Deane v. Caldwell, 127 Mass. 244.]

4. The taxes are a part of the rent and not a privileged debt.

5. By the lease the bankrupt was bound to pay the taxes of 1869, and parol evidence is not admissible to prove that the parties understood he was to pay those of both years.

The petitioners hold a long lease of a shop on Washington street, Boston, and on the thirtieth day of May, 1868, they underlet the shop to James Fortune, the bankrupt, for eight years and ten months from the first day of the next June, being two days less than their own term, at a rent which was payable monthly and very largely in advance of what they paid. Fortune covenanted to pay the rent, and all taxes which should be assessed on said premises during said term, to make no alterations without the written consent of the petitioners, and to keep the premises in as good order as at the beginning of the term, reasonable use, &c., excepted. The petition in bankruptcy was filed June 9, 1869. The petitioners alleged a breach of all these covenants, and have proved for all arrears of rent, without objection. They took possession of the premises early in September, 1869, on the day on which they saw a notice in the newspaper of the adjudication in bankruptcy, and say that they found the shop injured by alterations to the extent of five hundred dollars. They have since relet the shop at a reduced rent, and they asked to have the damages suffered by them in the reletting of the estate as well as the damage by the alterations assessed by the court or by a jury. They also offered to prove as preferred debts the city and state taxes assessed on the premises by the city of Boston for the years 1868 and 1869, which were assessed to the owner of the estate, and paid by the petitioners as required by the terms of their lease from the owner. At a hearing before the court the facts above mentioned were proved, and it further appeared that the lease contained this clause: "Provided also, and these presents are upon condition, that if the lessee or his representatives or assigns do or shall neglect or fail to perform and observe any or either of the covenants * * * or if the lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of his property for the benefit of creditors, then, and in either of the said cases, the lessors, or those having their estate in said premises may, immediately, or at any time thereafter, and whilst such neglect or default continues, and without further no-

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

tice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same, as of their former estate, and expel the lessee, &c. * * * without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that upon entry, as aforesaid, the said term shall cease and be ended."

E. Avery, for petitioners. We have suffered large damages by being obliged to re-enter and to let at a less rent. The case is therefore within the terms of the act, unliquidated damages arising out of any contract or promise. We did not enter because of the bankruptcy, but to protect ourselves, the bankrupt having removed his goods and left the shop just before he filed his petition, and in effect abandoned his lease.

B. F. Brooks, for assignees. The statute expressly says that rent may be proved up to the time of the bankruptcy, and this is a clear implication that future accruing rent cannot be proved. It is no debt, contingent or otherwise, as has been often decided: Auriol v. Mills, 4 Term R. 94; Hendricks v. Judah, 2 Caines, 25; Lansing v. Prendergast, 9 Johns. 127; Savory v. Stocking, 4 Cush. 607; Bosler v. Kuhn, 8 Watts & S. 183.

LOWELL, District Judge. The most important question is, whether the petitioners can prove for the damages suffered by them in reletting the premises. The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession, and if they do not take it the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent; if they do take it he is released as in all other cases of valid assignment, from all liability excepting on his covenants, and from these he is not discharged in any event. Henley, Bankr. (3d Ed.) 237; Auriol v. Mills, 4 Term R. 94; Copeland v. Stephens, 1 Barn. & Ald. 593; Tuck v. Fyson, 6 Bing. 321; Rob. Bankr. 328. This rule was long since modified in England by statutes 49 Geo. III. c. 121, § 19, and 6 Geo. IV. c. 16, § 75, by which the bankrupt was released from his covenants if either the assignee accepted the lease, or the bankrupt himself surrendered it to his lessor within fourteen days after notice that the assignee had declined. This remained the law by re-enactment in the several revisions of the bankrupt acts down to the latest in 1869 (32 & 33 Vict. c. 71, § 23), which authorizes an assignee to disclaim any onerous property or contract, and deprives the bankrupt of all interest therein whether the assignee disclaims or not, and gives any person "injured by the operation of this section" the right to prove the amount of his injury as a debt under the bankruptcy. This is the first legislative recognition that I have found of any debt of the character now sought to be proved, and the petitioners have failed to discover any judicial determination of a similar right. The American authorities follow the line of reasoning and decision of the earlier English cases, and hold that a lessor has no provable debt, contingent or otherwise, for the reason that rent accrues from time to time, and is not and cannot be due in solido beforehand, since it depends on occupation from time to time.

Leaving out of view for the moment the peculiar clause of this lease relating to bankruptcy, which the petitioners say they have never acted on, and overlooking the fact of their re-entry, how did the bankruptcy affect this lease? The assignees did not assume the lease, and consequently the original parties stand simply as landlord and tenant. If the bankrupt can find means to pay his rent, or can find a purchaser for the lease, no one is injured; if he cannot, the lessors may re-enter. Where are the unliquidated damages to be assessed against the estate of the bankrupt? In the very useful and accurate work of Mr. Taylor on Landlord and Tenant (section 457), it is suggested that the question whether future rent can be proved as a debt in bankruptcy must depend on the particular language of the several statutes, and that under the broad authority to prove contingent debts contained in some of these acts, such proof might, perhaps, be made. The latter part of the suggestion is not supported by any decision, and seems rather a prophecy of the English "bankruptcy act" of 1869 than a gloss upon any which had preceded it. The United States act of 1841 [5 Stat. 440] gave very full power to prove contingent debts and even to have them valued, but future rent was held not to be within its terms. Bosler v. Kuhn, 8 Watts & S. 183; Savory v. Stocking, 4 Cush. 607. There is, no doubt, strong reason for passing such a law, but the existing law does not cover the case. It is not uncommon now for leases to contain a provision that in case of breach the lessor may enter and relet the estate at the expense and risk of the lessee and charge him with the deficiency. Under such a clause a lessor might well have the right to prove for the full amount of the damages which should be ascertained by such reletting. Such a case would be analogous to that arising under the bankruptcy of the Metallic Compression Casting Company, which had contracted in writing with a skilled workman to employ him for a fixed time at a fixed rate of wages, and had discharged him when they stopped payment. I ruled to the jury that the workman had his election to sue for his wages from time to time, or to proceed at once for unliquidated damages, and when the company were in bankruptcy might have his damages assessed under section 19, and prove for the amount of the verdict; a ruling which was excepted to,

but the case was not carried further, and I see no occasion to doubt the soundness of the instruction. But rent stands on a very different foundation, because there is no right of action at the time of the bankruptcy, excepting for the arrears.

There is another sufficient answer to this part of the case. The petitioners have availed themselves of the power of re-entry, and have put an end to the estate of the bankrupt and repossessed themselves "as of their former estate." Such an entry is an eviction, and puts an end to the rent by operation of law, and by the terms of this lease, though by law and by contract they do not thereby waive any existing right of action for rent in arrear, or "preceding breach of covenant." This is all that their disclaimer amounted to, and if it were not, they cannot be heard after they have entered and exercised all acts of ownership and relet the premises, to say that they have not entered as lessors nor to repossess the premises, but merely as agents of the lessee, and to save the estate from waste. We have already seen that this lease confers no power or agency upon the petitioners in this matter, and their entry must be taken to be according to their right. It is immaterial whether the bankruptcy was the breach for which they entered; it is enough that they have entered lawfully, and have ended the term and the rent together. If the lease had been valuable, and they had relet the shop for an increased rent, I do not see how the assignees could have made any valid objection to the re-entry.

The petitioners have not waived any right they had before entry, and may prove for such damages as they have suffered by the changes made in the stairway and shelves. The case was heard by the register, Mr. Ellis, whose rulings were in accordance with my views in every particular. I find on this point that he refrains from assessing the damages, and refers the whole matter to the court. It was said at the argument that the register had once assessed these damages at seventy-six dollars, after a full hearing. If so he must have reviewed his decision, for he reports a mere reference to the court, and by consent of the parties omits the evidence. Upon the proofs before me I consider fifty dollars to be ample damages, and assess the same accordingly.

The petitioners are entitled to prove for one year's taxes. Any argument which shall establish their right to prove for those of 1868 will be equally strong to prevent the proof for 1869. The covenant is to pay all taxes assessed during the term, and taxes are assessed as of the first day of May. The tenancy began June 1, 1868, and ended about September 1, 1869. It seems to me that under this covenant the lessee was bound to pay the taxes for 1869, and not those for 1868, and the former having been due in theory of law at the time of the bankruptcy, though not payable until afterwards, may be proved. This debt is not entitled to preference, because as between these parties it rested in contract merely, and was to all intents and purposes a part of the rent. The taxes were not assessed to the bankrupt nor to the petitioners, and the city had no right to prove them in the bankruptcy. There is no right of preference or lien to which the petitioners can be subrogated, but only a right of action over against Fortune, if he should neglect to pay the taxes to the petitioners on demand after they had themselves paid them. Parol evidence was offered to show that both parties understood that the taxes of 1868 were to be paid by the tenant, but such evidence was inadmissible, and was rightly taken by the register only de bene. There was no offer to show a new contract by parol founded on a new consideration, but merely to explain the lease.

Let orders be drawn in accordance with this opinion.

Case No. 6,726.

In re HOUGHTON.

[See Case No. 6,727.]

Case No. 6,727.

In re HOUGHTON.

[4 Law Rep. 482.]

District Court, S. D. New York. Feb., 1842.

BANKRUPTCY—JURAT IN PETITION—FRAUD.

1. In the petition to be declared a bankrupt, the date of the jurat is not essential.

2. A fraudulent transfer by the petitioner will not prevent his being declared a bankrupt.

This was the case of a petition by Charles P. Houghton, to be declared a bankrupt under the late act of the congress of the United States [5 Stat. 440]. Upon a notice to show cause, several objections were made to the decree, to the effect, that there was no date to the jurat; that the petitioner converted trust funds to his own use in May, 1840; and that, in October, 1839, he fraudulently conveyed property to his father in trust for his wife.

BETTS, District Judge. The petition is dated on the 7th of February, without specifying the particular day, and, it is said, this renders the petition imperfect—that no remedy could be had against the party for false swearing, because there could be no proof as to when such false swearing occurred. The objection is not one of substance. The offense would be false swearing, and it forms no part of the attestation that the date should be affixed. It would be sufficient if the party were indicted for false swearing, to shew that the oath was made. If the party were accused of swearing falsely on the 7th of February, it might be proved that it was any other day.

A more important question in the case is, the interposition of the objection, that the petitioner has been guilty of fraud in contemplation of bankruptcy, and whether it would be a sufficient bar to his decree; because the acts of fraud were committed anterior to the passage of the act. The question is, can the court bar the party from his decree because he committed frauds previous to the enactment or its going into actual force? This is a question of great importance, and must sometime or other be met in the courts, as there is no doubt that creditors will interpose various acts of the debtor on the ground of fraud, such as his giving some of his creditors a preference, or making an assignment for his own benefit. This and various other such objections will no doubt be offered to his discharge. But it seems to me, that this is not the place to raise such objections. No doubt the parties will be met by all sorts of objections that can be raised against making him a bankrupt. All may be brought up, and if they are established they will overthrow his petition, unless the act indicates some other remedy. On this subject the law pronounces, that giving a preference to creditors shall be deemed a fraud against the act. And if it stopped there, the petitioner in such a case would be prevented from getting a decree. But this section is framed for a different purpose. It does not mean that the party shall be stopped from being a bankrupt, but seems to call for an enforcement of his petition, and that he shall be made a bankrupt, and then it goes on to point out how it shall act for the benefit of his creditors. The act of fraud clothes the general assignee with power to take possession of the property, thus indicating that the assignee in such a case is to have power over the property. But if the petition could be stopped there can be no assignee, and the creditors would be remediless, whereas this act contemplates that the act of fraud shall divest the property from the fraudulent assignor, and give it to the benefit of all the creditors. It says that any transfer of property made in contemplation of bankruptcy, to a person not being a bona fide creditor, shall be void, and a fraud on the act. And it is therefore urged, that the party committing a fraud upon the act shall be excluded from the benefit of the act. If the provisions of the act stopped there, the court would apply them. But the act goes on and says that the general assignee shall be at liberty to claim the property so disposed of, as part of the assets of the bankrupt. Therefore it cannot be a bar to obtaining bankruptcy, but puts the property in subjection to the assignee.

It is further said, that the assignee shall immediately go and recover the property thus fraudulently assigned, notwithstanding this assignment. But it does not say that the party shall be prevented from being a bankrupt, but that he shall be deprived of the benefit of the act. It does not debar him from the proceeding, but rather calls for his being made a bankrupt and places the property under the control of the assignee, and the assignee distributes it to the creditors. This construction of the law renders it unnecessary for the court now to pronounce whether all acts, antecedent and before the passage of the statute, came within its provisions. The question does not now come up, and the court need not say whether the statute is retrospective or applies to acts antecedent to its passage.

The court therefore wishes it to be understood, that, in relation to petitions for discharge, it is not sufficient cause to prevent the bankruptcy, to show before this court that there has been a fraudulent assignment, before the passage of this act, as there are other remedies for such cases. And in this case the objections that the petitioner made a conveyance to his father for the benefit of his wife, and made an assignment for preferred creditors, are included in this decision. The objection that the petitioner, since the passage of the act, used trust funds for his own benefit, is a matter of fact, which must go to the commissioners.

[NOTE. On the coming in of the proofs, the evidence showed that the obligations had been bought with funds of the father, and the court held them good for their full amount in the hands of the father as against the bankrupt. Case No. 6,728.]

Case No. 6,728.

In re HOUGHTON.

[5 Law Rep. (1842) 321.]

District Court, D. New York.

BANKRUPTCY—FICTITIOUS DEBT.

F. Sayre, for bankrupt.

P. J. Joachemssen, for creditors.

THE COURT had decided, on a previous hearing [Case No. 6,727], that the father of the bankrupt being assignee of his estate under a voluntary assignment, could not purchase debts owing by the bankrupt, at a discount, with such trust funds, and hold them as against other creditors for their full face, and it had been referred to a commissioner to take proofs on the allegation by creditors, that the bankrupt had in his schedule stated his father to be creditor for the whole amount of obligations known to him to have been so purchased.

THE COURT decided, on the coming in of the proofs, that the preponderance of evidence was, that the obligations had been bought with the funds of the father, and no part of the estate of the bankrupt had been applied in the purchase, and that the father had bought the claims as his own exclusively, and upon such fact it was further decided, that the debts remained good and sub-

sisting against the bankrupt for their full amount in the hands of his father, whatever might be his rights as against the creditors of the bankrupt, and that accordingly the bankrupt properly stated his father to be his creditor to the full amount of the notes, &c.

Case No. 6,729.

In re HOUGHTON.

[2 Lowell, 243; 7 Am. Law Rev. 754.] [1]

District Court, D. Massachusetts. April, 1873.

BANKRUPTCY—SELECTING ASSIGNEE—COSTS.

1. The practice of procuring creditors of a bankrupt, who have small privileged debts for wages, to prove their debts at the first meeting, and vote for assignee, is disapproved.

2. The fee of the register, for taking and certifying a deposition in proof of debt, is one dollar.

3. If rule 30 of the general orders be construed to give more than one dollar for such deposition, it is ultra vires; because the bankrupt act of 1867, § 47 [14 Stat. 540], fixes the amount by reference to the fee-bill of 1853 [10 Stat. 167], and the supreme court have power to diminish any fees fixed by the statute, but not to increase them.

4. The fee of one dollar is a charge on the fund.

5. A fee for a letter or power of attorney by a creditor is not a charge on the fund.

[In the matter of S. S. Houghton, a bankrupt.]

The case is now heard on the questions submitted.

The bankrupt carried on a very large retail business in three shops in Boston, and hired many girls to wait on his customers. When he failed, he owed them various sums, from less than a dollar to ten dollars. Before the first meeting of creditors was held, certain persons, who wished to use the votes of the girls, procured their debts to be proved in due form before a register. Upon each proof was a certificate by that officer that the fees paid by the creditor amounted to one dollar and twenty-five cents, for which there was a priority of payment, under section 28 of the bankrupt act. The several creditors had not in fact paid the fees; but they gave orders to the register to receive them from the assignees, who submitted the question, with a written explanation by the register, to the decision of the judge.

LOWELL, District Judge. After the first meeting, a motion was made to reject these proofs, on the ground that they were procured for the purpose of influencing the proceedings in the choice of the assignee. As the evidence was that the debts were just and valid, and had not been transferred, but were proved in the name and on behalf of the creditors, I could not interfere with their rights to prove them through any attorney they might choose to name, although he might be the bankrupt, or might be acting in the bankrupt's interest. All I could do was to refuse to confirm an assignee who might be chosen in that way, which, so far as the purpose for which the debts were proved at the first meeting, rather than afterwards, is concerned, was very much the same thing. That action on my part will tend, I hope, to discountenance the practice of bringing in the preferred creditors, who, in most cases, have no real interest in the choice of assignee, to vote for the bankrupt's friend. It would, perhaps, be a wise rule that such creditors, when sure of eventual payment in full, should have no further right than to object to a dishonest assignee; but in the present state of the law I could not impose such a rule upon the parties. I suggested to the assignees at the hearing that they could save expense to the estate by paying these small preferred debts without regular proof, if they were so fully assured of the facts that there would be no risk of mistake, or if the trade creditors should authorize it; and I understand they have adopted this course, to the great advantage of the general creditors. In the mean time, I repeat my disapprobation of the course that was pursued before the first meeting, and suggest to registers that they will inform persons who may attempt to choose an assignee in such a way that it will be useless. If I could tax the costs against the bankrupt, or whoever it was that induced these creditors to prove, I should be happy to do so; but I do not see that any discretion is left me. Rule 30 of the supreme court, and section 28 of the statutes, seem to me to intend that, if the creditor insists upon his exact right, he may have the cost of proving his debt charged upon the assets.

Then, what is the fee for this service? I am informed that it has usually been charged in this district, since the new rules were passed, and perhaps before, at one dollar. This is on the theory that the affidavit is either a deposition or an examination, and that whichever it is to be called, it is virtually a deposition; and by the fee-bill of 1853 (10 Stat. 167) the charge is twenty cents a folio, which makes on an average length of depositions seventy-five cents; and that by rule 30, twenty-five cents may be added for certifying the proof as correct in form. I have had occasion to learn that in one judicial district the registers, or some of them, charge two dollars and a quarter for every affidavit; and this most exorbitant charge is one great cause of complaint against the operation of the law. It is defended on the ground that rule 30 adds to the twenty cents a folio one dollar for each hour actually engaged; and the registers who make the charge assume that they constructively employ an hour in making out an affidavit, when they know very well that they actually do not. But if they could show in any case that they

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 7 Am. Law Rev. 754, contains only a partial report.]

had used so much time, a further objection would remain, that the bankrupt act prescribes, in section 47, the fee for depositions to be that already established by the fee-bill; and in two sections the supreme court are authorized to diminish the fees mentioned in the statute, but nowhere are they given the power to increase them. If, therefore, the rule were intended to apply to these affidavits, which I cannot admit, the fee could not be enlarged by it.

My only doubt is whether the whole fee of a register in such a case is not twenty-five cents; but upon careful examination and reflection I am of opinion that if a creditor offers his affidavit in due form, the register is to have twenty-five cents for examining and certifying it; but if the register really prepare the paper, he may charge one dollar, as for a deposition.

It remains only to say, that, so far as any part of the fee is for a power or letter of attorney, it is not a charge on the assets, because it is merely a matter for the convenience of the particular creditor. Assignees and registers will take notice that no further or other fees are to be charged than as above allowed. The dollar is, in my opinion, too much; but I do not see my way to refusing it.

[See Case No. 6,730.]

Case No. 6,730.

In re HOUGHTON.

[2 Lowell, 328; [1] 10 N. B. R. 337.]

District Court, D. Massachusetts. July, 1874.

BANKRUPTCY—CREDITOR'S RIGHT TO OBJECT.

1. A creditor has no absolute right to appear and oppose the discharge of a bankrupt, after the return-day of the order to show cause, though the proceedings may have been adjourned for other purposes.

2. But it is within the power of the court to permit opposition to be made at any time before the discharge is granted.

[Cited in Re Jacobs, Case No. 7,160.]

3. If a creditor who has duly filed specifications of opposition to the bankrupt's discharge is about to withdraw them, there may often be good reason to permit other creditors to carry on the opposition.

[Cited in Re Antisdell, Case No. 490.]

[In bankruptcy. In the matter of S. S. Houghton.]

C. P. Hinds, for objecting creditor.

J. O. Teele, for bankrupt.

LOWELL, District Judge. A creditor having the requisite qualifications filed his objections to the discharge of the bankrupt in due season, and now, after the time has passed for creditors to appear, another creditor asks leave to enter his appearance, and to be heard in support of those objections, if the original objector should decline to prosecute.

It is often highly expedient that such action should be taken, if it can legally be done. A judgment upon the question of the bankrupt's right to his discharge is a sort of judgment in rem, which establishes a status, that of a discharged or undischarged bankrupt, as the case may be, by which all persons interested are bound. In this respect it has much analogy to the petition by a creditor to have his debtor adjudged a bankrupt, in which proceeding our statute says that any creditor may come in and prosecute. Under the bankrupt act of 1841 [5 Stat. 440], and under the insolvent law of Massachusetts, neither of which contained any such express permission, it was held that from the nature of the case it was within the power of the court to authorize a new creditor to come in. Foster v. Goulding, 9 Gray, 50. And such is said to be the law of England. Avery & H. Bankr. p. 346. It may be said that the analogy fails in this, that if a creditor could not come in to support a petition, he could immediately file a new one; but this is not an important distinction. One of the reasons for granting the application in Foster v. Goulding was, that it was too late to file a new petition.

Under section 5120 of the Revised Statutes any creditor may file a petition to have the discharge set aside for any frauds that were not known to him when the discharge was granted. This section has not often been construed. If it means literally that knowledge acquired before the date of the discharge will be an answer to the petition to annul it, then, I think, the court should be very slow to refuse a creditor the right to come in after the regular time and before the discharge is granted, if he had then first acquired the knowledge. My own impression is that the statute means knowledge acquired before the time for opposing the discharge; for that is the only time when a creditor is notified to make opposition. But if the other view should prevail, and section 5120 be taken literally, then there would be an absolute bar to a petition to set aside the discharge, although there had been no opportunity for the creditor to be heard.

I see that it has been decided that a creditor may appear not only on the return-day, but at any time to which the proceedings have been adjourned for any purpose. In re Seabury [Case No. 12,573]. This decision meets the difficulty sufficiently, and would admit the petitioner in this case; but it seems to me repugnant to the directions of rule 24 that the appearance shall be entered on the day when creditors are required to show cause, and that the specifications shall be filed within ten days thereafter, unless the time shall be enlarged by order of the district court. I have decided in one case that the discretion of

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

the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before; but I do not think it can be laid down as matter of law that the day when creditors are required to show cause means any day to which the proceedings may have been adjourned for other purposes. But I do think that the rule intends that the court should have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute right imposing a corresponding duty upon the court, and a discretionary power to be exercised only upon cause shown.

I am further of opinion that there may often be good cause to permit a creditor to take up the opposition which another is about to relinquish. The practical consideration in this connection is, that a creditor, intending to oppose the discharge, may find that this duty has been assumed by another creditor; he examines the specifications, and considers them sufficient; perhaps he consults with that creditor, and finds him determined to prosecute the case. Suddenly he finds that the opposition is to be waived. This is the history of many cases. Opposition is very often withdrawn, and then the court can do nothing except to inquire ex parte whether any pecuniary consideration has been paid to the opposing creditor contrary to section 5110, cl. 8. This safeguard amounts to nothing. It is probable that cases are settled every day in which that part of section 5110 is evaded; though no one undertakes to prove it, and the court cannot ascertain it. It is certain that creditors do oppose, for the purpose of obtaining an advantage; and I am afraid they often receive what they desire in some form, perhaps not technically open to objection. A creditor who is doing that would discourage others from coming in, because he would not care to share his advantages with them.

The statute prescribes no time within which the specifications are to be filed, but leaves that matter to be regulated by the supreme court; and the rule of court, as we have seen, gives a power to enlarge the time. There are reasons and analogies in favor of its enlargement, whenever the substantial rights of creditors will be hazarded by the settlement of the case by one creditor, who is in truth the representative of all the creditors.

I will not undertake at this time to lay down any rules for the application of this discretionary power. A great variety of circumstances may be found in the different cases. But it is obvious that among them may be the fact that the debtor has bought off the original objecting creditor after the time for filing specifications has passed; and this could not have been availed of before it occurred. No doubt many other cases may call for the exercise of the power. As the only question argued in this case was its existence, and the particular reasons for exercising it were not set out, I give ten days to the creditor to file an affidavit or affidavits, setting forth such reasons as he may have why he should be permitted to appear and oppose the discharge at this time.

* Since the decision of this case, it has become the practice, in this district to admit a creditor to support specifications already filed by another creditor, almost as of course, upon a suggestion that the opposition is to be withdrawn.

HOUGHTON (HILL v.). See Case No. 6,493.

HOUGHTON (SHELDON v.). See Case No. 12,748.

HOUGHTON (UNITED STATES v.). See Case No. 15,396.

Case No. 6,731.

The HOUND.

[27 Law Rep. 29.]

District Court, New York.[1] June Term, 1864.

SHIPPING — CHARTER TO CARRY CHINESE COOLIES —VALIDITY AND CONSTRUCTION—ESTOPPEL—CUSTOM.

[1. The charter of a ship to carry Chinese coolies from China to a foreign country was not void, on the ground of immorality, before American vessels were prohibited by act of congress from engaging in it; for the fact that the business is subject to abuses is no evidence that it is immoral in itself.]

[2. The fact that persons who chartered a ship for the purpose of carrying Chinese coolies caused her to be surveyed, and a diagram made and delivered to the captain, showing the number of passengers she could carry according to the regulations of the act of congress, does not of itself limit the charterers to that number, in the absence of any evidence that such diagram was made a part of the contract.]

[3. The provisions of the general passenger act (10 Stat. 715, § 1), limiting the number of passengers which vessels may carry, apply only to vessels bringing passengers into this country, and do not affect American vessels carrying passengers from one foreign country to another; hence the use of the words "lawful passengers," in the charter of a ship for the purpose of carrying passengers between foreign countries, must be understood to refer to such description and number of persons as by law could be carried between the countries where the voyage was to begin and end.]

[4. A ship was chartered to carry coolies from China to the West Indies, but on arrival in China a dispute arose between the charterers and the master as to the number of passengers which the charterers were entitled to put on board. The matter was thereupon referred to the American commissioner in that port, who decided that the ship must be restricted to the number authorized by the general passenger act (10 Stat. 715, § 1). *Held*, that this decision was no bar to the maintenance of a suit by the charterers to recover for alleged breach of the charter party in limiting the number of passengers.]

[5. A provision in a charter party that the vessel shall carry "all such lawful passengers"

[1] [District not given.]

as charterers' agent shall think proper to ship, must be construed reasonably, and means a reasonable number only, having regard to comfort and safety.]

[6. A custom in the particular business (the Chinese coolie traffic) of overcrowding vessels could have no binding effect in the construction of the charter, so as to require the vessel to carry such a number as would be dangerous to life and health.]

In admiralty.

SHIPMAN, District Judge. The libellants in this suit are Tait & Co., of Amoy, in China, and the claimants Charles Mallory and others, of Mystic, in the state of Connecticut, owners of the ship Hound. The libel is founded upon a charter party entered into at the city of New York, which, among other stipulations, contains the following: The libellants agreed to charter the ship for the voyage from the port of New York to any safe port or ports in the world where the vessel could safely float, the vessel, upon the completion of the voyage, to be delivered in New York, and the charter to terminate on discharge of the cargo. The charter was to continue at least eighteen calendar months, and might continue thirty, at the option of the libellants. The claimants were to keep the vessel in good order, provided with every requisite, including men and provisions. The whole ship, with the exception of cabin, deck, and necessary room for the accommodation of crew and the stowage of cables and provisions, was to be at the use and disposal of the libellants, and no goods or merchandise of any kind were to be taken on board without their consent, on pain of forfeiture of the amount of freight agreed on for the same. The claimants (owners of the ship) were to take and receive on board, during the voyage, all such lawful goods and passengers as the libellants and their agents might think proper to ship. The between-decks, if required by the charterers, were to be kept clear of all provisions, water, etc. The claimants were to man the ship and victual the crew, the libellants to pay port charges, pilotage, stevedores, and for ballast, and to furnish passengers with everything required, such as berths, provisions, water, firewood, etc. The libellants were to pay as charter money at the rate of twenty-five hundred dollars per month. The particular terms of payment it is unnecessary to state. It was also stipulated that in case the ship should, in stress of weather, or other cause, danger or accident, be turned from the due course of the voyage, then the payment of the charter money should, during such time, cease, always excepting mutiny among passengers, and being obliged to put into port on their account. If the ship was detained beyond the time fixed by the charter party, demurrage was to be paid by the libellants at the rate of eighty-three dollars per day. The penal clause binds the parties in the sum of thirty thousand dollars. There are some other stipulations in the instrument, which it is not important to notice here. By an indorsement on the charter party, it appears to have commenced to run on the 25th of September, 1854. After counting upon the stipulations of the charter party, the libel alleges that the ship entered on the voyage, and in due course arrived at Macao in China, at which place she was furnished and provisioned by the libellants for four hundred passengers, to be carried from Hong Kong in China to Havana in the island of Cuba, but that the captain of the Hound refused to take that number, and took only two hundred and thirty. The libel also alleges that, by the laws of China and Spain, in force at the ports of departure and destination, the ship could have lawfully taken the whole four hundred passengers, and that, by the usage and custom of the port of departure, that was a reasonable and proper number. The damages for this alleged breach of the charter party, in refusing to take the required number of four hundred passengers, are then set out in the libel.

To this libel the claimants have filed an answer, setting up various allegations and denials. The answer denies, on information and belief, that the libellants furnished supplies for or tendered for transportation more than two hundred passengers. It alleges that the size of the ship was inadequate to the transportation of more than two hundred and thirty passengers (which was the number she actually carried), without endangering their health and lives, especially as the voyage was made during the hot season. It further alleges that, before the ship left the port of New York on her voyage, the libellants caused her to be measured and surveyed by a surveyor of this port, her superficial feet of room to be ascertained, a diagram of the same to be made and delivered to the captain with the other papers of the ship; and it is averred that, by this diagram, it is evident that two hundred and nineteen passengers—or one to every fourteen superficial feet—were intended to be carried, and no more, that being the largest number permitted by the statutes of the United States. The answer further alleges that, after a difference arose at Macao between the master of the Hound and the agent of the libellants, they both went before the Hon. Peter Parker, the commissioner of the United States, resident in China, and submitted to him the questions at issue between them, and that he decided that two hundred and nineteen passengers were all the ship was bound to take, on the ground that that number was all that she could lawfully carry under the laws of the United States. The answer then avers that, by force of the treaty between the United States and China, the action of the commissioner is binding on the parties in this suit, and a good defence to the claim set up in the libel. It is not necessary to notice the other allegations of the answer here.

The proofs taken in the cause are very voluminous, and the elaborate arguments submitted to the court embraced a wide range of topics. The court can do little more than present the material facts which it finds proved, and state the principles of law which applies to them, without pursuing the discussion at very great length. When stripped of the formal phraseology in which it is wrapped, the contract is what is well known among a certain class of commercial adventurers as a "Coolie Charter," an agreement by which American vessels, as well as others, were for a time engaged for the purpose of transporting Chinese laborers, called "coolies," from China to Cuba, California, and some other places. The object of the voyage was perfectly well understood by both parties at the time the contract was entered into. The libellants made no secret of it, and one of the owners, at least, was very far from ignorant of the intended destination of the ship, although he exhibited some reluctance in admitting it on the stand. Whether he had any direct knowledge of the object of the charterers at the moment of signing the charter party or not, he knew, before the ship sailed, that she was going to China after coolies, and he armed her with that view. The ship sailed, and arrived in due time in China, where she was to receive coolies and transport them to the island of Cuba. Here a difference arose between the charterers and the captain of the Hound as to the number to be carried. Reference was had to Mr. Parker, the resident commissioner of the United States, resident in China, and he advised that by the laws of the United States, and the terms of the charter party, two hundred and nineteen passengers were all the ship should take. She did, however, take two hundred and thirty. It was insisted on the trial that the charter of this ship was void, as against morality. But the court has been unable to perceive how the transportation of Chinese is any more immoral per se than the transportation of German or Irish passengers. It is claimed that great abuses have resulted from the business. But these abuses grew out of overcrowding the ships, and not out of the nationality of the passengers. Frauds may have been practiced upon the Chinese emigrants, both before and after they were transported, but these frauds are not chargeable to the carrying of the persons on shipboard. These frauds, and the practice of overcrowding the ships, very likely induced congress to enact a law prohibiting American ships from participating in the business altogether; but this fact does not authorize a court to pronounce a contract entered into before such prohibition null and void. An immoral act is one which is wrong of itself, and not merely from the manner in which it is performed. And it is easy to see that the transportation of Chinese passengers, when free from fraud and properly conducted, may be as innocent as any other business. The abuses to which a business is subject may call for its prohibition by legislation altogether, but this is no evidence that it is immoral in itself. This point is, therefore, not well taken.

It was also claimed, on the trial, that the diagram furnished the ship here, before she sailed, showed that the ship could carry but two hundred and nineteen passengers, and that this diagram became part of the contract, and must determine its construction. But the court has looked in vain for any evidence which would warrant the conclusion that this diagram became a part of the charter party. If that was intended by the parties, why was it not annexed to the charter party, or so referred to in it as to connect the two instruments together? And why did not the master of the Hound rely upon it in China; and take but two hundred and nineteen passengers, as the diagram and the passenger act of the United States indicated, if this was part of the contract? There is no point of view presented by the evidence which would warrant the court in holding that any particular number of passengers was fixed upon by the charter party, or by any definite agreement of the parties. The court is of opinion, upon the whole evidence, that, while there was no definite number fixed upon, it was, nevertheless, generally expected, both by charterers and owners, that the ship would carry about three hundred and fifty or four hundred. She was going upon what was called a "coolie voyage," and the number to be carried, in the absence of any specific stipulation, would naturally be understood as the usual number. I think the evidence in the case shows that such usual number was about three hundred and fifty or four hundred.

The claim set up in the answer, that the action of Mr. Parker, in China, who appears to have been referred to for advice, is a bar to this suit, is without foundation. This court is neither bound by his conclusions on the facts submitted to him, or on the law applicable to the case. Besides, the claimants themselves repudiated his advice, which was to be governed as to the number of passengers to be carried by the passenger act of the United States, whereas they disregarded that act, and took eleven passengers beyond the number allowed by it. The charter party obliges the claimants to receive on board all such "lawful passengers" as the libellants might choose to ship. It is contended that by this term "lawful passengers," it was intended to limit the number to that allowed by the general passenger act of congress. But, on examination of the first section of that act (10 Stat. 715), it will at once be seen that it refers in terms to persons taken on board with intent to bring them into the United States. The object of the law was to prevent the overloading of immigrant ships, and had no reference to

vessels owned by citizens of the United States, which might be engaged in carrying passengers between foreign countries. By the terms of the first section, the prohibition includes vessels owned by "any citizen of a foreign country," as well as those owned by citizens of the United States, and it follows, of course, that congress did not undertake to prescribe the number of passengers which ships owned by foreigners should carry between foreign countries. The term "lawful passengers," therefore, used in the charter party, must refer to such description and number of persons as by law could be carried between the countries where the voyage was to begin and end. No law of Spain or China has been proved before the court which prohibited the Hound from taking the whole number tendered.

We now come to the remaining and only important question in the case. All contracts are to have a rational construction, and one consistent with the principles of common sense and humanity. By this charter party the Hound was to take on board and carry "all such lawful passengers" as the libellants or agent might think proper to ship. This must be construed, not literally, but reasonably. "All," so far as the number is concerned, means a reasonable number and no more. No one would pretend that if the libellants had tendered eight hundred the ship would have been bound to take them, because such number would have overcrowded a ship of her size, and put the lives of both crew and passengers in jeopardy. It is obvious, therefore, that she was not bound to take a greater number than could be carried with reasonable comfort and safety. And the real question in this case is, what that number was. The libellants insist that the number tendered, which was four hundred, could have been lawfully and safely carried, while the claimants contend that they carried all that was safe or proper, which was two hundred and thirty. From a full and careful examination of the custom, and the incidents of this peculiar trade, the court is of opinion that four hundred would have been an unreasonable number. It may have been warranted by custom, but that custom of overloading ships with this class of passengers discloses so many dangers and abuses, that a decent regard to the life and health of human beings demanded a departure from the custom. But the court is equally clear that, while four hundred would have been an unreasonable number to have received on board, yet that two hundred and thirty was a less number than might have been safely carried. After weighing carefully the whole evidence bearing upon this point, I am satisfied that the ship could have safely carried two hundred and eighty passengers of this class, and that she was bound to receive at least that number on board when tendered. I think this number could have been transported with as much safety and comfort on that voyage as two hundred and nineteen European emigrants could have been brought over in the same ship from Europe. It follows, therefore, that there must be a decree entered for the libellants, with an order of reference to compute the damage suffered by them in consequence of the failure of the ship to bring the fifty passengers which her officers improperly rejected. Let the decree be so entered.

Case No. 6,732.

HOURQUEBIE et al. v. GIRARD.

[2 Wash. C. C. 212.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PRINCIPAL AND AGENT—PRODUCTION OF RECORD OF FOREIGN COURT—PARTNERSHIP PROPERTY—SALE—CONVERSION—ADVANCES.

1. The sentence of a foreign court of admiralty being full, and showing the ground of condemnation, no other part of the record need be produced.

2. If an agent or factor sell the goods of his principal, and has not received payment, or having received the same, invests the proceeds in property for the use of his principal, or marks and puts it away, the principal has a right thereto, and is entitled to the profits thereon, against the agent or his general creditors. Aliter, if the agent applies the money to his own use, and charges himself with it in account.

[Cited in Thompson v. Perkins, Case No. 13,972.]

[Cited in Overseers of the Poor v. Bank of Virginia, 2 Grat. (Va.) 547; Hamilton v. Hamilton's Ex'r, 18 Pa. St. 22.]

3. If two are jointly concerned in a particular adventure, the one authorized to dispose of the property, may appropriate the whole proceeds to his own use, and make himself the debtor to the other for a moiety; or he may hold the money for the joint account, and subject his associate to all the risks which may attend it.

4. If the connexion in a joint adventure terminate in the sale of the property, and one appropriates the proceeds to his own use, and charges himself with the proportion due to his associate in the adventure, an action on the case will lie for the part owner for his portion. Aliter, if the connexion does not terminate with the sale, in which case, account rendered must be brought.

5. If the plaintiff makes advances for another before and after his death, in an action against the executor, for money laid out and advanced for the testator, the advances made after the death of the testator, cannot be recovered.

Action on the case [against Stephen Girard, administrator of John Girard]. The declaration contained a count, upon account stated, in April, 1803; a count for goods sold, and the usual money counts. Pleas, payment, with leave, non assumpsit, and fully administered. The principal items claimed by the plaintiffs, were, the sum of 26,961 francs, due by an account settled between the plaintiffs and John Girard, in April, 1803, at Bordeaux;

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

with a memorandum, stating that the plaintiffs were to be accountable for freights, which should be received by them from the government, on a quantity of flour, to Senegal and Cayenne; as also on other property which may be received for account of John Girard. The second item is for one half of one hundred casks of wine, shipped on board of John Girard's vessel, the Lucy, of which he was commander; the only evidence of which was an account of sales of the said wine, at Goree, dated the 11th of June, 1803, and sent by John Girard to the plaintiffs, which account is headed thus: "Accounts of sales of wine, shipped in my brig, the Lucy, on joint account with Hourquebie & Brothers, agreeably to invoice, and intended for Cayenne, and other places, under my mark, 3878 dollars, one half, 1939 dollars, belonging to Hourquebies, with which I credit them." The third item of much consequence, was for money paid by the plaintiffs, for the board and education of John Girard's children; some of which became due, and was paid before, and some after the death of John Girard, which happened in October, 1803. The plaintiffs sent a commission to Bordeaux, in which the defendant joined; and each sent forward interrogatories attached to the commission. One of the plaintiffs' interrogatories required the witnesses to look upon the plaintiffs' book of entries, and to authenticate the same, and to say who made the entries. To this, all the witnesses answer "that the plaintiffs being present, state they have no books to represent; for, if there were, the entries would only conform to the account annexed to the commission, and therefore it is unnecessary to answer the questions." The defendant's counsel, in consequence of some agreement at the last term with the plaintiffs' counsel, when a continuance was granted the defendant, waived any objection to the commission, in consequence of this interrogatory not being answered; but they contended, that the refusal of the plaintiffs, to produce them before the commission for examination, and to enable the witnesses to answer the interrogatory, afforded a sufficient ground for the jury to presume, that if they had been exhibited, the entries would have shown that the sum due, by the settled account, had been discharged, by receipts of the sums alluded to in the memoranda to that account. Against the second item, on account of the wine, the defendant offered in evidence the record of a sentence of the vice admiralty court, in February, 1804, condemning the Lucy, John Girard, master, and about 4700 dollars, in gold and silver. The counsel insisted, that this specie was the result of the sales of the wine at Goree; and consequently, that the plaintiffs having thus lost their half of the proceeds of the wine, cannot now make it a debit against the defendant. The plaintiffs' counsel objected, that on the plea of payment, notice of this defence should have been given; and besides, the record does not appear to apply to this charge; besides which the record is not complete, the depositions taken in the case not being included in it.

BY THE COURT. The plea being non assumpsit, as well as payment, the state rule of practice, as to the plea of payment, is inapplicable. Second; whether the money condemned, were or were not the proceeds of the wine, is a question proper for the jury. Third; the sentence being full, and showing the ground of condemnation, and the property condemned, no other part of the proceedings are necessary to be produced.

The defendant's counsel argued, that the affair of the wine was a past transaction, and that the partnership, not being at an end at the time of the loss by capture and condemnation, and the balance being unliquidated, the plaintiff cannot recover, in this form of action, his half of those proceeds, even if his right was not lost by the condemnation, which they strongly contended it was. They cited 2 New York T. Rep. 293; [Ozeas v. Johnson] 4 Dall. [4 U. S.] 434; and the case of Lamalere v. Caze [Case No. 8,003], in this court. They insisted, that according to the regular course of such voyages, and such partnership as this was, John Girard might have invested that money in other cargoes on joint account, to a moiety of the profits of which the plaintiffs would have been entitled; or, if he had not so invested them, but had become bankrupt, the plaintiffs would have been entitled to his half of the proceeds, in preference to the general creditors. The plaintiffs' counsel combatted all the points made by the defendant's counsel.

Dallas and Milnor, for plaintiffs.
Ingersoll and Tilghman, for defendant.

WASHINGTON, Circuit Justice (charging jury). There are only two items in this account, which seem to be much contested. The first is the amount of the settled accounts in April, 1803; and the second, the plaintiffs' moiety of the account of sales of the one hundred casks of wine, in June of that year. As to the first; it is admitted, that the 26,961 francs were due to the plaintiffs in April, 1803; but it is contended, that by some means or other that debt has been satisfied, or that the jury may and ought so to presume, principally, from the circumstance of the plaintiffs not having produced their books to the commissioners, in compliance with the call of their own counsel. No proof of payments, other than what are credited, is given; nor is there any evidence to induce a suspicion of such a fact, and which those books might have cleared up. To create a presumption, some ground must first be laid. In this case none is pretended, and it is therefore too much to expect that a jury, passing upon the plea of payment, will, upon their oaths and affirmations, say,

that, from this circumstance, the debt has been paid. The defendant, by his own conduct, has destroyed the very presumption which his counsel rely on. For, if it be a just inference, that the books, if produced, would show that this debt has been paid, it was in the power of the defendant to have compelled their production, or the examination of them by the commissioners. It may then, at least, be suspected, that the counsel ask you to presume what their client does not himself believe, or has not much confidence in. But you are asked to inflict upon the plaintiffs, a punishment for not producing their books at the call of their own counsel, to which they would not have been subjected, had they refused to produce them upon a regular notice from the defendant. For, if you presume the debt paid, on account of this circumstance, the plaintiffs will be forever barred; whereas, if the call had been made under the act of congress, only a nonsuit would have been the consequence.

Second; as to the proceeds of the wine. This presents three questions. First; were those proceeds lost by capture and condemnation? second; if lost, are the plaintiffs' interests involved? and, third; if not involved, still can they recover in this form of action? The first is purely a question of fact. You will follow John Girard, in the Lucy, from Bordeaux to Goree, where the wine was sold; thence to St. Vincent's; and then to Antigua, where she was condemned. Attend to the cargo he brought out with him, and the disposition of it. The defendant insists, that as the flour taken on board belonged to government, and was on freight, and it does not appear that John Girard had any other cargo of his own, the money found on board, and condemned, must have been the proceeds of the wine. On the other hand, it is said, that John Girard might have had other cargo of his own, or might have had money of his own from other sources; and that, at all events, the evidence is too weak for you to found presumption upon. We leave you to judge of this. We have, indeed, no fixed opinion upon it; and if we had, we should think it improper to declare it.

The second point under this head, is, if the money condemned did result from the sales of the wine, are the plaintiffs to share in the loss? This is a question of law. We think it clear, that if an agent or factor sell goods consigned to him, and has not received the money, or having received it, invests it in property for the use of his principal, or marks it and puts it away as belonging to his principal, the latter has a right thereto, and is entitled to the profits made from it, for his account, either against the factor or his general creditors. On the other hand, it is equally clear, that if the factor applies the money to his own use, charging himself with the amount, in account with his principal, the money cannot be specifically followed; but the agent is merely a debtor for so much money. In like manner, if two persons be jointly concerned in a particular adventure, as in the case under consideration, where one is authorized to dispose of the whole, on joint account, if the connexion is of such a nature as to terminate with the sale, the owner, who made the sale, may appropriate the whole proceeds to his own purpose, and make himself debtor to the other for his proportion; or, he may hold the money for their joint account, entitling the other to a specific lien on it, and subjecting him to all the risks which may attend it as such. In this case, John Girard chose to apply the money to his own use, and to make himself a debtor to the plaintiffs for their half of it. The question is, had he a right to do so? It is insisted, by the defendant's counsel, that the partnership subsisted and continued after the sale at Goree; and thence it is inferred, that if profits had been made, or if John Girard had become a bankrupt, that the plaintiffs would have been entitled, in the first case, to his share of the profits, and in the latter, to a preference of the general creditors. But this is begging the whole question. The question is, did the joint concern continue after the sale, or did it then terminate? If it continued to further operations, the consequences deduced are clear, and the plaintiffs must bear the loss of their half of the proceeds. If it did not continue, these consequences would not follow. As we understand the only evidence on this subject, which is the account of sales, there was a joint concern in a single adventure, which was to terminate, and did terminate, upon the sale of the wine; one-half of the proceeds of which belonged to John Girard, and the other half he took to his own account, and credited the plaintiffs with it. This evidence of the nature of the connexion, is furnished by John Girard himself. The manner in which he closed the transaction, was communicated to the plaintiffs, who, by years of acquiescence, assented thereto, and have solemnly confirmed the same, by bringing this action for the amount thus passed to their credit.

But it is contended, that, according to the course of such a trade as the present, and the understanding of merchants respecting it, the connexion did continue, and was subsisting even at the time of the capture. It may be so; but certainly no evidence of such a custom was offered. The counsel appealed to the mercantile part of the jury, for the correctness of their statement. Should the jury undertake to act upon such a custom, we would warn them to examine well the very case before the court, before they bring the custom to bear upon it. The question is not, whether, if two are jointly concerned in a cargo, on such a voyage as the present, and a sale be made, the proceeds invested in other cargoes, the other

joint owner is entitled to share in profits and loss; but whether, if, after a sale, the whole proceeds are taken by the owner, who, on his own account, and as agent for the other owner, made the sale, and one-half is carried to the account of the other owner, the latter can claim ulterior profits, should such be made; or will be bound to stand by any loss which may arise? Such a custom, if it exists, strikes me as a very strange one.

The third point, under this head, depends upon the one we have just been considering. If the connexion between the plaintiffs and John Girard terminated by the sale at Goree, then clearly the appropriation by the latter of the plaintiff's part of the proceeds to his own account, acquiesced in for so many years by the plaintiffs, lays a clear foundation for their recovery, in this form of action, agreeably to the principles laid down in all the cases cited at the bar. If the connexion did not terminate there, this sum cannot be recovered in this form of action. As to the sums advanced by the plaintiffs for the board and education of John Girard's children, only those sums paid before the death of John Girard, can be recovered in this action. Verdict for plaintiffs.

[See Case No. 6,733.]

Case No. 6,733.

HOURQUIBEE v. GERARD.

[2 Wash. C. C. 164.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

CONTINUANCE—NEW TESTIMONY.

The court continued the cause, upon the application of the defendant, he being an administrator, and having a few days before discovered among the intestate's papers, material testimony.

[This was an action of assumpsit by Hourquibee & Bros. against Stephen Gerard, administrator of John Gerard, deceased, to recover 26,961 francs due on account stated between plaintiffs and defendant's intestate at Bordeaux, for one-half of the proceeds of 100 casks of wine shipped on board J. G.'s vessel, and sold by him, and for money advanced for board and education of J. G.'s children.]

Motion by defendant, to continue the cause: First, because it appears, by a commission returned in the cause, that the plaintiff had dispensed with an answer being made to one of his own interrogatories, which the defendfendant alleged was very material to his defence. The cases of Ketland v. Bissett [Case No. 7,742] and Winthrop v. Union Ins. Co. [Id. 17,901] were cited to prove, that if all the interrogatories are not answered, it is fatal to the whole commission. In answer to this it was said, that the defendant should not rely on the plaintiff's depositions, and therefore the objection could not bear upon the motion to continue. But further, that this commission had been returned for twelve months, and that the cause had been continued at the last term, on the motion of the defendant, for another reason, but this was not mentioned. The second ground for a continuance was, that the defendant had, within a few days past, looked at a letter of his testator, in his possession, by which it appeared, that the sentence of a foreign court of admiralty would be important and essential to his defence.

THE COURT agreed to the continuance, for the second ground assigned, particularly, considering the defendant as an administrator.

[The case was subsequently heard on the evidence and on the charge to the jury by the court, with a verdict for plaintiff. Case No. 6,732.]

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

Case No. 6,734.

In re HOUSBERGER et al.

[2 Ben. 504; [1] 2 N. B. R. 92 (Quarto, 33).]

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

DATE WHEN ASSIGNMENT IN BANKRUPTCY TAKES EFFECT—SHERIFF'S FEES ON AN ATTACHMENT ISSUED PREVIOUS TO BANKRUPTCY PROCEEDINGS.

1. Where an attachment was issued to a sheriff on June 8th, under which he seized on that day goods of the debtors, and they, on June 10th, filed their petition in bankruptcy, and on June 19th the register demanded of the sheriff the goods which he had attached, which he refused to deliver up, and, on September 1st, an assignee was appointed, who also demanded the goods, and the sheriff claimed to hold them for his fees, of which he presented a bill, and the assignee requested the register to sanction its payment, which he refused to do: *Held*, that the assignment in bankruptcy dissolved the attachment.

2. Such assignment dated back to the 10th of June, and the title of the assignee to the property vested in him as of that date, but subject to all liens then existing.

[Cited in Re Dey, Case No. 3,870.]

3. The proceedings of the sheriff, up to June 10th, were regular and valid, and he had a lien on the property for fees which had then accrued, but to no greater extent.

[Cited in Re Davis, Case No. 3,616; Zeiber v. Hill, Id. 18,206; Gardner v. Cook, Id. 5,226.]

[Cited in Stuart v. Hines, 33 Iowa, 63, and in brief in Goss v. Cardell, 53 Vt. 449.]

[In the matter of Doris Housberger and Gustav Zibelin, bankrupts.]

By the Register:

[2] [I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following ques-

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

[2] [From 2 N. B. R. 92 (Quarto, 33).]

tion arose pertinent to the said proceedings, and is stated and agreed to by James Davis, the assignee, who appeared in person on his own part, and on the part of the creditors of the said bankrupt.

[The assignee having been duly appointed on September 1st, 1868, and having on September 3d, received from the register assignment in due form, applied to the sheriff of the city and county of New York, for certain goods which had been taken by him under attachment issued June 8th, 1868, (the petition herein having been filed the 10th day of June, and the register having on the 18th of June received petition and schedules, and having on the 19th of June demanded the said goods of the sheriff, who then refused to deliver up the same,) and the sheriff having presented to the assignee a bill as follows: "Common Pleas, Raphael Goldsmidt against D. Housberger & Zibelin. Attachment issued June 8th, 1868, for eight hundred and fifty-six dollars and seventy-five cents. Sheriff charges, paid for cases, ten dollars. Keeper's fees, seven days and six nights, sixty-five dollars. Serving papers, two dollars and sixty-nine cents. Labor, ten dollars. Compensation to deputy, ten dollars. Total ninety-seven dollars and sixty-nine cents;" and having refused to deliver up the goods until such bills should be paid, the assignee asked the sanction of the register to its payment, which the register declined to give, whereupon the assignee requested certificate thereof to the court, which is now made accordingly.

[By the fourteenth section [of the act of 1867 (14 Stat. 522)] the assignment relates back to the commencement of proceedings in bankruptcy, and title vests in the assignee although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment, etc. The creditor failing in his action, must of course pay his own costs, and part of these is the sheriff's bill. And in all cases where this officer fails to collect his costs of the defendant, he looks to the plaintiff and his attorney for them. Why should the creditors at large be required to bear these costs for the benefit of the attaching creditor? It is true that in a state court when the property is relieved from the attachment the lien of the sheriff upon the goods for his costs is recognized, and they must be paid upon their liberation, the question of costs being one to be settled between the parties to that action at the end of the litigation. But here the attachment is dissolved, and the claim of the plaintiff is postponed, and the costs of his attorney are left, like his claim, without satisfaction, because all preference is disallowed; as well might the attorney say, that his costs shall be paid upon legal procedure well-founded, as the sheriff say that he has a lien upon the goods for his costs under the attachment now dissolved, for which costs both the plaintiff and his attorney are responsible to the sheriff, without any pretence that they are unable to pay them in this case. It sometimes happens that there are a series of attachments, and it may be conceived that so many would be issued to engulf, in sheriff's costs upon them, whatever assets there might remain for the creditors at large. If, then, the sheriff's costs are to be allowed as a lien upon the goods, nothing may remain for the creditors at large of the bankrupt, although each creditor issuing his attachment may be perfectly responsible and abundantly able to pay the costs in his case. For these reasons I am of opinion that upon the dissolution of the attachment provided for as above, the property may be taken by the assignee, free from any lien of the sheriff for his costs, and that he must look to the parties upon whose action he proceeded.] [2]

BLATCHFORD, District Judge. The attachment must be assumed to have been properly issued on the 8th of June. It was legal and valid until it was dissolved. It was dissolved on the 10th of June. The assignment which dissolved it related back to the commencement of the proceedings in bankruptcy (section 14). The filing of the petition on the 10th of June, followed by an order of adjudication, was the commencement of proceedings (section 38). The attachment was, therefore, dissolved by the assignment as of the 10th of June. The title to the property attached vested in the assignee as of the 10th of June, but it so vested subject to all subsisting liens then existing on the property. The attachment was not vacated or made void ab initio. It was only dissolved from and after June 10th. The proceedings of the sheriff under it, up to June 10th, were regular and valid, and I think he has a lien on the property, for his fees which accrued prior to the filing of the petition, but to no greater extent.

Case No. 6,735.

In re HOUSE.

[1 N. Y. Leg. Obs. 348.]

District Court, S. D. New York. Jan., 1843.

BANKRUPTCY—PREFERENCE OF CREDITORS.

Where it appeared that the debtor was in a state of apparent insolvency in July and September last, there being executions in the sheriff's hands against him, and no property to satisfy them, and that on the 20th of August last he had assigned all his stock of goods in his store to M. & M. (one of whom was his father-in-law), thereby paying a debt of upwards of $3,000 due to that firm by him individually, and as one of the firm of H. & M., and on his examination he stated that there were debts due him to the amount of $10,000, but which debts appeared to be but of small if of any value, *held*, that the assignment, under the cir-

[2] [From 2 N. B. R. 92 (Quarto, 33).]

cumstances, amounted to a preference, and was made in contemplation of bankruptcy.

[In the matter of the petition of the creditors of Samuel A. House.]

This was an application by a creditor for an involuntary decree, and came before the court on the report of Mr. Commissioner Campbell. The principal question for adjudicating upon was whether an assignment, made and executed by the debtor, amounted to a preference, and was given in contemplation of bankruptcy.

A. U. Lyon, for bankrupt.

J. W. Wheeler, for creditor.

BETTS, District Judge. This is a case of involuntary bankruptcy. The petition was filed by a creditor on the 8th of October, alleging the act of bankruptcy to be a fraudulent sale and transfer of his goods by the debtor, etc., in contemplation of bankruptcy, and with intent to give a preference to particular creditors over others. This allegation is denied by the debtor, and, in his objections filed, he also denies that he owed the petitioning creditor $500, or that he was insolvent. Proofs were taken on the issue before Commissioner Campbell. It stands fully established upon the testimony of the deputy sheriff, Willett, that this debtor was in a state of apparent insolvency in July and September last, there being executions in the sheriff's hands against him, and no property to be found to satisfy them; and, independent of the deposition of the prosecuting creditor, the testimony of the debtor on his examination clearly shows that the petitioning creditor had a debt owing him by this debtor when the petition was filed exceeding $500. On the 20th of August last, the debtor transferred and conveyed all his stock of goods in his store to Morrison & Manning, paying thereby a debt of over $3,000 due that firm by him individually, and as one of the firm of House & Morrison. He states, on his examination, that there are outstanding debts due him to the amount of about $10,000, but it is manifest from the account given of them that their positive value is small, and, indeed, it is very equivocal whether they can be justly rated as of any worth. The transfer of the whole stock of goods placed in the control of Morrison & Manning, all the estate of the debtor that seems to have been at that time available, and considering the amount of his indebtedness, the pressure of executions over him, the presumption amounts to almost positive proof that he made the assignment to secure a preference to that concern (one of which was his father-in-law), and that it was done in contemplation of his own bankruptcy. Upon the evidence, as reported to me, I accordingly decide that the petition is supported, and the objections are to be overruled and disallowed, and that a decree of bankruptcy pass against the debtor.

Case No. 6,736.

HOUSE v. CASH.

[2 Cranch, C. C. 73.] [1]

Circuit Court, District of Columbia. April Term, 1813.

DEPOSITIONS—ADMISSIBILITY OF—TIME OF TAKING.

When notice is given that a deposition will be taken between certain hours, it is not necessary to wait till the last hour.

Mr. Taylor, for defendant, objected to a deposition, because the defendant attended at three o'clock, and the deposition had been taken before that hour; the notice being that it would be taken between the hours of 11 a. m. and 5 p. m. He contended that the plaintiff was bound to keep open the examination during the whole time.

But THE COURT (THRUSTON, Circuit Judge,) overruled the objection.

Case No. 6,737.

HOUSE v. The LEXINGTON.

[The case reported under above title in 2 N. Y. Leg. Obs. 4, is the same as Case No. 6,767a.].

HOUSE (NORTH v.). See Case No. 10,310.

Case No. 6,738.

HOUSE v. YOUNG.

[3 Fish. Pat. Cas. 335.] [2]

Circuit Court, N. D. Ohio. Dec., 1867.

PATENT—INFRINGEMENT—REISSUE—DECISION OF COMMISSIONER.

1. Where the plaintiff put in evidence his letters patent, and the defendant, by way of defense, offered reissued letters patent for the same invention, bearing date after the patent of the plaintiff, but being a reissue of an original of earlier date than the plaintiff's patent: *Held* that, upon the face of the papers, the reissued letters patent related back to the date of the original, and the plaintiff could not recover.

[Cited in American Roll-Paper Co. v. Knopp, 44 Fed. 611.]

2. The legal presumption is that the invention as described in a reissued patent was made at the date of the original patent; and upon this point, the decision of the commissioner of patents is conclusive, unless fraud is shown.

This was one of several actions upon the case, tried, upon submission, by Judge SHERMAN, and brought to recover damages for the infringment of letters patent [No. 38,389] for "improvements in electric baths," granted to plaintiff [Mark W. House], May 5, 1863. The defendant [Jennie Young] claimed under letters patent for "improvement in electro-magnetic bathing apparatus," granted to her husband, James Young, May 14, 1861, and reissued June 28, 1864.

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

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

Ranney & Bolton, for plaintiff.
Willey & Cary, for defendant.

SHERMAN, District Judge. This is an action of trespass for the infringement of letters patent for new and useful improvements in the application of electro-magnetism to bathing tubs. The plaintiff introduces the letters patent to him, dated May 5, 1863, and there rests his cause. The introduction of the letters patent is prima facie evidence of a new and useful invention, and that the patentee is the first inventor.

The defendant rests her defense on the ground that her deceased husband, Dr. James Young, under whom she claims, was the first inventor, and relies, along with other evidence, upon a patent issued to Dr. Young, dated May 14, 1861, and a new patent reissued thereon, dated June 28, 1864.

If the defense relied only on the first patent of May, 1861, there would not be much difficulty in arriving at a conclusion. The specifications and claims are so defective and indefinite that it is almost impossible to understand them, and it is exceedingly doubtful whether an apparatus or machine could be constructed under them, that would in any manner be useful and practical, especially when it is contrasted with the ingenious and lucid statements of Dr. House's patent.

But it is claimed by the defendant that Dr. Young's reissued patent of June, 1864, relates back to the date of his first patent of May, 1861, and hence by that relation it covers the defects of that patent, and establishes that he was the first inventor.

That a reissued patent does relate back to the date of the original patent, is well established.

"In case of a surrender of a patent for a defect arising from inadvertence or mistake, and a reissue, the new patent and the proceeding on which it issues, have relation to the original transaction." Grant v. Raymond, 6 Pet. [31 U. S.] 244.

"Under section 13 of the act of 1836 [5 Stat. 122], a second patent with corrected specifications, has relation back to the emanation of the first patent, as fully, for every legal purpose, as to causes subsequently accruing, as if the second patent had been issued at the date of the first one." Stanley v. Whipple [Case No. 13,286].

"If a patent which was invalid by reason of defective specifications, is surrendered, and a new one taken out, the second patent relates back to the date of the original patent." Smith v. Pearce [Id. 13,089].

How far the court can go back of the reissue and determine whether it was properly reissued, or whether the reissue is not broader than the original patent, and covers a new invention, is a question often raised and as often decided.

The doctrine on this subject is thus stated in Curt. Pat. p. 277: "The question has been raised, how far the decision of the commissioner of patents upon the existence of a defect in the specification, arising from inadvertence, accident, or mistake, is reëxaminable elsewhere. It becomes important, when, in an action under the reissued patent, the defense is set up that the reissue is for a different invention from that described in the surrendered patent.

"Under the act of 1832 [4 Stat. 559], the supreme court held that the reissue of a patent by the commissioner was prima facie evidence that the proofs of defects required by the statute had been regularly furnished and were satisfactory. Subsequently, under the act of 1836, the same court seems to have considered the granting of the new patent as so far conclusive upon the question of the existence of error in the original patent, arising from inadvertency, accident, or mistake, that nothing remained open but the fairness of the transaction. That the question of fraud might be raised, but that unless the surrender and renewal were impeached by showing fraud, the reissue must be deemed conclusive proof that the case provided for by the statute existed."

The author to support his text cites [Philadelphia & T. R. Co. v. Stimpson] 14 Pet. [39 U. S.] 448, and Allen v. Blunt [Case No. 216].

In the case of Allen v. Blunt [supra], which was a case at law, after reciting section 13 of the act of 1836, under which the commissioner of patents is authorized to make reissues, Judge Story says:

"Now the specification may be defective or insufficient either by a mistake of law, as to what is required to be stated therein, in respect to the claim of the inventor, or by a mistake of fact, in omitting things which are indispensable to the completeness and exactness of the description of the invention, or the mode of construction, or making or using the same. Whether the invention claimed in the original patent, or that claimed in the new amended patent, is substantially the same, is and must be in many cases a matter of great nicety and difficulty to decide. It may involve considerations of fact as well as of law. Who is to decide the question? The true answer is, the commissioner of patents, for the law intrusts him with the authority, not only to accept the surrender, but to grant the new amended patent.

"No one can well doubt that in the first instance, therefore, he is bound to decide the whole law and facts arising under the application for the new patent. I very much doubt whether his decision is or can be reëxaminable in any other place or tribunal, unless his decision is impeached on account of gross fraud or connivance between him and the patentee, or unless his excess of authority is manifest on the very face of the papers. In other cases, it seems to me, that the law having entrusted him with the authority to ascertain the facts and to grant the patent, his decision, bona fide made, is

conclusive. It is like many other cases where the law has referred the decision to the sound discretion of a public officer, his decision becomes conclusive."

Again, in Potter v. Holland [Case No. 11,330], the court say: "The power and duty of granting a new patent for the original invention, when a lawful surrender of the old patent is made, are by law, expressly confided to the commissioner. The decision made by him in this case, is that the reissued patents are for the same invention originally discovered and intended by the patentee to be secured by the original patent. That decision the law has confided to his judgment. The court must take that decision as a lawful exercise of his authority. It is not reëxaminable here unless it is apparent upon the face of the patent that the commissioner has exceeded his authority, or unless there is a clear repugnancy between the old and new patents, or unless the new one has been obtained by collusion between the commissioner and the patentee."

It will be seen from these authorities, that the validity of the new or reissued patent can only be inquired into in three particulars:

First. Was there fraud and collusion between the commissioner and Dr. Young? This is not pretended or claimed.

Second. Is there apparent on the face of the patents an excess of authority on the part of the commissioner? This is said to be applied only to cases where there is a manifest difference in the character of the invention; for instance, when the first patent was for a chemical combination, and the reissue for a machine.

Third. Was there a clear repugnance between the new and the old patent?

As I understand this case, the matter of infringement claimed and proved is the use, by the defendant, of the movable metallic side electrodes of which the plaintiff claims to be the first inventor and patentee. By a recurrence to the first patent of Dr. Young, he claims in his specifications a side electrode. It is not set out and described as fully as in the specifications and claims of the reissued patent, or in Dr. House's patent. But he clearly intends to describe a side electrode. It is not movable or sliding. It is not metallic, but he mentions that their design and use is to pass currents through certain parts of the body of the patient. The reissued patent describes more particularly, and in more precise terms, the side electrodes, and that they are sliding on metallic rods. You may refine and reason very plausibly that they are two distinct inventions; but it seems to me that the idea of side electrodes, by which to pass the current through different parts of the body of the patient, was in the mind of Dr. Young, and intended by him in his specifications and claims for the first patent, and that by his reissued patent he used different language and methods to describe and carry out the same idea, and that these methods were not so radically different as to prevent the commissioner from making a reissue to him. At all events, there is not such a clear repugnancy between the old and new patents, in the language of the authorities, as to justify us in reversing, or even reviewing the decision of the commissioner.

I therefore hold that the reissue of Dr. Young's patent related back to his first patent, and that the decision of the commissioner of patents, in the reissue, is conclusive, and that this court can not go back of that decision. Therefore, the defendant is not guilty of the infringement of Dr. House's patent as complained.

This view of the case does not render void nor set aside all of Dr. House's patent. It contains many excellent and ingenious devices, highly creditable to him as an inventor, that are not named or claimed in Dr. Young's patent, and which, in connection with his double batteries and currents, and effective and scientific mode of conducting electricity into the bathing tub, render his invention highly useful, and, with the exception of the side electrodes, are not an infringement of Dr. Young's patent. Judgment for defendant.

HOUSE AND LOT NO. 3 ABATTOIR PLACE (UNITED STATES v.). See Case No. 15,166.

Case No. 6,739.

HOUSER v. CLAYTON et al.

[3 Woods, 273.] [1]

Circuit Court, E. D. Texas. May Term, 1878.

REMOVAL OF CAUSES — PETITION FOR REMOVAL — AMENDMENT—VERIFICATION—STATEMENT OF DEFENSE IN—ORDER OF REMOVAL.

1. Where, in an action of trespass brought in a state court, the defendant justifies the alleged trespass under the authority of a court and of the laws of the United States, the case is removable to the federal court under section 2 of the act of March 3, 1875 (18 Stat. 470), as a case arising under the constitution or laws of the United States.

[Followed in Ellis v. Norton, 16 Fed. 6. Cited in Bock v. Perkins, 139 U. S. 631, 11 Sup. Ct. 678.]

2. Where such case has been removed to the federal court on the ground that it is one arising under the constitution or laws of the United States, that court will confine the defendant substantially to the ground of defense which he indicated in his petition for removal.

3. Where a petition for the removal of a cause from a state to a federal court, under section 2 of the act of March 3, 1875 [18 Stat. 470], alleged as ground of removal that there was in the suit a controversy between the plaintiff who, when the suit was brought, was an alien, and the defendant, who was a citizen of the state where the suit was brought: *Held*, that the ground alleged was sufficient, and that

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

the fact that the plaintiff, after the suit was brought, had become a citizen of the United States, did not prevent the removal of the cause.

[Cited in Bruce v. Gibson, 9 Fed. 541; Carrick v. Landman, 20 Fed. 211.]

4. The petition for the removal of a cause from the state to the federal court, may be amended.

[Cited in Deford v. Mehaffy, 13 Fed. 491; Glover v. Shepperd, 15 Fed. 838.]

5. The act of March 3, 1875 [18 Stat. 470], does not require the petition for removal to be verified; it is nevertheless eminently proper that it should be.

6. Said act does not require that the order for the removal of the cause should be made before appearance by defendant.

This was a suit brought in the district court for the county of Galveston by Henry Houser against W. T. Clayton and A. Heidenheimer, to recover damages for an alleged trespass by unlawfully entering the house of the plaintiff in Galveston, searching the same in a rough and violent manner, and terrifying his family. On the 12th day of February, 1878, the defendants filed a petition to remove the cause to the circuit court of the United States for the Eastern district of Texas, which petition was accompanied by a bond as required by law. By leave of the court subsequently given, the petition for removal was amended, and the amended petition was filed on the 16th of March, 1878, and set forth as cause for removal two several grounds. First, the petitioners stated that the defendant Clayton, in committing the alleged trespass, was acting in his official capacity as deputy marshal of the United States for the district aforesaid, in the execution of a warrant issued by the district court of the United States, commanding the marshal to search for and seize any mercantile property of one Samuel Levine, in the house in question, being the common residence of said Levine and the plaintiff, and Levine having been adjudicated a bankrupt by the said district court of the United States at the instance of Heidenheimer and other creditors; and that Heidenheimer was a mere attendant of Clayton, assisting him in making said search. The petition alleged that the said district court of the United States had jurisdiction in the premises under the bankrupt laws of the United States, and that the defendant Clayton, as such officer, was acting under its authority. The petition set forth a copy of all the bankruptcy proceedings, containing amongst other things a copy of the warrant referred to in the petition. As a second and additional ground for the removal of the cause, the petition alleged that the plaintiff, at the time of filing the suit, was an alien, and not a citizen of the United States, but a subject of the emperor of Austria, and that the defendants were citizens of Texas. The petition as amended was duly verified by the oath of the defendants. The court accepted the petition and bond, and made an order for the removal of the cause, and the same was removed accordingly.

T. M. Jack and John T. Harcourt, for plaintiff.

J. Z. H. Scott and A. N. Mills, for defendants.

BRADLEY, Circuit Justice. The plaintiff moves to remand the same on the ground that the causes of removal were insufficient. The plaintiff, in support of the motion to remand, contends that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court. That the petition for removal was insufficient, presenting no legal ground for removal; that the amended petition was unauthorized by law; that the order for removal was made on a day subsequent to the appearance of the defendants; that the petition and exhibits attached thereto are variant and contradictory; that at the date of the amended petition the plaintiff was a citizen of Texas. It was stated by the plaintiff, in certain exceptions filed in the state court, that he obtained his naturalization as a citizen of the United States after the commencement of the suit, and before the filing of the amended petition.

We think that the motion to remand the cause cannot be granted. In our view, either of the causes of removal set forth in the petition was sufficient.

First. The defendants justify the alleged trespasses under the authority of a court of the United States, and under the laws thereof. This presents a case arising under the laws of the United States, and is within the terms and meaning of the second section of the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States," etc. (18 Stat. 470). Such a defense set up in a suit in the state court, and overruled there, would clearly entitle the defendants to carry the case, by writ of error, to the supreme court of the United States, both under the 25th section of the old judiciary act [1 Stat. 85], and under the act of 1867 [14 Stat. 385], passed in lieu thereof. But the only ground on which it could be thus made reviewable by that court, is that it is a case "arising under the constitution or laws of the United States;" and if it is such a case, then it is removable to the circuit court of the United States under the second section of the act of 1875, supra. It may be objected to this view, that it does not appear that the defendants will adhere to the justification set up in their petition for removal, when the cause shall proceed in the circuit court of the United States; that, when there, they may elect to adopt some other defense. But as this would be a fraud upon the court, and upon the course of justice, after having obtained the removal of the cause on that ground, the circuit court will take care that

they shall be held to this defense, and will not permit them to plead any other. Should they attempt to set up another defense, independent of that on which they have obtained a removal, it will be the duty of the court to strike it out, and to confine the defendants to substantially the ground of defense which they have indicated in their petition—not perhaps to the literal statement of it, but to that which is substantially the same.

The second ground of removal, namely, the alienage of the plaintiff and the Texas citizenship of the defendants (which also arises under the second section of the act of 1875), is also sufficiently alleged in the petition. It is true, the petition only alleges that the plaintiff was an alien when he filed his suit in the district court for Galveston county, and does not allege that he still remained an alien at the time of filing the amended petition for removal. But we think the allegation was sufficient. It was lately decided by the supreme court in the case of Insurance Co. v. Pechner, 95 U. S. 183, that, under the judiciary act of 1789, the requisite citizenship for the removal of a cause from a state court to a federal court must exist at the commencement of the suit in the state court. It is true, the court drew its conclusion from the language of the 12th section of the judiciary act, which was, "that if a suit be commenced in any state court by a citizen of the state against a citizen of another state," etc., then the cause might be removed; and the language of the act of 1875 is different, and is not so explicit on this point. But we think that the intent of the act is the same. Its language is, "that any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects, etc., either party may remove said suit," etc. The description here given of a suit that may be removed embraces a suit in which the parties have the requisite citizenship or alienage at the time of its commencement; and as that was the time fixed by the previous law for ascertaining this condition or status of the parties, it may very properly be construed to be the time intended by the present law for the same purpose. It is convenient to have some fixed and definite time. The commencement of the suit is the most convenient and reasonable time. If a subsequent time were fixed, it would involve a necessary shifting and changing of jurisdiction. We shall adhere to the old rule as within the intendment of the present law until some other rule shall be adopted by the superior court.

The formal objections to the removal of the cause are not tenable. There is no good reason why a defendant should not be allowed to amend his petition, if by inadvertence it is imperfect as first presented. It is contended that it cannot be amended in so important a matter as that of being verified by affidavit, where the original petition is not so verified; in other words, that the original must be considered as no petition. We do not perceive why this result should follow. The statute does not require a verification, though it is eminently proper that the petition should be verified.

It is said that the order of removal was made on a day subsequent to the appearance of the defendants. The act of 1875 does not require that the order should be made before appearance. It only requires that the party desiring a removal shall make and file a petition therefor "before or at the term at which said cause could be first tried, and before the trial thereof." Section 3.

Without going into further detail, we may say that no sufficient ground has been pointed out for remanding the cause. The motion is overruled.

Case No. 6,740.

In re HOUSTON.

[Nowhere reported; opinion not now accessible.]

HOUSTON (UNITED STATES v.). See Case No. 15,398.

HOUSTON & GREAT NORTHERN R. CO. (KIDWELL v.). See Case No. 7,757.

Case No. 6,740a.

In re HOUTMAN.

[Nowhere reported; opinion not now accessible.]

HOUTZ (SMITH v.). See Case No. 13,062.

Case No. 6,741.

HOVEY v. The FRANCIS SKIDDY.

[43 Hunt, Mer. Mag. (1860) 68.]

District Court, S. D. New York.

COLLISION—NEGLIGENCE.

[A tug with a tow and a steamboat were navigated at a low rate of speed in the Hudson river, in a fog so thick that they were first warned of their dangerous proximity by the noise of each other's paddles when about 200 feet apart. The tug immediately reversed. The steamboat stopped, and then tried to cross the tug's bows, and collided with the tow. *Held*, it appearing that if the steamboat had reversed at once the collision would not have happened, that she should be held solely in fault.]

This case came up on exceptions to the report of the commissioner to whom the case was referred under the rules of January term, 1859. The action was brought by [Alfred H. Hovey], the owner of the canal boat Atlantic, to recover the damages occasioned by her being run into by the Skiddy on the Hudson river. The boat was in tow of the steam tug Illinois. There was a fog up-

on the river so thick that the boats were first warned of their dangerous proximity by the noise of each other's paddles, at a distance of some two or three hundred feet apart. The commissioner reported in favor of the libellant.

HELD BY THE COURT (BETTS, District Judge): That the commissioner had authority to hear the case under the rules. That the case is one of admiralty jurisdiction. That on the facts both vessels were culpable in being kept under headway in such a state of the atmosphere, though their fault was mitigated by their being driven at so low a rate of speed. That, if this fault had continued until the collision, it would have been a case of mutual fault, calling for an apportionment of the damages. That on the proofs, however, the tug stopped and backed at such a distance that a like proceeding on the part of the Skiddy would probably have prevented a collision, and this fault no longer remained common to both. That, when it was ascertained on the Skiddy that she was stopping in a critical closeness to the tug, she was started ahead, crossing the bows of the tug, and that this proceeding was a fault casting the blame of the collision upon her. That the pleadings on both sides are faulty in not setting forth distinctly all the facts material to be proved to support the case of the prosecution or defence, and proofs on those points not alleged would have been legally inadmissible. That the court also might refuse to decide those points not specifically at issue on the pleadings, but as the case has been fully discussed on the merits, and the pleadings can be reformed on an appeal, if one is taken, the court will decide on the law and facts of the case that the findings of the commissioner are correct, and that the exceptions must be overruled. Decree, therefore, for libelant, with a reference to ascertain the damages.

Case No. 6,742.

HOVEY v. HENRY.

[3 West. Law J. (1846) 153.]

Circuit Court, D. Massachusetts.

PATENTABLE INVENTION—COMBINATIONS.

[A patent for a combination is not invalidated by showing that each part or element had been known and used before. Rather, it must be shown that all the elements had been known and used in the present combination; and, if this is the case, it is immaterial that they were applied to a different object, for there is no invention in applying a known combination to a new object.]

This was an action on the case, brought by William Hovey, of Worcester, against Erastus Henry, of Woodstock, Connecticut, for an infringement of the plaintiff's patent for an improvement in the "straw cutter." The patent [No. 3,431] was dated February 12th, 1844. The concluding part or claim of the specification was as follows: "I do not claim a cylinder of knives cutting against a solid surface, as that has been done before; but what I claim as my invention, and desire to secure by letters patent, is the cylinder, having any number of arms around it, to which adjustable knives are affixed, constructed and arranged as above described, in combination with the roller against which they cut, in the manner and for the purpose herein set forth."

Plea, the general issue, with a notice, in pursuance of the statute, of the evidence to be introduced.

It was admitted in the defence, that the defendant had made and sold straw cutters, substantially like that of the plaintiff, with adjustable knives. It was contended, however, and evidence was given tending to show that the improvement of the plaintiff was not new. It appeared that "Green's" straw cutter, patented in 1831, contained a cylinder of knives, cutting upon a smooth roller; but the knives were not adjustable. It also appeared that in the rag cutter, the knives were adjustable, but that they operated in a different manner from those of the straw cutter, producing a different cut, and were in combination with a firm bar beneath, and not with a smooth roller. On this evidence, it was contended for the plaintiff, that his straw cutter presented a combination which had been unknown before his invention. Another ground of defence was, that the plaintiff had sold his invention more than two years previous to his application for a patent, so that the patent was void under the act of March 3, 1839, § 7 [5 Stat. 354]. It was admitted that the application was made December 22, 1843; and evidence was offered tending to show a sale, some time in the month of December; but there was no proof of a sale prior to December the 31st. The remaining ground of defence was, that the plaintiff had abandoned his invention to the public before his application for a patent; and evidence was introduced, showing numerous sales by the plaintiff during the two years prior to the application for a patent, and also advertisements of the plaintiff's straw cutter in various newspapers. It did not appear that the plaintiff had allowed persons to make the machine during these two years without accountability to him.

O. L. Bridges and Charles Sumner, for plaintiff.

Charles F. Russell, for defendant.

WOODBURY, Circuit Justice (summing up to the jury), stated that the claim of the plaintiff was for a new combination, and that, in order to support this, the combination must differ substantially and materially from former combinations. The burthen of proof was on the defendant to show that the combination was not new. To do this, it

was not sufficient to show that each part or element of the combination had been known and used before; but that all the parts had been known and used in the present combination, and it was not a new invention, if all the parts in a combination had been applied to a different object before, and they were now only applied to a new object. With regard to the defence that the plaintiff had put his invention on sale more than two years prior to the application for a patent, here the burthen was on the defendant. This was in the nature of a statute of limitations, and it was for the defendant to make it out to the satisfaction of the jury that there had been such a sale; and he must do this in a manner that would justify the jury in taking away the property of the plaintiff. An inventor holds a property in his invention by as good a title as the farmer holds his farm and flock. With regard to the abandonment, there must be evidence of a distinct character, showing such an intention. The natural presumption would be that the person who had invented a machine, would not give it to the world.

NOTE. The plaintiff did not ask for vindictive damages, but merely such as should establish his right. Verdict for the plaintiff, and damages assessed at $350. The effect of the verdict is to establish the plaintiff's title to a very valuable patent-right in the straw cutter.

Case No. 6,743.

HOVEY et al. v. HOME INS. CO.

[10 N. B. R. 224;[1] 13 Am. Law Reg. (N. S.) 511; 3 Ins. Law J. 815.]

Circuit Court, S. D. Ohio. Nov., 1874.

BANKRUPTCY—PURCHASE OF DEBTS BY BANKRUPT—SET-OFF.

A debt of one insolvent purchased by his debtor immediately prior to the filing of a petition in bankruptcy, and purchased in order to set the same off against his indebtedness, is protected by the bankrupt act [of 1867 (14 Stat. 517)], it only forbidding the set-off of claims purchased after petition filed.

[Cited in Lloyd v. Turner, Case No. 8,436; Mattocks v. Lovering, 3 Fed. 213.]

In bankruptcy.

SWING, District Judge. The petition in this case alleges that the Independent Insurance Company, prior to the 9th of October, 1871, had issued eight policies of insurance to eight several parties, and that prior to that date the defendant, the Home Insurance Company, for a valuable consideration, had issued to the said Independent Insurance Company policies of reinsurance upon each of said original policies of insurance in certain specified amounts. That on the 9th and 10th days of October the property covered by said policies of insurance was destroyed by fire; that the total amount of adjusted loss upon said policies of reinsurance, is thirty-six thousand six hundred and seventy-two dollars; that the proof of said loss was duly made, and notice thereof given to defendant. And that the said sum of thirty-six thousand six hundred and seventy-two dollars is due and owing thereon from the defendant to the plaintiffs.

The defendant pleads the general issue, and files notice of set-off, in substance, that before the petition in bankruptcy had been filed, it had become, by purchase and assignment, the owner of five of the original policies of insurance reinsured by them, to wit: That to the Western News Company for ten thousand dollars; that to Henry W. King & Co. for fifteen thousand dollars; that to Simpson, Norwell & Co. for five thousand dollars; that to Hotchkin, Palmer & Co. for two thousand five hundred dollars; and that to C. P. Kellogg & Co. for five thousand dollars. That the property covered by these policies of insurance was lost and destroyed by fire; that due and legal proof of loss had been made, and notice thereof duly given; that the total amount of the adjusted loss upon the five policies was thirty-three thousand five hundred and fifty-three dollars and fifty-six cents, and asks to have said sum set off against the plaintiffs' demand; admits a balance due the plaintiffs of three thousand one hundred and thirty-nine dollars and sixty-six cents, which defendant claims to have tendered the plaintiffs. The reply is a general denial. The agreed statement of facts shows that the Independent Insurance Company issued the original policies of insurance, and the defendant issued the policies of reinsurance; that the property covered by the policies was destroyed by fire; that due and legal proof of loss was made, and notice thereof legally given, and that the amount of loss covered by the reinsurance was thirty-six thousand six hundred and seventy-two dollars. It further shows that the defendant purchased and had assigned to it the five policies set forth in the notice of set-off; that due and legal proof of loss was made, and notice thereof given plaintiffs, and that notice of the purchase and assignment was given by the defendant to the plaintiffs; that the amount of the adjusted loss upon the five policies of insurance was thirty-three thousand five hundred and fifty-three dollars and fifty-six cents; that they were purchased at twenty-five to forty per cent., and for the purpose of setting off the same against the demand of the plaintiffs. And that at the time of the purchase of said policies the Independent Insurance Company was insolvent, and the agents of defendant making such purchase, had reasonable cause to believe it was so insolvent.

It also appears, from the agreed statement and the evidence in the case, that proceedings under the insolvent laws of Massachusetts were instituted against said com-

[1] [Reprinted from 10 N. B. R. 224, by permission.]

pany in the courts of said state, on the 2d day of December, 1871, for the purpose of winding up the affairs of said company, and on the 9th day of January, A. D. 1872, an order was made appointing trustees for that purpose, but that, prior to the time of making said order, but on the same day, a petition in bankruptcy was filed against the company, upon which adjudication was made, and under which plaintiffs were chosen assignees. Upon this statement of facts plaintiffs would be entitled to recover the amount of their demand, unless the defendant is entitled to have set off against this amount, the amount of the adjusted losses upon the five policies purchased by it. Is then the defendant entitled to have them set off? This the plaintiffs deny, for two reasons. First. That the defendant had no corporate power to purchase and take an assignment of said policies for the purpose of set-off. Second. That the defendant, with knowledge that the Independent Insurance Company being insolvent, with insolvent proceedings pending against it, and the probabilities of proceedings in bankruptcy, could not purchase the same to be set off against the claim of the plaintiffs.

In support of the first proposition, it is said that corporations can exercise only such powers as are expressly granted, or which are clearly implied from those expressly granted, and that the power to make the purchase and take the assignment of these policies is neither expressly granted nor implied from powers expressly granted; and in support of this we are referred to the 10th section of the act of 1856, which provides that "It shall be lawful for such company to loan or invest any part of its capital stock, money, or other funds in such way as the directors shall deem best for the safety and interest of the stockholders, and to sell and dispose of any interest which the company may have acquired by any such loan or investment." 1 Swan & C. 362.

We are further referred to the 6th section of act of 15th of April, 1867, by which it is provided that "It shall be lawful for any insurance company organized under this act, or incorporated under any law of this state, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages, on any unencumbered real estate within the state of Ohio, worth fifty per cent. more than the sum loaned thereon, exclusive of the buildings, unless such buildings are insured and the policy transferred to said company; and also in the stocks of this state, or stocks or treasury notes of the United States; and also in the stocks or bonds of any county or incorporated city in this state, authorized to issue by the legislature, and to lend the same or any part thereof, on the security of such stocks or bonds or treasury notes, or upon bonds and mortgages as aforesaid, and to change and reinvest the same as occasion may, from time to time, require; but any surplus money over and above the capital stock of such insurance companies, or any insurance companies incorporated under any laws of this state, may be invested in or loaned upon the pledge of the public stock or bonds of the United States, or any one of the states, or the stocks, bonds, or other evidences of indebtedness of any solvent dividend-paying institutions incorporated under the laws of this state, or of the United States, except their own stock; provided, always, that the current market value of such stocks, bonds, or other evidences of indebtedness, shall be, at all times during the continuance of said loans, at least ten per cent. more than the sum loaned thereon."

It is also claimed that section 10 of the act of 1856 has been construed by the supreme court of the state, in the case of Straus v. Eagle Ins. Co., 5 Ohio St. 59. That by that construction no power existed in the defendant to make such purchase and to take such assignment, and that we must follow such construction. In the case of Pease v. Peck, 18 How. [59 U. S.] 598, Justice Curtis says: "There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on construction of their own laws. But although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it." And again, in the case of Butz v. City of Muscatine, 8 Wall. [75 U. S.] 583, Justice Swayne says: "Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications. The cases of a different character, involving state statutes, in which the adjudications of the courts of the states in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present time."

In the light of these authorities, the general application of the rule may well be doubted, and its special application to the present case is exceedingly doubtful; for it can hardly be claimed that this decision has become a rule of property. But admitting the rule as claimed by plaintiffs, how does the decision apply to the facts of this case? In the case before the supreme court of Ohio, the proof was a conditional purchase of notes by the insurance company, for the purpose of setting them off against an amount due upon a policy of insurance to the maker of the notes. No money was paid, and the entire syllabus of the case shows the decision to be confined to the case

made by the proof. It is true, the learned judge, delivering the opinion of the court, says: "That it (the corporation) had no power to become a party to the contract of indorsement by which it obtained the notes in question, and no capacity to take or hold the legal title." But even this language must, we think, be considered as applying to the case before the court, and so the supreme court of the state in the subsequent case of White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 610, clearly indicate; for, in speaking of the opinion of the court in that case, Judge Peck says: "But, while we concede there was such an abuse of power as would prevent the relief asked, we are not prepared to hold that where the indorsement is one which, under certain circumstances, the company might lawfully accept, in other words, where there was a mere abuse and not a total want of power, that such indorsement will be null and void for all purposes and for all persons." But the extent to which a decision is of binding authority is very clearly stated in the case of Cohen v. State of Virginia, 6 Wheat. [19 U. S.] 399, and afterwards affirmed by the supreme court in the case of Carroll v. Lessee of Carroll, 16 How. [57 U. S.] 287. Chief Justice Marshall, in delivering the opinion of the court in the former case, says: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The facts of the present case show that the Independent Insurance Company had issued certain policies of insurance; that the defendant had reinsured it against loss on the same; that loss upon the original policies had occurred by which defendant had become liable to pay upon their policies of reinsurance, transactions which, to some extent, were connected together. The original insurance was the foundation upon which the reinsurance rested, out of which it originated, and there could have been no right of recovery upon the reinsurance until a liability to pay the original insurance had arisen. The loss had taken place; the liability to pay the original insurance had been fixed, by which the defendant had become liable to pay the reinsurance. The company issuing the original policies of insurance was insolvent, and the holders of them were selling them for twenty-five per cent. Was it not, under such circumstances, "for the safety and interest of the stockholders" of the Home Insurance Company, that the directors of the company should invest so much of the funds of the same as would be necessary for the purchase of the original policies at their selling price, rather than to permit them to pass into the hands of others, by which they would have been compelled to pay their full amount? I think it was, and that such an investment, purchase, and transfer was within their corporate power and consistent with public policy.

But, admitting the power to make the purchases and receive the assignments, can the policies be set off against the plaintiff's demand?

The 20th section of the bankrupt law [14 Stat. 526] provides "that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of any claim purchased by or transferred to him after the filing of the petition." It is not denied that the policies were purchased and transferred before the filing of the petition, and that they were provable claims against the estate of the bankrupt. thus coming, as we think, clearly within the letter of the provisions of this section. It is said, however, that this section was not intended to enlarge the right of set-off, as it existed prior to its passage. That, as the law was then established, these claims having been purchased with a knowledge of the insolvency, of the pendency of the proceedings in Massachusetts, and the expected proceedings in bankruptcy, and for the purposes of set-off, they could not have been set off. It may be admitted that the decisions of the courts of the several states have not been uniform upon this question. Those of Louisiana, and a portion of those of New York and Massachusetts, holding, that under such circumstances set-off could not have been allowed, whilst a portion of both New York and Massachusetts recognize a different doctrine. And the doctrine of set-off, as recognized by the supreme court of Missouri, in the case of Morrow v. Bright, 20 Mo. 298, and of the court of appeals of Kentucky, in Finnell v. Nesbit [16 B. Mon. 280], would, we think, admit the set-off.

In Massachusetts, up to the time of the decision of the case of Smith v. Hill, 8 Gray, 572, it did not seem to have been seriously doubted by their courts that all claims existing against an insolvent's estate at the time of the commencement of the proceedings in insolvency, could be set off. But this decision holds a different doctrine, and yet the case may have been well decided, without such ruling. For in that case

Kibbs, the insolvent, at the time Hill purchased the goods and gave his notes, was in failing circumstances and unable to pay his debts. And that Hill bought the goods upon condition that the note should be placed in the hands of a third party for the equal benefit of all his creditors, so as to avoid any question as to the legality of the case. They were given and placed in the hands of an attorney, who accepted the trust, and many of the creditors of Kibbs sent their claims to the attorney and received their proportion of the proceeds of said notes. It was a part of the contract of sale that this trust should be created in favor of the other creditors, and certainly no court would have permitted the defendant under such circumstances to defeat a trust which he himself had created, so that the general question was not necessarily involved in the case. Whatever may be the effect of these several decisions, the bankrupt law intended to establish a uniform rule in regard to set-off, which would be the same in every state. It is said, however, that the great object of the bankrupt law was to secure an equal distribution of the property of the bankrupt among all the creditors, and permitting a set-off in a case of this character would defeat that object. But would it any more defeat it than if a creditor, who knows of the utter insolvency of a debtor, is permitted to bring his suit against him, to prosecute it to final judgment, issue his execution, and seize every dollar's worth of his property, have it sold and put the proceeds in his own pocket, to the exclusion of every other creditor? And yet the supreme court of the United States, in the case of Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473], has decided, under the bankrupt law, this can be done. And again, prior to the passage of the bankrupt law, an insolvent debtor could transfer all his property to a single creditor who had full knowledge of the debtor's insolvency, with intent on the part of the debtor of giving, and on the part of the creditor of receiving, a preference over all other creditors, and this the bankrupt law interferes with only when the transaction has taken place within a limited period of time before the filing of the petition, and it specifies particularly what transactions shall be a fraud upon the bankrupt law. In all of which the act of the bankrupt, his motive and intent, are essential elements; but in the purchase and transfer of the claim to be set off, he has nothing whatever to do. He neither makes, procures, or suffers the purchase and transfer.

Now, if one creditor can fairly go into the courts and by their process take from the remaining creditors every dollar of the bankrupt's estate, knowing the insolvency, intending to produce the preference, and the bankrupt in the mean time, with full knowledge of his condition and the result of the act of his creditor, why may not the debtor of the bankrupt honestly and fairly go into the market and purchase from the creditors of the bankrupt their claims and have them set off? Could congress have intended any other limitations than those expressly provided, a mutual debt or credit, which was provable against the estate of the bankrupt, and which had been purchased and transferred before the filing of the petition? To say that congress intended the additional condition, that it had been purchased without the knowledge of insolvency, would be to place the purchaser of a bill, bond, or note of the bankrupt in a worse position than the man who, with the aid and assistance of the bankrupt, had secured a preference by a conveyance of all the bankrupt's property, for in the latter case the law limits the time within which it may be declared fraudulent and void to four months; but in the former there is no limitation; it may have been purchased within four months or four years, but it is not protected. And again, it would open a wide field of litigation to establish the questions of insolvency and knowledge. But how stands the question of construction upon authority? Four decisions construing this section, have been cited. That of Hitchcock v. Rolla [Case No. 6,536], decided by Judges Drummond and Blodgett, and that of In re City Bank of Savings [Id. 2,742], by Judge Hoffman. The case of Hopkins v. Jackson [Id. 6,687], decided by this court, and the case of Sawyer v. Hoag [17 Wall. (84 U. S.) 610], decided by the supreme court of the United States. The Cases of the Savings Bank and Hopkins were in favor of the set-off, and that of Hitchcock v. Rolla and Sawyer v. Hoag were cited as against the set-off. As to the reasoning and authority of the first two cases I shall say nothing. As to the third case, it was a bill in equity, and the court says, the fair inference is that the claim was merely transferred to enable the holder to realize in full his claim, and that it was incumbent on him to show that he was more than the nominal owner. And the reasoning of the learned judge, based upon the theory that the bankrupt law rests upon the principle of an equal distribution of the property of the bankrupt, would apply with equal force against the decision of the supreme court of the United States, in the case of Wilson v. Bank of St. Paul [supra]. And further, the recent decision of the supreme court of the United States, in the case of Sawyer v. Hoag [supra], deciding that the capital stock of such company was a trust for the benefit of the general creditors, prevents the evil resulting from a ruling different from that made by the court in the case. As to the case of Sawyer v. Hoag, I do not regard the decision in the light in which it is viewed by the learned counsel for the plaintiffs. If the supreme court had given to the 20th section the construction contended for, there would have been no necessity of determining the character of the indebtedness of

Sawyer, for it was an admitted fact that he knew of the insolvency of the company, when he purchased the certificate. That he purchased it for thirty-three and one-third per cent., and for the purpose of set-off. So that no matter what the character of this debt, under the construction claimed no set-off could have been allowed. But the supreme court says the first and most important question to be decided is, whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock or subscription?

Having determined this most important question, that the debt was a part of the stock of the company, and, therefore, a trust fund for the benefit of the general creditors of the corporation, they decide as against such a fund the set-off could not be allowed, and their construction of the 20th section must be taken as applying to a case of the character they found the one before them to be. So that rather than being an authority in favor of the construction claimed by plaintiff, it would seem to be one strongly, inferentially at least, against it. The English and American bankrupt laws differ in this, that the English bankrupt law has relation to the commission of an act of bankruptcy, and the American to the filing of the petition. So far as I have been able to learn the decisions of the English courts, they have been uniform in holding that knowledge of insolvency did not prevent a set-off. Among the numerous authorities upon that point, I shall only refer to two. In Hawkins v. Whitten, 10 Barn. & C. 223, Bayley, J., says: "Notice of an insolvency, therefore, or notice of stoppage, are no longer ingredients upon this point. Notice of an act of bankruptcy is alone the criterion or dividing point, and before this period, Whitten takes the notes he claims to set off, and thereby becomes a creditor of the bankrupts and they became his debtors. It may be true, and is, that he took these notes for the very purpose of making them the subject of the set-off and of getting in substance twenty shillings in the pound upon these notes; but as this has not been prohibited, we cannot say that it is illegal." In the case of Dickson v. Cass, 1 Barn. & Adol. 354, Bayley, J., says: "The next question arises on the claim made by defendant to set off the sum of five hundred and ten pounds, being the amount of notes issued by the banking-house and taken in payment by R. Cass and Smart, after they knew the bankers were in a state of insolvency or had suspended their payment, but before they knew that any member of the firm had committed an act of bankruptcy. Hawkins v. Whitten, 10 Barn. & C. 217, is a decisive authority to show that they are entitled to deduct that sum from the debt claimed by the plaintiffs. There the defendant claimed to set off notes of the Wellingborough Bank, which he had industriously obtained after the bank had stopped payment, and it was held that he had a right to set off the notes, they having been taken before he knew they had committed an act of bankruptcy." In addition to the American cases cited, I think the case of Smith v. Brinkerhoof, 8 Barb. 519, recognizes the right of set-off in bankruptcy, as limited only by the filing of the petition. The general doctrine of set-off is very clearly set forth by Chancellor Walworth in Holbrook v. Receivers of Fire Ins. Co., 6 Paige, 220.

In view of all the facts in this case, that the officers of the Independent Insurance Company were purchasing these claims, although for other parties; that it was reported to defendants they were purchasing for the company; the fact that they were being purchased in large numbers for twenty-five per cent., I think the defendants had a right to make the purchases, and that by a proper construction of the provisions of the bankrupt law they have the right to set them off against the plaintiffs' demand. The defendants having failed to establish their tender, judgment will be rendered for the plaintiffs for the balance of their demand, with interest.

HOVEY (MILLIGAN v.). See Case No. 9,605.

Case No. 6,744.

HOVEY v. The SARAH E. BROWN.

[39 Hunt, Mer. Mag. (1858) 329.]

District Court, S. D. New York.

ADMIRALTY PRACTICE — EXCEPTIONS TO COMMISSIONER'S REPORT—COLLISION—DAMAGES —INSURANCE ON CARGO.

[1. A party cannot, by exceptions to the report of a commissioner to compute damages, again raise a question on the merits which was decided by the court before the reference.]

[2. A common carrier in possession of a vessel and cargo has a qualified property therein, which makes him a competent party both by the New York law and in admiralty, to maintain a suit to recover damages resulting from the wrongful act of a stranger.]

[3. Payment by an insurance company, under a policy held by the carrier, of damages occasioned to cargo by collision, is not a discharge or satisfaction of the liability of the other vessel to the carrier for the whole amount of the damage, when she alone was in fault.]

[This was a libel by Alfred H. Hovey against the steamboat Sarah E. Brown to recover damages for a collision.]

The case came up on exceptions to the commissioner's report. The action was for injury done by the steamboat to a vessel called the Mist, then in the possession of the libelant, and to the merchandise put on board her by its owners, and committed to the libelant's charge as a common carrier.

The answer of the claimant denied the right set up by the libelant, and also denied that he had paid any money to the owners of the cargo because of any injury to it. The court, upon hearing the cause, gave a decree for the libelant, and referred it to a commissioner to compute the damage. On the reference it appeared that the gross amount of the injuries caused by the collision was $6,667.81, including lighterage and preservation of the property, and that there was realized from its sale $2,353.59, leaving a balance of $4,314.24, for which sum, besides lighterage, towing, and interest, the commissioner reported. The libelant held a general policy of insurance covering the property in question, upon which the libelant was paid by the company $2,950. The claimant alleged that this amount should have been deducted from the damages, as a satisfaction and extinguishment so far of the cause of action, and excepted to the report on this ground, and also upon the ground that the libelant proved no actual payment by him to the owners of the cargo, and that the libelant was not entitled to damages beyond those actually sustained by the boat.

HELD BY THE COURT (BETTS, District Judge): That the decision of the court upon the merits proceeded upon the ground that the libelant, as a common carrier, had a qualified property in the Mist and her cargo sufficient to enable him to maintain an action in his own name for the injuries caused by the collision. That the claimant's exception to the allowance of damages beyond what he had actually paid goes to the merits of the action, and the question cannot be brought up again by exception, but must be raised, if at all, by appeal, or at least by motion for a new trial. Moreover, by the law of this state, a common carrier is a competent party to sue a wrong-doer for and recover the full value of property injuriously interfered with by strangers while in his possession. 7 Cow. 670; 2 Kern. [12 N. Y.] 343. The same privilege and authority has been recognized in admiralty as belonging to him. That the payment by the insurance company was not in favor of the steamboat, or in discharge or extenuation of its liabilities. She, by her fault, had incurred a liability to the amount decreed against her for the consequences of the collision. This single responsibility, and nothing more, is sought to be enforced against her by this action, and it clearly cannot be claimed, as an acquittance of that charge, that another party, under a contingent contract of insurance, paid the libelant a portion or the whole of the liability which the steamboat had legally incurred to him. There is no privity of contract or interest between the insurance company and the steamboat in this respect. The company and the libelant may stand in quite a different relation in respect to the application of that money, but whether the company attempts to reclaim the payment made on her contract or abandons it, is solely a question between that party and the libelant, with which the claimant has no concern. [The Monticello v. Mollison] 17 How. [58 U. S.] 152. Exception, therefore, overruled, except that the claimant is entitled to a recomputation of the charges, to ascertain whether "lighterage and towage" has been twice allowed by the commission.

Case No. 6,745.

HOVEY v. STEVENS.

[1 Woodb. & M. 290; [1] 2 Robb, Pat. Cas. 479.]

Circuit Court, D. Massachusetts. May Term, 1846.

INFRINGEMENT OF PATENT—INJUNCTION—PATENTABILITY OF INVENTION—SCOPE OF CLAIM—EVIDENCE—DECLARATIONS.

1. Where a bill is filed for an injunction against the use of a patent, and the answer denies the use of it, and also the originality of the invention, if the denial is supported by affidavits bringing the originality of the invention into doubt, an injunction will not issue till the parties settle the right in an action, which is pending between them at law, for a violation of the patent, unless the complainant shows, that he has for some time been in the undisturbed use and sale of his patent, or has recovered damages against others for the use of it.

2. Nor can a patent be aided in respect to such an use or such recoveries, if it be one useful in respect to another patent for another invention, where such an use and such recoveries have been had, unless it is connected in law to that patent and is a part of it.

3. It is doubtful whether a mere change in the mode of fastening knives on a cylinder to be ground, or to fasten one instead of several, is a change in structure from an old machine sufficient to justify a patent for it.

[Cited in Teese v. Phelps, Case No. 13,819; Woodworth v. Rogers, Id. 18,018.]

4. If the respondent constructed and used his machine before the complainant took out a patent for his, it is not a justification, if he had seen and copied an improvement from the complainant's.

5. If the patentee claims, as a part of his invention, some things which are old and some new, he cannot succeed, without disclaiming what is old.

6. It should appear also with reasonable certainty, whether the complainant in his patent claims a new combination of old parts and things, or a new invention of new parts, and if not intelligible as to which is claimed, the patent may be void for uncertainty.

7. Declarations of a party, made before the dispute arose, in connection with acts, may be competent evidence for him, as tending to show what intentions then existed.

[Cited in Andrews v. Hovey, 124 U. S. 704, 8 Sup. Ct. 678.]

This was a bill in equity, filed April 14th, 1846, for an injunction against the defendant [Silas Stevens] not to make or use a machine "for grinding tools," for which a patent had been taken out by the plaintiff

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

[William Hovey], September 23d, 1845 [No. 4,204; reissued June 19, 1847, No. 96]. Among other things, the bill alleged that the plaintiff, before February 12th, 1844, had invented and obtained a patent for a machine called "Hovey's Spiral Revolving Straw-Cutter," which, on the 1st of April, 1845, was violated by the defendant and one E. Hovey, who were sued therefor, and the action against the defendant settled or compromised, and that against Hovey prosecuted to a verdict and judgment in favor of the plaintiff. It was further averred, that the machine for grinding tools was necessary to make the other useful, being adapted to grind the knives in the straw-cutter and being a highly beneficial machine for that purpose, and that it was copied and infringed upon by the defendant, October 1st, 1845, to an extent very injurious to the plaintiff. That for this an action at law has been instituted against him, but before a trial can be had, the damage is likely to be great, and the defendant is irresponsible, and, therefore, an immediate injunction is prayed for. Various other matters were detailed in the bill, but it is not necessary to repeat them, except as some of them may be mentioned in the opinion of the court. The answer denied the originality of the invention, and all the principal allegations affecting the defendant and was sworn to, accompanied by several affidavits. Others were put in by the plaintiff, which will be referred to in the opinion.

Mr. Hallett and Charles Sumner, for complainant.

Mr. Stanton and Charles L. Woodbury, for defendant.

WOODBURY, Circuit Justice. I shall pass by all the formal objections to the bill in this case, as being multifarious, and as seeking distinct objects, some of which are supposed by the defendant to be improper and untenable. Because a decision on the merits may be more satisfactory to both parties, if there be enough in the case to enable me to form one. Nor is it necessary to settle in detail the objections to some portions of the depositions, which are excepted to as incompetent; because my opinion will not rest on those portions where the declarations of third persons, not agents nor witnesses, are introduced by either side; or those of the parties are introduced by themselves, unless made before this dispute and proving the existence of certain inventions in connection with certain acts before a particular date. In such case, as developing a link in a transaction, they may be competent. See Burnham v. Rangeley [Case No. 2,176], and cases there cited.

Looking then, to the merits, before deciding whether the patent of the plaintiff for grinding tools has been violated or not, it is necessary to ascertain first, what is the extent and character of it; how are they, if this patent is considered as standing alone? and how are they, if it is considered as connected with the prior patent by the plaintiff for cutting straw? Standing alone, the patent itself purports to be merely for "a new and useful improvement in machinery for grinding tools." When we refer to the schedule annexed for a specific and more minute description of it, the patent is described to be "a new and useful machine for grinding the twisted or spiral cutters or knives used in the machine for cutting straw, and generally known as 'Hovey's Straw-Cutter.'" There is then added: "The nature of my invention consists in attaching the twisted (sometimes called spiral) blades or cutters to a flange, projecting from a stock, hung on journals in traversing carriage, so as to present the back of the cutter to be ground to the action of a grindstone or other reducing or polishing wheel, so that as the cutter on the carriage traverses lengthwise, it shall vibrate freely on the axis of the stock to which it is attached, to follow the twist of the blade, and grind it to a sharp edge, such as is required in cutting, by impinging the cutting edges against the surface of a cylinder by the rotation of the two cylinders or the cutting cylinder on a plane, the cutting being effected by a pressure towards the centre of the axis of the cylinder of knives. The reciprocating motion of the cutters during the traverse motion being governed by the spiral or twisted surface of the knife itself, or any thing analogous thereto." Had the specification closed here, or only made references afterwards to the drawings, and some particulars as to gearing and details in the construction, there could not be much doubt that the patentee intended to claim, as a part of his invention, the "attaching the twisted (sometimes called spiral) blade or cutters, to a flange projecting from a stock." But he proceeds to add another description of his invention, in which this part is omitted, and details it as being "to give to the stock to which the knives or cutters are attached, a reciprocating motion on its axis whilst it traverses longitudinally before the grinder. And therefore," says he again, in the summary which follows immediately in the close of his specification, "what I claim as my invention, and desire to secure by letters-patent, is giving to the spiral or twisted knife or cutter, attached to a flange in a line radiating (or nearly so) from the axis of the stock a traversing motion in the direction of its axis, in combination with a reciprocating rotary motion on its axis, when this latter motion is governed by the twisted plane of the cutter, or any thing essentially the same to enable the grinder to give the required bevel to the ground face and the proper line to the edge, substantially in the manner herein described."

From these two last descriptions of his invention, some doubt is cast over the fact,

whether the mode of attaching the cutter to a flange in the stock, was intended as a part of it or not. He says nothing about it in one of them, and in the other, it seems more natural to regard what is said about the attachment of the cutter, as a mere description of the machine, than as a part of the claim of what had been newly invented by him. This would confine the claim for inventive novelty as he had just before done, to the "traversing motion of the stock, in combination with a reciprocating rotary motion on its axis." From these last clauses, independent of the description in the commencement of the specification, I should come to the conclusion, that the attaching of the cutter to the stock was not claimed as his invention, but merely used as a part of his machine. But we can resort to the introduction of the specification as well as the summing up at the close, to ascertain the true extent of the claim. See the cases collected in Davoll v. Brown [Case No. 3,662]. Adverting to that, I am inclined to hold, for the purpose of this inquiry, that notwithstanding the second description of his invention, omitting entirely the attachment of the cutters and the final description of it, speaking of the attachment rather as a part of the machine, than a part of what he claimed as his invention, it may be regarded as a portion of that claim. Though in describing all machines, many parts mentioned are not new, nor claimed as what has been invented by the patentee, such as in this case the grindstone and the bands, and several other portions, yet at first he seems distinctly to claim this mode of attaching the knife as a part of his invention; and though not repeating that claim in another description afterwards, and leaving it somewhat ambiguous in the summing up, yet he does not expressly renounce it, and is therefore probably entitled to it. In the next place, considering the attachment to the knife as a part of the claim, can the whole invention be treated as a part and parcel of the former patent for the straw-cutter? The answer to this becomes material in the discussion of future points, on account of the longer possession enjoyed of the patent for the straw-cutter, and the verdicts which have been recovered for it, and the settlement made formerly for the use of it by the present defendant. But neither the patent nor specification for the straw-cutter, refers to the grinder, nor does the patent for the latter say any thing of the grinder being auxiliary to the straw-cutting machine. It is described there as an "instrument or machinery for grinding tools" generally; and from the evidence, it may be used to grind any tools, that need a bevel or chisel edge, and can be securely attached or fastened into the stock. But in the specification, as before detailed, it is described "as a new and useful machine for grinding the twisted or spiral cutter or knives used in the machine for cutting straw, and generally known as 'Hovey's Straw-Cutter.'" It is not, however, claimed as having been invented with the other. Its originality has never been tried with the other. It is not taken out as a part of the other, nor is the oath to its originality extended so as to embrace the other. Isaacs v. Cooper [Id. 7,096]. And though from the evidence, as well as the description, it is, as averred in the bill, very useful and economical in the manufacture or use of the other, yet the patent for it being a separate independent patent, as is the machine, it must be tried on its own merits, and be protected according to the facts connected with its own operations and use. The next inquiry on the merits, then, arises and is whether the evidence shows an infringement on the patent for the grinder by the respondent, standing as it does alone and independent. There is some contradiction on this point. The respondent undoubtedly has used a grinding machine, where the transverse and rotary motions are probably combined as here, and probably the cutters or knives are attached to the stock in a like manner. I say probably, because the witnesses, who describe his machine as now used, do it in general terms as being like Hovey's in appearance, without going into details on this point, or producing the machine itself or a model of it. Perhaps E. Hovey's affidavit is an exception, and in some respects is particular enough, but not in others. The importance of greater distinctness on this point hereafter will be seen from the circumstance, that, by evidence on the part of the respondent, and, indeed, by admissions by the counsel for the plaintiff, the combination of these two motions is not new. Most of Blanchard's machines for turning unequal surfaces, contain them. If, then, the patent for the grinder claimed, as newly invented, the combination of those two motions and only that, the patent is not new, and the defendant has not violated it by using a combination, which was so long and so commonly employed before. But if he be considered as claiming also a new mode of attaching the knives or cutters in a stock in order to be ground, as we have been inclined to construe it for the purpose of this hearing; and if it be proved, that the defendant uses the same mode of attaching his knives to the stock, which seems probable, though not shown with much certainty, then the only consideration remaining under this head is, whether that kind of attachment or fastening is new, so as to be entitled to protection by a patent. This must be proved by the testimony of more than one witness, as urged by the counsel for the respondent, because the answer is responsive to the bill concerning an infringement, and denies any novelty whatever in the patent, and is sworn to. See Carpenter v. Providence Wash. Ins. Co., 4 How. [45 U. S.] 185. But Leonard Worcester, C. Whee-

lock, and Albert Curtis testify, that the machines in use several years ago for grinding clothiers' shears and other spiral knives, similar to one produced in court by the respondent, and proved to be prior in use, by Lyman Wilder's affidavit and letter, did not fasten the knives to a stock separately, but put in the cylinder to which the knives were attached, and fastened that, and ground all the knives together in that cylinder.

It further appears, that Hovey's cylinder, with all the knives attached as in his hay-cutter, can be so inserted and fastened to the stock, but are so close together as not to be then capable of being ground in that way to a chisel edge, which is desirable; and hence each knife must be placed in separately, or a portion of the knives be removed from the cylinder, the others standing further apart, and then in that position they are capable of being ground together. I do not see any evidence on the part of the defendant, which specially rebuts this, or proves either that the defendant's machine does not attach the knives separately to the stock, or if it does, that such a mode of attaching the knives was in use many years previous to Hovey's invention of the grinder. Showing either of these would have ended this inquiry. But this not having been done, we must proceed to the next question, which is, whether such a change from the old form is a material one, and though new in form is also new in principle? A novelty in principle may consist in a new and valuable mode of applying an old power; effecting it, not merely by a new instrument or form of the machine or any mere equivalent, but by something giving a new or greater advantage. Now it is certain that one knife in Hovey's hay-cutter, and in others like his, may need to be ground alone, and though there it could be ground, held in the hand or on the old plan, while fastened in the cylinder, if as far apart from the other knives as the shears are in the old shear cutters for cloth; yet it could not be so ground if set in the cylinder so near others as in Hovey's machine. And for aught which appears, it could not be so ground, if set as near together as in the defendant's machines, they being, I understand, like Hovey's in this respect, and differing only in the manner of securing the knives on the cylinder by rings at the ends rather than by screws. It may seem a small change to attach single knives in a stock to grind them, rather than several of them on a cylinder; but is, perhaps, a material one in all cases, like Hovey's and Stevens's machines, where the knives are fastened so close together on the cylinder as not to be able to be ground to the proper edge together while on the cylinder. It is also in appearance a small change, and, as one witness expresses it, a very obvious change to any mechanic, when the occasion or the exigency arises for such a convenience, to alter the means of attaching a cylinder with several knives in it to the stock, so as to attach it with a single knife or cutter in it, or with a flange and one knife screwed to the flange. And I should like to hear more evidence from mechanics and experts, whether such a change merely in the fastening is a change of principle, or is any thing which is new in principle; or whether one mode is not a mere equivalent for the other, so as to fix one knife instead of several in one cylinder or flange on a cylinder, whenever it becomes convenient or necessary to grind one knife alone. The testimony of Nourse and Eddy throws considerable doubt over the novelty of this in point of principle, and so do the cases cited in Phil. Pat. 100, 125. But at present, I feel disposed to regard it as new, though with some hesitancy. The rotary motion possibly may be shown to be imparted differently to the single knife attached to the stock in Hovey's grinder, from what it is when the cylinder is attached as in Stevens's. My own opinion at first was, that the rotary motion in the old machines was obtained by the ends of the axle of the cylinder resting loose enough to revolve easily in holes or boxes or arbours, and the ends in Hovey's being fixed and not revolving, but the piece to which the flange was attached being hollow, and revolving on a solid bar. But I find, on further examination, that both the cylinder to which the old knives were attached and the stock to which the single knife is attached, have their ends resting on screws which enter each end, and revolve probably in the same manner. And so may Stevens's new machine revolve; though his old one, which is present, is believed not to. If this be so on seeing Stevens's machine now in use, and having it critically examined, the consequence must be, that the only difference between his and the old machine for grinding, or between Hovey's and the old ones, will be, that in the old ones all the knives revolved as attached to a cylinder, and in the others only one may revolve so attached. For the stock to which the flange for the single knife is attached, may be and is a cylinder, or a cylinder with a flange. If there be any other difference between the grinders, it will consist in the fastening this single knife to the flange with screws in Hovey's machine, while in Stevens's it may be so fastened or may be secured at the ends, as in the old machines, by rings or otherwise, and not by screws. More light and certainty on these particulars are desirable, and may, in the end, be very important. For without some difference in producing the rotary motion, a change merely in attaching several knives on a cylinder, to attaching but one, or in attaching that one to a flange on the cylinder by screws, instead of attaching it to the cylinder by rings at the end, hardly seems a sufficient change in form, or principle, or results, as to grinding, to justify a patent. In that event, this patent might be invalid without the further objection urged by the

defendant, that the grinder has neither new parts, nor a new combination. It would then be, as Nourse and Eddy testify, composed of changes from the old grinding machine, which are probably either formal or mere equivalents, and exhibit no new power or principle. In the case of Hovey's straw-cutting machine, which has been adverted to in argument, the new fastening by screws was such as enabled a party to adjust the knives, if becoming uneven or unequal in width, and when they otherwise would not be adjusted. It was likewise so constructed as to take one out, and grind or repair it alone with ease, when before it could not be. But here no such gain as to adjustment in grinding is obtained by this fastening of one to a flange by a screw, because one left alone in a stock, or at a greater distance from others, could be ground on the old cylinder as well as in the new way. Leaving this point, then, to be settled definitely hereafter on fuller testimony and examination by experts, (and I leave it for this inquiry and for this only, as if favorable to the plaintiff, in order to reach other matters,) I shall proceed to the next question that is controverted. Nothing is said here as to the permanent stock itself being claimed in the patent as a new invention by the plaintiff, and hence I shall make no comments on that point.

The next question is, whether the respondent did not himself, before Hovey obtained his patent, discover or construct this new mode of fastening; and if he did, whether it would be reasonable or legal to restrict him in the use of it, because Hovey afterwards procured a patent for it. As to this, on the whole evidence, it is very clear that Stevens erected his machine for grinding before Hovey obtained his patent. It is also proved that he had projected such a machine or contemplated it, before he saw Hovey's or had Fisher in his employment. It is further manifest, that all the parts of it insisted on, except the mode of attaching the single knives, had been in use and well known to mechanics for many years previously. At the same time, it is very evident that he did not perfect his machine as now used in all its parts till he had seen Hovey's, which was made as early as 1843. That a workman with him, by the name of Fisher, had before lived with Hovey, and used the grinder, and had afterwards re examined Hovey's. And that the defendant's resembles Hovey's not only in general form and principle, but in some accidental defects. Under these circumstances, it becomes a very important question, whether he did not copy his invention in some respects from Hovey's, and especially as to the mode of attaching single knives, and giving to them a rotary motion. If he did this, without Hovey's consent, and before he made his machine public or sold it, I should think that his use of such a grinder, though begun before Hovey obtained his patent, ought not to be protected. It would be a use by fraud, and could not be contemplated and saved under Act 1839, c. 88, § 7 (5 Stat. 354). To be sure, that act in broad terms allows any one to use and vend a machine, which he has purchased or constructed before the inventor applied for a patent. This, however, I think must be construed to mean a purchase of the inventor or his grantee, or a construction by their consent, or by his own ingenuity. Hence, if he himself invented it before, or if he copied it before from other inventors than Hovey; or if Hovey consented to the construction or use of one machine of this kind by Stevens for grinding, of which there is some testimony, then the respondent should not be restrained in the continued use of that one machine, whether we look to the act of congress itself, or to what is reasonable and equitable, independent of the act. Morris v. Huntington [Case No. 9,831]. But, as before remarked, if he constructed it by a fraud and piracy on the inventor, I shall hold, for the purpose of this examination, that he is not protected. So grave a question as this of fraud, and where the testimony as now, is conflicting, it would hardly be decorous for me to settle in this preliminary inquiry, when the same question is soon to be tried by a jury in the action now pending at law between these same parties, for a violation of this patent. And the more especially is it inexpedient for me to settle it under such circumstances, when it does not appear that in the mean time any very great additional damage can occur to the plaintiff; or that the defendant may not have sufficient property, though not wealthy, to respond for such further small injury as is likely to occur during the present term, till a trial will probably be had.

In addition to these considerations against deciding the question of fraud now, and, if adjudged for the plaintiff, against now issuing an injunction, there are several others of some moment. One is this: Does the plaintiff claim this mode of fastening as only a part of a new combination, though old in and of itself, separately as a piece of machinery? Or does he claim to have invented originally that mode of fastening? The specification is somewhat uncertain on this point, and as it has not been much adverted to in argument, and the construction adopted may have a decisive influence on the result in the trial at law, I do not propose to decide it now. If the specification be so uncertain in this respect to be unintelligible, it would be void, and it will have to be surrendered and amended. Lowell v. Lewis [Case No. 8,568]. But if it be clear and distinct, as being only a new combination, then there is no claim to invention except in regard to the combination, and no parts of the machine need be proved to be novel. While on the contrary, if it be clear that the mode of fastening is claimed as newly invented by him. then he must prove that as new, and also satisfy the court that he can unite, in the

same patent, claims for a new invention of one part, and for a new combination of that and a rotary with a transverse motion, which is old. Or that he can claim them as a new combination throughout, when it is new only in part. Whittemore v. Cutter [Id. 17,600]. If he does not so satisfy the court, he will, in that event, likewise have to take out a new specification for only one of those claims, and a new patent for the other, or disclaim such part as is not new. See Whittemore v. Cutter [supra]; Lowell v. Lewis [supra]; Evans v. Eaton [Case No. 4,560]; Sullivan v. Redfield [Id. 13,597].

Again, in respect to the present application. An injunction, when asked before the trial and resisted, is never to issue as a matter of course till the trial. There must, in such case, in order to obtain it in advance, be proof not only of a patent, but also of some length of use under it, or some considerable sales of it, or some recovery, establishing the validity of the patent, so as to impart to it weight or strength as valid beyond the mere issue of it. Here are neither. The patent issued only in September, 1845, and the offence is averred to have happened in the next month, and the proof is, that the patent was not taken out at all till the plaintiff saw the defendant use the machine, and then took out the patent in order to prosecute him. There have been no sales of it proved. There has, likewise, been no recovery or settlement shown by anybody, tending to establish the validity of the patent for the grinder, but only of the hay-cutter, a separate and independent machine, as before explained; and the invention and validity of which are questions distinct from those in the grinder, and in discussing which in trials heretofore, it is not pretended that the invention or validity of the grinder have been canvassed at all, or in any way passed upon, either by courts or juries. These last circumstances are of course no bar to the recovery in the action at law, for an infringement of a patent, but they disable a party from obtaining an injunction in advance.

If an injunction should issue in advance of the trial in a case like this, without any of the above circumstances to justify the right claimed by the patent, it should issue in all cases on the patent alone, though resisted and impugned by the opposite party. But such never has been the law, and if the practice was adopted, it would produce often heavy losses and irreparable mischief among conflicting claimants. While the present course gives ample redress in damages, if the plaintiff succeed for an infringement, and moreover, in case of long use, numerous sales, or previous recoveries, adding strength and greater probability of validity to his patent beyond merely getting it out, will assist him by a preliminary injunction. In Orr v. Littlefield [Case No. 10,590], where most of the precedents are collected, not a case is given where an injunction, when resisted, was granted, unless a possession and use of the patent had existed for some time. The shortest was three years, and, in most of the cases there collected, the time had been several years longer. Here the time had not been one month before the alleged infringement, and only about half a year before this suit was instituted, being, in the words of the decision in 3 Mer. 624, a patent of but "yesterday," when the alleged violation occurred. In most of these cases, also, there had been numerous sales of the patent, and recoveries for violations. Here there had been none of either. Again, in many cases there referred to, it is shown that when possession for some years has existed, or numerous sales, or recoveries, the court will not refuse an injunction, or dissolve it on a denial of the validity of the patent by a respondent, either through affidavits, or an answer, or other pleadings. Yet, on the other hand, as there shown, if none of those fortifying circumstances exist, courts will not only refuse an injunction, if one has not before been granted, but also dissolve it if it has been previously allowed, provided the validity of the patent is denied or brought into doubt. Here there is an entire absence of all those fortifying circumstances, and there are also pleadings in this denying the validity of the patent, as well as in the case at law in relation to this same subject. Besides these considerations, some doubts are cast on the originality and validity of the patent for the grinder by the evidence of Nourse, Eddy, and others; and an issue on that is framed, and is to be tried in the action at law, and, without deciding on that question now, except pro forma, as before remarked, in order to reach the other points, it is doubtful enough to prevent the allowance of an injunction, where none of the counterbalancing and fortifying circumstances exist that have just been referred to. Rogers v. Abbot [Case No. 12,004].

The injunction, then, cannot be granted, as the case now stands; but I shall not dismiss the bill, till it can be seen during the term, whether any new facts shall be developed by the trial or otherwise, that may require a different disposition to be made of it, in order to enforce substantial justice between these parties. Injunction refused.

[NOTE. For an action at law between the same parties for damages for violation of the patent, which resulted in a judgment of nonsuit, see Case No. 6,746, following, which case also contains an opinion by Woodbury, Circuit Justice, on complainant's motion that no costs be allowed respondent except in the action at law.]

Case No. 6,746.

HOVEY v. STEVENS.

[3 Woodb. & M. 17;[1] 2 Robb, Pat. Cas. 567.]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

INFRINGEMENT OF PATENT — DESCRIPTION — SUBJECT OF—NEW INVENTION—COSTS IN EQUITY.

1. In a patent for an improvement in the machinery to grind knives, it is necessary, by the act of congress, not only to describe the machine to be used under the patent, but to distinguish what part of it, or what combination under it, is new, or is the improvement claimed to be invented. It is made necessary, also, by that act, to do this in clear, intelligible, and certain terms. This is not now required to be done with so great accuracy as was formerly exacted, nor to be done in technical language; but it must be made with reasonable certainty and clearness. It may be done in a summary at the close of the specification, disclosing as new any of the machine before described, which is old in its parts, or in combination, or it may be done in the summary, referring in terms, or by implication, to other parts of the specification for assistance, and in such case the other parts are to be considered as explanatory of the summary, or a portion of it, for this purpose.

2. In this case, the summary appeared to claim a traverse motion of a part of the grinder, in combination with a rotary one, so as to bring up the knife to the stone steadily, though spiral in form. On referring to other parts of the specification, as to what his invention consisted of, it still seemed to be the combination of those two motions, and it was *held* that such a combination, when connected, as here, with the mode of effecting it, was a legal subject of a patent.

3. But it being conceded that it was not original, the plaintiff was not allowed now to consider his invention or improvement to be the stock used in the machine, or the goose neck, pressing the blade against the stone, when he had not distinguished either of them in any portion of the specification as the new and particular improvement he had made, nor done it, if at all, with reasonable certainty.

4. It is not enough to describe a machine containing the stock, or goose neck; but he must state further, that they, or one of them, is what he claims to have invented, either as a new part, or used in a new combination, if such be the fact.

5. So if he claims the whole machinery as newly invented, either in parts or in combination, he must state that distinctly; and it will suffice, if he really invented the whole combination, or all the parts. But if he claims too much, or too broadly, it will be fatal, unless the excess is disclaimed.

6. If his particular improvement, which he really meant to claim as new, is not distinguished from the rest of the machinery, as new, nor in sufficiently clear terms set out, the only mode of obviating the difficulty is either by an amended specification or a new patent.

7. Costs in equity are prima facie to be allowed to the prevailing party. But where they are inequitable in whole, or in part, they may be disallowed; though the burthen of showing them to be so rests on the party objecting to them. If the bill is brought solely for the benefit of the complainant, they are disallowed, to him, unless the respondent is charged with some wrong; and if the respondent succeeds on other grounds than those, in which cost was incurred, his cost may be disallowed in the discretion of the court.

[Cited in Bradley v. Rhines, 8 Wall. (75 U. S.) 393.]

8. But where he succeeds in a bill for an injunction against the use of a patent, on the objection of too great uncertainty in the specification, and no decision has been made in equity or at law in favor of the originality of the patent, which had been denied by him, he is to receive costs incurred in that defence.

9. But where the evidence cast some shade over his fairness of conduct in respect to the plaintiff and his machine, the court declined to allow him beyond actual cost, and rejected travel and attendance in the bill in equity while taxed at the same terms in the suit at law.

[Cited in Andrews v. Hovey, 124 U. S. 705, 8 Sup. Ct. 678.]

This was an action at law [by William Hovey against Silas Stevens] for a violation of a patent, which had been obtained by the complainant, for "a new and useful improvement in the machinery for grinding tools." It was alleged be to peculiarly fitted to sharpen knives used in Hovey's strawcutter, and the letters patent were in the form set out in the case of Hovey v. Stevens [Case No. 6,745], heard here May term, 1846, for an injunction. The material parts of the specification are there extracted, as well as in the opinion of the court here, and are referred to as part of this case. At the trial here, October term, 1846, before Judge SPRAGUE, the plaintiff, after proving his patent, offered a paper, certified to be a copy of one filed by him in the patent office, October 6, 1846, as a new specification for a reissue of letters patent. It described certain portions of the original patent, as in substance in the case before referred to. It set out, also, that "the nature of my invention consists in applying to said machine a stock or arbor, having a flanch thereon, on which the spiral or twisted knives are fastened to be ground," &c. And further, that the stock was "not claimed as new;" and in the close, that he did not "claim the grinder, the traversing carriage, or rotary motion, as they have before been used; but what I do claim as new, and desire to secure by letters patent, is the combination of the stock, constructed" as described, and knives attached, &c., &c. The judge ruled, that this paper offered as evidence of a disclaimer of portions of the old specification, was not competent evidence for that purpose, as it had not been filed as a disclaimer in the patent office; nor was it completed as a new specification by a surrender of the old one. And he further stated, therefore, that, in his opinion, the plaintiff's claim was so uncertain and so imperfectly described without it, or in the original specification, as to make his patent invalid until he filed another and more accurate and more specific description of what he deemed new and patentable in his invention. He held, that it might be considered as clear enough for a combination of two motions described, but for nothing else; and the mode of con-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

structing them was conceded not to be original. Thereupon the plaintiff became nonsuit, with leave to move to set it aside, and be heard on this ruling before the whole court. The hearing was commenced in November, 1846, and renewed and finished in April, 1847.

C. Sumner and B. F. Hallett, for plaintiff.
Chas. Levi and Woodbury & Stanton, for defendant.

SPRAGUE, District Judge, stated his views at length, against the motion.

WOODBURY, Circuit Justice. I concur, generally, in the conclusions expressed by my associate, on this motion. Having tried the case, he has devoted particular attention to its different aspects; and it is not, therefore, necessary for me to go very fully into the grounds for my opinion. But as the argument has been before both of the judges of this court, in order to have the minds of both exerted on the question, I do not feel at liberty to withhold some detail of the impressions made on mine. The ruling at the trial, that the new specification, not being completed, could not be considered as a disclaimer, is not objected to at the argument. The sole question, then, is, whether the original specification sufficiently distinguishes what is the particular improvement claimed to be invented by the plaintiff, and then describes it with proper clearness and accuracy. On a former occasion, when an injunction was moved against this defendant, I presented some views on the matters supposed to be claimed as new in this patent. Hovey v. Stevens [Case No. 6,745]. But by the proposed new specification since filed, and the admission of counsel in the argument of the present motion, the aspect of the case has been, in some respects, changed, and our inquiries much narrowed. This patent is, in the letters themselves, described to be for "a new and useful improvement in machinery for grinding tools." This obviously means, looking to the patent itself, not "that he has invented" the whole machine for grinding, which he afterwards describes in his specification, either as a new combination throughout, or as having new parts throughout, but that he has made some "new and useful improvement in the machinery" ordinarily used for that purpose.

The next inquiry is, what is that particular improvement, looking to the specification and drawings? How is it described, or distinguished from what is not new, when there is a summary setting out the claim to some particular novelty that is to govern? Moody v. Fiske [Case No. 9,745]; Wyeth v. Stone [Id. 18,107]. But, if it refers to other parts of the specification and drawings, those parts are to be examined in connection with it, in order to ascertain what is claimed in the summary as the new improvement. See Davoll v. Brown [Id. 3,662], and cases cited therein. I am not aware that the new paper filed as an amended, or new specification, but not completed, can be referred to in construing the summary and original specification. And it is now conceded not to be properly in the case as a disclaimer. But it can probably be considered as an explanation by the plaintiff, of his intended meaning, and can be referred to, in considering whether the words as used in the original specification carry out clearly, or not, what it is now said he then intended. The summary is in these words: "What I claim as my invention, and desire to secure by letters patent, is, giving to the spiral or twisted knife or cutter, attached to a flanch in a line radiating (or nearly so,) from the axis of the stock, a traversing motion in the direction of its axis, in combination with a reciprocating rotary motion on its axis, when this latter motion is governed by the twisted plane of the cutter, or anything essentially the same, to enable the grinder to give the required bevel to the ground face, and the proper line to the edge, substantially in the manner herein described."

No one can read this without coming to the conclusion that the improvement Hovey describes here, as invented by him, is giving to the knife, as fastened, a traversing motion in combination with a reciprocating rotary motion. In the next place, if the concluding words, "substantially in the manner herein described," allow and claim any different manner of giving those motions in combination, it does not alter what is claimed as the improvement, but merely permits the mode of giving the motions to be different, if remaining "substantially" the same. If, also, "herein described" means, in the whole specification, rather than the summary, which is a little doubtful, but ut res magis valeat, I will so consider it, by adopting a liberal construction towards the patentee. I do this, not to prejudice him by including more than is in his summary, and thus making the latter too broad, and hence, void. But it is to aid him by further illustrations and explanations. I do not see, however, that the obvious meaning of the summary, when standing alone, is altered by the descriptions, when they are carefully analyzed. There are two of these. The first one is: "The nature of my invention consists in attaching the twisted (sometimes called spiral,) blades or cutters to a flanch projecting from a stock hung on journals in a traversing carriage, so as to present the back of the cutter to be ground to the action of a grindstone, or other reducing or polishing wheel, so that as the cutter on the carriage traverses lengthwise, it shall vibrate freely on the axis of the stock to which it is attached, to follow the twist of the blade, and grind it to a sharp edge, such as is required in cutting, by impinging the cutting edges against the surface of a cylinder by the rotation of the two cylinders, or the

cutting cylinder on a plane, the cutting being effected by a pressure towards the centre of the axis of the cylinder of knives. The reciprocating motion of the cutters, during the traverse motion, being governed by the spiral or twisted surface of the knife itself, or anything analogous thereto." Here, again, the leading feature is the combination of the two motions. So is it in the only other description of his invention, as follows:—Certain things are necessary "to carry out my invention, viz., to give to the stock to which the knives or cutters are attached, a reciprocating motion on its axis, whilst it traverses longitudinally before the grinder, sa as to give the required bevel to the ground face, and a line to the cutting edge, which, in its rotation, will generate a cylinder." Now, although those motions are described as produced by the stock and other machinery used to grind the knives, yet it is the combination of the two motions which is the most clearly described as his new improvement, and not the use of either a stock, or goose neck, or flange, or attaching the knife by a screw. They seem to be mere parts of the machinery in which the combination of these two motions is represented as the novelty. In the next place, though it is doubtful whether a patent can be taken out for mere motions, or for mere combinations of motions, yet adopting again the most liberal construction for the patentee, that this is a patent for a new mode, or manner of producing those motions, the matter might be patentable. Stone v. Sprague [Case No. 13,487]; 3 Car. & P. 502; Jupe v. Pratt, Webst. Pat. Cas. 144.

But after reaching that conclusion we are met by the admission in the amendment of the specification filed, and in the argument for the plaintiff, that the combination of those two motions is not a novelty; and that if the patent is to be regarded as for that, it is too broad, and hence, being not original for that, must be invalid. Kay v. Marshall, 1 Mylne & C. 373; Wyeth v. Stone [Case No. 18,107]; [Evans v. Eaton] 7 Wheat. [20 U. S.] 356; Moody v. Fiske [Case No. 9,745]; 4 Barn. & Ald. 541; Bovill v. Moore, 2 Marsh. 211. How then can the plaintiff be entitled to recover, or be aided by a new trial? Only, I apprehend, by showing from the specification, that some other thing than this combination is actually and clearly claimed in the original specification as the new improvement.

At the hearing of the motion for the injunction, it was conjectured that if any other new improvement was claimed, it might be the mode of fastening or attaching the knife to the flange with a screw. But it appears now, in the admission before referred to, that the fastening of the knives with a screw is not meant to be claimed as a novelty. Neither is the grinding one knife at a time claimed as a novelty, standing alone and per se. While, on the contrary, in the statements in the new specification filed, it is the stock, in combination with the other parts, which he desires to have considered as his particular improvement. But at the argument of the present motion, it seems to be contended, there are three novelties in the improvement of the plaintiff, and either of them well enough distinguished. One is a new combination of all the parts, they all being old for like purposes—that, it is said, never before so united in this manner. One is in the stock as permanent, united with the other parts; and one is the mode of pressing the blade against the stone, combined with the rest. Now, as to the first claim, we are unable to discover it in the specification, as for any new combination of parts, unless it be the traverse and rotary motions, united—and that is now acknowledged not to be new. As to the second claim for a new part in a permanent stock, or a new combination with it, it is certain that the original patent refers to the stock, and so does the proposed disclaimer. But the latter concedes it is not a new part. Neither of them speak of it as a permanent stock, ipsissimis verbis, and the machine, it is conceded, would work well without its being a permanent stock—but not so well for some purposes. Undoubtedly a permanent stock at times is better, so as to attach to it separate knives and grind them, when out of order, or to attach newly made separate knives and grind them, so as to be ready for commercial sales at a distance, and for immediate use. Unless the stock then, be claimed as a permanent one, and, being such, as a novelty, either in the combination or as a separate part, this second ground fails. For temporary stocks, or moveable stocks have long been used in grinders for sharpening clothing shears—if both they and permanent ones have not been in combination with other parts similar to those for grinding knives to split or shave leather. The third and last claim of novelty in a part or in the combination, is the goose neck pressing the knife to the stone. Because, according to the paper filed as an amendment, unless the combination consists of a permanent stock with the other parts, there is nothing else in the combination which is now claimed at this hearing, that is new or useful, unless it be the goose neck and screw to hold against the back of the knife to keep it close to the grindstone.

Now, in examining whether the original specification can be fairly construed to distinguish this stock in particular, or this goose neck, as the new improvement of the plaintiff, when combined with the rest—that is, never having been before so combined substantially, the language used must be looked at liberally and favorably to the plaintiff. It is apparent, from all the specifications and drawings, that both the stock and goose neck, to press the knife against the stone, are enumerated and described as parts of the whole machine. This, however, is not enough

to relieve the case from its difficulties. Here, after describing the whole machine with all its parts, which is well enough done in most respects, he should have distinguished the stock or the goose neck as the new parts he had invented; or if neither, he should have stated the combination of one or both to be new with the rest of the machinery, or if not so, that some other combination in the machine, or the whole of it, was what he claimed as his improvement. 2 Marsh. 212. Thus the whole machinery and apparatus were claimed as new in Wyeth v. Stone [Case No. 18,107]. But, instead of any of these being done here, he seems to distinguish and particularize with clearness nothing as novel in the machine, except, as first mentioned, the combination of the two motions. Nor are these distinctions useless or arbitrary, or of recent requirement in our patent laws.

A party may claim to have discovered some new part of a machine which is useful, or some new combination, or in other words, new arrangement of old parts, which is useful. Either is patentable. But they are not to be described in the same way; and whichever is his particular improvement must be plainly stated; because the public, when making or using similar machines, have a right to know, first, what he claims to have patented and invented as new—whether new parts or new combinations only; and if new parts, what new ones? and if new combinations, of what old parts? See cases cited in Davoll v. Brown [Case No. 3,662]. So the persons whom a patentee prosecutes have a right to know clearly what they are to defend against; a claim of new parts or of new combinations? and if of either, the specific parts which are set up as new, or which are set up as brought into a new combination. Wyeth v. Stone [supra]; Webst. Pat. Cas. 86, note; Macfarlane v. Price, 1 Starkie, 199; Rex v. Cutler, Id. 354. So the act of congress requires this. What is claimed as new or an improvement is to be set out substantially, in order that the commissioner of patents may judge if it be new, so as to issue a patent, and courts may see whether it is new in the trials contesting it. Lowell v. Lewis [Case No. 8,568]. It is necessary to be done, also, to see if he claims any thing before known or not, or, in other words, too much. On these points see, also, 1 Starkie, N. P. 199; Evans v. Eaton, 3 Wheat. [16 U. S.] 354; Phil. Pat. 268, 270, and cases cited therein; 3 Brod. & B. 5; 2 H. Bl. 489, 464; 3 Car. & P. 611; Ames v. Howard [Case No. 326]; 2 Starkie, 249. Hence, saying that the patentee has made an improvement in certain machinery without distinguishing what it is, or what part is new, has been adjudged to be bad. Barrett v. Hall [Case No. 1,047]; 1 Starkie, N. P. 149; Phil. Pat. 398. Or saying he has made an improvement in a machine, and describing the machine, but not distinguishing the novelty or new improvement from the rest, is equally bad. Davies. Pat. 361; 2 Marsh. 211. Also, it must not only be distinguished, but so distinguished as to be intelligible, unambiguous, accurate. 3 Car. & P. 611. Beside the good reasons in favor of this, there are the positive requisitions by congress. By the act of July 4th, 1836, the patentee "shall particularly specify and point out" what he claims "as his own invention or discovery." See, also, Bovill v. Moore, 2 Marsh. 211; Stone v. Sprague [Case No. 13,487]; Wyeth v. Stone [supra]; Moody v. Fiske [Case No. 9,745]. See section 5, "specifying what the patentee claims as his invention or discovery." See section 6. "In case of any machine he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions." 5 Stat. 119. I would not, however, be so strict on this as was once the practice. See Phil. Pat. 398. I would be as indulgent to patentees in describing their claims as is consistent with the rights of the public and of other inventors, and the imperative requirements by congress. To obtain clearness and exactness I would not confine them to technical language; but rather encourage what is in popular use, and better understood by all. 4 East, 135. Nor in most cases are they to be restricted to any particular part of their specification, but resort for light to all portions of it and of the drawings. See Davoll v. Brown [supra]. Yet still the claim to novelty must, not merely for the reasons before stated, and the acts of congress before cited, but by all on this subject from the foundation of the government, be clearly described somewhere in the specification. Thus, by the act of 1790, § 1 [1 Stat. 109], it must clearly, "truly" and "fully" be set out. By the act of 1793, § 3 [1 Stat. 321], it must be described in "full, clear and exact terms," so as to be distinguished from what was before known. In short, the bargain by government is to give the inventor an exclusive use for 14 years, if he will place on record and distinguish clearly and truly what his novelty or improvement is, so that the public can easily understand it and benefit by it after the 14 years, if not before. Webst. Pat. Cas. 86; 11 East, 105; 3 Mer. 161. Hence, of course, the claim must be made to something as new, in such plain terms that it can be readily understood, and with "reasonable certainty"—Wyeth v. Stone [supra]—what it is. The fewer technical terms are used the better, if the subject is intelligible without them. But as specifications are legal instruments no less than descriptions of mechanical and philosophical, and sometimes chemical improvements, it is desirable that they should always, before filed, be examined by some experienced lawyer as well as by some machinist or other expert, fully acquainted with its subject matter. Infinite expense and trouble would be yearly saved by this. The advice of legal counsel

is as useful in the preparation of such an instrument as in preparing a difficult deed or will.

In the present case, for instance, how easy and clear it would have been, to say in the specification what the inventor wished, and to say it so as to be at once intelligible to all. If originally he claimed no part as new, to say so; and to add, that all these old parts so combined and arranged in order to give a bevel edge to the knives, was the sole novelty in his claim. And if, in that combination, the stock to be used was meant to be a permanent one, and that was deemed important, to say so. Again, if he meant to claim some part as new, as well as a new combination, and he deemed it proper to unite both in one patent, how easy it would have been to have identified the part as new, which he claimed, as well as described the new combination. So, if he meant to claim as a new invention some part alone, independent of any new combination, it would and should have been so described, separately, as a new part. But now, unfortunately, all is doubtful on the face of the patent as to what he claims to be new, unless it be the combination of the two motions. It is not doubtful what the machine is in which he intends to patent "an improvement," as before remarked, except, perhaps, in one important particular, as to the stock of it being permanent or not. But, putting the construction on that most favorable to him, the doubt remains from his description of the machine, what was the particular improvement in it which he claims to have invented? what does the machine perform, that he supposed was novel? or by what improved arrangement, except the two motions combined together? It was not new for it to give a bevel edge to instruments, as that had been given before. Nor does he claim this as the novelty in his operations. But he rather claims a novelty in the mode of doing it. At first he seemed to claim that novelty in the mode to be by combining the traverse and rotary motions. Next, it seemed from other portions of the specification, to be by attaching the knives to a flange by a screw; then it was said to be by using a permanent stock for the flange and knife; and lastly, by the goose neck and screw, to secure the knife when grinding, to the grindstone. All these occurred to others, on reading the patent, if they were not all suggested on his part. This uncertainty and obscurity as to which was meant, or which is, in fact, described as the novelty, except the two motions, are an insuperable difficulty, as the letters now stand, and cannot be overcome except by a new specification. They are objections, not merely on conjectural data. The latter stand out in bold relief on the face of the specification, and the objections cannot be removed but by the use of new language. It is now said that in point of fact he did not mean to claim the two motions, or the attachment by a screw, or moveable stock, as novel; but rather a permanent stock, and the apparatus to crowd the knife, while grinding, close to the stone. He seems yet to hesitate between these two last. But if he meant to describe these two, or either of them, as the novelties, in his original specification, he was very unlucky in the terms selected, since the other matters, rather than these, were, at the first hearing of the case, supposed to constitute what was new in his apprehension. They still, on the fact of the specification, seem most prominent. Whether these parts now insisted on, the stock or the goose neck, are, in truth, new or not, either in themselves or in combination, is a question not before us at this time; but only whether they are plainly distinguished in the specification as the particular improvement which he claims to have invented? On that, it is enough to say that by the language he has there used, neither of them seem to be so described at all; much less described with reasonable certainty.

The machine itself, as a whole, is described with sufficient clearness and certainty, as the counsel justly argue, unless it be whether the stock is permanent or moveable. But that is not the difficulty. It is the want of a description, whether his improvement is meant to be as consisting in the combination of the whole, or of all the parts, or only of one or two of them; and if the last, which? And, also, whether it consists in such new combination of some of the parts; or of an invention, also of some, and if so, which? This is the fatal uncertainty, and extends to everything claimed as new; except, also, the two motions, and the combination of them is admitted to be not original. Several cases have been cited and urged on us parallel to this, where the patent or principle contended for by the plaintiff, has been sustained. But, in all, the description was different, or the validity of the claim was overruled; and in the present case the description fails to meet either of the two strongest cases cited in Story's Reports [Stone v. Sprague, Case No. 13,487; Wyeth v. Stone, Id. 18,107], or those in Mason, Wheaton, and Marshall, which have not been cited, but which bear strongly on this case. I have made a thorough analysis of all of them, but it is not necessary to repeat it, as the principles involved in them are embodied into the remarks already submitted by me.

I regret the delay and expense which an amendment of his specification will cause to the patentee; but am better satisfied in coming to the conclusions that it is necessary, (forced on us by considerations of settled law, and safety to the public as well as individuals,) by the reflection that the patentee, if he has made a new and useful invention, is still able to reap the benefits of it. He will effect this by describing, in a new specification, what he claims as new, with greater certainty, accuracy and clear-

ness, so as to comply nearer with the act of congress, and give to the community the particular information, to which they are, by law, entitled, concerning what he claims to be new. Care, of course, will be taken, also, to disclaim all he does not consider as new, in his combination, or new in the parts used. Bovill v. Moore, 2 Marsh. 212; Prouty v. Ruggles, 16 Pet. [41 U. S.] 336. The motion to set aside the nonsuit cannot be granted.

After this decision was announced, the bill in chancery, which was pending between the same parties for an injunction against the use of this grinding machine, by the defendant, was directed to be dismissed. See a report of the original case at the last term. Hovey v. Stevens [Case No. 6,745]. The complainant moved that no cost be allowed to the respondent, except in the present action at law, on the nonsuit. This motion was argued at the May term, 1847, by the same counsel on both sides, and the opinion was pronounced by

WOODBURY, Circuit Justice. It is, doubtless, a sound principle in chancery, to exercise some wider discretion over the allowance of cost, than is done in a court of law. See Hunter v. Marlborough [Case No. 6,908], at the last term, and Burnham v. Rangely [Id. 2,177]; Hull. Costs, 625, 626; 2 Ath. 111, 400, 552. But still the general rule is there, as at law, to give costs to the prevailing party. See cases cited in those above, and Barker v. Birch, 1 Dowl. & L. 816; and 7 Scott, 397; 4 Beav. 350. What prevails by law—what is legal is presumed to be moral, and conscientious, and equitable, till the contrary is shown. Vancouver v. Bliss, 11 Ves. 462. This rule is applied, likewise, to bills for injunctions, as well as to other proceedings. 3 Mylne & C. 738. But, if peculiar circumstances of an equitable character exist in favor of the defendant receiving no cost in the case, or none for particular items, it is deemed justifiable to withhold them. See ante. But the burthen to show these peculiar circumstances is on the complainant. 2 Ves. Jr. 463. See cases before cited. And Lord Eldon regretted that the rule in chancery had ever been different from that at law. See cases in Hunter v. Marlborough [supra].

I am not disposed to depart from what has been long established on this subject; but shall not be inclined to make exceptions to the general rule which prevails both in equity and law, beyond what is sustained by sound principles and established precedents. None have been referred to, withholding costs from the prevailing party, under circumstances like these, while several cases seem opposed to it. Thus, it has been held, where a party had obtained an injunction, and it was dissolved, that costs of affidavits, taken and used for the respondent, should be allowed, though he might have succeeded without them, on a demurrer. He had a right to pursue either course. Bamearly Canal Corp. v. Timbly, 13 Law J. (N. S.) 34. On the contrary, where a long defence was resorted to against a bill in chancery, and failed, though the bill was dismissed on other grounds, costs to the respondent were disallowed (Sanders v. Benson, 4 Beav. 350), because he had not succeeded in what they related to. So, if the will was not for any wrong of the defendant, but to settle what the title of the plaintiff was, and a decree was for the plaintiff, he had no costs against the defendant. In Robinson v. Cropsey, 2 Edw. Ch. 143; 2 Chit. Eq. Dig. 933, 934. Again, where items exist in the bill of cost, which are vexatious or unnecessary, they can be excluded if distinguishable from others which were proper. 1 Beav. 130; 4 Beav. 25. Bringing the present case to these tests, nothing is found in the general character of the cause which raises any peculiar claim from exemption from the usual rule of allowing costs to the prevailing party. The fact, that the bill for an injunction failed, on account of a defective specification, which thus made the title to the patent bad, by an express act of congress, was not a failure for any fault of the defendant; nor was it from the want of form in the bill of pleadings, which could be cured by the statutes of jeofail, or an amendment; and hence, not be visited by large costs, charged to the plaintiff. But it was a defect in the patent or deed itself, of the plaintiff—an imperfection in his title. It was not curable by any amendment within the power of this court. And, by the patent law, itself, when amended, at the patent office, as it may be under the 13th section of that law, if happening "by inadvertence, accident or mistake;" yet it is only then, and it is done at the loss of all the previous term of the patent, and of all actions pending, and, of course, of the cost incident to them; being valid only in respect to "cases subsequently accruing." See 13th section of the act of July 4th, 1846 (5 Stat. 122).

It has been further argued, that the merits of this case are with the plaintiff, and hence he should not pay costs. But how the real merits between these parties as to originality of the invention, are, the court cannot anticipate till they are tried. The originality is claimed on the one side, and denied by the other; and both the action at law and bill in chancery have been disposed of without a decision on that point. Had that point been settled in favor of the plaintiff, and the cases failed merely on technical grounds, in prosecuting the action, whether of form or substance, it might be proper in the bill in equity to allow no cost to the respondent. Wray v. Barwis, 1 Peake, 70. But that has not been settled in the bill in chancery, and the error in the reasoning of the plaintiff, consists, chiefly, in supposing it has been settled in his favor; that hav-

ing ended in a postponement of any injunction, till the validity or originality of the patent—they being denied—should be tried at law. On the only trial at law, before going into the question of originality, the letters patent of the plaintiff were adjudged to be bad under the act of congress, for want of certainty in the particular part, or combination, claimed to be original, and the plaintiff became nonsuit. Consequently, though in the hearing for an injunction some evidence was offered by the plaintiff to prove priority in making his machine before the defendant made his—and some knowledge of its qualities, by a workman afterwards employed by the respondent, and some apparent resemblance between them, even in defects or mistakes; and thus a strong presumptive case was made out by the plaintiff, as to originality; yet the respondent denied the originality of it, under oath, and put in several affidavits, and some models, to prove an earlier existence and general use of similar grinding machines. But whether this satisfactorily overcame the plaintiff's evidence, I did not decide. On the contrary, I expressly forbore to do it for the various reasons there stated, and continued the bill in chancery till that issue, as to originality, could be tried and settled by a jury.

Another argument is now urged against costs to the respondent, on the ground that the letter and deposition of Wilder were used to mislead, and did mislead, about the old machines and knives, in the hearing as to an injunction. It will be seen, however, that nothing decided in that hearing, or in the trial at law, could be affected by that letter and deposition, whatever was the intent in using them. But on examining them with care, is it at all certain that the ground blade, referred to by Wilder, was likely or designed to mislead; and was not a new one sent with the old machine and old knives, in order that they might be compared together? And it is clear, that "the care-worn and gray witness," to which Wilder poetically refers in his letter, was the old "machine," and not this blade. It is called "machine"—totidem verbis. It is difficult, then, to find any peculiar reason in the case, as yet appearing, or yet ascertained, which renders it inequitable to follow the general rule of allowing cost, as before explained, to the prevailing party. A different state of facts may be settled hereafter, and results reached, which may change the equities as well as law, between these parties; but until that time arrives we must be governed by the situation of things as they now stand. I came to a like conclusion, in Hunter v. Marlborough [supra], and think the exceptions to the general rule should be very few, and rest on very strong grounds. But, although nothing is yet found, by the court or jury, to justify me in refusing cost to the respondent, as inequitable in the bill for an injunction; yet I feel compelled to say, that several matters were proved against him in that hearing, which made an impression on my mind less favorable to his claims in equity, than to those of the plaintiff. And though I formed no decisive opinion, whether other persons than these parties might have invented and used like machines earlier than either of them, and thought that I should not, for the reasons then given, form a decisive opinion till a trial at law; yet the course of the defendant was not, in some respects, such towards the plaintiff and his machine, as to entitle him to any more costs than are clearly proper under all the facts and circumstances, belonging to both cases. Hence, being obliged to travel and attend here, in the action at law, I deem it just he should not tax travel and attendance, also, in the bill for an injunction, at the same terms, between the same parties. But all the depositions taken and used in the latter case, which were pertinent, and the usual counsel fee, seem to be proper charges, necessary to his defence, and, therefore, are allowed.

Case No. 6,747.

In re HOW.

[18 N. B. R. 565;[1] 11 Chi. Leg. News, 141.]

District Court, D. Massachusetts. Jan. 6, 1879.

BANKRUPTCY—POWER OF COURT—ORDERS OF.

The bankrupt court has power to order a bankrupt to pay over to the assignee sums which, apparently, are in his hands.

[Cited in Re McKenna, 9 Fed. 29.]

In bankruptcy.

LOWELL, District Judge. This was a petition by the assignees in bankruptcy of Calvin How and Frank G. How, alleging that they have in their possession at the present time certain promissory notes and certain sums of money, which were part of their assets, and should have been paid over to the petitioners, and praying relief. The petition was referred to Mr. Sherman, the register having charge of the case, who has reported that the notes mentioned in the petition have been collected by Calvin How, and, upon the whole evidence, he finds in the hands of said Calvin, unaccounted for, the sum of four thousand nine hundred and ninety-five dollars and eighty-six cents, and in the hands of Frank G. How, in like manner, the sum of nine hundred dollars.

Upon a review of the evidence, I agree with the register that those sums are severally chargeable to the bankrupts as reported. It was agreed by both parties, as I understood, that the question whether the bankrupts had, in fact, lost or spent the money or part of it, since they received it, or since the bankruptcy, if received before, was not fully

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examined or intended to be examined by the register. And the argument before me did not touch the point of the power of the court to punish a bankrupt, actually poor; or how such power, if possessed, should be exercised; and whether anything like a poor debtor's oath could be administered to them. All that is asked at this time is an order on the bankrupts, severally, to pay over the sums which, apparently, are in their hands.

I have no doubt of the power of the court to pass such an order. A debtor who becomes bankrupt submits himself, or is by law submitted, to the summary jurisdiction of the court. It is not necessary that the assignee should sue him in order to obtain the assets. His position is somewhat like that of an attorney, or other officer of the court, or of an accountant of the court. The cases on this point are, I believe, entirely uniform. In re Dresser [Case No. 4,077]; In re Speyer [Id. 13,239]; In re Kempner [Id. 7,689]; In re Peltasohn [Id. 10,912]. The case of In re Salkey [Case Nos. 12,253 and 12,254] is also somewhat analogous to, though not identical with this, because that was a question of the disclosure required of a bankrupt.

I shall pass the order that the bankrupts pay to the assignees the sums found by the register to be due from them, respectively, in thirty days from this 6th January, 1879.

Case No. 6,748.

HOW et al. v. KEMBALL et al.

[2 McLean, 103.] [1]

Circuit Court, D. Illinois. June Term, 1840.

BILLS AND NOTES — INCREASE OF LIABILITY BY INDORSEMENT — PARTIES TO THE CONTRACT — RIGHTS OF ASSIGNEE—STATUTE OF FRAUDS—CONSIDERATION.

1. An indorser of a note who increases his liability, by indorsement, beyond what the law implies, is to be considered as a guarantor. And this new contract can only be enforced between the parties to it.

2. It does not pass to any subsequent assignee. The late decisions in England require an agreement to pay the debt of another to state in it the consideration.

3. Under the statute of frauds, the consideration is a part of the agreement, which must be in writing. Prior to these decisions the rule was otherwise. And the latest decisions seem not very strictly to sustain this construction.

4. In this country the weight of authority does not coincide with the English rule. But in this case the guarantors are the holders of the note, and their guaranty is a part of the transfer of it, which imports a consideration.

[Cited in Perry v. Swasey, 66 Mass. (12 Cush.) 38; Clay v. Edgerton, 19 Ohio St. 553.]

[This was an action on a promissory note by Calvin W. How & Co. against Kemball and others.]

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

Beaumont & Skinner, for plaintiffs.

Mr. Spring, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiffs as assignees of the following note:

"On the 20th of August, 1838, we jointly and severally promise to pay James Kinza, or order, the sum of three thousand nine hundred dollars, with seven per cent. interest per annum from the date hereof, for value received of him. Mark Beaubien, Jr., Mark Beaubien, Sr. Chicago, August 20, 1837."

Indorsed:

"I assign the within note to Benjamin Harris, without any recourse on me. October 10, 1837. James Kinza."

"I hereby guaranty the payment of the within note, unconditionally. Benjamin Harris."

"We guaranty the payment of the within note, at the Chicago branch of the State Bank of Illinois. Kemball & Porter, A. Garrett, George W. Dale."

In the first count in the declaration, the plaintiffs, who are the last assignees, set out the note and the assignments, and aver that when the note became payable, the said Mark Beaubien, Jr., did not reside in Illinois, but in Michigan; and that, the 24th August, 1838, at the city of Chicago, the said plaintiffs instituted a suit on the note against Mark Beaubien, Sen., against whom judgment was entered. That execution on the judgment was issued, which was returned "No property." The second count contains the assignments, and the note, &c., as the first count. The third count contains the note, the assignments, and avers that the defendants assigned, and then and there guarantied the payment of the said note, on the day it should fall due, and payable at the Chicago branch of the State Bank of Illinois, &c. And that when the note became due suit was brought, &c. The fifth count sets out the note, the assignments, and avers that the defendants promised to guaranty, and did guaranty, the same, as above, &c. The sixth and seventh counts are substantially the same as above. The defendants pleaded the general issue. And, on the trial, an objection was made to the introduction of the note, and the indorsements thereon, on the ground that, in the first and second counts, the assignments of the note, merely, are set out, whilst the indorsements, under which the plaintiffs claim, is a guaranty to pay the note at the Chicago branch of the State Bank of Illinois. And this guaranty, it is contended, is not evidence under the other counts, because the action is not brought on it, and no consideration for the guaranty appears either on its face, or from the averments in the declaration.

The indorsement of the note by the defendants to the plaintiffs, is not a mere assignment of the note, but the indorsers guaranty

the payment of the amount, when due, at a specific place. This created a liability somewhat different from that which the law implies from an ordinary indorsement. On the face of the note no place of payment is designated. The indorsement, then, changes the place of payment, and binds the indorsers as guarantors for the amount. This, to some extent, at least, must be considered a new contract. A contract which can only be enforced by the plaintiffs with whom it was made. Had they assigned the note, this guaranty, by the defendants, would not have passed to the assignee, as would a guaranty given at the creation of the note. It was a new contract, so far as a different liability from a simple indorsement was incurred, not incorporated in the note, nor transferable by its indorsement. In the case of Oxford Bank v. Haynes, 8 Pick. 423, it was held, that where upon a promissory note, made by S. and A. to the plaintiffs, were written the words, "I guaranty the payment of the within note," which were signed by the defendant, that he was a guarantor, and not a surety. If the indorsement of the defendants be considered a guaranty, the action must be upon it as a special agreement, or upon the consideration which induced the defendants to enter into it. 2 Cox, 172; 2 Boom, Com. Law, 66, 614; 2 Sch. & L. 112; Chit. Bills (Ed. 1839) 373. The third count in the declaration, and the counts that followed it, set out the guaranty, and the breach, &c. And here a question is raised, and elaborately argued, whether this guaranty is binding, as it states no consideration. That this is an undertaking by the defendants to pay the debt of another, which by the statute of frauds must be in writing; and that, as a consideration is essential to the validity of every such agreement, it must be stated in the agreement. The statute of frauds of this state, in regard to this question, is, substantially, copied from 29 Car. II. c. 3, § 4. "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or of some other person thereunto by him lawfully authorized."

Whether the consideration constitutes an essential part of the agreement, which, by the act, must be in writing, is a question that has been much discussed in England and in this country, and upon which courts have differed in their decisions. Until the decision of the case of Wain v. Warlters, 5 East, 10, was decided, Lord Ellenborough said, "We had always taken the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing; and so understanding the law we have no authority or disposition to change it." The action of Wain and another was brought against Warlters, as the assignees and holders of a bill of exchange, drawn by one Gore, and accepted by one Hall, which was due, and for the payment of which the defendant gave the following promise in writing: "Messrs Wain & Co., I will engage to pay you by half-past four this day, fifty six pounds and expenses on bill, that amount on Hall." On this promise the plaintiffs alleged that they stayed proceedings, &c.; but the court held that it was not binding, as the consideration, which was a part of the agreement, was not stated in it. That without a consideration the agreement was inoperative, and that they might as well hear parol proof of the promise as the consideration. This decision has been much examined in England, and in several late cases has been confirmed. And particularly in the cases of Saunders v. Wakefield, 4 Barn. & Ald. 595; Jenkins v. Reynolds, 3 Brod. & B. 14; James v. Williams, 5 Barn. & Adol. 1109; Clancy v. Piggott, 2 Adol. & E. 473. The same doctrine has been sanctioned in the cases of Leonard v. Vredenburg, 8 Johns. 29; Larson v. Wyman, 14 Wend. 246. It has been denied in the cases of Hunt v. Adams, 5 Mass. 360; Packard v. Richardson, 17 Mass. 122; Levy v. Merrill, 4 Greenl. 180; Id. 387; Sage v. Wilcox, 6 Conn. 81; Miller v. Irvine, 1 Dev. & B. 103; [Violett v. Patton] 5 Cranch [9 U. S.] 151, 152. In Ex parte Minet, 14 Ves. 189, Lord Eldon said, there was a variety of authorities directly contradicting Wain v. Warlters, 5 East, 10, and in Ex parte Gardom, 15 Ves. 286, he says, "Until that case was decided I had always supposed the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear in the writing."

On reading the late English decisions on this subject, I cannot perceive the conclusiveness of the reasoning of the judges. Nor can I perceive the danger of subverting the object of the statute, by adhering to what Lords Eldon and Ellenborough considered, before the decision of Wain v. Warlters, its settled construction. And it will be found that in some of the latest decisions in the queen's bench, if the above case has not been departed from, its principles have not been very strictly adhered to. An individual agrees, in writing, to pay the debt of another. It is admitted that without a consideration such an agreement is not binding. But why may not the consideration be proved by parol? This, the court say, would open the door to fraud, which the statute of frauds intended to close. That as no agreement is valid without consideration, therefore the consideration is an essential part of the agreement, and must be in writing. So a consideration is essential to the validity of a deed; and yet, where the deed

upon its face expresses no consideration one may be proved by parol. Peacock v. Monk. 1 Ves. Sr. 128; White v. Weeks, 1 Pen. & W. 486; Davenport v. Mason, 15 Mass. 85; Hartley v. M'Anulty, 4 Yeates, 95.

"No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough that the person, for whom the guarantor becomes surety, has benefit, or the person to whom the guaranty is given, suffers inconvenience, as an inducement to the surety to become guaranty for the debtor." Comyn, Cont. 242. In the case of Newbury v. Armstrong, 6 Bing. 201, the court held that the consideration sufficiently appeared on the following guaranty: "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ to the amount of £50." Mr. Justice Burrough observed, "Whatever is necessarily implied may be taken to be in the instrument." And Chief Justice Tindall remarked, "We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." In the case of Davies v. Wilkinson, decided in the queen's bench, May, 1839, and reported in 1 Jur. (Am. Ed.) 327, the court held the following instrument valid: "I agree to pay to Mr. C. Davies, or his order, £695 at four instalments, viz: £200 on June 10, 1833; £150 on the settling-day, after the St. Leger, at Doncaster; £150 on the settling-day, at Epsom, in 1834; £100 on the settling-day, after the St. Leger, in 1834; the remaining £95 to go as a set-off for an order of Reynolds to Mr. Thompson, and the remainder of his debt owing from Mr. C. Davies to him." Lord Denman observes, "This instrument is a note, up to a certain point, but the addition makes it an agreement. As to the second objection, that if it be an agreement, there is no consideration on the face of it, I think the promise in this case conveyed by the words, 'I agree to pay,' imports consideration." How these words import a consideration more than the words, "I promise to pay," is not perceived. The court seem to feel the practical inconvenience of their former decisions on this subject, and without overruling them expressly, are desirous of escaping from their consequences.

But in deciding the question now before the court, it appears to me, there need be no conflict with the English decisions. The guaranty here is by the defendants as indorsers of the note to the plaintiffs. The defendants are the assignees of the note, and they assign it to the plaintiffs. Now an ordinary indorsement, as between the indorser and the indorsee, is evidence under the general count for money had and received. And this effect is given to the indorsement although in fact money may not have been the consideration passing between the parties. Now, is not the transfer of this note by the defendants to the plaintiffs, at the time of the guaranty, sufficient evidence of consideration? In the act of making the guaranty the property in the note is assigned. And does not this import a consideration? The guarantors are not only parties to the note, but the responsibility they assume is the ground on which the plaintiffs purchase the note. There is, says Comyn on Contracts, an important distinction between a collateral guaranty on a separate paper, or without indorsement, that a bill shall be duly paid by the parties thereto, and the act of indorsing the instrument. The collateral guaranty is void unless it be in writing and signed, and be given upon a sufficient consideration. Where the guaranty or promise to pay the debt of another, is made at the same time with the contract to which it is collateral, is incorporated into it, and becomes part of it, the whole is one contract, and the want of consideration, as between the plaintiff and the guarantor, cannot be alleged. Leonard v. Vredenburg, 8 Johns. 29. And much less can a want of consideration be alleged by an assignor who in assigning a note guaranties the payment of it. This case is much stronger than the one cited from Johnson. The guarantor in that case, at the time the note is executed, guaranties its payment. He had no beneficial interest in the note, but was the mere surety of the maker. And as this was done at the time the note was given, the act of guaranty became incorporated in the note and constituted a part of it. The note may have been received on his credit, and he shall not set up a want of consideration. The same reason applies with greater force against the defendants. Their guaranty was not only an inducement to the plaintiffs to receive the note, but they were the holders and owners of the note, and as such were interested in selling and transferring it to the plaintiffs. They, it is true, undertake to pay the debt of the drawers of the note, but they do so that they may pass the note to the plaintiffs more readily, and at its full nominal value. If this be not the clear import of the transaction, both from the language of the guaranty, connected with the note and the assignment of it, and the averments in the declaration, I have failed to comprehend the subject. Where the party himself is benefited by the transfer, says Chitty on Bills (Ed. 1839) 272, it should seem that even his verbal promise would be valid. I cannot doubt that the defendants, under the circumstances of this case, cannot allege a want of consideration, and I think the guaranty is sufficiently set out in the third and other following counts.

The district judge, however, entertaining some doubts, as to the sufficiency of the

averments of the declaration, to admit the evidence, a proposition was made to certify the point to the supreme court, under the act of congress. But the plaintiffs' attorneys, to avoid delay, asked leave to amend the declaration, which was granted.

Case No. 6,749.

HOW et al. v. McKINNEY et al.

[1 McLean, 319.] [1]

Circuit Court, D. Indiana. May Term, 1838.

PLEADING—VARIANCE.

1. If there be a variance between the writ and declaration, advantage cannot be taken of it by motion, but the variance must be pleaded in abatement or set out by a special demurrer.

2. Oyer of the writ must be prayed, and as oyer of the writ is now refused in England under a rule of court, the variance between the writ and the declaration is not pleadable there.

[Cited in Evans v. Morton, 2 Ind. 245.]

In this case, a motion was made by Mr. Pettit, who appeared for the defendants, to quash the writ on the following grounds: (1) Because the declaration varies from the writ. (2) Because the writ is in case, and the endorsement on it is special, on a promissory note and bail required. (3) The writ is too general, being simply trespass on the case.

BY THE COURT. The second and third objections to the writ are not sustainable. The writ is in the usual form and is good. And, as to the objection of variance between the writ and the declaration, that should be taken advantage of by plea in abatement or a special demurrer. A practice, it is said, has been adopted in one of the judicial circuits of this state, to take advantage of any variance between the writ and declaration, by a motion in this form. And it is insisted that this is in conformity with the English practice. It is true that a plea in abatement or demurrer for this variance is not now filed, as formerly in England; and the reason is, because, under a rule of court, oyer of the writ is refused; and without craving oyer, this matter cannot be pleaded. 2 Wils. 394, 395; 1 Bos. & P. 646, 647; 3 Bos. & P. 395; 7 East, 383. Nor will the court set aside the proceeding in respect of the variance. 2 Wils. 393; 3 East, 167. But this practice has not been adopted by the courts of the United States, nor does it appear that any decision of the supreme court of this state has sanctioned the practice of the circuit referred to. In the case of Duval v. Craig, 2 Wheat. [15 U. S.] 45, the supreme court held that variances between the writ and the declaration, are matters pleadable in abatement only, and cannot be taken advantage of, upon general demurrer to the declaration. And also in the case of Chirac v. Reinecker, 11 Wheat. [24 U. S.] 280, the court say variances between the writ and declaration, are in general, matters proper for pleas in abatement, and if in any case such variances can be taken advantage of by defendant, it is an established rule, that it can only be done upon oyer of the writ, granted in some proper stage of the cause.

The motion to quash is overruled.

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

HOW (WHITE v.). See Cases Nos. 17,548 and 17,549.

Case No. 6,750.

In re HOWARD et al.

[4 N. B. R. 571 (Quarto, 185).] [1]

District Court, D. Maryland. 1871.

BANKRUPTCY—DIVIDENDS—PROOFS.

1. Where commercial paper is indorsed by a firm in its firm name, and also by the individual name of one or more members of the firm, and the makers of the note become embarrassed and bankruptcy ensues to the indorsers of the note, and the holders accept with permission of court forty per cent. from the makers, they are only entitled to dividends against the indorsers, individually, and as a firm, to an amount equal to their claim after deducting the forty per cent. received from the makers.

[Cited in Lowell v. French, 54 Vt. 199.]

2. In bankruptcy the joint and separate estates are considered as distinct estates. A joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security—may prove his whole claim against both estates and receive a dividend for each, but so as not to receive more than the full amount of his debt from both sources.

[Cited in Emery v. Canal Nat. Bank, Case No. 4,446; Re Tesson, Id. 13,844; Re Thomas, Id. 13,886.]

By R. STOCKETT MATHEWS, Register:

I, the undersigned, having been designated by the court as the register in bankruptcy, before whom the proceedings in the above matter of the bankruptcy of Howard, Cole & Co. are to be had, do hereby certify, that in the due course of such proceedings the following questions pertinent to the same arose, and were stated and agreed to by Chapman, Lyons, Smith & Co., of New York City, and Walter B. Brooks, assignee in the above matter. And the said parties request that the same should be certified to your honor for your opinion thereon.

Baltimore, November 16, 1870.

Howard, Cole & Co., to Chapman, Lyons, Smith & Co.

Shipley, Roane & Co. Note due January 6th, 1870	$4,278 16
Interest to 22d of January, 1870	14 61
Shipley, Roane & Co.'s note due 22d of January, 1870	4,125 68
	$8,418 45
Forty per cent. settled by Shipley, Roane & Co.	3,367 38
	$5,051 07

—Upon which notes Geo. W. Howard and Howard, Cole & Co. are indorsers.

[1] [Reprinted by permission.]

Chapman, Lyons, Smith & Co. proved their claim for the amount of eight thousand four hundred and eighteen dollars and forty-five cents to the separate estates of Geo. W. Howard and Howard, Cole & Co., as indorsers on said notes of Shipley, Roane & Co., Geo. W. Howard being the first indorser. On the 23d May, 1870, W. B. Brooks, assignee, declared a dividend of thirty per cent. on the estate of Howard, Cole & Co., but withheld payment thereof on these notes until Chapman, Lyons, Smith & Co. made a settlement with Shipley, Roane & Co., then in progress, but not consummated until afterwards, and said settlement is deducted from the above account, three thousand three hundred and sixty-seven dollars and thirty-eight cents. On the 13th of October, 1870, the said assignee paid said thirty per cent., amount, one thousand five hundred and fifteen dollars and thirty-two cents, to said Chapman, Lyons, Smith & Co., which is not deducted above. The questions submitted by the assignee for his instruction are:

First. The assignee claims that he has the right to deduct the amount received by Chapman, Lyons, Smith & Co. from Shipley, Roane & Co., and to pay dividends on the balance, five thousand and fifty-five dollars and seven cents, as being the debt due by Howard, Cole & Co. and by Geo. W. Howard as indorsers. Chapman, Lyons, Smith & Co. object to this, and claim that they are entitled to collect dividends from the estate of Howard, Cole & Co. and Geo. W. Howard on the entire debt, eight thousand four hundred and eighteen dollars and forty-five cents, until it is fully paid by said dividend and the amount received as above from Shipley, Roane & Co.

Second. The assignee is prepared to pay a second dividend out of the estate of Howard, Cole & Co., and the first dividend out of the estate of Geo. W. Howard, and the assignee has been advised that it is his duty first to deduct the two dividends paid out of the estate of Howard, Cole & Co., and on the balance remaining to declare a dividend out of the estate of Geo. W. Howard. Chapman, Lyons, Smith & Co. object to this, and claim that they are entitled to full dividends out of the estates from Howard, Cole & Co. and Geo. W. Howard, without crediting any dividend received from the other estate until the whole debt is paid. The register is requested to decide the above questions or issues.

W. B. Brooks,

Assignee of Chapman, Lyons, Smith & Co.

The questions presented by the statement of facts which is submitted for the direction of the court by the agreement of Mr. Brooks, the assignee, and Messrs. Chapman, Lyons & Smith, the proving creditors, are of great importance and replete with difficulty. None similar to these in all respects, have as yet received consideration from either of the courts in which the jurisdiction granted by the bankrupt act [of 1867 (14 Stat. 517)] and its supplements is exerted. Nor does it seem inadvisable to reduce the agreed statement of the parties to a simpler form in order that the salient point to be determined may be clearly eliminated, before an effort is made to apply to them the provisions of the statute, and the provisions bearing upon the sections involved in this examination.

First. The firm of Howard, Cole & Co., composed of Geo. W. Howard, John H. Cole, and Henry F. Schurman, was adjudicated bankrupt on their own petition, and the adjudication also specially embraced each of the individual members of the firm. The assignee appointed by the court upon the election of the creditors, took possession of the assets of the firm, and of the several estates of the individual partners. A first dividend of thirty per cent. upon the debts proved against the assets of the firm has been paid, and the assignee has called a third meeting of creditors, and is prepared to pay a second dividend upon the debts proved against the assets of the firm, and a first dividend upon the debts proved against the separate estate of Mr. Howard, one of the copartners.

Second. George W. Howard was a member of the firm of Howard, Cole & Co., as well as of the firm of Shipley, Roane & Co., but prior to the filing of the petition of the former firm in bankruptcy, he had withdrawn by the consent of his partners therein from the second firm.

Third. The notes of Shipley, Roane & Co. referred to in the statement of the parties, were used for the accommodation of Howard, Cole & Co., and were indorsed by the firm in its partnership name, as well as by Mr. Howard, one of the partners in both firms.

Fourth. Shipley, Roane & Co., or rather the continuing partners, after the withdrawal of Mr. Howard, having been compelled to stop payment through the failure of Howard, Cole & Co., sought to obtain a compromise and settlement of the debts due by them, and succeeded in arranging a composition with their creditors of forty per cent. on the amount of their respective claims, and this arrangement was consummated with the consent of the assignee under a proper order of court. It was also accepted by Chapman, Lyons, Smith & Co., one of the partners to this inquiry.

The questions evolved from these facts may be stated succinctly as follows: First. For what amount may Chapman, Lyons, Smith & Co. prove a claim against the assets of Howard, Cole & Co.? Second. For what amount may they prove a claim against the separate estate of George W. Howard? Third. In computing the dividends to which they may be entitled, shall any deduction be made on account of the settlement made by them with Shipley, Roane & Co.?

If there had been no settlement with Ship-

ley, Roane & Co., the register would be relieved from all doubt as to the fittest mode of marshaling the assets of the joint and several estates, and the proper dividends allowable on claims against both which might be held by one and the same creditor. The questions then could scarcely be treated as questions of first impression. They were elaborately, and, as the register thinks, exhaustively examined by Judge Hall, in Mead v. Bank of Fayetteville [Case No. 9,366]. The conclusions of that able judge were subsequently followed by Judge Blatchford in Re Bigelow [Id. 1,397]. Both these judges hold that "the weight of American authority favor the right of a creditor who has a joint contract as to the firm, and several as to one or more of the partners, to prove against the firm and the individual partner, or partners, and to receive dividends from the joint and individual assets." They follow the rule laid down upon mature consideration by Judge Sprague, in Re Farnum [Id. 4,674]. A contrary rule prevails in England, but it has not satisfied the most eminent judges and jurists of that country, and has been condemned under the act of 1841 [5 Stat. 440], by Judge Story and Judge Cushing. Story, Partn. § 376; 10 Cush. 478. The fortunate creditor holding a two-fold security is, in fact, equally a creditor of the firm, and of the individual member as indorser. He may, outside of bankruptcy, pursue his remedies simultaneously against the drawer of a note, and all indorsers subsequent to its making and prior to his holding. While he can have legally but one full and complete satisfaction of the debt, he is entitled to receive that from any and all sources, nor can he be put to an election as to the person against whom he shall first proceed in extremes, or the property from which he shall first aim to recover his debt in whole or in part. The indorsement is taken as an additional security for the payment of the debt by the principal debtor, and on his default, they stand, drawer and indorser, in pari passu, towards the holder of their dishonored paper. Any other or different view than this, it seems to the register, would do violence to the manifest intention of the law, not less than the plainest inferences to be drawn from some of its express provisions. The assignee of the property and assets of the copartnership is elected exclusively by the votes of the creditors of the partnership, but, when once elected, he becomes, by the specific force of the law, also the assignee of the separate estates of the several partners. And the law directs both the time and the mode of the distribution of the funds in his hands, and the application of any surplus which may remain from either source of assets towards the extinguishment of debts proven against the other estate. Section 19 of the act (March 2, 1867), in its third paragraph, points out that proof of claim may be made against the bankrupt if he shall be bound as "indorser"—and such was Mr. Howard in his individual capacity—although the debt was one incurred by the drawers, Shipley, Roane & Co., for the accommodation of Howard, Cole & Co., the second indorser, and Mr. Howard's was equally an accommodation indorsement. But Chapman, Lyons, Smith & Co. were holders bona fide and for value, and it is not carrying legitimate inferences too far to add that they seem to have relied upon the first indorser, who was reputed to be a man of independent fortune, quite as much as they reposed faith in the solvency of the firm of which he was a member.

One other point remains to be noticed. The holders of the notes offered for proof have made a composition of their claims against the drawers, Shipley, Roane & Co., at the rate of forty per centum of the aggregate amount. This settlement, as the register is informed, was made under an order of court, expressly vesting the assignee of H., C. & Co. with authority to give his official assent to its terms. And it was made without prejudice to, or waiver of, any of the rights, with one exception, which the settling creditors then had, or might have, against the estates, either joint or separate, of the bankrupts. But in accepting such a composition the creditors meant to surrender, and in law did yield their claim, to that extent, against either or both the funds in the hands of the assignees: and Shipley, Roane & Co. became subrogated to the rights of Chapman, Lyons, Smith & Co. against the partnership funds. The latter firm have relinquished their full claim against Shipley, Roane & Co., and have assumed the hazard of their fidelity to the arrangement made with them. Clearly, then, Chapman, Lyons, Smith & Co. are creditors of Howard, Cole & Co. for no more than the sixty per centum of the original debt; to the same extent they ought to be permitted to prove their demands against the first indorser on the notes they hold, who is one of the firm of bankrupts, but not the less a separate person so far as his indorsement is concerned.

The assignee is in charge of the funds derived from all sources, separate or joint; he watches over their distribution, and can easily guard against improper or excessive payments. If the partnership proceeds will be available in the liquidation of partnership debts to the extent of fifty per centum, this amount, added to the amount of the compromise per centage, would leave but ten per cent. of the original amount still due, and the dividend from the separate estate of Mr. Howard may be adequate to its extinguishment, and may even be in excess of the deficiency. But the assignee can guard against any payment from either funds, in excess of the sixty per cent. for which either and both are liable, only to that extent. The creditors may obtain a full payment of the sixty per cent., provided the pro rata div-

idends which they share with the other creditors shall amount in the aggregate to so much. But if the joint funds furnish only forty per cent. of the total claim against it, and the separate estate of Mr. Howard reaches only to ten per cent. of the claims proven against him, then Chapman, Lyons, Smith & Co. would lose ten per cent. of their debt. This calculation is simply used as an illustration of the views of the register in connection with the arrangement of the creditors with Shipley, Roane & Co. And the register respectfully submits his opinion to the consideration of the court.

GILES, District Judge. The register, R. Stockett Mathews, Esq., to whom the case was referred, has certified into court several questions growing out of the following brief statement of facts. The firm of Chapman, Lyons, Smith & Co. hold two promissory notes, drawn by the firm of Shipley, Roane & Co., one for four thousand two hundred and seventy-eight dollars and sixteen cents, due 6th January, 1870, and the other for four thousand one hundred and twenty-eight dollars and sixty-eight cents, due 22d January, 1870. They were payable to Geo. W. Howard, and by him indorsed, and they were also indorsed by the firm of Howard, Cole & Co., of which firm Geo. W. Howard was a member. Before the said notes reached maturity, Geo. W. Howard and the firm of Howard, Cole & Co. were decreed bankrupts. The firm of Shipley, Roane & Co., being in embarrassed circumstances, offered to compromise with their creditors upon the payment of forty cents on the dollar, and the said firm of Chapman, Lyons, Smith & Co. and other creditors of said bankrupt, asked of this court permission to accept the said proposition without prejudice to their claims against the said bankrupt, which was granted. And the said firm of Chapman, Lyons, Smith & Co. received of Shipley, Roane & Co. forty per cent. on the amount of their said notes.

On these facts three questions are certified to the court; I state them in the order in which they naturally arise.

First. On what amount will the firm of Chapman & Co. be permitted to receive a dividend from the bankrupt estate. Clearly, only on the amount of the said notes, after deducting the forty per cent. received from Shipley, Roane & Co. The second and third questions are really but one in fact, and I shall answer them together. Although by the 36th section of the bankrupt act, where partners in trade shall be adjudged bankrupts, all the joint property of the partnership, and also all the separate estate of each of the parties shall be taken; yet, in the administration in bankruptcy, the joint and separate estates are considered as distinct estates. This is perfectly clear by the rule laid down for their administration in the said section. It has therefore been held that a joint creditor having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security. He would, therefore, by the same principle, be allowed to prove his whole claim against both estates and receive a dividend from each, but so as not to receive more than the full amount of his debt. In this case, the firm of Chapman & Co. can prove the amount of said notes (with the deduction of the forty per cent.) against both the private estate of Geo. W. Howard, and the partnership assets of Howard, Cole & Co., and receive dividends from both, the assignee taking care that from both the creditor firm does not receive more than full satisfaction of its claim. I concur, therefore, fully in the opinion which the register has sent up in this case.

Case No. 6,751.

In re HOWARD et al.

[6 N. B. R. 372.] [1]

District Court, D. Maryland. 1873.

BANKRUPTCY—PROOF OF DEBTS—FAILURE OF CONSIDERATION.

A. sent certain notes to B., which were endorsed by C., to be discounted and the proceeds placed to his (A's) credit. He drew against them by certain drafts in favor of C., which B. failed to pay. C. was subsequently adjudged a bankrupt, and B. sought to prove his claim against the bankrupt for the notes sent to him by A., but the assignee refused to allow it. On the petition of B. to review the action of the assignee in refusing to allow the claim to be proved, the court *held*, that inasmuch as the drafts were not paid, B. had no right to retain the notes, and, therefore, there was a failure of consideration. Claim rejected.

GILES, District Judge. The petition of F. Skinner & Co., of Boston, to review the action of the assignee in refusing to allow the claim of the petitioners as proved, and for an order allowing the same, &c. To this petition the assignee files an answer, stating that the claim of the said petitioners is not a valid claim against the said bankrupt estate, because the said notes, on which it is founded were passed by Howard, Cole & Co. to J. S. Barry & Co. under a special agreement, and were only to be used for a particular purpose, and without any consideration passing from Barry & Co. to Howard, Cole & Co.; that under this special agreement, they were sent to the said petitioners by Barry & Co., by letter of the twentieth of November, eighteen hundred and sixty-nine, to be discounted by said petitioners, and out of the proceeds sight drafts to the amount of ten thousand dollars, in favor of Howard, Cole & Co., were to be paid, which was not done, but said petitioners placed the proceeds of said notes to the credit of Barry & Co. on their general running account, without any further payment or credit being given by them to Barry & Co.; and that

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therefore the said petitioners have no valid claim to hold the said notes, or prove them against the bankrupt estate of Howard, Cole & Co. Two commissions have been issued in this case, one to Boston and the other to New York, under which much testimony has been taken. But the question in this case lies within a very narrow limit, and depends entirely on the circumstances under which these notes were passed by Barry & Co. to the petitioners, F. Skinner & Co. Are they such as to render them the bona fide holders of the said notes for a valuable consideration?

Now, the evidence shows clearly that these notes were drawn and endorsed by said Howard, Cole & Co., and by them passed over to Barry & Co., under an agreement that said Barry & Co. were to get them cashed, and to divide the proceeds equally between the two houses. There is no evidence to show that this agreement was known to the petitioners when they received the said notes. We have the evidence of John S. Barry, of the firm of Barry & Co., and the evidence of Edward F. Cutter, of the firm of F. Skinner & Co., and also the letter from Barry & Co. to the petitioners, enclosing the said notes. Does the evidence show that petitioners received these notes under circumstances which make them the bona fide holders of the same, free from any equities between Howard, Cole & Co. and Barry & Co.? The letter of the twentieth of November, eighteen hundred and sixty-nine, must settle this question, for although Cutter swears that he understood that these notes were to be discounted, and the proceeds credited to the house of Barry & Co., on their running account, yet, as it is not pretended, that, outside of said letter of the twentieth of November, there was any special agreement to that effect, can such agreement be found in the terms of the said letter? What are they? "We beg to advise our drafts on you direct, in favor of Howard, Cole & Co., five thousand dollars; ditto, five thousand dollars; R. Mickle, ten thousand dollars, in all twenty thousand dollars, which please honor and oblige. We inclose, herewith, a batch of good paper, amounting to twenty-six thousand seven hundred and six dollars, which please pass for us. Against this, and the former lot of one hundred and nine thousand and forty-two dollars and seventy-five cents, our total drawings to date, including the above named drafts (and draft advised to-night in another letter, in favor of your New York house) amount to one hundred and twenty-five thousand dollars in all, and all duly advised." To this letter, petitioners reply: "November twenty-second, eighteen hundred and sixty-nine: Your favors of the twentieth are at hand, covering notes amounting to twenty-six thousand seven hundred and six dollars and four cents."

This was a clear adoption of the terms of the letter of the twentieth November. Petitioners could not set up afterwards any claim inconsistent with it. Is not the true construction of the letter of the twentieth November this: "We send you a batch of good paper, amounting to the sum of twenty-six thousand seven hundred and six dollars, to be discounted by you, and against the proceeds of which we have drawn on you three drafts at sight, two for five thousand dollars each, and one for ten thousand dollars." Now the evidence shows that the petitioners never paid these drafts, but that they were protested and returned. What claim can they now set up to retain these notes? To sustain their claims, I am referred by their learned counsel to three decisions of the supreme court: To the case of Swift v. Tyson, 16 Pet. [41 U. S.] 1; Bank of the Metropolis v. New England Bank, 1 How. [42 U. S.] 234; and Goodman v. Simonds, 20 How. [61 U. S.] 343. The case of Swift v. Tyson decided, that where a party took a negotiable instrument before its maturity in payment of a pre-existing debt without any notice of facts which impeach its validity as between the original parties to the same, he holds it unaffected by these facts, and could recover on it, although, as between the antecedent parties, the note was without any legal validity.

In the case in 1 How. [42 U. S.] 234, the supreme court held that where there have been for several years mutual and extensive dealings between two banks, and an account current kept between them in which they mutually credit each other with the proceeds of all paper remitted for collection when received, and accounts regularly transmitted from one to the other and settled upon these principles, and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them on its own account; there is a lien for general balance of account upon the paper thus transmitted, no matter who may be its real owner. And to show why it is so, Taney, J., in delivering the opinion of the court, says: "If an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed. We do not perceive any difference in principle between an advance of money and a balance supposed to remain upon the faith of these mutual dealings."

The evidence in this case shows that no further payment or credit was given by the petitioners to Barry & Co. for or on account of these notes. In the case of Goodman v. Simonds [supra], the supreme court affirmed their ruling in the case of Swift v. Tyson [supra], with this addition, that the surrendering of collateral securities, previously given, and affording increased indulgences as to time, furnish a sufficient consideration for the transfer of the paper, and passes it to the party unaffected by any prior equities between the original parties to the same.

There must be some present consideration at the time of the transfer. The petitioner must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper. For this principle see the following cases: Sweeney v. Easter, 1 Wall. [68 U. S.] 166; Farrington v. Frankfort Bank, 31 Barb. 183; Fenouille v. Hamilton, 35 Ala. 319; Roseborough v. Messick, 6 Ohio St. 448; Trustees v. Hill, 12 Iowa, 462; Jenkins v. Sehaub, 14 Wis. 1; Ruddick v. Loyd, 15 Iowa, 441. These cases have been decided since the case of Goodman v. Simonds and seem to answer the question propounded (but not decided) by the learned judge who delivered the opinion of the supreme court in that case, to wit: "Whether the same conclusion, (viz.: to hold the transfer unaffected by any equities between the original parties) ought to follow, where the transfer was without any other consideration than what flows from the nature of the contract at the time of delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt?" On this question there had been much conflict in the decisions up to that time. The necessity for a present consideration to sustain the transfer and render it superior to any equities between the original parties to the paper, seems to be recognized as the law of this state in the case of Gwynn v. Lee, 9 Gill, 138.

I will therefore sign an order rejecting the said claim of the petitioners against the bankrupt estate of Howard, Cole & Co.

[See Case No. 6,750.]

Case No. 6,752.

The HOWARD.

[Cited in Baker v. Cargo and Materials of The Slobodna, 35 Fed. 543. Nowhere reported; opinion not now accessible.]

Case No. 6,752a.

The HOWARD.

[2 Adm. Rec. 148.]

Superior Court, S. D. Florida. April 7, 1838.

SALVAGE COMPENSATION — ILLIBERAL CONDUCT OF SALVORS — PROFESSIONAL WRECKERS.

[1. Salvors who adopt a liberal course of conduct towards a vessel in distress, tendering their services promptly and without stipulations or conditions, and acting gallantly and with alacrity, are entitled to a more liberal reward than those who either wait to be called upon for assistance, or refuse to render it unless the vessel is placed in their charge as security for compensation. The latter attitude is especially worthy of condemnation, and the master who would yield to such a demand, under any circumstances short of total loss, would prove unworthy of his trust.]

[Cited in The Angeline, Case No. 385.]

[2. A wrecking master and his crew boarded a vessel aground on the Florida Reef, and offered to assist in unloading her. The master answered that he did not want his vessel unloaded, as he thought he could get her off without it. He asked, however, that the wrecking crew might "lend a hand" in getting out an anchor. The wrecking master replied that he had no control over his men, and they might assist if they wished to, and his crew then refused to help unless the stranded vessel were given up to them. *Held*, that the wrecking master's conduct was aggravated by his statement that he had no control over his men, for such control is the only security which the owner has for valuable property necessarily coming into the hands of wreckers in the course of their business.]

[3. Twenty-five per cent., upon a valuation of $35,391, allowed to several wrecking vessels, and their officers and crews, for rescuing, in partially damaged condition, a vessel and cargo stranded upon Florida Reef.]

In admiralty.

Wm. Marvin, for libellants.

C. Walker, for respondent.

WEBB, Judge. In this case James Curry and others have libelled in admiralty, and caused to be attached by the process of this court, the British bark Howard and her cargo of sugars, upon a claim for salvage services alleged to have been rendered in relieving them from great and imminent perils to which they were exposed on the Florida Reef; and, under the same attachment, petitions are presented by Asa F. Tift and George P. Young, also asking compensation in the way of salvage for services rendered by themselves and their respective crews in assisting to save the same property. From the history of this case, as it is disclosed in the pleadings, and by the testimony, it appears that on Saturday night, the third instant (March), the bark Howard, while prosecuting a voyage from Havana, in the island of Cuba, to St. Petersburgh, in Russia, ran ashore on the Florida Reef. That shortly afterwards she was boarded by the petitioner Tift, and six men under his command, who immediately commenced laboring with the crew of the bark for the purpose of relieving her. That they continued to labor all night, and until 11 o'clock a. m. of the next day, before they succeeded in hauling her off the rocks. That about 8 o'clock on Sunday morning, while the bark was still on shore, she was boarded by Captain Tresca, of the sloop Globe, one of the libellants, who tendered the services of himself, his vessel, and crew to unload the bark, which services the respondent did not choose to accept, stating that he did not want his vessel unloaded, as he believed he could get his ship off without taking out any part of her cargo, but, as he was then engaged in getting out another anchor, he would like to have some assistance from Tresca's men (his boat's crew) then on board the bark to aid his own crew in getting it out, to which Tresca replied that his men might assist if they thought proper, but he had no control over them. That the

men, on being asked to assist about the anchor, answered that they would do so if the bark was given up to them; but the respondent declined securing their services upon those terms, and proceeded with the force he already possessed, including Tift and his men, and in three hours succeeded in hauling off into deep water. That, shortly after the conversation between the respondent and Tresca and his men, the masters of the schooners Hester Ann, Citizen, and Susan Hooper, boarded the bark, she being still on the rocks; but between them and the respondent nothing was said respecting their assistance. They tendered none, none was requested of them, and none was rendered by them. That after the bark was hauled off, owing to the peculiar position of the reefs, near which she lay, and the wind being ahead, it was found impossible to proceed to sea, and she was permitted to remain, swinging to the single anchor by which she had been hauled off, under the impression, no doubt, that it was amply sufficient to hold her securely, as she was then comparatively but little exposed; but, in consequence of the wind blowing during the succeeding night with much greater violence than it had previously done, she was again drawn upon the rocks, and, beginning to leak very shortly afterwards (which she had not previously done), a signal was hoisted for assistance; and the libellants, who were lying with their vessels in a harbor about a mile off, immediately proceeded to her, and, after taking out part of her loading, succeeded in relieving her and bringing her to this port.

The dangers to which the bark and cargo were exposed, when the services of the libellants were accepted, the extent of their services, and the difficulties and perils which they encountered in their performance, together with the losses which the cargo had sustained in consequence of the injuries received by the ship, are all set forth in the pleadings, and it is unnecessary to repeat them here, particularly as there is but little discrepancy between the parties in their representations of this part of the transaction. But the respondent, while admitting the performance of the services, nearly in the terms charged by the libellants, denies that they are entitled to any reward or compensation for those services, because he says the proper assistance was not afforded him at a time when it would have prevented all the injuries which subsequently occurred. He contends that had the men of Tresca assisted him, in taking out his anchor, at the time they were requested to do so, it would have prevented his vessel from going on the rocks the second time, as that anchor, in addition to the one by which she was hauled off, would have been sufficient to have held her, notwithstanding the severity of the subsequent blow, and that all the injuries which the ship and her cargo afterwards received are owing to their improper conduct in refusing their assistance in carrying out the anchor, or imposing such terms for their services as he could not accept. That the other libellants have also forfeited all claim to compensation or reward for their services, because they did not voluntarily tender their assistance when they boarded the bark, to take out the anchor especially as they discovered that his own crew and Tift's men were laboriously employed in trying to get it out.

On the part of the libellants it is denied that they refused to render their assistance at any time, and it is averred that when Tresca boarded the bark, he tendered the assistance of himself, men, and vessel, which was unconditionally refused by the respondent, who only expressed a desire that his (Tresca's) men should lend him a hand to get his anchor out, and that his men did not refuse to afford that assistance, and only meant by saying, "If the vessel now given up to them," that they should be considered as having a lien upon her which would secure to them a compensation for the services they might render in getting her off the rocks. That the respondent did not want their assistance when they first boarded the bark, as he believed he could get her off without, and therefore was not disposed to pay for assistance which was not essentially necessary to the preservation of his ship or cargo. That, as regards the other libellants, there was not even a desire expressed that their aid should be afforded in any way; and that as soon as their services were needed in the estimation of the respondent, and required by him, they were promptly rendered and efficaciously bestowed, without any condition whatever on their part.

From the testimony, I am fully satisfied that the respondent did not believe, when Tresca boarded his vessel, that he absolutely required any additional aid to secure the preservation of his ship and cargo from injury. She was then staunch and tight, had leaked none, and, as he himself says in his answer, she thumped but lightly, and the wind was moderate. It is also in proof that all on board believed she could be gotten off without further assistance; but as the crew of the bark and Tift's men were much fatigued by their labors during the preceding night, it would have been convenient and acceptable to them had Tresca's boat crew who were fresh, "lent them a hand" in getting out their anchor. Whether the respondent intended to pay them for lending a hand or not does not appear; but I think it is altogether apparent that he did not intend to regard them in the light and character of salvors for any service they might perform in getting out the anchor.

There is, however, another feature connected with this part of the transaction which, if susceptible of explanation at all, shows that the services of the libellants in carrying out the anchor could not have been so important as the respondent has since

chosen to estimate them. He alleges that the injuries which resulted to the vessel and cargo are attributable to the improper conduct of the salvors, in not affording their assistance in getting the anchor out before she was hauled off the first time, as that anchor, had it been taken out in proper time and placed in a proper position, would have prevented her going ashore the second time. This may be true, but the conclusion is by no means apparent to the mind of the court, when judging from the facts disclosed by the pleadings and the testimony. It seems that the anchor, about the taking out of which there is now so much controversy, was carried out by the crew of the bark and Tift's men, but was rendered wholly useless in consequence of the chafing and parting of the cable. How the parting of the cable would have been prevented by the employment of Tresca's men, or the other salvors, in getting it out, is not shown, and there is no pretense that it was designed to substitute a chain cable in place of the hempen one that was used, had they received the additional aid; nor does it appear that they ever had another chain cable on board which could have been so substituted. It is said, however, that the stream anchor, when carried out, could not be placed in the proper position for the want of sufficient force, and that the chafing of the cable, which destroyed its use before it could be serviceably employed in hauling the vessel off, was owing to the length of time which it required the bark's crew and Tift's men to get it out. This statement does not, to my mind, sufficiently establish the fact that the subsequent injuries received by the bark are attributable to the misconduct of the libellants in not rendering their services in getting the anchor out, and placing it in the proper position: First. Because it is not perceived why the force of the bark, crew, and Tift's men was not sufficient to take out, in daylight, a stream anchor with a hempen cable, and place it in position which they wished,—especially when the wind was moderate, as is alleged in the answer,—when the same force had previously taken out in the night the bower anchor with a chain cable, and placed it in such a position as enabled them to haul off the ship by it. Second. Because the stream anchor was not essentially necessary in hauling off the bark, as is proved by the fact that she was afterwards hauled off by the bower anchor alone. Third. If the hempen cable attached to the stream anchor was rendered useless by chafing during the comparatively short time employed in getting out the anchor, it is not presumable that it would have lasted through the following night, and aided the bower anchor in keeping the ship off, especially as the wind had increased in violence, and consequently the strain on the anchors and chafing of the cables must from that cause have been greatly increased. Besides, it is alleged in the petition of Tift, and not in the answer, that the bark was gotten off the first time about 11 o'clock on Sunday morning; and although she had but one anchor out, and as it is now said was not hauled off as far as she ought to have been, yet there was no attempt made during the remainder of the day to get out another or to haul her further from the shoal, notwithstanding the weather was such as would have permitted them to have done either, had either been deemed necessary. This circumstance, however, is not adverted to for the purpose of imputing negligence to the respondent,—for I have no doubt that he (and it is in proof that Mr. Tift, who knew the coast and prevailing winds) believed that the ship, after being hauled off the first time was in perfect safety; but it shows that he did not at that time regard the services of the libellants as of any importance to him, and that he made no effort to obtain their aid, further than simply to request it as a personal favor, that his own men, who were fatigued, might by that means obtain some respite from the severity of their labors.

Viewing the transaction, therefore, in every aspect which is presented to my consideration, I have not been able to arrive at the conclusion that the injuries received by the bark and her cargo, in consequence of her going on shore the second time, are properly attributable to the neglect or misconduct of the salvors in not rendering their aid when they boarded her on Sunday. But while the testimony, in the opinion of the court, exonerates them from being the cause of so much injury, it at the same time places some of them in an attitude which the court sees with regret, and which calls for its animadversion and rebuke. It should be recollected that from the peculiar character of the Florida coasts, and the dangerous shoals, reefs, and currents with which it is environed, and by which the immense commerce that continually floats through the Gulf of Mexico is at all times exposed to ship wreck, the business of wrecking has grown into an established and well-defined profession, distinct from, and unconnected with, all other occupations. Those who are engaged in it have avowedly abandoned all other pursuits, and devoted themselves and their property alone to this. They hold out the idea that they have prepared themselves, at a great expense, to render their services efficiently when required; that they are at all times ready to afford aid and comfort to those who are in distress, and are ever willing to risk their own lives and property to save the lives and property of others. Such a profession on a coast like this, when properly pursued, is not only essentially beneficial to commerce, but is honorable in itself, and affords frequent opportunities of exercising the finest and most generous feelings of the human heart, and such a profes-

sion will always receive that encouragement from every reflecting and liberal tribunal which it so justly merits. But while an enlarged and sound policy dictates that every proper encouragement should be given to those who faithfully perform the duties of such a calling, and the obligations it imposes, the same policy requires that any departure from strict propriety should be visited with its appropriate punishment.

It is not the single act of saving the property of others when exposed to danger, however perilous or laborious the services, that will entitle the salvor to the highest consideration when he presents his claims for compensation. There will always be something in the manner in which the services are performed which will be taken into account, and will have its influence in the decision of such questions. The wrecker who, regardless of personal considerations, gallantly rushes into dangers to preserve the lives and property of others, when exposed to the horrors of ship wreck, or he who promptly goes forward, and contributes his aid when he believes his services will be beneficial in preventing impending loss, without stopping to enquire what amount in dollars and cents his exertions will bring to his own pocket, will always receive that liberal reward for his labors which it is the policy of the law to allow, and which courts feel pleasure in awarding to generous and manly conduct; while he who holds back and quietly looks on at approaching ruin until his own services become indispensable to the preservation of the property he sees exposed, with the expectation that his reward will thereby be increased in proportion to the increased dangers from which the property is ultimately rescued, will find that he is disappointed in the realization of his golden hopes, and that a display of avarice at such a time renders him an object of contumely and reproach.

To the credit, however, of most of those who are engaged in this business on the coast of Florida, few complaints of this kind have been heard. The fearless daring of the Florida wrecker in the hour of peril, and his readiness to afford relief to those who need his assistance, are almost proverbial; and until recently the generosity with which he has warned the stranger of the dangers that surrounded him, and the benevolence with which he has pointed out the way of avoiding those dangers, without the expectation or even hope of reward, have been often urged as arguments before this court in commendation of those who follow that profession. And I have pleasure in saying that such arguments have had their full influence in causing the liberal salvages which have generally been awarded at this place. But in proportion to the disposition which this court has always evinced to award with a liberal hand gallantry and merit in the salvors, so, in the same proportion, has it always been disposed to take away that reward from him whose conduct is either illiberal or unworthy.

In the case under consideration, I regret that this rule must be enforced to the prejudice of some of those who claim here as salvors, not because I believe the injuries to this ship and cargo have resulted from their improper acts, but because they did not adopt that prompt and liberal course of conduct upon first visiting the bark which they should have done, and which I had believed was characteristic of the Florida wreckers. The course pursued by Capt. Tresca cannot be tolerated; because, if it resulted in no injury in this instance, in another case a similar course might cause the entire loss of the most valuable property. Besides, such conduct is not befitting him who sets out with the avowed and only intention of affording his assistance in the relief of the property of others when exposed to peril, and who is in the daily habit of presenting that object as an evidence of his general merit as a salvor. It is no argument in justification of the apparent unwillingness to work, to say that they had no lien upon the vessel or cargo, for their compensation, unless she were given up to them by the master. The labor which they might have bestowed in relieving her would have constituted their best lien; and those who are employed as wreckers on this coast are too well acquainted with their rights not to have known that such a lien would be recognized in all courts. Besides, the master had no right to give up his ship to them; and a demand to that effect was an insult offered to him in his misfortunes, as it presupposed his inability to command or direct the operations of his crew and others in a case of emergency. In such a case he would no doubt avail himself of the local information possessed by those who were assisting him, respecting the reefs and shoals by which he was surrounded, and would act upon their instructions and advice in avoiding them; but the master of a ship who, under any circumstances less than its total loss, yields his entire command to strangers, of whom he can know nothing, is undeserving the situation he holds, and to require it of him is requiring that which no one who regards his own character will give up.

There is another matter in relation to the conduct of Captain Tresca which places him in a worse position, in the opinion of this court, than that occupied by any of the other salvors. When requested to direct his men to assist in taking out the anchor, he replied, as it is alleged and proved, that he had no control over his men, but they might assist if they chose. It is a well-established rule that masters of all vessels are, to a certain extent, responsible for the conduct of their men while under their command; and, if this be a correct principle in reference to vessels ordinarily employed, how

much more strongly should it apply to the masters of vessels engaged exclusively in the pursuit of wrecking. Property to an immense amount sometimes comes into their hands, in the hurry and confusion incident to ship wreck, without any of the guards which its owners, in the shape of bills of lading and receipts, ordinarily place around it, for its protection from negligence or embezzlement. And if the masters of these vessels have no control over their men, in what consists its security while in their custody? The fidelity of the masters themselves is in some degree secured by the license which they are required to have before they can engage regularly in this business; but the ordinary seamen who are employed on board such vessels, are unknown to the court which grants the license, and, indeed, to the whole world, except the master who employs them. He alone knows them, and introduces them into this business as worthy of confidence, and he is responsible for their conduct; and for him to say that he has no control over them, when required to work in their professed calling, is an aggravation of his own evident unwillingness to perform the duties imposed by his avowed undertaking when he obtained his license. As to the men, though not blameless, I consider them much less culpable than the master. They looked to him as a guide for their own conduct; and, seeing his unwillingness to take hold, it is not surprising that they should have felt the same; especially as they doubtless thought by holding back they might get a more profitable job, should the ship not be gotten off by those employed with the anchor.

The masters of the schooners Hester Ann, Citizen, and Susan Hooper, though less in fault than Captain Tresca of the Globe, are nevertheless not wholly free from censure. They did not pursue that liberal and generous course which is expected from those who are engaged in the profession which they have adopted. When they perform meritorious services, they always look for a high reward for those services; and, in support of their claim to it, they invariably urge, as one among other reasons (and its force is never denied), that they are engaged in no other pursuit from which they could obtain a living, and are at all times at the point of danger, ready to render aid and succor to the distressed. Such an appeal should have its effect, but the right to make it imports something more than barely looking on at the distresses and difficulties of others, and waiting to be asked to render their assistance when no other hope of safety is left. They should voluntarily go forward and tender their services without condition or stipulation, and, if not rejected, should render them with ardor and alacrity, and then expect what they would always receive, an ample reward for their labors.

As regards the other salvors represented by the libellants, although included in the general denunciations of the respondent, there is no just cause of complaint against them. They at no time evinced any indisposition to perform their respective duties, but, on the contrary, the very moment a signal was made on board the bark indicating that their services were needed, they went promptly to her relief, and labored faithfully till it was accomplished.

In respect to the petitioner Tift and his men, there is not a shadow of complaint. Their services are acknowledged to have been of great importance, and to have been rendered with the utmost promptitude and fidelity from the beginning to the end of the whole transaction. They are therefore entitled to the most liberal consideration in estimating their claims to compensation. Nor is there any complaint against the petitioner, Young, and his men. Their services, however, were of a different character. They were not employed until the latter part of the transaction, and had not an opportunity of doing much. But they will nevertheless, in consideration of their good conduct, receive an equal share, in proportion to their numbers, with those salvors who are libellants in this cause. The appraised value of the undamaged part of the cargo saved in this case, exclusive of duties, is $23,504. The sales of the sugars which were damaged by salt water, made under an interlocutory order of court, produced, also, exclusive of duties, $4,387; and the appraised value of the bark in her damaged state is $7,500,—making an aggregate value of $35,391. Twenty-five per centum on that sum, which the court believes to be the proper proportion to be allowed as salvage for the services rendered in rescuing this property from the perils to which it was exposed, had there been no charge of improper conduct against any of the salvors, would produce the sum of $8,847.75, from which sum is to be deducted the salvors' proportion of expenses in landing the cargo at the wharf in this place, and the repacking of the damaged sugars, and the sales of these sugars, say $347.75, leaving a balance of $8,500 to be distributed as follows: To Asa F. Tift and his men, as a reward for their faithful and meritorious conduct, $1,500; to the four vessels employed in saving the cargo and bringing it to this port, $3,500; to the other men employed, exclusive of forfeited shares, $2,880, to be laid out in 49 full shares and 4 half shares, and distributed among them as follows: To those employed on board the schooner Hester Ann, 11 shares,—2 of which to be paid to the mate, 1 to each of the ordinary seamen, and 1 to the master, his other 2 shares being forfeited for neglect of duty; to those employed on board the Citizen, 11 shares,—2 to the mate, 8 to the men, and 1 to the master, his other 2 forfeited; to those employed on board the Susan Hooper, 13 shares,—2 to the mate, 10 to the men,

and 1 to the master, his other 2 forfeited; to those employed on board of the Globe, 9 full shares and 4 half shares,—2 of which to the mate, 7 to the seven men not on board the bark on Sunday, and a half a share each to the four men who were with Captain Tresca on board the bark, the master's shares all forfeited; and to Captain Young and his four men which were employed, 5 shares, to be divided equally; and to the respondent, for and in behalf of all persons interested in said bark and cargo, $620, being the value of 9 full shares and 4 half shares, forfeited by the masters of the schooners Hester Ann, Citizen, and Susan Hooper, and the master of the Globe and his four men.

After the opinion of the court as regards the amount of the salvage to be paid, and the reasons for that opinion, were pronounced in this cause, the respondent requested that the case might still be kept open for two weeks to give him an opportunity of consulting friends in Havana as to the least injurious mode of raising the money for the payment of the salvage and expenses; and this request was most cheerfully granted by the court; and, as that time has now elapsed, it is presumed that he has made his arrangements to settle the business without resorting to a sale of any of the cargo, except such as from its injured condition requires to be sold. A venditioni exponas, however, must be issued unless the amount has already been paid into the registry, but it will be returned satisfied upon the payment to the marshal of the amount of the decree, including the costs.

Case No. 6,753.

HOWARD v. AMERICAN DAIRY, ETC., CO.

[10 Chi. Leg. News, 22; 6 Am. Law Rec. 193.]

Circuit Court, N. D. Ohio. 1877.

RIGHT TO COSTS—STATE AND FEDERAL STATUTES—REMOVED CASES.

[This was an action by Julius F. Howard against the American Dairy & Commercial Company of New York City. Heard on motion of defendant to set aside the verdict of the jury and to grant a new trial.]

Before WELKER, District Judge.

As to costs of the case (the verdict of the jury being for five dollars damages in favor of the plaintiff) it was held:

1. That, where suit was originally commenced by the plaintiff in a state court and removed by the defendant under the statutes to this court, the state statute in reference to the recovery of costs by the plaintiff is followed in this court. The state statute provides that, in actions of this character, if the plaintiff recovers the sum of five dollars, he shall recover costs.

2. That the statutes of the United States (Rev. St. § 968) limiting the right to recover costs where the damages are less than five hundred dollars only applies to actions originally brought in the circuit court.

Motion overruled, and judgment against defendant for the damages and costs.

HOWARD (AMES v.). See Case No. 326.

HOWARD (BOWEN v.). See Case No. 1,723.

Case No. 6,754.

HOWARD v. CHRISTY.

[2 Ban. & A. 457;[1] 10 O. G. 981.]

Circuit Court, W. D. Pennsylvania. Nov. 13, 1876.

PATENTS—APPLICATION AND ISSUE — DATE OF INVENTION.

The original application for a patent, dated December 6, 1849, was filed in the patent office, March 1, 1850, was rejected April 9, 1850, and was withdrawn May 4, 1850. It was afterwards repeatedly renewed and resulted in the allowance of patents in 1869: *Held*, that the date of the invention is referable to the date of the original application, to wit, December 6, 1849.

[This was a suit by James Howard against Robert Christy to recover damages for the infringement of two patents.]

James J. Johnston and George H. Christy, for plaintiff.

Joseph M. Gazzam, for defendant.

McKENNAN, Circuit Judge. This is an action at law for the infringement of two patents granted to James Howard, the plaintiff, as follows: (1) Patent No. 91,133, dated June 8, 1869, in which the invention claimed is: The method described (in the specification) for preparing paper for roofing purposes—to wit, by passing the paper through liquid asphaltum, heated to that degree which will cause the paper and the asphaltum on it to dry as fast as it is drawn from the reservoir of liquid asphaltum. (2) Patent No. 95,689, dated October 12, 1869, in which the invention claimed is: The arrangement of the reservoir, A, windlasses, B and C, adjustable rollers, D, scrapers, i and h, and rollers, e and f, constructed, arranged and operating substantially as described in the specification and for the purposes therein set forth.

The parties have stipulated to waive a jury, and that the issues of fact in the case be tried and determined by the court, and the evidence on both sides has been taken in writing and submitted to the court. Upon the evidence thus submitted the following facts are found: (1) The inventions described and claimed in said patents are novel and useful. (2) The plaintiff was the first and original inventor thereof, and the

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

date of his invention is referable to the date of his original application for a patent—to wit, the sixth of December, 1849. (3) This application was filed in the patent office March 1, 1850, accompanied by a specification and by a model on March 5, 1850, was rejected April 9, 1850, and was withdrawn May 4, 1850. (4) It was afterward repeatedly renewed (when does not appear), and resulted in the allowance of the patent aforesaid. (5) During the interval between the date of his application and the allowance of the patent, the plaintiff did not intend to, and did not in point of fact, abandon his said invention to the public. (6) The said inventions were not in public use or on sale with the consent and allowance of the plaintiff for a period of two years before his original application for a patent. (7) The defendant has practised the method described and claimed in letters patent 91,133 on a machine of similar construction to that described in letters patent 95,689, and is, therefore, an infringer.

These findings embraced all the material issues of fact raised by the pleadings. Several questions of law have been suggested touching the alleged defectiveness of the specifications, and the presumptive abandonment of the invention from delay in the procurement of patents, but as the objections to the plaintiff's title on these grounds have no warrant in the well-settled principles of the law of patents it is only necessary to say that they are unsustained.

Upon the whole case the court is of the opinion that the plaintiff is entitled to recover, and, as the damages have been assessed by stipulation at $100, judgment will, therefore, be entered upon the findings in favor of the plaintiff for that sum.

Case No. 6,755.

HOWARD v. COBB.

[Brunner, Col. Cas. 75;[1] 3 Day, 309.]

Circuit Court, D. Connecticut. 1809.

EVIDENCE—PROMISSORY NOTE—ADMISSIBILITY OF ADMISSIONS OF JOINT MAKER—JURY — SEPARATION AFTER SUBMISSION OF CASE AND BEFORE VERDICT.

1. In an action upon a promissory note executed by A. and B. jointly brought against B. only, after the bankruptcy of A., under the laws of the United States, it was *held* that the admissions of A. were evidence against B.

[Cited in Bound v. Lathrop, 4 Conn. 339.]

2. If the jury separate after a case is committed to them, and before they have agreed in a verdict, and afterwards return a verdict, it will be set aside. But neither the jurors nor the officer to whose care they were committed can be compelled to testify to the fact of such separation.

This was an action [by Stephen Howard] on a joint note signed by Ashbel Stanley and Jeduthan Cobb, brought against Cobb only, it being alleged that Stanley, since the execution, had become a bankrupt under the laws of the United States. The defendant pleaded a discharge in full to Stanley. On this plea issue was joined, it being contended by the plaintiff that the discharge was forged.

Mr. Daggett, for plaintiff, offered the declarations of Stanley in evidence to prove that he had acknowledged the debt to be due long after the discharge purported to have been executed.

Mr. Goddard, for defendant, objected to the admission of this evidence, on the ground that, as Stanley was absolved from the payment of this note by his certificate, he could be examined as a witness; and therefore his declarations could not be proved.

BY THE COURT: If Cobb should be compelled to pay this note, he could compel Stanley to indemnify him (it had been stated by the counsel on one side, and assented to on the other, that Cobb signed the note only as surety for Stanley), as it would be a debt accruing after the bankruptcy of Stanley. His declarations, therefore may be proved.

The plaintiff obtained a verdict.

The defendant moved in arrest of judgment. The principal ground was that the jury had separated and mingled with the inhabitants of New Haven before they had agreed upon a verdict.

The fact was not conceded, though the counsel for the plaintiff stated that this had been the general practice in Connecticut; that juries had always separated when they pleased.

Mr. Goddard, for defendant, called upon one of the jury as a witness to establish the fact of such separation.

The Court informed the juror that he should not be compelled to answer, as it was a misdemeanor in him, but that he might answer if he pleased. The juror declined answering.

The deputy-marshal to whose care the jury had been committed was then called.

The Court said that he could not be compelled to answer unless he pleased. He declined.

The counsel for defendant then proposed to wait until the rest of jury should come in, observing that perhaps some of them would be willing to testify.

The Court said that they would not wait a moment in such a case as this.

The counsel for defendant then offered to prove the declarations of the jury, as evidence of the fact in controversy.

The Court said they would not hear such declarations. They expressed, however, a clear opinion that judgment must have been arrested if it had been proved that the jury separated before they had agreed upon a verdict. The statute of this state (Gen. St. tit. 6, c. 1, § 11) they considered so explicit and imperative that it could not be evaded, let the practice be ever so universal against it.

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

In the next case the court appointed an officer to take care of the jury, and charged him not to suffer them to separate until they had agreed in a verdict, nor to speak to them except to ask them if they were agreed.

Case No. 6,756.

HOWARD v. COBB.

[The case reported under above title in 13 Leg. Int. 361, 19 Law Rep. 377, and 36 Hunt, Mer. Mag. 707, is the same as Case No. 2,924.]

HOWARD (COBB v.). See Cases Nos. 2,924 and 2,925.

HOWARD (COOK v.). See Case No. 3,160.

Case No. 6,757.

HOWARD v. CRAWFORD COUNTY.

[1 Pittsb. Rep. 531; 6 Pittsb. Leg. J. 454.]

Circuit Court, W. D. Pennsylvania. May Term, 1859.

COUNTY BONDS IN AID OF RAILWAYS — VALIDITY OF SUBSCRIPTION—UNAUTHORIZED CONDITIONS —SIGNATURES OF COUNTY COMMISSIONERS.

[1. Under a statute authorizing a county to subscribe for railroad stock upon the recommendation of a grand jury (Acts Pa. April 21, 1846, and May 4, 1852), the fact that the decision of the grand jury in favor of such a subscription is submitted to a vote of the people can in no wise affect the validity of the subscription, whatever the result of the vote, since the submission is wholly unauthorized.]

[2. Where a subscription by a county to railroad stock was made upon a condition not authorized by the law under which the subscription was made, and such condition was omitted from the bonds issued by the county, *held*, that one who received the bonds in payment for work done in good faith in constructing the road was entitled to recover upon them, whether he had notice of the condition or not.]

[3. The fact that railway aid bonds are signed by only two of the three county commissioners does not affect their validity, as the signatures of two, with the corporate seal, are sufficient.]

This was an action [by George W. Howard against Crawford county] to recover interest due on bonds of defendant, issued to the Pittsburgh and Erie Railroad Company, and by them transferred to plaintiff.

The case was opened on behalf of plaintiff, by Mr. J. W. Farrelly, of Meadville, who stated that in 1846 an act was passed incorporating the Pittsburgh and Erie Railroad Company, authorizing the construction of a railroad from the city of Pittsburgh to the city of Erie, in the state of Pennsylvania. In 1852 another act was passed, conferring power upon the counties of Erie, Crawford, Mercer and Lawrence to subscribe to the stock of said railroad company, and providing that said subscriptions should be made upon the recommendation of a grand jury, who should fix the amount, designate the terms, &c., and that said subscription should be made upon no other conditions. In August, 1853, the grand jury of Crawford county recommended a subscription of $200,000 to the stock of said company. In a few days after, the county commissioners held a meeting, and subscribed $200,000, the amount recommended by the grand jury. By the terms of the subscription the county was to have four directors in the road, and in order to have said directors appointed, the commissioners executed a single bond for the whole amount of subscription. Subsequently that bond was cancelled, and lithographed bonds were issued, ranging from one hundred to one thousand dollars each, having twenty years to run—the coupons to be paid semi-annually. A fly-leaf was attached to the bonds, containing the act of assembly authorizing the subscription, the recommendation of the grand jury, and the subscription of the commissioners, to show that the bonds were good and perfect, and issued in accordance with the law of the state. The work was put under contract, and the plaintiff, as a contractor, commenced work, and continued to work upon the road for about a year. By their agreement he was to receive $150,000 in county bonds, $100,000 in the company's stock, and $300,000 in cash, from the company. He expended $60,000 in the work. He received in bonds $12,000, in cash the sum of $2,000, and perhaps $3,000 in the stock of the company. He was obliged to suspend the work for want of means; and now suit is brought upon the coupons attached to bonds paid him, at par, by the said railroad company. The amount due him as interest exceeds $2,000.

Mr. Pettis opened the case for defendant. going into a lengthy history of the various transactions connected with the subscription by Crawford county, the connection of the plaintiff with the company, &c. The case in behalf of the county rests upon alleged irregularity in the issue of the bonds, and also upon the question of fraud. The whole issue of $200,000, it is alleged, was obtained by fraud and misrepresentation, upon the part of the company and its agents.

A large amount of testimony was given in the shape of depositions.

Shaler, Stanton & Farrelly, for plaintiff.

N. P. Fetterman and Mr. Pettis, for defendant.

McCANDLESS, District Judge. This action is instituted by George W. Howard upon coupons, detached from bonds of Crawford county, of which he is the holder. In the aggregate, they amount to $2,163. The multiplicity of matters presented, and the seeming confusion in which you must have received them, requires that the court should undergo some labor in making them intelligible to the jury.

The legislature of Pennsylvania, by an act passed the 21st of April, 1846, authorized

the incorporation of a company to build a railroad, beginning at, and uniting with the western terminus of the Baltimore and Ohio Railroad, if such road shall be constructed in the county of Allegheny, but if said railroad shall not terminate there, then to begin at some point in the city of Pittsburgh in the county of Allegheny, thence by such direct and practicable route, &c., and terminating in the town of Erie, in the county of Erie, &c. This act, although passed by the legislature, and approved by the governor, owing to the non-payment of the enrolment tax, does not appear in the published laws until 1850. The wisdom and policy of the act, is evident, from the termini indicated; and its execution was no doubt suspended by a different action of the Baltimore and Ohio Company, fixing a terminus upon the Ohio, further south, and probably a want of sufficient enterprise and means to complete the road. At that date the modern discovery of appropriating the whole property of the people to pay the debts of a corporation, had not occurred; and the simple old way of paying for what you subscribed was then fashionable. Consequently, the act slept upon the statute books, until about the period of the war connected with the "chimney top," an era prolific of suits in this court. Erie county and its citizens manfully resisted the encroachments of New York on the one side, and of Ohio on the other, and claimed that their patrimony should remain intact, whatever might be the demands of commerce, or the personal convenience of the citizens of the different states.

In 1852 a supplement was passed to this act, doubtless originating with the sound substantial freeholders of Crawford county, with the hope of passing the immense traffic from east to west, and vice versa, through their territory, instead of Erie. Whether or not, or for the purposes of speculation, it is the law of the land, and it is the function of this court to give it a proper interpretation.

The plaintiff has presented a clear case, unless it is rebutted by something offered by the defendant. He has shown you the bond and coupons—that he is a meritorious creditor; that he has labored for the corporation from whom he received those bonds; and that labor, if it did not inure, was intended to inure to the benefit of Crawford county. The citizens of the county saw him commence the work with eclat; saw him pursue it until he had expended upwards of $60,000, and would have canonized him, if the result had made Meadville a center of trade, or other than a mere inland town. Relying on the public faith and credit of the county, he took these bonds; and this was one resource from which he expected to reimburse himself and pay his hands. The whole project failing, and particularly this lateral branch, that was to consummate so much, the commissioners of Crawford county now seek to repudiate—not the principal of the bonds, for which they admit they are liable, but the interest, upon the pretext that there was some irregularity in the issue of the bonds, and that there was fraud, to which the plaintiff was a party. The first is for the court, the latter is for you.

Whenever there is any evidence of fraud, however slight, it is the duty of the court to submit it to you. We are compelled to say, after a careful review of all the testimony offered, that there is nothing to implicate the plaintiff in any act of fraud or misrepresentation; and that he might properly repel the accusation by charging an attempt to commit it, upon his adversaries. This, then, disposes of the only question of fact upon which you will have to pass; and upon the court must rest the responsibility of deciding upon the legality of the subscription, and the liability of the defendant.

We accordingly charge you:

1. That although we cannot agree with the supreme court of Pennsylvania, that the act of the grand jury was invalid, by reason of the repeal of the Gauge law; yet, that their recommendation of the 11th day of August, 1853, was a literal and substantial compliance with the act of assembly of the 4th day of May, 1852. Their authority "to advise and recommend," was not exhausted in the first instance.

2. The submission to a vote of the people, however much it may have been designed to relieve the grand jury from responsibility was unauthorized, and whichever way it may have resulted could not alter the effect of their advice and recommendation to subscribe, submitted to the court of Crawford county.

3. The condition incorporated with the subscription, was wholly unauthorized by the act of the 4th of May, 1852. It may be operative in an action between the county and the corporation; but as to the plaintiff, whether he had notice of it or not, it is not binding upon him, and is a fraud upon him and all others, who have in good faith received the bonds of the county. The very asterisks, or dots, which have been made the subject of so much comment, indicated that the commissioners, themselves, intended to omit a condition, which without impairing their liability if inserted, would have rendered their bonds unsaleable in the market. If it were otherwise, they cannot now come here, and stultify themselves, avoid their deliberate and solemn act, by charging the plaintiff with notice. The omission was a release of the condition. Neither can they allege that the bonds are not valid because a portion of them were signed only by two actually in office, instead of all the commissioners. The duty enjoined by the act is to be performed by the commissioners, as the "constituted" authority of the county, and the signatures of two with the corporate seal, is sufficient without the assent or signature of the third.

4. It was no part of the duty of the grand jury to indicate whether the subscription was to be paid in bonds or money. It was simply to "advise and recommend" the subscriptions.

5. The several points submitted by the counsel for plaintiff and defendant are here substantially answered, and they are specially so in a memorandum attached to each.

Upon the whole facts and law of the case, if you believe the testimony, we have no hesitation in charging you that the plaintiff is entitled to your verdict; and we hope that for the honor and reputation of Crawford county, this is the last case of the kind we shall hear of in this court.

The jury then found for the plaintiff $2,163.67, being the whole amount claimed; $1,848 was the principal, and $315.67 was the amount of interest.

Case No. 6,758.

HOWARD et al. v. CROMPTON et al.

[14 Blatchf. 328.] [1]

Circuit Court, N. D. New York. Sept. 24, 1877.

BANKRUPTCY — PAYMENT TO BANKRUPT WITHOUT ACTUAL NOTICE—REMEDY OF ASSIGNEE.

1. H., who was a debtor to a bankrupt at the time of the commencement of the proceedings in bankruptcy, thereafter and before the adjudication of bankruptcy paid the debt to the bankrupt, without any actual notice or knowledge of the pendency of the bankruptcy proceedings, and in the usual course of business, but the money thus paid did not come to the hands of the assignee in bankruptcy. The assignee brought suit against H. to recover the debt: *Held*, that the suit could be maintained.

[Cited in Sicard v. Buffalo, N. Y. & P. R. Co., Case No. 12,831.]

2. Whether the district court can try an action at law otherwise than by a jury, suggested.

[See Babbitt v. Burgess, Case No. 693.]

[Error to the district court of the United States for the Northern district of New York.]

[This was an action of debt by John Crompton and others, assignees in bankruptcy of A. Miller & Co., against Jacob R. Howard and others. The district court gave judgment for plaintiffs, and defendants bring error.]

Levi H. Brown, for plaintiffs in error.

Seymour & Weaver, for defendants in error.

JOHNSON, Circuit Judge. This is a writ of error to the district court. The important question presented by counsel, upon the argument, is, whether the assignees of the bankrupts can maintain an action against persons who were debtors of the bankrupts at the time of the commencement of the bankruptcy proceedings, to recover the amount of such debt, notwithstanding the facts, that, before the adjudication of bankruptcy was made, but after the commencement of the proceedings, the debtors paid to the bankrupts the full amount of their debt, without any actual notice or knowledge of the pendency of the bankruptcy proceedings, and in the usual course of business, the money thus paid not having come to the hands of the assignees. It was determined, in the district court, that the action could be maintained.

But for the fact of payment, there could, of course, be no question of the right of the assignees to maintain the suit. Section 14 of the bankrupt act of March 2, 1867 (14 Stat. 522), directs the judge or register to assign and convey to the assignee, by an instrument under his hand, all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and enacts, that "such assignment shall relate back to the commencement of said proceedings in bankruptcy, and that thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings;" and, after some further provisions, not material to be stated, it goes on to say: "All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had, if no assignment had been made, shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts, and effects."

The time of the commencement of the proceedings in bankruptcy is defined, by section 38, to be the time of the filing of the petition for adjudication. It is to that time that the effect of the assignment relates, which carries to the assignee the property then owned by the bankrupt. It does not carry that which he subsequently acquires, whether by his own industry or by any other mode of acquisition. This period is fixed for the operation of the transfer of all the bankrupt's estate, real and personal—terms broad enough to carry every property interest. If, as is suggested, there is an ab-

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

sence of these words of reference in the clause of the 14th section which is above quoted, beginning with the provision in regard to property conveyed in fraud of creditors, it is still to be considered, that some time must be fixed as that which this part of the section refers to. It must be either the time of the commencement of the proceedings, or the later time of the appointment of the assignee. If it be the latter, then the extraordinary and irrational result will follow, that, as to some species of property, the creditors take that, and that only, which the bankrupt has at the beginning of the proceeding, while, in regard to other species of property, that, and that only, which he has at the appointment of the assignee, can be taken for the creditors. Such a rule is inconceivable, and may be unhesitatingly rejected by the court, as not a possible legislative intent. I have no doubt that the relation back to the time of the commencement of the proceedings applies to every species of property interest, and marks the division between the ownership of the assignee, in reference to the past, and the ownership of the bankrupt, in respect to the future, acquisitions of the bankrupt. If this be the true sense of the provisions spoken of, then the assignees' title took effect, by relation, established by the statute, as of the named period, and effect must be given to it accordingly. That hardship and injustice may ensue in particular cases, is to be regretted, but does not warrant the court in disregarding the will of the legislature. In legislating on such a subject, a stringent and absolute rule prevents certain possibilities of fraud, very necessary to be guarded against, while it does render it possible that particular hardships may, in consequence of such rules, be brought about, but the weighing of the advantages of the one rule or the other belongs not to the courts, but to the legislature. It is said, that relation to another time is a fiction of law, and that law will not permit a fiction to work injustice. This is certainly true of those fictions introduced into the law for purposes of convenience, but has no reference to such as the legislature has established, to subserve the legislative policy of the laws. Upon this subject, the observations of Chief Justice Tindal, in Balme v. Hutton, 9 Bing. 471, 524, are instructive, and throw much light upon all the questions involved in this part of the case. He says: "It has been observed, in one case, that this relation is a fiction of the law, and that fictions are not to be favored. But I must confess myself unable to consider it as any fiction at all; for, it appears to be the direct positive enactment of the legislature, expressed in plain and unequivocal terms. That such an enactment is, indeed, attended, in some cases, with hardship, must be admitted. but there seemed to have been no alternative for the legislature but either to allow these individual cases of hardship, or to submit to a general inconvenience; for, unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended is evident from the consideration, that, in various instances, where the individual hardship was greater than was warranted by the general convenience, the legislature has, from time to time, by new statutes, cut down the relation, in particular cases; as, first, in the case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. I. c. 15); next, in the case of the sale of real property by the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy (21 Jac. I. c. 19); again, in the case of payments by the bankrupt to creditors, for goods sold (19 Geo. II. c. 32); and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts, bona fide made and entered into more than two calendar months before the date and issuing of the commission (46 Geo. III. c. 65). All which provisions of the legislature do prove and establish two points, first, that such relation to the act of bankruptcy did at the time exist under the previous enactments; and secondly, that nothing short of the authority of parliament itself was sufficient to relax the severity of the former law. The courts of law have uniformly held such construction of the bankrupt acts. I will refer to one case only, namely, the judgment of Lord Hardwicke, when chancellor, in Billon v. Hyde, 1 Ves. Sr. 326; because it appears to me to import that, at that time, he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord Hardwicke observes: 'It is said that this rule (the relation to the act of bankruptcy), founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one, which is the general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it, on this general rule, that it is better to suffer a particular mischief, than an inconvenience; and the legislature foresaw that there would be a particular mischief which they cured by that proviso, but did not extend it further, because, the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult, commonly, to find out whether

there was a mixture of fraud; so the legislature thought it better to lay down that general rule.'" The legislation of England has introduced exceptions to the generality of the relation back, created by their bankrupt laws, from time to time, thus mitigating the severity of the operation of those laws upon persons innocent of any wrongful intention. The first of these, in the order of time, was the statute 1 Jac. I. c. 15, § 14, which enacts, that no debtor of the bankrupt shall be endangered for the payment of his or her debt, truly and bona fide, to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt. If that were the law of the United States, as it was, and substantially is now, the law of England, the payment by the plaintiffs in error involved in this case would be protected. But, unfortunately for them, the congress, in its wisdom, did not enact that or any equivalent provision, and the courts have no authority to introduce it. Various English cases are referred to in the brief of the counsel for the plaintiffs in error, containing expressions which seem to favor his views on this subject, but they all are founded upon one or more of the exceptions which have been, from time to time, introduced into the English statute law. Those cases afford no ground for saying that the courts have any power to give relief, but rather the contrary, because, the exceptions were introduced only by the direct provisions of the statutes referred to. The counsel for the plaintiffs in error endeavors to import into the law a necessity for notice, such as the English statutes, and the English cases founded upon those statutes, require; but, as those requirements of the English statutes do not form part of ours, there is no warrant for that course.

Without further pursuing the subject, I find no ground for doubt that the decision of the district court was correct. The payment, though innocently made, having been made after the commencement of the bankruptcy proceedings, and the money not having come to the hands of the assignees, did not extinguish the debt, and the right to recover is unaffected.

As no question has been made as to the mode of trial pursued in this case by the mutual consent of the court and counsel, I do not feel called upon to consider its propriety, further than to refer to certain sections of the Revised Statutes, which bear upon the subject (sections 566, 649, 700), and to remark that the two sections last referred to relate only to the circuit court. The judgment must be affirmed.

Case No. 6,759.

HOWARD v. DAVENPORT.

[Cited in Blennerhassett v. Sherman, 105 U. S. 108. Nowhere reported; opinion not now accessible.]

Case No. 6,760.

HOWARD v. LA CROSSE & M. R. CO.

SOUTER v. SAME.

[1 Woolw. 49.] [1]

Circuit Court, D. Wisconsin. April Term, 1864.

WHEN VALIDITY OF INCORPORATION CANNOT BE QUESTIONED — OF DISCHARGE OF RECEIVER IN CHANCERY—SECURITY — OTHER REMEDY — POSSESSION REVERTS — RIGHT FORFEITED —DECREE INVALIDATING JUDGMENT.

1. When a party has been impleaded in a bill as a corporation, and, in decrees made in the cause, has been recognized as such, the question cannot be afterwards raised therein, whether the proceedings had in order to its incorporation were regular or effectual.

2. A railroad ninety-five miles long, being a link in an important route, whose gross annual earnings are $800,000, in good condition, is ample security for mortgage debts thereon amounting to $2,200,000; and a receiver of such road, appointed at the suit of a party on whose debt $300,000 is offered to be paid, and who has a decree which provides for sale in case of default of payment, as therein provided, will be discharged.

3. A receiver of such road will be discharged, who was appointed on a creditor's bill, showing a judgment for $16,000, when the plaintiff enjoys all the ordinary remedies for enforcing his lien, and has received only $1000 for four years, during which the receiver has been in possession of the road.

4. A party having, as security for a large debt, a lease of such road, from whom the possession was taken by the receiver, is, upon his discharge, entitled to have possession restored to him.

5. But a party holding such lease, who has failed to pay sums which he therein stipulated to pay as consideration therefor, and who, by reason of his failure in that behalf, has lost possession, and permitted the property to remain out of his possession for four years, exposed to the hazards of sale, has lost his right of possession.

6. An unreversed decree, declaring that the judgment, to secure which such lease was made, was invalid, and setting it aside, will have a persuasive influence towards discharging a receiver appointed, or sought to be retained, for its benefit.

This was a motion made by the Milwaukie and Minnesota Railroad Company, for an order discharging a receiver, and transferring to it possession of a certain section of railroad, upon its paying, within a short day, the sums now due upon it. The railroad which is involved in this matter is ninety-five miles long, and extends from Milwaukie to Portage. It is a part of a railroad built by the La Crosse and Milwaukie Railroad Company. This corporation, having mortgaged the road here involved to Bronson and Souter, as trustees, to secure certain bonds with interest coupons, and default in the payment of the interest having been made, on the 9th of December, 1859, the mortgagees filed their bill of foreclosure in the United States circuit court for Wisconsin.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

The Milwaukie and Minnesota Railroad Company, Zebre Howard, Graham and Scott, and Selah Chamberlain were impleaded with the mortgagees. In 1858, Howard had recovered in the state court of Wisconsin a judgment against the mortgagees, which he sued over in the federal court, where, on the 28th of November, 1859, he had judgment for $16,379.86. In 1860, he filed his creditor's bill on this judgment, in which suit a receiver was appointed, who, on the 11th of June in that year, took possession of the whole road. On the 6th of July following, the same receiver was extended to the foreclosure suit above mentioned. A decree having been rendered in that cause, appeals were prosecuted to the supreme court, whence it was remitted to the circuit court, with special directions set forth in the mandate: "To enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied are not sufficient to discharge the interest due on the 1st day of March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court; and on bringing the proceeds into court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and if they exceed that, to the principal of the bonds, in case the bondholders assent, or pro rata to those who may assent; and any remaining balance of the proceeds to be invested, under the direction of the court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal. And further, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings; and also such counsel fees in behalf of the trustees, as the court, in its discretion, may deem right to allow." [Bronson v. La Crosse & M. R. Co., 2 Wall. (69 U. S.) 283.]

The La Crosse and Milwaukie Railroad Company made to one Barnes, as trustee, a mortgage, which was subseqüent and in terms subject to the mortgage to Bronson and Souter. This mortgage was foreclosed and the road sold, and the Milwaukie and Minnesota Railroad Company became the purchaser. This company was organized under the laws of Wisconsin, with the view of making this purchase, and, in the bill first above mentioned, was impleaded in its corporate capacity, as the successor of the mortgagor, and as the holder of the equity of redemption. The Milwaukie and Minnesota Railroad Company suffered the bill of Bronson and Souter to be taken as confessed, but two of its stockholders interposed answers, so that the court, in its decree, recognized its corporate existence. And the supreme court gave heed to those answers, and decreed with a view to the matters alleged therein, and, of necessity, with a recognition of the company's corporate existence. This company now offered to pay all that the mandate required; that is, "all the interest due and secured by the mortgage," providing the receiver be discharged, and they be placed in possession of the road. The mortgage debts amounted to $2,200,000. The road was in good condition, and constituted a part of a direct line of railroad from Milwaukie to the Mississippi. Its gross earnings for the year preceding the application here, as shown by the receiver's reports, were $800,000. Under the mandate it was the duty of the court to enter a decree for the interest, and, after giving day of payment of the sum to be found due, to direct a sale in case of default therein. With such a decree entered, which would stand as security for the accruing interest, and the road being of such value, as is shown by the above recited facts, the moving party insisted, that, if they paid at once what was required by the decree to be paid within a year, they should be restored to the possession of their own property. This claim was resisted by the other parties to the suit, upon grounds which the court in its opinion pass upon, and which there fully appear.

Mr. Carpenter, for motion.
Mr. Cary, contra.

MILLER, Circuit Justice. The first suit above mentioned is a proceeding in chancery, instituted in the district court of the United States for this district while it possessed circuit court powers, to enforce a judgment lien on the road of the La Crosse and Milwaukie Railroad Company. It was commenced in 1860, and on the 11th day of June, in that year, a receiver was appointed, who took charge of the whole road and all its appurtenances. Prior to this, on the 9th day of December, 1859, the plaintiffs in the second suit, who were trustees of a mortgage to secure $1,000,000, covering the eastern end of the road from Milwaukie to Portage, had brought their suit in the same court to foreclose their mortgage; and on the 6th day of July, 1860, on their motion, the same person was appointed receiver of this part of the road, who had been previously appointed receiver of the whole road in the Howard suit. The amount of Howard's judgment is about $20,000, and is conceded to be subor-

dinate in its lien to the mortgage of Bronson and Souter.

The district court rendered a decree in favor of Bronson and Souter for half the amount of the debt secured by their mortgage, and ordered a sale and foreclosure. From this decree the trustees appealed to the supreme court. That court, at its recent term, reversed that decree, holding that the plaintiffs were entitled to the full amount of the bonds secured by the mortgage, with the accruing interest. [Bronson v. La Crosse & M. R. Co., supra.] The mandate of the supreme court, which is now before us here, directs us to ascertain the amount of interest due on these bonds on the 1st day of March last, after deducting such sums as may be in the hands of the receiver applicable to that purpose; and that, if that sum, with the accruing interest and costs, is not paid within twelve months from the date of the order ascertaining the amount, then the road is to be sold.

The Milwaukie and Minnesota Railroad Company now comes forward, and proposes to pay this sum within a short time to be fixed by the court, say twenty or thirty days, and asks an order directing that, upon such payment, the receiver be discharged, and that he deliver to said company the railroad from Milwaukie to Portage, with the rolling stock and other appurtenances properly belonging to it. A similar order is asked in the Howard suit.

The granting of this order is resisted by Souter, the surviving trustee, Howard, and Selah Chamberlain; and it is very obvious that, if the plaintiffs are paid all that is due them on their mortgage, the order appointing a receiver in the suit should be discharged, unless some very stringent reason exists for its continuance.

The first inquiry, in this view of the case, is concerning the claim of the Milwaukie and Minnesota Railroad Company. The La Crosse and Milwaukie Railroad Company, which built the road, and which gave the mortgage to Bronson and Souter, afterwards made a mortgage to William Barnes. This mortgage was foreclosed by a proceeding prescribed by the statutes of Wisconsin; and the purchasers at the sale organized themselves, under the laws of that state, into the corporation now setting up this claim. By virtue of that sale and foreclosure, this company became the successors in interest of the La Crosse and Milwaukie Railroad Company. In it rests, subject to the incumbrance, the legal title to the road, appurtenances, and franchises of which it asks possession.

An attempt is made, on this motion, to question the regularity of the proceedings by which this company was incorporated, and the fairness of its purchase.

The first objection is altogether inadmissible, because this corporation was made a defendant to the foreclosure suit by the plaintiffs, and has been recognized by them, and by this court, and by the supreme court of the United States, as an existing corporation. It is certainly too late, for any purpose of this suit, on a motion of this kind, to question its legal existence.

Nor can the second objection be entertained. The supreme court of the United States, in the case wherein we are now considering its mandate, has passed upon the very question. It has decided that the Milwaukie and Minnesota Railroad Company has become the owner of the road, and that, by virtue of the foreclosure proceedings under the Barnes mortgage, all liens subsequent in date to that incumbrance, including the claim of Howard, were cut off and for ever barred.

The language of the supreme court is this: "Now, it appears that each of these judgments was recovered after the date of the third mortgage of the La Crosse and Milwaukie Company, upon the foreclosure of which the Milwaukie and Minnesota Company was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard, of November, 1858, and the last judgment of Graham and Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse and Milwaukie Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser, under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukie and Minnesota Company. These judgment creditors, therefore, according to their answers, have no interest in the subject matter of this litigation."

This opinion was rendered in a proceeding to which all who oppose the present motion, except the Milwaukie and St. Paul Railroad Company, were parties; and that company acquired any interest it may have in the property now under consideration, pendente lite. In the case of Russell v. Ely, 2 Black [67 U. S.] 575, the supreme court has decided that the mortgagee of real estate does not acquire the legal title to the mortgaged premises, nor the right of possession, except by the consent of the owner, and that the holder of the legal title may maintain ejectment against the mortgagee in possession. It cannot, then, be controverted in this proceeding, and so far as the parties to this suit are concerned, that the Milwaukie and Minnesota Railroad Company is the legal owner of the property of which it asks possession.

I next proceed to examine the objections raised by each of the parties I have mentioned to the discharge of the receiver, and to placing the road in the possession of that company.

The plaintiffs generally urge, as their first ground of objection, that the road itself and its appurtenances are not a sufficient secu-

rity for their debts; and that during the year which is given by the supreme court for the payment of the arrears of interest, they should be retained in the hands of the receiver, in order that the accruing revenue may be applied thereto. The property on which the plaintiffs' mortgage is a lien consists of a road-bed ninety-five miles in length, extending from Milwaukie to Portage, together with the depots, rolling stock, and other appurtenances connected therewith. It constitutes a part of a direct line of road from the former city to the Mississippi river, and is a link in one of the most valuable routes, both present and prospective, in the United States. The gross annual earnings from this ninety-five miles of road for the past year, as shown by the reports of the receiver, which are before us, are about $800,000. It is in good condition, and there is no reason to believe, that when it is transferred from the control of a receiver to that of the real owner, its value or its receipts will be diminished. There are two mortgages on which the interest is all paid, prior to that of these plaintiffs. Their aggregate amount, together with the plaintiffs' mortgage, is about $2,200,000. The road must be worth this sum, and is ample security for the plaintiffs' debt. If we consider the amount of the gross receipts just stated, the fact that the party now asking possession, in order to obtain it, proposes to pay some $300,000 or $400,000 of the plaintiffs' demand, and that the decree which we are to render must stand as security for his further claim, on which he can have an order of sale for any instalment of interest, if unpaid when it becomes due, it would seem to be the merest pretence that, after the payment of the sum awarded to him, his security requires the longer continuance of a receiver. With the accrued interest paid in full, with ample security for the remainder of his debt, and with speedy and sure means of enforcing its payment in case default be made therein, there can be no reason why he should longer retain the property from the control of its owner.

With regard to Howard, I have already shown that the supreme court has decided that he has no further interest in the property. It is said that its opinion was delivered under a mistake of fact. It may have been, and in a proper proceeding in his case it might be found that he has a valid subsisting lien; but, on this motion, I must consider the presumption to be the other way, and act accordingly. But suppose it be conceded that his lien is valid. It amounted, when his suit was brought, to less than $20,000. Shall this road, with annual receipts to the amount of $800,000, be retained in a receiver's hands, for this comparatively inconsiderable sum, when the creditor possesses all ordinary remedies for enforcing his claim? Is there no means of enforcing a lien or collecting a debt but through a receiver? Howard has now had his receiver for four years; and has received but $1000, and has taken no steps in his cause since the order affording him this extraordinary remedy. And during all this period he has been asserting a lien, the validity of which, at the best, is extremely doubtful. It surely cannot be necessary, under such circumstances, to argue against persevering in that mode of enforcing the judgment.

Mr. Chamberlain objects to the property's being turned over to the moving party here, and insists that possession should be restored to him. He asserts that he has a judgment for over $700,000, which is a lien upon the road; and that, when the receiver was appointed, he was in possession under a lease, which was executed to him as security for his debt. If these representations were true, and his lease unimpeached, or his debt conceded to be just, I should have no hesitation, upon discharging the receiver, in replacing the property where the court, when it made the appointment, found it. And as the matter is now presented to me, moreover, I am constrained to say that Mr. Chamberlain's objection to the discharge of the receiver is the only one which has deserved a moment's consideration. It is not true, however, that Mr. Chamberlain was in possession when the receiver was appointed. The terms of his lease required him, out of the proceeds of the road, to keep down the interest upon the mortgage debt of the plaintiff in this suit. This he failed to do, and, either voluntarily, or upon necessity, some fourteen or fifteen days before the first order appointing a receiver, he had surrendered possession of the property to the plaintiff. This fact is conceded by all parties, and is distinctly proved by Mr. Dow in the principal suit, and shown by the accounts returned into this court in that case. When the receiver was first appointed, therefore, the property was taken by the court from these plaintiffs, and not from Mr. Chamberlain. Again, it appears that through his failure to keep down the interest on the mortgages, and by parting with the possession, Mr. Chamberlain abandoned his claim under the lease, and can no longer insist on the right to hold possession of the property as his security. I must confess, that, upon examining the lease in the light of this conceded fact, it is by no means clear to me that, if Mr. Chamberlain were to bring his action to recover possession, he should be successful. The consideration, or the main consideration, has failed. At all events, after permitting the property, for four years, to be kept both from him and from its owners, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated. Nor can I, in an application like this, addressed in some sense to the discretion of the court, shut my eyes to the fact that Mr. Chamberlain's judgment, which

was for the debt secured by the lease, stands upon a very doubtful basis as to its validity and justice. It is certainly true that, by a decree which is in full force, it has been set aside and vacated.

And although I do not propose here to determine whether that decree can be used by the La Crosse and Milwaukie Company, or by its successors, the Milwaukie and Minnesota Company, yet it certainly must have a persuasive influence in determining whether a receiver should be continued for the benefit of that judgment, or whether, if he is discharged, the possession should be remitted to Mr. Chamberlain.

When I add to these considerations, as in my opinion the fact is, that there is sufficient security for any lien Mr. Chamberlain may have on the road; that the courts are open for him to enforce it; and that, although a party to all the suits concerning this road, he has never thus far, either by original or cross bill, set up a claim to any relief; I do not think his objections are sufficient to induce us to continue the receiver, or to award to him the possession of the property upon the receiver's being discharged.

By reason of a disagreement between Mr. Justice Miller and Mr. District Judge Andrew J. Miller upon the subject matter of the motion, the application was, notwithstanding the above opinion, overruled.

[NOTE. The Milwaukee & Minnesota Railroad Company appealed from the order denying their petition for the dismissal of a receiver, but the appeal was dismissed by the supreme court in an opinion delivered by Mr. Justice Chase on the ground that the removal or appointment of a receiver rested in the sound discretion of the court, and was not reviewable. 131 U. S. Append. lxxxi.]

HOWARD (McCORMICK v.). See Case No. 8,719.

HOWARD (MELLUS v.). See Case No. 9,403.

Case No. 6,761.

HOWARD v. MILWAUKEE & ST. P. RY. CO.

[7 Biss. 73.] [1]

Circuit Court, E. D. Wisconsin. Oct., 1875.[2]

LIEN OF JUDGMENT—PRIORITY.

1. A judgment prior in point of time is paramount to a posterior judgment, even though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party.

[See note at end of case.]

2. It seems, however, that in such case a court of equity would allow the junior judgment creditor to redeem even after the statutory period for redemption had expired.

[See note at end of case.]

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

[2] [Affirmed in 101 U. S. 837.]

The plaintiff [Charles Howard] sought to recover from the defendant [the Milwaukee & St. Paul Railway Company] the possession of a strip of land about eighty feet in width, occupied by defendant as a road-bed and right of way for its railroad, and extending from the south end of block 41, in the second ward of the city of Milwaukee, to a point where the same crosses the west line of the town of Granville, in Milwaukee county. On the 1st of May, 1858, Sebre Howard obtained a judgment against the La Crosse & Milwaukee Railroad Company, in the circuit court of Milwaukee county, for $25,586.78. On the 29th of October, 1858, execution was issued upon this judgment, and on the 15th of January, 1859, the sheriff of Milwaukee county sold the property before mentioned, upon the execution, as the property of the judgment debtor, to the plaintiff for $4,000, and by deed dated 13th June, 1862, conveyed the property to the purchaser. Before the issuing of this execution the judgment had been assigned to the plaintiff, and the sheriff's deed was recorded November 20th, 1863. It was under this proceeding that the plaintiff claimed title. There were liens upon the property by mortgage and judgment prior in date to plaintiff's judgment, among which were a mortgage executed 17th of August, 1857, by the La Crosse & Milwaukee Company to Bronson and Soutter, to secure the payment of $1,000,000, and a judgment in favor of Newcomb Cleveland rendered October 7, 1857, by the United States district court for the district of Wisconsin, for $111,727.71 damages and $544.15 costs, which judgment was docketed on that day. On the 21st day of June, 1858, the La Crosse & Milwaukee Railroad Company executed a mortgage upon its railroad and property, to secure the payment of $2,000,000 of bonds, and on the 11th of August, 1858, made to the same party a supplemental mortgage further securing the payment of the same bonds. The first installment of interest upon that mortgage fell due January 1, 1859. The mortgage was subsequently foreclosed by advertisement, and on the 21st of May, 1859, all the property, franchises and rights of the mortgagor were sold under the mortgage, and bid off by Barnes in trust for the bondholders. On the 23d of May, 1859, Barnes and the bondholders in interest united as purchasers of the property in organizing a corporation under the statutes of Wisconsin, which received the name of the Milwaukee & Minnesota Railroad Company, and the rights and interests, whatever they were, acquired by Barnes and the bondholders, were transferred to the Milwaukee & Minnesota Railroad Company. On the 9th of December, 1859, Bronson and Soutter filed a bill in the district court of the United States for the district of Wisconsin, to foreclose the $1,000,000 mortgage, which covered the line of road from Milwaukee to Portage City. The La Crosse & Milwaukee Railroad Company, the Milwaukee & Min-

nesota Railroad Company, Sebre Howard, Charles Howard the plaintiff here, and others, were made defendants in that action. Sebre Howard answered the bill, setting up his judgment and contesting the mortgage. It is unnecessary here to trace the steps of that litigation further than to say that it culminated in a decree of sale, with an order that in case the Milwaukee & Minnesota Company should, before sale, pay into court certain sums amounting in all to about $468,000, it should be let into possession of the road, rolling stock and other property of the La Crosse Company, from Milwaukee to Portage, subject to prior liens. On the 4th of January, 1866, pursuant to that order, the Milwaukee & Minnesota Company paid that sum into court, and on the 9th of January, 1866, took possession of the property, and managed and operated it from that time until the 6th of March, 1867. In April, 1863, Frederick P. James and others, judgment creditors of the La Crosse & Milwaukee Railroad Company, filed in this court a bill against the Milwaukee & Minnesota Railroad Company, the La Crosse Company and Selah Chamberlin, which prayed among other things that the sale under the Barnes mortgage might be decreed fraudulent and void, and the Milwaukee & Minnesota Company be decreed to take nothing under that sale, and that that company be enjoined from taking possession of or exercising any control over the property and franchises mentioned in that mortgage, or from interfering in any manner with the road or its franchises, or the management thereof. That bill was dismissed by this court July 17, 1865, but on appeal to the supreme court of the United States the decree of dismissal was reversed [James v. Railroad Co., 6 Wall. (73 U. S.) 752], and in obedience to the mandate of the supreme court, on the 9th of July, 1868, a final decree was rendered in that cause, by which it was decreed that the foreclosure and sale of the Barnes mortgage be set aside and annulled as fraudulent, and the Milwaukee & Minnesota Company was perpetually enjoined from setting up any right or title under it to the railroad and other property sold under that mortgage, and the Barnes mortgage was decreed to remain only as security for the bonds issued under it in the hands of bona fide holders for value without notice. The decree also contained an order of sale of the railroad and property, but no sale was ever made under that decree. On the 18th of April, 1866, Frederick P. James, assignee of the Cleveland judgment, filed his bill in this court against the Milwaukee & Minnesota Railroad Company, to enforce the lien of that judgment, and to have the property covered by the lien sold. The bill in that case set out the judgment, also the mortgage to Barnes, and the creation of the Milwaukee & Minnesota Company, alleging that mortgage to have been fraudulent, and that the Milwaukee & Minnesota Company were holding the property in fraud of the rights of creditors of the La Crosse & Milwaukee Company, and prayed a sale of the property for the satisfaction of the Cleveland judgment, subject to certain prior liens and incumbrances. On the 11th of January, 1867, a decree was entered in said cause by which it was adjudged and decreed that there was due to James upon the Cleveland judgment $98,801.51, and that the same was a lien and incumbrance as of date of October 7, 1857, upon all the right, title and interest which the La Crosse & Milwaukee Railroad Company had in and to the property situated between Milwaukee and Portage City. The decree provided for a sale of all the railroad formerly known as the La Crosse & Milwaukee Railroad, from Milwaukee to Portage, then in the possession of the Milwaukee & Minnesota Company, and that that Company and all persons claiming under it be barred from all equity of redemption. This decree also contained the recital that the La Crosse & Milwaukee Company had ceased to exist as a corporation, and that the Milwaukee & Minnesota Company had succeeded to its property subject to liens and incumbrances thereon. On the 2d of March, 1867, pursuant to this decree, a sale was made by the marshal to the defendant, for $100,920.94. On the 5th of March, 1867, this sale was confirmed by the court and a marshal's deed executed. On the 6th of March of the same year, on demand, the Milwaukee & Minnesota Company surrendered possession to the defendant as purchaser of the property, and the defendant has since claimed to be the owner of the property and has been in possession.

Finches, Lynde & Miller, for plaintiff.
John W. Cary, for defendant.

DYER, District Judge. The mortgage from the Milwaukee & La Crosse Company to Barnes was posterior to the plaintiff's judgment. The sale by advertisement under that mortgage left the plaintiff's judgment and the sale thereunder unaffected as to priority and as to rights accruing from priority. Indeed I do not see that the record of the Barnes mortgage and foreclosure is at all material here as an aid to the defendant's alleged title, except to show the origin of the corporation known as the Milwaukee & Minnesota Company.

Although a bill was filed to foreclose the Bronson and Soutter mortgage, there was no sale upon that mortgage. The result of that proceeding, if I correctly understand the record, was to vest in the Milwaukee & Minnesota Company the possession of the railroad and property. By payment of the $468,000 as permitted by the court, it acquired the right of possession and the possession in fact of the mortgaged property. To this extent at least it stepped into the place of the mortgagor and owner of the equity of redemption. But this possession and interest

of the Milwaukee & Minnesota Company were all the time subordinate to prior liens and interests, among which were the plaintiff's judgment and sale.

This proceeding under the Bronson and Soutter mortgage, did not therefore affect the plaintiff's interest, as it would have done had there been a sale thereunder, and its materiality, so far as the defendant's claim of title is concerned, is not apparent except as showing the relation of the Milwaukee & Minnesota Company to the property in question.

The judgment which is the basis of the plaintiff's claim of title was docketed May 1, 1858. The judgment upon which the defendant rests its assertion of title, was docketed October 7, 1857. The Howard judgment under which the plaintiff claims, was therefore posterior in date and docketing, to the Cleveland judgment under which the defendant claims. The plaintiff then is asserting superior title, under a judgment subordinate in rank as to date of recovery to the judgment upon which the defendant's rights depend. The plaintiff's title springs from a sale of the property upon an execution issued upon the Howard judgment. The defendant's title springs from a sale under a decree rendered upon a bill filed to enforce the Cleveland judgment, to which bill, the Milwaukee & Minnesota Company was sole defendant as the party in possession of the railroad and property, and to which bill and the decree so rendered, neither the La Crosse & Milwaukee Company nor the plaintiff was a party. As to the question of paramount title, this is the gist of the controversy; and it seems to lie within small compass. The sale to the plaintiff upon his judgment took place January 15, 1859. The sale to the defendant upon the Cleveland judgment occurred March 2, 1867.

This question of paramount title turns upon the point as to whether the defendant got a superior legal title by virtue of proceedings to which the plaintiff was not a party. A subsequent judgment creditor sells the property upon which his judgment is a lien, upon execution duly issued. A prior judgment creditor subsequently sells the property under a decree for the enforcement of his judgment lien, to which decree the person in actual possession is alone a party; who gets the better legal title?

It is contended with much force, that although the Milwaukee & Minnesota Company had been let into possession of the road, under the decree in the Bronson and Soutter case and was virtually holding the equity of redemption, yet, as that company was subsequently at the suit of James and others, enjoined from asserting any right or title to the property, because of the fraudulent character of the Barnes mortgage, and as the plaintiff was not a party to the decree upon the Cleveland judgment, and did not have his day in court in that proceeding, the defendant did not acquire superior legal rights by the sale under that decree. If the sale upon the Cleveland judgment had been upon execution, the plaintiff as a subsequent judgment creditor would have had the statutory right and period to redeem, of which he was deprived by the proceeding in equity which was taken. If he had been a party to the proceeding on the Cleveland judgment, he could have been heard to contest that judgment by showing payment or making other defence. These are some of the points urged by plaintiff's counsel, and it is insisted, that as the plaintiff was not a party to the proceeding upon the Cleveland judgment, his rights were not cut off nor affected.

It is to borne in mind here, that we are not dealing with the equities of the parties in interest, but with their strict legal rights. True it may be, that the Barnes mortgage and the proceedings for its foreclosure were, as has been at different stages of the litigation claimed by different parties, including the defendant, fraudulent; I think I must nevertheless treat the Milwaukee & Minnesota Company as a corporation once having an actual existence. It has been so treated by the courts. It was recognized as such in the Bronson and Soutter case, by decree or order of court letting it into possession of the road, and for a period extending from January, 1866, to March, 1867, by permission of the court, it possessed, managed and operated this railroad and property. It was recognized by this court as a corporation in the proceeding upon the Cleveland judgment, and its existence throughout all the litigation was also continuously recognized by the supreme court of the United States. It was the party in possession of the property when the bill on the Cleveland judgment was filed, and when the decree was rendered.

Now suppose a second mortgagee forecloses his mortgage and takes title under his foreclosure sale, but does not take possession. Suppose then a prior mortgagee forecloses his mortgage, does not make the second mortgagee a party, takes title under his foreclosure sale and gets possession. Who has the paramount legal title? Clearly the prior mortgagee, but the second mortgagee's right of redemption is not cut off, because he was not a party to the proceeding. Let us follow it further. Suppose the prior mortgagee forecloses his mortgage, does not make a second mortgagee a party, and gets title under a foreclosure sale. The second mortgagee is in possession holding title under a foreclosure of his mortgage. The paramount title is again in the prior mortgagee, but he cannot have a writ of assistance or other process in his foreclosure proceeding against the second mortgagee to get possession of the premises, because that second mortgagee was not a party to his suit. The equity of redemption of that mortgagee is not cut off, and if the prior mortgagee would

get possession, in case the second mortgagee does not redeem, he must bring ejectment. I mention these only as illustrations of the general principle.

Now a judgment creditor with a posterior lien issues execution, sells the property, and takes title. A prior judgment creditor prosecutes his bill in equity to enforce the lien of his judgment. The party in possession is sole defendant in the bill. A decree is rendered, enforcing not any lien created by the decree, but the lien of the judgment as of the date of the judgment, and a sale is ordered. The sale transpires and then a contest arises upon the legal titles held respectively by the purchaser under the decree and the purchaser under the execution sale upon the subsequent judgment. I cannot come to any other conclusion than that the purchaser under the decree founded upon the first judgment in this state of the case takes the paramount legal title. True, the plaintiff was not a party to the bill filed upon the prior judgment, but the omission to make him a party did not give him superior legal rights. For rank of legal title we must look to the judgments from which the respective titles flow. In settling legal rights we must give him superiority whose lien was first acquired. By omitting to make the plaintiff a party to the bill upon the Cleveland judgment, the plaintiff was not cut off from certain equitable rights which under the law had accrued to him in his position as a subsequent judgment creditor. If when the decree was rendered upon the Cleveland judgment, and when the sale was made under that decree, the plaintiff had been in possession of the premises, he could not have been dispossessed by any writ issued in the equity suit, upon the principle that a writ of assistance cannot go against a stranger to the record in a foreclosure case. The only remedy which the defendant could have resorted to against the plaintiff, had the latter been in possession, would have been ejectment. But it is said the plaintiff lost his right to make the statutory redemption which he could have exercised had the sale upon the Cleveland judgment been made upon execution. This may be true. But certainly a court of equity would have given him the right to redeem. The plaintiff could have filed his bill and if there were no questions involved except priority of lien, a court of chancery must have granted to him the privilege of redeeming. In holding the defendant's legal title paramount, the rule that if subsequent incumbrancers are not made parties, their rights are not bound by the decree, is not transgressed. The proceedings under the Cleveland judgment did not cut off the plaintiff's rights. He stood after that decree as he stood before. No process could run against him on that decree, because he was not a party. But his legal title was all the time held subject to the prior judgment lien. That lien could be made effectual by a sale as ordered, and the sale culminated in a title paramount, because the standing of the titles depends upon the rank in time of the judgment liens, and the purpose to be subserved in making the plaintiff a party would have been to cut off his equity of redemption, and as he was not made a party that equity was not extinguished, and so as to such equity he was left in the position he was in, before the decree upon the Cleveland judgment.

I understand the decision in Terrell v. Allison, 21 Wall. [88 U. S.] 289, to be that process cannot issue to enforce a decree against one not a party to the suit. The purchaser of mortgaged premises was in possession, and was not a party to the foreclosure. The decree provided that the purchaser at the foreclosure sale be let into possession, and a writ of assistance was issued against the person in possession not a party to the foreclosure. It was held that this could not be done, as the party's rights were not affected by the decree. But as the mortgage lien was prior to his purchase, can it be doubted that the purchaser at the foreclosure sale could have maintained ejectment against the occupant, and that his legal title was paramount?

In Hickey v. Stewart, 3 How. [44 U. S.] 750, the heirs of James Mather brought ejectment. The defendants to support their possession relied upon the record in a suit in chancery in which the heirs of Starke were complainants and the heirs of Mather were defendants, in which suit it was decreed that the right to the land was in complainants, and Mather's heirs were ordered to convey to complainants and to deliver to them possession, and the writ of habere facias was awarded. The defendants in the ejectment suit got possession under this decree. But it was held that they could not successfully defend under that decree against the plaintiff's title, the decree giving only an equitable right. This case is cited here in support of the theory that the defendant's interest as purchaser at the sale under the decree upon the Cleveland judgment is only an equitable interest, and that the decree gave only an equitable right which cannot prevail against a legal right. But the whole reason for the ruling of the court in the case of Hickey v. Stewart was that the defendants in the equity suit were not within the jurisdiction of the court when the decree was rendered, could not for that reason be compelled to convey the title to the land, and had not conveyed, and until they should convey according to the decree, the defendants had nothing but an equitable estate under the decree. The doctrine of that case, it seems to me, is not applicable to this, because here the court had jurisdiction of the parties before it, made a decree of sale, and a sale was had and a legal title vested thereby under which the defendant entered upon possession. But it is argued that if the

plaintiff had been made a party to the bill upon the Cleveland judgment, he could have contested that judgment by showing that it had been paid, or was not an existing judgment, or the like, and that he did not have his day in court so to do. He has however his day in court when he comes to try legal titles, and in that contest to defeat defendant's title, may show that the judgment had been paid and so did not exist at all as a basis for the decree, or that the entire proceeding was void and that consequently there is no foundation for the defendant's title.

It is also contended that, although the Milwaukee & Minnesota Company was in possession of the railroad and property when the decree upon the Cleveland judgment was entered, as, at the suit of James, the Barnes mortgage was held fraudulent and that company was enjoined from asserting any right or title to the property, and as that ruling involved the conclusion that the company had no interest in the property, the defendant is estopped now to claim that it had any interest or title which could be acquired by the sale under the decree upon the judgment. This position is taken upon the theory that the sale upon the Cleveland judgment was merely a sale of the supposed interest of the Milwaukee & Minnesota Company in the property, and a sale of that interest alone, it is forcibly urged, could not prevail against an execution sale of the interest of the original judgment debtor on the Howard judgment. But the radical difficulty with this position is, that the defendant's title does not have for its source the supposed interest of the Milwaukee & Minnesota Company in the property. The maintenance of defendant's title does not depend upon a claim that the Milwaukee & Minnesota Company had a valid, transferable interest in the property. Indeed the bill upon the Cleveland judgment asserts affirmatively the fraudulent character of that company's alleged interest and claims. The interest sold upon the James decree relates back to the date of the Cleveland judgment, as the interest sold upon the Howard judgment relates back to its date. The terms of that decree were, that the Cleveland judgment was a lien charge and incumbrance as of the date of October 7th, 1857, upon all the right, title and interest which the La Crosse & Milwaukee Railroad Company had of, in and to the La Crosse & Milwaukee Railroad from Milwaukee to Portage, and a sale was accordingly ordered. The lien enforced by that decree was the lien of the judgment. The sale under the decree passed the actual property covered by the lien and the interest of the company existing at the time of the rendition of the judgment. It was so held by the supreme court on the appeals that were taken in the James case upon the Cleveland judgment.

Justice Nelson says this judgment became a lien on the road from the time of its rendition, and that the sale under the decree in chancery, followed by conveyance and confirmation, passed the whole of the interest of the company existing at the time of its rendition, to the purchaser. Railroad Co. v. James, 6 Wall. [73 U. S.] 750. I do not see therefore, that by standing upon this title, the defendant is claiming as against any previous assertion that the Milwaukee & Minnesota Company had a valid interest in the property sold, nor does that title vest upon such supposed interest. It has its source in the judgment and lien, and not in any title of the Milwaukee & Minnesota Company, nor in the decree rendered upon the judgment; and here I think Chautauque Bank v. Risley, 19 N. Y. 371, is to be distinguished, for there the title rested upon the debtor's own conveyance, made under direction of the court, and had no relation to the judgment. The creditor did not fall back upon his legal remedy, but the title sprang from a conveyance by the debtor to a receiver and then a sale by the receiver. There was, as Judge Comstock says, an abandonment of the prior judgment lien, and the whole title of the defendants came from the conveyance of the debtor himself made by order of a court of chancery, which conveyance could not cut off subsequent judgment liens so as to affect a title acquired under them. But in the case at bar the creditor stood upon his lien although equity was resorted to to enforce it. The judgment and lien, not the conveyance of the party, are the source of title. The remarks I have made in relation to an estoppel arising upon the record in the suit of James v. The Milwaukee & Minnesota Co. [supra] aply to the same question in connection with the record in the case of the defendant against the Milwaukee & Minnesota Company. I do not think the plaintiff has shown a right to recover against the defendants, concluding as I do that the defendant has a paramount title. I will let the testimony offered by the plaintiff and objected to by defendant stand in the case, and must direct a verdict for defendant.

[NOTE. The plaintiff took the case to the supreme court upon a writ of error, where, in an opinion by Mr. Justice Clifford, the decision of the lower court was affirmed. 101 U. S. 837. It was held that the plaintiff was not benefited by the fact that he first enforced his lien. He must show that the prior lien of the defendants had been displaced, or had become inoperative. Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage. In view of the decision in Railroad Co. v. James,—6 Wall. (73 U. S.) 750,—the enforcement of the lien under which defendants claimed by proceeding in equity was proper. Process against the plaintiff under that decree could not affect his rights, as he was not a party to the proceeding; consequently, the lien of his judgment still remained in force, and his equity of redemption was not extinguished.]

HOWARD (PARSONS v.). See Case No. 10,777.

Case No. 6,762.

HOWARD et al. v. PRINCE et al.

[1 Hughes, 239; [1] 11 N. B. R. 322.]

District Court, E. D. Virginia. 1874.

FRAUDULENT CONVEYANCES—VENDOR REMAINING IN POSSESSION AFTER A BILL OF SALE—FOLLOWING STATE LAW.

1. The possession by vendor, after bill of sale, of the fixtures used in the manufacture of tobacco, is not per se fraudulent, under the rule in Twyne's Case and under the 1st section of chapter 114, of the Virginia Code.

2. In such a case, the principle, caveat creditor, is to be applied.

3. In such a case, the federal court follows the state law and the precedents of the state courts.

[This was a suit brought by Howard and Wendlinger, assignees, against George S. and John D. Prince.]

In the beginning of February, 1873, George S. Prince, a manufacturer of tobacco in Richmond, Virginia, applied to his father, John D. Prince, of Brooklyn, New York, for $2,000, offering to mortgage the fixtures in his factory to secure the amount, or to make an absolute bill of sale of the fixtures. John D. Prince replied, that he could not then say whether he could spare the money, that his son might, however, draw for $500, and that if he should find he could let George have the rest of the sum, he would insist upon an absolute sale to him of the fixtures. A draft for $500 was drawn by George Prince, on the 1st of March, and paid by John D. Prince. Original letters relating to the transaction, reaching to July 19th, 1873, are filed in the cause. In June afterwards, upon renewed solicitations by George, the father finally consented to spare the remaining $1,500, and required a bill of sale of the fixtures to be sent him. Accordingly, on the 14th of June, 1873, George S. Prince drew for $500 as part of the $1,500 remaining due, which draft was paid by John D. Prince. But on the 19th of July following, on George's telegraphing that he had drawn a third draft for $500, John D. Prince wrote, complaining that George had neglected to send him the promised bill of sale with inventory of fixtures, saying that he would accept and pay this draft, but declaring that George need not draw again without performing his promise, for he should certainly allow the draft to be protested. George Prince thereupon forwarded a bill of sale of the fixtures, the original of which is attached to the depositions in the case, taken by Commissioner Winslow, of New York. The bill of sale is dated Richmond, June 14th, 1873. This instrument was copied at the time it was written into the letter-book kept by George Prince in his factory, by M. M. Burton, his manager, was known and talked of in the factory, and no concealment of it attempted. It does not appear to have been recorded in the office of the chancery court of the city of Richmond, where registered instruments are by law recorded. There is no actual fraud proved in the transaction—none attempted to be proved as against John D. Prince, of Brooklyn, who would seem to be a man of wealth and high character, and a liberal and kind father. Probably the bill of sale was not actually made until about the 19th of July, the date of the third draft, and of Mr. John D. Prince's letter of complaint; probably it was then made out and antedated as of the 14th of June, in order to conform to the date of the second draft, that being the date when George Prince seemed to consider that the contract between himself and father had been concluded. It is contended that if this bill of sale was good at all, the fact that it was dated on the 14th of June, but delivered on the 19th of July, invalidates it without proof that a fraudulent purpose was subserved by such antedating. It is proved by the defence (and is not denied by the complainants) that the whole $2000 obtained from John D. Prince, was used by George in payment of dues to creditors in the line of his business. It is not charged or proved that George Prince was insolvent on the 19th of July, 1873, or that the bill of sale was made in contemplation of insolvency or bankruptcy, or that John D. Prince knew, or had reasonable cause to believe at the time, that his son was insolvent or contemplated bankruptcy. Therefore, this bill of sale does not fall within the second clause of the 35th section of the general bankrupt act [of 1867 (14 Stat. 534)], and was just as valid if made on the 19th of July, 1873, as if made on the 14th of June before. If made in good faith, the 11th section of the amendatory act of congress of 22d of June, 1874 [18 Stat. 180], would take the transaction from the operation of that clause. The panic of 1873 came on in September following the transaction which has been described. George Prince became a victim of it on the 17th of December in that year, when he filed his petition in bankruptcy. His assignees in bankruptcy now file their bill on the chancery side of this court against George S. Prince and John D. Prince, and pray that the bill of sale of the 14th of June, 1873, may be set aside as fraudulent, and that the tobacco fixtures conveyed by it may be sold as part of the assets in bankruptcy, in the case of George S. Prince, bankrupt, pending on the bankruptcy side of this court.

Submitted on written argument and the evidence.

Ould & Carrington and Keen & Davis, for complainants.

Jno. A. Lynham, for defendants.

HUGHES, District Judge. The case presents itself as one of a sale of personalty, where the vendor remains in possession of the goods sold. The old common law rule

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

was, that in such a case the continued possession of the goods by the vendor was, per se, fraudulent, and rendered the sale void. It was decided in Twyne's Case, which was rendered upon the statute of 13 Eliz. c. 5, declaratory of the common law, that though the sale in that case were upon valid consideration, yet the continued possession of the vendor invalidated the sale; the secrecy and non-delivery which was proved raising a presumption that the whole transaction was collusive, creating a trust for the benefit of the vendor. In Edwards v. Harben, 2 Term R. 587, it was held that such possession was not merely evidence of fraud, but was itself, in point of law, fraudulent. These cases controlled the decisions of the English courts for a long period of time, and produced for many years, like decisions by the courts of many of the states in this country, Virginia included, and by the courts of the United States. But in England, the doctrine of fraud, per se, has been discarded, and the milder rule has for some time obtained, that continued possession after sale of personalty by the vendor creates only a presumption of fraud, and that the fact of fraud is not, in suits at law, to be determined by the court, but must be left to the jury; and it is further held in England, that if the personal chattels savor of the realty, as, for instance, engines, utensils, and machinery belonging to a manufacturing establishment, no presumption of fraud will arise from the want of delivery. 2 Kent, Comm. 516, and cases there cited. If the transaction under consideration between George S. Prince and John D. Prince is fraudulent, it is so under the law of Virginia, as construed by the courts of Virginia; that law being now section first of chapter 114 of the Code of 1873.

Ccunsel for complainants contend that this court must decide this case by the precedents which they cite from the supreme court, and other courts of the United States. In one sense, that should and must be done. But in no case in which a court of the United States has had to pass upon the doctrine to which I have alluded (other than cases in which the personalty concerned was a ship at sea, or other thing exclusively within the admiralty jurisdiction), has it decided against the law and ruling of the courts of the state in which the property was assigned. The leading federal decisions (especially the noted case of Hamilton v. Russell, 1 Cranch [5 U. S.] 309) were rendered upon cases arising in the district court of Columbia, where the federal courts were at liberty to lay down the law irrespective of the laws of the states. In the case now before me, I should go counter to the uniform practice of the courts of the United States if I should be governed by any other law in my decision than the statute of Virginia, just referred to, and should construe it by any other precedents than those of our own court of appeals. I have said that the rule of Edwards v. Harben, 2 Term R. 587, did substantially obtain for a long time in Virginia. See 2 Hen. & M. 289, 302; 2 Munf. 341; 3 Munf. 1, 7; 5 Munf. 28; Gilmer, 15; 5 Rand. [Va.] 211, 599; and 2 Rob. [Va.] 280. But at last our court of appeals found it necessary to recede from a rule which common experience had taught to be unjust and untenable. The cases of honest assignments where the vendor retained possession, were too numerous and too frequent to allow of a further adherence to the old arbitrary rule of fraud per se. Accordingly in the case of Davis v. Turner, 4 Grat. 423, cited with distinguished consideration throughout the United States and in England, most of the judges who had held to the rule, themselves receded from it, and the court adopted the conclusion, expressed as follows by President Cabell: "It seems now conceded on all hands that the continued possession of the vendor, after an absolute sale, is open to explanation in some form or shape, and we are not so restrained from authority as to prevent our allowing an explanation that shows such possession and the whole transaction to have been fair and honest, and especially where such possession has been held under a bailment for a valuable consideration, in good faith made from the vendee to the vendor. . . . It would be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome prima facie presumption, to administer justice on this subject, in the true spirit of the statute, and it is better to confine the interposition of the court to guiding, instead of driving, them by instructions, and to the power of granting new trials in case of plain deviation." I need not repeat that this case of Davis v. Turner has become a leading case on the subject on this continent. As declaring the law of Virginia, it is binding upon this court.

The question before us now, is whether the transaction that has been described, which took place between George and John D. Prince, in June and July, 1873, was fraudulent under section first, chapter 114, relating to fraudulent acts, of the Code of Virginia. A full and free power to dispose of chattels is an essential and inherent incident of ownership; and the vendee has the same right to leave them in the possession of the vendor that he would have to take them into his own custody, or place them in the possession of a third person; unless such act necessarily and inevitably tends to deceive and defraud creditors. 4 Hill, 271. The frequent necessity of intrusting personal estate to others than the actual owner, forbids an arbitrary enforcement of the rule that possession shall always be deemed conclusive evidence of title. 2 N. H. 13. It being a case in chancery, I am to exercise the functions of a jury; and in doing so, I am required to presume that the transaction was fraudulent, because of the fact that George S. Prince retained possession of the fixtures assigned

by the bill of sale; but I am also allowed to take the other facts presented in the evidence into consideration, as explaining away or not, this legal presumption. If the bill of sale under consideration had been made for the purpose of securing to John D. Prince the payment of a debt which George S. Prince owed him before the time of the assignment, the case would have been the invidious one of preferring one creditor over others; and the presumption arising from continued possession would have been exceedingly strong, if not insurmountable; for it would have been a case of preference and partiality. But the fact here was, that the father advanced money to the son for the purpose of being used, and which was used, for the benefit of other creditors. The money paid by the father was faithfully appropriated to the claims of other creditors; and the assignment was made, not to the prejudice of other creditors, but to their advantage. This is a circumstance in the case which I find myself unable to consent to disregard. Again, if the property assigned had been public or corporate bonds, or bills payable, or tobacco, or any movable thing which could have been physically delivered with convenience, then if it had not been delivered, but the use and possession of it retained by George S. Prince, the presumption of fraud would have been very strong. But the property assigned was not of this movable and transferable sort. It was fixtures, a personalty which savored of realty; a sort of property which John D. Prince would have had no use for in Brooklyn, N. Y.; a sort of property which as often as not in Richmond, does not belong to the manufacturer of tobacco, but belongs to his landlord or other owners; a sort of property the mere possession and use of which in the business of tobacco manufacturing, are not in fact presumptive of the manufacturer's ownership. It is a sort of property the real ownership of which is not, in fact, and as of course, presumed from the mere use of it by the manufacturer, nor made the basis of credit, any more than is the ownership of the building. It is a sort of property the ownership of which would be especially inquired of by a prudent creditor before giving credit. The Virginia court of appeals having adopted the present English rule on the legal question under discussion, I will presume that it has adopted also the English precedents. See Ryan & M. 312; 8 Taunt. 838; 5 Esp. 22; 3 Barn. & C. 368; and 3 Barn. & Adol. 498.

The case under consideration is emphatically one in which the rule caveat creditor applies. The creditor of a tobacco manufacturer in Richmond does not in fact presume that either a factory building or the fixtures in it is the property of the manufacturer. He does look and he should look to the ownership of each before giving credit upon either. In the case of fixtures, if there is no actual fraud by misrepresentation and false pretence, fraud ought not even to be presumed from the mere fact that a vendor has use and possession of such ponderous personalty as tobacco fixtures, which he has sold. The evidence of Mr. Burton in this case is, that in nine-tenths of the tobacco factories of Richmond, the fixtures are in other ownership than that of the manufacturers, or are under mortgage. The presumption of fraud created by law in this case, is therefore, I conceive, negatived by the nature of this property as well as by the proved facts of the transaction. The fixtures were bought by contract; they were paid for in money; the purchase-money was used bona fide by the vendor in payment of his creditors; the continued possession was of property that would have been useless if removed merely to effect a change of possession; it was used after the sale, for the benefit of the business and of the creditors; and the property was of such a character as not by the custom of Richmond to create the impression of ownership in the person using it, or to give a credit to that person. I am, therefore, of the opinion that the bill of sale in this case ought not to be set aside; and that the bill of the complainants ought to be dismissed. I will make an order to that effect, and give leave to the complainants within ten days of its date to appeal from the order upon filing a bond for costs, and a copy of this record and this decision with the clerk of the circuit court.

There was no appeal.

HOWARD (RUBBER TIP PENCIL CO. v.). See Case No. 12,102.

HOWARD (RUSSELL v.). See Case No. 12,156.

HOWARD (SAUNDERS v.). See Case No. 12,375.

HOWARD (TOMPKINS v.). See Case No. 14,089.

Case No. 6,763.

HOWARD v. UNITED STATES.

[2 Cranch, C. C. 259.] [1]

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

APPEAL—PROFANE SWEARING.

Appeal [by Gustavus Howard] from the judgment of a justice of the peace, imposing a fine, for profane swearing in his presence.

THE COURT dismissed the appeal, saying that no appeal lies in such a case (CRANCH, Chief Judge, doubting).

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

HOWARD (UNITED STATES v.). See Cases Nos. 15,399–15,404.

HOWARD (VIRGINIA v.). See Case No. 16,963.

HOWARD (VOSS v.). See Case No. 17,013.

HOWARD, The EDWARD. See Case No. 6,436.

HOWARD, The IDA L. See Case No. 6,999.

HOWARD, The MAY. See Case No. 9,348.

Case No. 6,764.

Ex parte HOWARD NAT. BANK.

In re NORTH et al.

[2 Lowell, 487;[1] 16 N. B. R. 420.]

District Court, D. Massachusetts. June, 1876.

COMPOSITION—SET-OFF.

1. A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for and payment pro tanto of his liabilities to the bank, by the operation of the law of mutual credit.

[Cited in National Mahaiwe Bank v. Peck, 127 Mass. 302.]

2. The deposit should be set off against the aggregate amount of the notes of the bankrupt on which he is principal debtor, or on which, he being indorser, the real principals are insolvent. Solvent principals, for whom the bankrupt is surety, must pay their own notes.

3. It seems, if a bank has contingent or unliquidated claims against a bankrupt depositor, his deposit may be retained by the bank until it is ascertained what the provable debt is, if any, and then it can be used in set-off so far as is necessary.

4. In composition cases, in which no assignee has been appointed, the debtor stands in the position of an assignee in respect to set-off.

C. H. North & Co., having failed, filed their petition in bankruptcy in March, 1876, and soon after offered a composition of fifty per cent, which was accepted and recorded in April. Upon their schedules were several notes signed by various persons and indorsed by the bankrupts, and other notes signed by the bankrupts and indorsed by sundry persons, which had been discounted by the Howard National Bank of Boston, of which some were overdue before the composition was effected, and some were not yet payable. The bank had about $2,000 of the money of North & Co. on deposit. When the composition was recorded, the bankrupts, together with the several parties, respectively liable on certain of the notes, went to the bank and took up the paper, nothing being said about the deposit. Afterwards, the bank claimed the right to apply the deposit upon a note signed by D. M. Oliver & Co., and indorsed by North & Co., which came due in May; and the latter insisted that the credit should be given on an earlier note signed by J. N. Tryon, and indorsed by the bankrupts, which was overdue when the composition was made. This question was submitted to the court on the foregoing facts.

N. Morse, for the debtors, contended that they had the first right of appropriation, as in case of payment of money by a debtor to his creditor; that the bank had the next right; but that, as nothing was done about it up to the time of the composition, the deposit should be applied to the debt which came due the earliest.

H. D. Hyde, for the bank, argued that it was like collateral security, which the holder may appropriate in the mode most beneficial to himself.

LOWELL, District Judge. This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor; the law being unwilling that the bank should be called on to pay its debt to the assignee in full, and receive only a dividend on the debt due from the bankrupt.

I have been referred to no decision which approaches this case, and have not had time for a thorough examination; though I venture to think I should know of some of the cases, if there were many.

It would be easy to put a variety of supposed cases, in which the assignee or the bank might be thought to have equities on the one side or the other, and I have exercised my mind somewhat in that direction; but, on the whole, I have come back to the language of the statute, and find the simplest way the best. The statute says, that, in all cases of mutual debts or mutual credits between the bankrupt and a creditor, the account between them shall be stated, and one debt be set off against the other, and the balance only be allowed or paid, as the case may be. In bankruptcy, all debts are to be liquidated as of one and the same day; and the reason for applying a payment to the first debt rather than the second ceases, for that reason is the presumption that a debtor intends to begin at the beginning. There is no beginning nor end to debts in bankruptcy, excepting that they must be debts, or be capable of liquidation at some time before the case is closed. There can be no doubt, for instance, that if the bank held mere contingent debts or contingent liabilities, or a claim for unliquidated damages arising by contract, the deposit must be left in their hands, until it could be ascertained what their provable debt would be, if any thing; and that it might then be used as a set-off.

In this state of the law, it appears to me that the credit should be set off against the whole ultimate debt to the bank; that is to say, against the aggregate amount of the notes of the bankrupt in which he is the principal debtor, and as to those in which he is indorser, so far, and so far only, as is

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

made necessary by the insolvency of the real principals. Where he is surety for solvent principals, they must pay their own debts.

When a debtor pays money, he may dictate the mode of its application at his pleasure, for the reason that he might have withheld the payment altogether. If he gives security, he gives it for such debts as he agrees to have it applied to. If payment is made generally, or security is given without restriction, the creditor has the right of appropriation; because it is presumed that the debtor would have signified his choice, if he had any, or, if the security was part of the bargain, that its special application would have been cared for when the bargain was made. A set-off created by law to prevent injustice does not stand on the footing of contract. The money or credit belongs to the assignee for the use of the general creditors; but the law says he shall not recover it in full, and turn the particular creditor over to a dividend. This leaves the appropriation, not to the actual or presumed intent of the parties, for there is none, but to the operation of the law of mutual credit.

I understand the practice in England to be, that a banker who has discounted notes for his customer may prove for the whole money as so much lent the customer, exhibiting a list of his notes or bills, which are called securities. Any deposit the banker has in hand would come out of this sum total. If, however, any bill or note is paid by other parties after the proof has been admitted, its amount is to be deducted from the total debt proved. In other words, the proof is considered as made on each note or bill separately, though not so in form. See Ex parte Burn, 2 Rose, 55; Ex parte Barratt, 1 Glyn & J. 327; Ex parte Hornby, De Gex, 69.

It is plain, that, if it were our practice to prove in this way, we could only require such notes and bills to be struck out as were paid by the parties primarily bound to pay them; because all sureties and indorsers, and other persons in similar relation to the bankrupt, can retain the proof of the creditor against the estate of the principal debtor: and I suppose this to be the law of England too, though it has not been applied there to this precise case. The effect of such a mode of proof, and of such subsequent modification of it as obtains in England, would be, that the set-off would practically be applied pro rata to the whole primary debt of the bankrupt, and to so much of the debt which he had contracted as indorser or surety for others as they were not able to meet; which is the result I have reached by a somewhat different way.

In this district, it is not the law, and I suppose it is not the custom of bankers, to consider the discounts as money lent, and the notes as security; but each note is treated as a separate contract, and is to be so proved in bankruptcy. This is undoubtedly the law of Massachusetts; but the law of England seems to amount to nearly the same in practice, with the important exception, that the banker there can vote on his whole debt at the first meeting, while here he can vote only on the absolute debt, reserving his proof against the bankrupt as drawer or indorser until the several notes or bills shall have been dishonored,—a practice which seems simple and just, and which puts a holder of notes, which he has bought in the market, on the same footing with the banker who has originally discounted them for the person who afterwards becomes bankrupt.

There is a class of cases, bearing some resemblance to the present, which tend to support the rule I adopt. The several indorsers of the bankrupt's notes are considered as quasi sureties for him. If, therefore, they pay the notes, they can stand in the place of the bank; and they have an equity to say that any security or set-off which the creditor holds shall be duly applied towards the debt. This is admitted law. Now, in many cases where a creditor has had a surety for a specific part of his debt, and has proved the whole debt against the bankrupt principal, it has been held that he must give credit for the dividends pro rata, so as to relieve the surety in the proportion that the debt for which he is liable bears to the whole. This doctrine has been applied where there were several guarantors or sureties for given amounts, and to the case of accommodation acceptances, where the acceptors, having paid the bills, were subrogated to their proportion of the whole debt proved against the principal. I see no distinction in the doctrine, but only in the mode of its application between that case and this. Here is a sum of money which the law says shall be a payment, not of any particular part, but generally, of the debt of the bank; and I think each indorser may say that he has an interest in so much of it as will be represented by the note he has indorsed compared to the whole debt. Cases involving the principle which I refer to are Ex parte Turner, 3 Ves. 243; Ex parte Rushforth, 10 Ves. 409; In re Plummer, 1 Phil. Ch. 56; Hobson v. Bass, 6 Ch. App. 792; Paley v. Field, 12 Ves. 435; Bardwell v. Lydall, 7 Bing. 489; Gray v. Seckham, 7 Ch. App. 680. I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed. The credit is to be set against the aggregate debt of the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent.

Case No. 6,765.

The HOWDEN.

[5 Sawy. 389.] [1]

District Court, D. California. Feb. 4, 1879.

CARRIER—DEFECTIVE MEANS.

Where a vessel delivered her cargo in a damaged condition, and the proof showed that the damage was due to the defective and obsolete construction and arrangement of her bulwarks and stanchions, which required extra precautions in the way of dunnage to prevent injury to her cargo, and such precautions were neglected: *Held*, that the vessel was liable, notwithstanding that the log-book showed that she had encountered some heavy weather on the voyage.

[This was a libel in rem against the ship Howden to recover damages for the delivery of her cargo in damaged condition.]

Milton Andros, for libelant.

C. Temple Emmet, for claimant.

HOFFMAN, District Judge. It is not denied that the goods in question in this case were shipped at Calcutta on board the "Howden," and that when delivered at this port they were in a very damaged condition. The defense relied on is, that the damage was caused by the perils of the seas. On the arrival of the vessel two separate surveys were held upon her and her cargo. The first was made at the request of the libellants, by Captains Davidson and Freeman. The second was made at the instance of the agents of the ship, Messrs. Dickson, De Wolf & Co., merchants of this city. All these surveyors are experts of great experience and of unquestioned capacity and integrity. From their reports, confirmed by their oral testimony on the stand, it appears that the vessel was of iron, but with wooden bulwarks attached to wooden stanchions. These stanchions passed through the iron stringer plate, and projecting some three feet below it, their ends were attached by bolts to the sides of the vessel. It was found that every one of the apertures in the stringer plate, through which the stanchion passed, had leaked during the voyage, and that the damage to the goods in question was due to that cause exclusively.

With respect to the mode in which the cargo was dunnaged, the report of Captains Davidson and Freeman states: "As regards the opinion expressed that the cargo has been dunnaged in the usual manner, we believe this mode would have been sufficient for ordinary iron ships, but as this is an exceptional one, having wooden stanchions passing through the stringer plate, as previously described, we consider that some precautions should have been taken to endeavor to protect the cargo from damage from this objectionable mode of construction." On the stand these witnesses reiterate the opinion contained in the report, and they add that, in their judgment, a vessel constructed as was the "Howden," would not be seaworthy to carry a dry and perishable cargo without extra dunnage.

Captain Hutchings reports: "That apart from the damage caused by sweat, there was a large amount of salt water damage, caused principally by the objectionable and now obsolete construction of putting rough tree stanchions of wood through iron deck stringers, it being quite impossible to prevent them from leaking. These stanchions were found to be well matted but without dunnage; it is believed they should have been dunnaged. It was also seen that for about fifty-five feet on each side, in the middle section of the ship, the dunnage battens next above the between-deck seams were not in place, and that nine upper battens on the starboard, and ten on the port sides, in the section of the ship where cargo had been stowed, were also out of place; and although the frames of the ship were well matted, it is believed that dunnage should have been placed there." It will be observed that this report of an expert, employed by the ship's agents, is even more unfavorable than that of the surveyors employed by the libellants.

It further appeared in evidence that the mode of constructing the bulwarks, which Captain Hutchings characterizes as "objectionable and obsolete," though originally adopted many years ago when ships were first built of iron, has long since fallen into disuse, and in fact been wholly abandoned. The few so constructed that remain are very old vessels which have not been altered, and which have happened to survive the dangers of their service. But perhaps the most significant fact in this connection is the rule adopted by Lloyds' Register of Shipping (London). This rule provides that "the objectionable practice of cutting through the stringer plates for the admission of wooden rough tree stanchions will not be allowed."

One other circumstance of almost equal significance is shown by the testimony. When the vessel was about to receive at this port a cargo of wheat for Liverpool, bulkheads were erected on either wing, made of stout boards and "shingled," so as to shed the water on the outside, and at a distance of from fourteen to twenty inches from the sides of the vessel. Whether the master, taught by his experience on his recent voyage, voluntarily adopted this precaution, or whether it was insisted on by the shippers or insurance companies, does not appear. But the fact that it was resorted to seems to imply the acknowledgment that the defective construction of the vessel rendered necessary the employment of extraordinary methods to protect the cargo, and that the ordinary dunnage which had been used at Calcutta was insufficient.

On the part of the claimants, it is contended that the vessel was, before the com-

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

mencement of the voyage, surveyed at Calcutta by a Lloyds' surveyor, who directed certain repairs to be put upon her, and on their completion, gave her a certificate pronouncing her "a first-class insurance risk to any part of the globe." But it appears from the testimony of this witness, and from his report, that his attention was in no way directed to the mode in which the bulwarks of the vessel were constructed. The report states that "at the request, etc., he attended the ship 'Howden,' lying, etc., for the purpose of inspecting certain defects in the plating and frames of the vessel, as well as to recommend the best method of repairing the same, and, after a careful inspection of the parts, I now recommend as follows." He then details at length the defects he found in the vessel's frame and plates, and indicates minutely the repairs to be made. On a subsequent day he inspected the repairs reported finished, and found the "repairs advised by him had been fully and faithfully executed." He therefore gives the vessel a first-class certificate.

It thus appears that neither his inspection nor his report had any reference to the original defective construction of the bulwarks. They related solely to injuries sustained by, or defects in, the frame and plates. It is worthy of remark that neither this witness, nor any other sworn in the cause, attempts to defend the mode of construction alleged to be objectionable and obsolete; nor do any of them deny that it has been practically condemned and abandoned, although old vessels constructed in that manner have not entirely disappeared from the ocean. The claimants have also sought to show, by the testimony of the stevedore by whom she was loaded at Calcutta, that the vessel was well and thoroughly dunnaged according to the usage of that port. This statement conflicts with the evidence of the surveyors who inspected her hull, and who testify, as we have seen, to the absence of battens, which should not have been omitted. But even if it be admitted that she was well and thoroughly dunnaged in the usual manner, it will not aid the case of the claimants. The contention of the libellants is that the exceptional and defective construction rendered necessary dunnage of an extraordinary and unusual character, such as was employed when she was loaded at this port, and that that precaution was neglected.

It is also contended by the claimants that the vessel encountered such severe and boisterous weather during the passage as to justify us in ascribing the damage to the cargo to "perils of the seas." We have already seen what, in the opinion of the experts, was the real cause of the damage, and that it would have occurred to some extent at least under the conditions presented by any ordinary voyage, "it being quite impossible," Captain Hutchings states, "to prevent them (the stanchions) from leaking."

But the record of the voyage, as contained in the log-book, wholly fails to show that the weather was of exceptional severity. On several occasions the ship is noted as laboring heavily; twice she is obliged to lie to. But nothing is said of any damage to her on these occasions. She is not spoken of as straining, opening her butts or seams, or making an extraordinary quantity of water. She appears to have encountered only the ordinary vicissitudes of weather to be expected on a voyage from Calcutta to this port by the southern passage. On her arrival no signs of having been strained or in any way damaged could be detected. The experts unanimously attribute the injury to her defective construction and insufficient dunnage, and reject the suggestion of damage by sea peril. If, under the evidence in this cause, after a voyage such as the log-book shows that of the "Howden" to have been, the defense of perils of the sea be admitted, it is probable that few, if any, vessels arrive at this port after long voyages, the log-books of which would not furnish a similar means of evading their obligations as carriers.

An interlocutory decree for the libellant, and order reference to the commissioner to ascertain the damages.

Case No. 6,766.

HOWE v. ABBOTT.

[2 Story, 190; 2 Robb, Pat. Cas. 99; Merw. Pat. Inv. 312.] [1]

Circuit Court, D. Massachusetts. May Term, 1842.

PATENTS—PATENTABILITY—INFRINGEMENT.

1. The application of an old process to produce a new result, is not a patentable invention; there must be, also, some new process or mode. But the production of an old result by a new process is patentable.

[Cited in Tyler v. Deval, Case No. 14,307; Olcott v. Hawkins, Id. 10,480; Winans v. Denmead, 15 How. (56 U. S.) 345; In re Maule, Case No. 9,308; Yearsley v. Brookfield, Id. 18,131; Stimpson v. Woodman, 10 Wall. (77 U. S.) 126; Sewall v. Jones, 91 U. S. 184; Dunbar v. Meyers, 94 U. S. 199; Adams v. Loft, Case No. 61; Phillips v. Detroit, 111 U. S. 608, 4 Sup. Ct. 583; Western Electric Co. v. La Rue, 139 U. S. 607, 11 Sup. Ct. 672; Appleton Manuf'g Co. v. Star Manuf'g Co., 9 C. C. A. 42, 60 Fed. 414.]

2. Where a patent was taken out for a combination and an entire process, it was *held*, that the use of a part of the process and combination was not an infringement thereof.

[Cited in Hotchkiss v. Greenwood, 11 How. (52 U. S.) 270; Brown v. Piper, 91 U. S. 41; Cochrane v. Deener, 94 U. S. 792.]

[Cited in Tillotson v. Ramsay, 51 Vt. 312.]

Case for the infringement of a patent. The suit was brought on a patent [No. 31] granted on the 18th day of March, 1841, to the plaintiff, Elias Howe, assignee of Joseph C. Smith (the asserted original inventor.) The inven-

[1] [Reported by William W. Story, Esq. Merw. Pat. Inv. 312, contains only a partial report.]

tion was described in the letters patent, to be "a new and useful improvement in the application of a material called 'palm leaf,' or 'brub grass,' to the stuffing of beds, mattresses, sofas, cushions, and all other uses for which hair, feathers, moss, or other soft and elastic substances are used." The letters patent stated, that the invention was originally secured by letters patent, dated on the 3d of March, 1833, to Joseph C. Smith, and that these latter letters patent had been cancelled on account of a defective specification, and the present letters granted to Howe, as his assignee, upon such cancellation. The breach alleged was an unlawful making and using of the invention. The defendant [Ebenezer E. Abbott], pleaded the general issue, with notice of special matters of defence.

The specification annexed to the letters patent was as follows: "To enable others skilled in the art to which this appertains to make and use my invention, I shall now proceed to describe the method of preparing or manufacturing the same. The first operation is to reduce the palm leaf, or brub grass, to filaments or fibres, sufficiently fine to be spun, which filaments or fibres I then spin, and form into a rope; which should be twisted as hard as possible, so as to kink, or cause the rope to form in balls or coils. This spinning and twisting should be done upon machines similar to those used for spinning and twisting hemp. After the aforesaid process of twisting is completed, the coils, balls, or twisted hanks, should be placed in a steam, or any other kind of oven, where they should be baked to such a degree, as to permanently fix the curl or twist in the fibres or filaments. When this effect is properly produced, the coils should be untwisted; which operation may be effected by a reverse motion of the same machinery by which it is twisted. After passing through these several preparative processes, the fibres of palm leaf or brub grass are left in a light, and durably elastic, and curly state, and are suitable for stuffing any of the various articles herein above enumerated. I shall claim as my invention the process of preparing or durably curling palm leaf, or brub grass, by reducing the leaf to small filaments, or fibres, and likewise spinning, baking or steaming, and untwisting the same; the whole operation being substantially as herein above described, and for the purpose above specified. Elias Howe. Witnesses: R. H. Eddy. Ezra Lincoln, Jr."

At the trial it appeared in evidence, that the mode stated in the specification for spinning and curling the palm leaf, after it was reduced to filaments or fibres, was precisely the same process, by the same machinery, as had long before been, and now was used to spin, and twist, and curl, hair stuffing for beds, mattresses, sofas, cushions, &c. But it did not appear, that the palm leaf was ever actually spun or curled in this way, for the purpose of stuffing beds, &c., until about the time when the original patent to Smith was granted. There was also evidence to show, that, in point of fact, Smith did not invent the application. But that, a short time before the original patent was granted, Smith carried some of the palm leaf, cut into strips and filaments, to the shop of one Jonathan D. Bosson, a manufacturer of curled hair for beds, &c., in Roxbury; and Bosson showed him, how it might be spun and curled for beds, &c., and actually did spin and curl some of it in Smith's presence by his own hair machinery; and that Smith immediately returned home, put the same process in operation, and obtained his original patent. Smith (who was examined as a witness for the defendant) admitted, that he had carried the palm leaf to Bosson's shop; but he denied, that Bosson told him how to spin and curl it, or that he spun or curled it, on his machinery, as Bosson had stated. There was other evidence to show, that long before Smith's supposed invention, and at least ten or twelve years ago, the same process had been applied by other manufacturers of curled hair to other grasses and vegetable substances, viz., to manilla grass, to common sedge, to sisal grass, and to a substance called "coir," of which sofas are made. It was also proved, that the defendant did not bake or steam his palm leaf, after it was stripped, and spun, and curled; but stopped his process with the mere spinning and twisting. All the witnesses concurred in opinion, that the process was far more sure and perfect, so far as the curling was concerned, by baking or steaming the palm leaf after it was spun; and they thought it so essential, that the defendant's process would be defective in attaining the object, and that the curls would not be permanent without it.

B. R. Curtis, for defendant, insisted: (1) That the patent was not valid, because it was not for any new process, but merely for preparing palm leaf, to produce certain results by an old method. (2) That the patent, according to the specification, was for a combination and an entire process; and that the defendant did not use the whole combination or entire process, but a part only, which was well known and in use before.

H. Fuller and Mr. Russell, for plaintiff, contended, a contra, that the objections were not well taken.

STORY, Circuit Justice. I shall not interfere to stop the cause from going to the jury. But it strikes me, that both of the objections are well founded. In the first place, it is admitted on all sides, that there is no novelty in the process, by which the stripping, or twisting, or curling, the palm leaf, is accomplished. The same process of twisting, and curling, and baking, and steaming, has been long known and used in respect to hair used for beds, mattresses, sofas, and cushions. It

is, therefore, the mere application of an old process and old machinery to a new use. It is precisely the same, as if a coffee-mill were now, for the first time, used to grind corn. The application of an old process to manufacture an article, to which it had never before been applied, is not a patentable invention. There must be some new process, or some new machinery used, to produce the result. If the old spinning machine to spin flax were now first applied to spin cotton, no man could hold a new patent to spin cotton in that mode; much less the right to spin cotton in all modes, although he had invented none. As, therefore, Smith has invented no new process or machinery; but has only applied to palm leaf the old process, and the old machinery used to curl hair, it does not strike me, that the patent is maintainable. He, who produces an old result by a new mode or process, is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it.

The other objection strikes me, upon the evidence, which is not controverted, to be equally fatal. The specification in the summing up is manifestly for the entire process or combination, and not for the several parts thereof. Now, the defendant does not use the entire process or combination, but a part thereof only, which certainly, therefore, is not a violation of the thing patented, which is the entire combination. Besides; the parts used were well known before; and, indeed, the entire process was well known before, as the evidence clearly shows. It may be, and it strikes me, that the defendant's process is, probably, far less perfect in accomplishing its purposes, than that used by the plaintiff. But that constitutes no ground for a recovery. The question is not, which is best, or is most perfect; but whether the one mode or combination is an infringement of the rights secured by the other mode or combination. There are other difficulties upon the evidence; but I venture to suggest, that unless these objections can be overcome, or the evidence controlled, they seem to be fatal.

NOTE. The plaintiff, upon these suggestions, consented to have a verdict taken for the defendant, with liberty to move for a new trial, if he should, upon further examination, think that he could change the posture of the case. Verdict for defendant, accordingly.

Case No. 6,767.

HOWE v. COBB et al.

[3 McLean, 270.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

PRACTICE AT LAW—CREDITORS' BILLS—TIME OF FILING.

1. Under the statute of Michigan, a creditor's bill may be filed on the return of an execution by the proper officer nulla bona before the return day named in the writ.

2. The assignees may show that the defendant in the judgment had property.

3. This is more a question of practice, on general principles, than of construction.

At law.

Stewart & Joy, for plaintiff.

Barstow & Lockwood, for defendants.

OPINION OF THE COURT. This was a creditor's bill, "setting up a fraudulent assignment to defendant Hill, by reason of which the execution issued on the judgment obtained by the plaintiff against Cobb, was returned nulla." One of the defendants demurred, and assigned the following cause of demurrer: That the fi. fa. issued on the above judgment was returned before the return day named in the writ, and was, consequently, insufficient to sustain the bill.

This proceeding is under a statute of Michigan, of 1838 (Rev. Laws, p. 365, § 25), which provides, that, "whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and every other person to compel the discovery of property, or things in action due to him, or held in trust for him," &c. In Smith v. Thompson, Walk. [Mich.] 1, Chancellor Manning held, that an execution returned by the sheriff the 17th May, and which, on its face, was returnable the 18th, was insufficient to authorise the filing of a creditor's bill. And in the cases of Thayer v. Swift [Har. (Mich.) 430], and Stafford v. Hulbert [Id. 435], it was also held, previously, "that a judgment creditor's bill could not be sustained, where the execution was returned unsatisfied before the return day named in the writ; although the bill was not filed until after the return day."

In the case under consideration, the execution was returned a very short time before the return day in the writ, nulla bona. The marshal, in making the return, acted under a legal responsibility, and is liable to an action for a false return. Indeed his return becomes a matter of record, and is conclusive as between the parties to the judgment and the officer, except in an action for a false return. The above statute requires that the execution shall have been returned unsatisfied, before a creditor's bill can be filed; and the only question is, whether the return before the day named in the writ authorises this proceeding. We are inclined to think that where the marshal has, under his responsibility, returned the execution, being liable for a false return, a bill may be filed by the creditor. The object of the statute clearly was, that before the bill was filed there should be record evidence of the defendant's inability to pay the judgment; and this is shown by the return in this case.

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

We are not prepared to say, that the assignees, as charged in the bill, may not allege in their answer, and prove on the hearing, that the defendant in the judgment has property, on which the whole or a part of the judgment might be levied.

It is insisted, that this court will follow, as has often been ruled, the settled construction of a state statute. This is admitted, but the point before us is more a question of practice than of construction. It arises upon general principles, as at what time an execution may be returned by the marshal or sheriff. Upon the whole, we think that from the character of the proceeding and the rights involved, a very technical rule on this subject is neither called for nor justified. The bill was filed before the return day, but the process, we understand, was not served until afterwards.

The demurrer to the bill is overruled.

HOWE (DIKE v.). See Case No. 3,906.

HOWE (GARDINER v.). See Case No. 5,219.

HOWE (HUNT v.). See Case No. 6,891.

Case No. 6,767a.

HOWE et al. v. The LEXINGTON.

[3 Betts, D. C. MS. 31; 2 N. Y. Leg. Obs. 4.]

District Court, S. D. New York. Jan. 2, 1843.

CARRIERS—BILL OF LADING—DELIVERY OF GOODS—CUSTOM AND USAGE—MEASURE OF DAMAGES.

[1. Where a bill of lading appoints no particular method of delivery, the carrier must at least give notice of the time and place of unlading, or the place of deposit; and a usage or custom, to excuse such notice, must be so clear and notorious as to afford a presumption that all parties acted with an understanding of its character and application.]

[Cited in Snow v. The Inca, Case No. 13,145a.]

[2. Where, under a bill of lading, goods are to be shipped by water, and the carrier, without notice to the shipper, transships them by rail, a custom of the vessel to land and store goods without notice to the consignee is not applicable.]

[3. Goods were loaded on board a vessel under a bill of lading which appointed no particular method of delivery. The carrier, not receiving a full cargo, without notice to the owner, transshipped them by rail, and upon their arrival, not being able on inquiry to find the consignee, placed them in the warehouse usually employed by the carrier, where they were subsequently found by the consignee, and tendered to and unconditionally refused by him, though they were in a perfectly safe and sound condition. *Held*, that the mere transshipment and deposit in the warehouse subject to charges did not amount to a conversion entitling the owner to recover the full value of the goods, but that the carrier should have given the consignee notice of arrival through the public papers and the post office, and that the consignee might recover the difference in the market price between the day of arrival and the day when he had knowledge thereof.]

[Cited in Knox v. The Ninetta, Case No. 7,912; The Joshua Barker, Id. 7,547; Lowry v. The E. Benjamin, Case No. 8,582.]

[This was a libel in rem by William L. Howe and Benjamin C. Cummings against the schooner Lexington, for failure to deliver goods under the terms and conditions of a bill of lading.]

C. Belcher, for libellants.

N. F. Waring, for claimants.

BETTS, District Judge. The libel arises upon a bill of lading executed at Philadelphia by the master of the schooner Lexington, February 23, 1842, by which he acknowledged the receipt on board his vessel of thirteen tierces seed, to be delivered at the port of New York to the libellants or their assigns, they paying freight. The libel avers that the goods were not transported to New York and delivered pursuant to the contract; that the master did not proceed with the schooner with all reasonable dispatch, and bring the said seed to the port of New York within a reasonable time; and that he has wrongfully converted the seed to his own use. The respondents allege performance of the contract.

The case upon the facts is briefly this. The schooner, at the time these goods were received on board, was up at Philadelphia for freight to New York; but not obtaining a cargo, and it being mid-winter, the master concluded to transship the portion of cargo taken on board, and forward it by the Transportation Line across New Jersey. This was done about the 26th of February. Some of the shippers at Philadelphia assented to the change of conveyance, but no consent was given in this case, and none was applied for. The seed had been shipped originally by Mr. Quinn in behalf of Smith, Bagerley & Co., and a receipt taken from the master therefor, and afterwards, being purchased by the libellants, he surrendered that receipt, and obtained the present bill of lading from the master. When the seed was shipped, it was understood the vessel would wait for a full cargo, and, as freight at the time was dull, it was uncertain when she would fill up, and he (Quinn) directed or advised the transshipment at the time it was made. The seed arrived in New York between the 1st and 3d of March, and the consignees, B. C. Cummings & Co., not being known to the agents of the Transportation Company, and on inquiry they not being able to find such firm or person, or ascertain their place of business, the goods, after three or four days' delay, were stored in a warehouse usually employed for such purposes by the company. The seed went into the warehouse on the 5th of March, and the proof is that Mr. Cummings subsequently ascertained at the office of the Transportation Company that it was there, and also called at the warehouse and saw it, and that delivery was offered him on payment of charges, to wit, freight and storage, the latter at six cents on each cask per week. Mr.

Cummings stated that the seed had not been delivered according to agreement, and he should leave it until he made further inquiries. Subsequently he gave notice to the master of his refusal to accept the seed, and demanded its equivalent in damages, and therefore this suit was instituted.

The main proposition upon which the action was rested by the libellants is that the contract of affreightment was a special one, and that the vessel is bound to its performance according to its terms, and that the master, by transshipping the seed, without showing a case of necessity, has violated the shipping contract, and rendered the vessel liable for the value of the property. Other particulars were brought in incidentally to show a probable injury to the shipper by diverting the lading from one mode of transportation agreed upon, to a different one, but the proofs on that branch of the case are not very definite or satisfactory, and at best, perhaps, can be claimed to amount to no more than to leave the fact in doubt whether the libellants would have been better or as well off, in respect to the state of the market, if the seed had continued on board the schooner, and been brought here in the ordinary course of voyage by sea. In that view of the case the question would become entirely technical, and the decision of the court would be limited to the point whether, upon an unnecessary transshipment of goods, the bill of lading is absolutely broken, and the affreighter is entitled to demand their value, irrespective of the fact whether they were brought to the port of destination and delivered by the substituted conveyance as speedily, and as advantageously to him, as if they had remained in the vessel where first placed. I do not, however, consider it worth while to moot a point so narrow and injurious, and shall weigh the facts and circumstances in proof to ascertain whether the tierces of seed have been delivered according to the bill of lading, and, if that is found so, shall regard the contract as substantially performed, without heeding the method of performance as of moment in the case.

Had the schooner brought the tierces to this port, what was the obligation of the master, under his bill of lading, in respect to them? Carriers by land or water are bound to make delivery of the goods conveyed conformably with the condition upon which the bailment was received. Story, Bailm. § 538–541; 4 Pick. 371; 15 Johns. 39; 6 Cow. 268; 2 Wend. 327; 6 Wend. 335. An undertaking on shipment to deliver the goods to an individual or his assignees is not satisfied by landing them on a wharf or at a warehouse, unless notice be given the owner. 15 Johns. 39; 2 Kent, Comm. 603, 605, and notes; Story, Bailm. § 543. Notice must be given the consignee, if the goods are delivered at a place of deposit or business (4 Durn. & E. [Term R.] 581; 5 Durn. & E. [Term R.] 389), because the prima facie obligation of the carrier is to make the delivery personal (4 Price, 31; 3 Brod. & B. 177), unless, by the contract, express or implied, some other mode of delivery is substituted (2 Barn. & Ald. 356), and the decisions do not ratify a discrimination (intimated Judge Buller) in this respect between carriers by land or water (Holt, Shipp. 359). The bill of lading in this case having appointed no particular method of delivery, the carrier would have been bound to make it personal, or what should be equivalent to that,—such, at least, as notice of the time and place of unlading, or the place of deposit. 15 Johns. 39; 4 Pick. 371; Story, Bailm. § 543–545. And clearly it would not be sufficient satisfaction of such obligation to store the goods, and await their being discovered and demanded by the consignee. If any usage or custom of the port is relied upon to excuse a compliance with the terms of the bill of lading, it should be one so clear and notorious as to afford a presumption that all parties acted with an understanding of its character and application. The Aberfoyle [Case No. 17]; The George [Id. 5,329]; The Reeside [Id. 11,657]; Brown v. Jones [Id. 2,017]; Rogers v. Mechanics Ins. Co. [Id. 12,016]; 17 Wend. 305. Without any evidence in the case to that effect, I shall hold that such diligence was not used, on the arrival of the goods in New York, to apprise the consignee of their place of deposit, as to render storing them in a warehouse a delivery to him, on the part of the owners of the schooner, supposing they had been brought in her.

There is testimony showing that the delivery was in consonance with the accustomed course of business with the Transportation Line, and might probably be sufficient in respect to shipments made directly with that association. 17 Wend. 305. That point, however, it is not now necessary to decide or consider, because the transshipment from the schooner being the act of the master, without the assent of the libellants, the company become his agents in the transaction, and he must show a fulfillment of his engagements, at least to the same extent he would have been bound to perform them, had the goods been brought here in his vessel, and he then might not even be protected against loss or injuries by a defense which would have availed his own vessel. Trott v. Wood [Case No. 14,190]. It is proper also to observe, in this connection, to avoid any inferences not intended to be authorized by the decision, that if either the usage of business, or the contract of affreightment, had authorized the schooner to place the goods in a warehouse, or land them on the wharf, it would not follow that, in a voluntary transshipment of this kind, the same method might be pursued by the substituted vessel, for the owner, knowing the ship to which he had confided his goods,

might take means to protect his interest by keeping himself advised of her proceeding or arrival; or he might trust to the goods remaining on board the usual period of time after the vessel should have come in. If then put to the risk of demanding and taking the goods when brought into port, the owner might stand upon a better footing, in having them remain with the vessel in which he had placed them, than to have them transferred to another, bringing them with entire safety, and equal or greater dispatch.

The contract entered into by the master not having been performed by him, the next inquiry is as to the consequences. It is manifest, upon all the authorities, that, if the goods are lost or deteriorated, the ship or her owners are bound to bear the loss (Holt Shipp. pt. 3, cc. 2, 8; Abb. Shipp. pp. 249, 250), unless protected by exceptions in the bill of lading; and, when the transshipment is without necessity, the vessel or her owner cannot have advantage of that protection (Shieffelin v. Wheaton [Case No. 12,783]). In both cases the owner of the goods recovers to the amount of his actual damages, for the substance of the contract has not been performed, the goods not being put in his possession in the condition it was stipulated they should be delivered. He may accordingly refuse to receive them, and claim their full value, or take them with compensation for their deterioration. The ground for the allowance of damages, and their measure, in such case, is apparent; but in this case the goods are offered the libellants in a perfectly safe and sound condition, and the breach, therefore, does not touch the vital and substantive part of the contract. An action at law on the bill of lading would, on such a state of facts, entitle the plaintiff to recover the special damages sustained in consequence of the imperfect execution of the agreement on the part of the master. This would be the ordinary remedy. [Vassa v. Smith] 6 Cranch [10 U. S.] 226; 8 Johns R. 13. The carrier, being, under the law, charged with the responsibility of an insurer, should be subject to the same rule of damages when the action rests upon the contract; and the insurer is liable to the amount of actual loss. 1 Phil. Ins. 285; 2 Phil. Ins. 495. Suits in admiralty, however, are not subject to the limitations as to modes of procedure or remedies that attach to actions at law. The whole case is presented upon its facts and equities. The redress rendered is commensurate to the grievances and demand, admiralty courts being in no way trammeled in the exercise of their jurisdiction by technical names or forms of suit. This libel not only alleges a breach of contract, and seeks the redress an action ex contractu would afford at law, but it furthermore charges a conversion of the goods, and proceeds as in trover for such tort; and accordingly the question is directly presented whether the transshipment of the goods at Philadelphia, and deposit of them in a warehouse in New York, to be detained until the charges incident to this substituted conveyance should be satisfied, is a wrongful conversion of the goods, entitling the owner to recover their entire value against the first depositary. There is no refusal to deliver on demand proved, so as to raise the question whether the master of the schooner could lawfully claim storage fees, or whether the freight charged exceeded that stipulated by the bill of lading. The libellant Cummings did not demand the goods; and, when they were proffered to him on payment of charges, he made no objection to the charges, but said the delivery had not been made according to agreement, and he should leave the seed until he made further inquiries. Admitting that the detention of the goods might constitute a conversion on the part of Mr. Monroe (the warehouseman) or the Transportation Line, if demanded by the owner, yet their possession, being lawful in its inception, in respect to their own acts, would not become wrongful, unless set up in opposition to the right of possession of the true owner. Story, Bailm. §§ 105, 107. There would accordingly be strong reason to question the right of the libellants to sustain an action against the second bailees, without a previous demand of the goods; but, however that might be at law, or what the personal liability of the master in tort or assumpsit, it is now to be inquired whether a right arose to the libellants to proceed against the vessel, on this state of facts, and demand the full value of the goods shipped on board.

The doctrine that the shipment of goods on freight creates an obligation maritime in its character, and which may be enforced in rem against the vessel by admiralty courts, I shall consider so far as settled by adjudication in our own courts as to furnish the rule of decision in this case. The Rebecca, [Case No. 11,619]; 2 Gall. 378; The Betsy [Case No. 1,364]; The Volunteer [Id. 16,991]; Certain Logs of Mahogany [Id. 2,559]. I am given to understand that the point is under review before the circuit judge of this district, on appeal in a neighboring district; and his decision, if it lays down a different rule, will thereafter become the law of this court. There would be no distinction as to the competency of admiralty jurisdiction, under the doctrine of these authorities, whether the claim of reparation arose from malfeasance or nonfeasance; and, as has been already suggested, the allegations and recovery in admiralty courts are in conformity to the right of the case in all its circumstances without the necessity of employing different forms of action to reach the remedy. If, then, a case is established here which would charge the owner of the vessel, relief to the same extent, the contract being maritime, will be given against the vessel.

According to the opinion already indicated, the substantial part of the contract was per-

formed. The goods were safely transported and delivered here pursuant to the bill of lading, and the owner had knowledge that they were at this port, and subject to his order. One incident of the contract, however, had not been fulfilled. The cargo was not placed in possession of the libellants, nor had they immediate notice of its arrival in the port of New York. A distinction exists, in the nature of things, between the mode and degree of actual delivery of goods transported inland in small parcels by carriers, and that of large packages or a cargo, water borne, and brought from abroad. The difference is adverted to in the cases, and the result of the discussions in the courts on the point seems to be that although the contract of carriage only stipulates to transport the goods from one port to another, yet it is not satisfied, as Mr. Justice Buller at first held, by unlading them at the port of delivery. 5 Durn. & E. [Term R.] 389. But in addition to that, due and reasonable notice must be given the consignee unless such notice is excused or rendered unnecessary by the terms of the bill of lading. 2 Kent, Comm. 604, 605; 4 Pick. 371; Story, Bailm. (2d Ed.) § 544; 4 Bing. New Cas. 314, 330. In Golden v. Manning, 3 Wils. 429, the court discussed the question as to the duty of carriers after the goods reach the place of destination. The general rule declared was that if the undertaking did not impose on the carrier the necessity of a personal delivery, and the goods, being of great bulk, or for other cause, are deposited in a warehouse, the carriers are obliged to send notice to persons to whom goods are directed, within a reasonable time. The law has not settled definitively whether such notice shall be actual, or only implied, nor the method of giving it; and therefore, according to general principles, it must at least be such as, under the circumstances of the case, would be reasonable. The libellants having no known residence or place of business in the city, and having taken an undertaking upon the bill of lading to have the goods delivered here, it would be consonant to the usual course and habitude of transacting business in analogous cases to give notice in the public papers, and also through the post office. This latter has become a medium of notice in mercantile transactions so common and so well recognized by law as to render an omission of that mode of giving information a laches, unless accounted for upon satisfactory facts or circumstances. There is nothing in the evidence to excuse it in this case, and as the bearing of the proof is that the price of clover seed declined from one to two or two and a half cents per pound, between the arrival of the cargo here and the knowledge of its arrival acquired by the libellants, they are justly entitled to be reimbursed that loss. They cannot hold the whole contract broken upon this particular, and recover the whole value of the shipment, but ought to have received the goods when tendered them, exacting only an indemnity for the omission to fulfill the duty of giving notice dependent upon the arrival of the property in port. I shall decree accordingly, and, if the parties do not settle this loss at 1½ cent per lb., a reference must be had to compute the actual loss, when further evidence to that point may be adduced by either party. Order accordingly.

[The case was referred to an auditor to take further proofs in the question of value. The libellants filed exceptions to the clerk's report, which were overruled. Case No. 6,767b.]

Case No. 6,767b.

HOWE et al. v. The LEXINGTON.

[3 Betts, D. C. MSS. 66.]

District Court, S. D. New York. April 5, 1843.

PRACTICE IN ADMIRALTY—EVIDENCE—BILL OF LADING.

[1. An objection to a clerk's report on a reference to ascertain the amount of damages in an admiralty case cannot be taken by argument, but must be by formal exception.]

[2. On a libel in rem upon a bill of lading, the clerks and agents of the transportation company claimant, having personally no interest in the business, and not responsible for its defaults, are competent witnesses.]

[This was a libel in rem by William L. Howe and Benjamin C. Cummings against the schooner Lexington for failure to deliver goods under the terms and conditions of a bill of lading. A decree was rendered for the libellants (Case No. 6767a), and the cause referred to a clerk, to take further proofs on the question of value. To the clerk's report the libellants filed exceptions.]

BETTS, District Judge. In deciding the case upon the merits in favor of the libellants, the court fixed provisionally the damages to be recovered at 1½ cents per lb. on the 12 casks of clover seed. But as the gist of the controversy had not turned upon the value of the seed at any particular time in this market, that sum was not determined with any great precision by the witnesses, and the court had adopted it, as seemingly the nearest approximation to the depreciation, the decree left to either party the privilege of a reference to the clerk to take further proofs upon the question of value. The clerk reports the new proof submitted to him, and his estimate of the depreciation of the seed between the period of its arrival at this port, and the time the libellants had notice thereof, at the sum of one & a half cents per pound, and the quantity at 6811, and the sum to be recovered by the libellants, $102.16. The libellants except to the report and contend they are entitled to three cents per lb., and the claimants, without interposing any exception to the report, insist that upon the whole evidence the libellants are not entitled to any allowance. But it is not competent to the claimants to inter-

pose any objection to the report by way of argument only. It must stand as admitted against those parties who have not taken formal exceptions, and accordingly the sole question is whether the clerk's report is supported by the testimony in the case.

I have gone carefully over the whole proof again and find no ground for advancing the allowance made by the clerk. The Greens are not incompetent witnesses. They were merely clerks or agents of the transportation line, and had personally no interest in its business, nor are they responsible for its defaults. There is nothing in the proof from which the court is authorized to infer that these persons acted in any respect in contradiction of the orders or trust of the company, and on a mere question of diligence or fidelity between the principal and his clerk as to the conducting of a piece of business, would not disqualify the clerk from testifying in relation to the transaction between the principal and third parties. Both Greens are corroborated by Monroe as to the only facts material in the case,—the time the seed arrived in New York, and the time knowledge of its arrival reached persons inquiring for it in behalf of the libellants; and their testimony would fix the last at a period not later than the 15th of March.

As to the value of the seed in the market at that time, I am inclined to the opinion that the weight of evidence is that if it had depreciated at all intermediate its arrival that depreciation had not exceeded 1½ cents per lb. On an exception by the claimants, it would most probably have been decided that the allowance should have been less. Mr. Russel gives the only positive testimony to that point. Mr. Thompson's is but hearsay, and Mr. Monroe speaks only from a high offer, and that by a buyer. Still, as the owner held it at 9 cents, when he called on Monroe, and the latter stated the offer price at the time to be 7½, I think the 1½ cents given the libellants may be permitted to stand, and that it is a full recompense to him for the loss. The exceptions are accordingly overruled and with costs.

Case No. 6,768.

HOWE v. McDERMOTT.

[4 Cranch, C. C. 711.] [1]

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

PRACTICE—NEW TRIALS—COSTS—JUDGMENT.

When a new trial is granted on payment of costs, although the general rule is that if the costs are not paid by the second day of the term next after granting the new trial, the judgment shall be entered upon the verdict; yet, under particular circumstances the court will, at that term, set aside the judgment and permit the cause to be tried.

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

Trover [by Howe, executor of Frail, against John McDermott], for a slave. There was a verdict for the plaintiff at the last term. The court at that term, upon affidavits granted a new trial upon the condition of payment of costs. Upon the first calling of the trial-docket of this term, the defendant, who lived in Maryland, had not paid the costs, and the court postponed the cause to the second calling of the docket, when (namely, 26th May, 1836,) the costs not having been paid, THE COURT, on motion of the plaintiff's counsel ordered the judgment to be entered upon the verdict, although Messrs. Key & Dunlop said they expected their client every moment. Afterwards, namely, on the 18th of June, 1836, the defendant appeared with his witnesses to try the cause, and offered to pay the costs, but the plaintiff issued his execution and arrested him.

Messrs. Key & Dunlop moved the court to set aside the judgment, and quash the execution; which THE COURT (MORSELL, Circuit Judge, contra,) did, upon the condition that the defendant should pay all the costs up to this day, including the costs upon the execution, and an immediate trial or continuance at the plaintiff's option.

MORSELL, Circuit Judge, said that he considered the rule to be that if the costs were not paid by the second day of the term next after the granting of the new trial the judgment should be absolute, and he thought the rule should be rigidly enforced. The parties then agreed to try the cause on the 28th of June, on which day, the costs not having been paid, the judgment was entered up absolutely.

Case No. 6,769.

HOWE v. MORTON et al.

[1 Fish. Pat. Cas. 586; [1] 23 Law Rep. 70.]

Circuit Court, D. Massachusetts. March 8, 1860.

PATENTS—INFRINGEMENT—ADDITIONS OR MODIFICATIONS—FOREIGN PATENTS—INJUNCTION—BOND OF INDEMNITY.

1. No matter what additions to, or modifications of, a patentee's invention a defendant may have made, if he has taken what belongs to the patentee he has infringed, although with his improvements the original machine may be much more useful.

[Cited in McComb v. Brodie, Case No. 8,708; Converse v. Cannon, Id. 3,144; Strobridge v. Lindsay, 2 Fed. 694.]

2. Howe's first claim is substantially the same as if he had said: "I claim the forming of the seam by a combination and arrangement of parts as hereinbefore described," i. e., of the parts necessary for the accomplishment of the end.

3. Where the want has always existed, and not only existed but been pressing, and it is said that an old instrument would always have answered the want, the improbability is so great as to require strong evidence to overcome it.

4. A foreign patent, to destroy a patent granted in this country, must have been granted be-

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

fore the invention here, not merely before the application for letters patent.

5. An invention is not "patented" in England within the meaning of the acts of congress until the specification is enrolled. The enrolled specification takes effect only from the date of its enrollment, and not from the date of the filing of the provisional specification.

[Cited in Goff v. Stafford, Case No. 5,504; American Diamond Rock-Boring Co. v. Sheldon, Id. 297; Ireson v. Pierce, 39 Fed. 798.]

6. A patent having but six months to run, the defendants were allowed to give bond with sureties to account and pay damages, if any were awarded, in lieu of a preliminary injunction.

[Cited in Potter v. Whitney, Case No. 11,341; Morris v. Lowell, Id. 9,833; Hoe v. Boston Daily Adv. Corp., 14 Fed. 916.]

7. The defendant will be allowed to give bond with security to account, etc., when his machine embraces improvements which could not be used without using the original invention of the patentee upon which they were ingrafted.

[Cited in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

These were motions for provisional injunctions in two cases, to restrain the defendants [Albert Morton and others and Charles W. Williams] from infringing letters patent [No. 4,750] for an "improved sewing machine," granted to Elias Howe, Jr., September 10, 1846. The claims of the patent will be found in the report of the case of Howe v. Underwood [Case No. 6,775].

T. Giles and B. R. Curtis, for complainant.

A. C. Washburn, H. F. Durant, and C. Cushing, for defendants.

SPRAGUE, District Judge. I will now state the result at which I have arrived in both cases. As the matters involved in these two cases are complicated, and as I have no notes, and speak from memory merely, I may omit some of the considerations which have brought me to the conclusion at which I have arrived. I believe, however, that I can state the reasons of my decision sufficiently to enable the counsel to understand the most material grounds upon which I proceed.

Here are two applications for preliminary injunctions, made to the court at the same time, in two distinct suits, founded on Howe's sewing machine patent, dated September 10, 1846. One suit is against the Williams machine, so called, and the other is against three different machines, called respectively the Sloat, the Johnson, and the Gibbs machine.

The defense relied upon is, that there is no infringement. The validity of Howe's patent is conceded. It is not impeached for the want of novelty, or as embracing too much in its claim of invention; nor is it contended that it does not embrace all that he did, in fact, invent.

The question is, whether the defendants have infringed. The various patents introduced, granted prior to this of Howe, have been introduced not to show his patent to be invalid for want of novelty, but to ascertain what there is new in it, by showing what was before known.

The inquiry is, what is there in common between the defendants' machines and the Howe machine, which is not in common between the Howe machine and the prior ones? or, in other words, what do the defendants use that belongs to Howe? It being taken for granted that whatever is new in Howe's machine belongs to him, and is secured by his patent; and it being insisted that nothing of that which is new and secured by his patent, is used by the defendants in their machines. So that it is the question whether the defendants do use what belongs to Howe by his patent.

And here I would remark that this inquiry excludes various matters which have, properly enough, been gone into, as to the diversities between the defendants' and Howe's machines. No matter what the diversities are; or what additions to or modifications of Howe's original invention have been made by the defendants, if these new improvements are ingrafted upon Howe's invention, secured to him by his patent. The defendants may have taken Howe's machine as the basis and means from which to make their improvements. If they have taken what belongs to Howe, they have infringed, although with the improvements the machine may be much more useful than it would be without them. This is a well-known principle of patent law.

We are to inquire what there is in the defendants' machines that is taken from Howe's; and this induces the necessity of a comparison, in the first place, between Howe's patent and what was prior, in order to determine what there is in Howe's that is novel.

In examining Howe's patent, let us look, in the first place, at the summing-up, the first claim in which is as follows: "The forming of the seam by carrying a thread through the cloth, by means of a curved needle on the end of a vibrating arm, and the passing of a shuttle, furnished with its bobbin, in the manner set forth, between the needle and the thread which it carries, under a combination and arrangement of parts substantially the same with that described."

It is with this general claim that I shall have to deal. In giving a construction to a claim we must look at the specification which precedes it: and this is especially necessary in this case, because the claim makes express reference to the specification.

The summing-up begins by claiming the forming of the seam. That is a result. The real claim, as subsequently stated, is for the means by which that result is reached, namely, by carrying a thread through the cloth, by means of the needle at the end of the vibrating arm, and then carrying the

shuttle with its bobbin between the needle and its thread, under a combination and arrangement of parts substantially as described.

Some discussion has been had, whether this is to be deemed a claim for a combination, or a claim for a machine. I do not think it necessary to classify this claim, and to draw deductions from such classification. That is generally an unsafe mode of reasoning. I shall deal with the language of the claim and the specification as I find them, and apply the principles of law.

The patentee uses the words "combination and arrangement." I shall use the word "combination," not in any special sense, but as expressing a union of parts, co-operating to produce one result. Now, that claim would be substantially the same as it is, if it had used merely the latter part—if it had said: " I claim the forming of the seam by a combination and arrangement of parts, as hereinbefore described." Of what parts? The parts necessary for the accomplishment of the end. It specifies some of those parts in the beginning of the summing-up, namely: the needle carrying its thread through the cloth; the shuttle carrying its thread between the needle and its thread; and then, without any further specification of the parts, says, "under a combination and arrangement of the parts substantially as herein described." It specifies the needle and shuttle, and shows that these are some of the parts to be taken into view in the claim. But suppose it had omitted that enumeration of parts, and had said: "I claim the forming of the seam, by a combination and arrangements of parts substantially as herein described." When we look at the previous description we see that the needle and its thread, and the shuttle and its thread, are a part of the previous description, and therefore, would be embraced in a general statement that he claims that combination and arrangement of the parts of the machine, substantially as described, used for the purpose of forming the seam.

Looking at it then, as a claim for the general combination and arrangement of the parts described, what is there in it that is new? I may state, in general terms, that there is a mechanism for forming the stitch; and mechanism for holding the material to be sewed, which we denominate the cloth; and a mechanism for feeding the cloth; and all these general elements in combination and in an arrangement set forth in the specification.

Now, we must look at some of the subcombinations, as I should term them. And I do this because a great portion of the argument treated the general combination as if composed only of simple elements, whereas, there may be subcombinations entering into the general combination.

We find, in the first place, the kind of stitch made by Howe, which I shall denominate the interlocking stitch. He uses two threads, and by the mechanism which he describes, he interlocks the threads, forming a loop by carrying the needle and its thread double through the cloth, and then carrying the shuttle and its thread between the needle and its thread through that loop, and thus interlocking the threads as the first step toward forming the stitch. Then we find the holding apparatus, consisting of two surfaces fixed against the cloth; these surfaces being one, one side of the shuttle-box, and the other plate X; the plate X being adjusted according to the thickness of the cloth which is to pass between these two surfaces; and the statement that it is adjusted according to the thickness of the cloth, shows that it is intended to press upon and hold the cloth. These are the holding surfaces—stationary holding surfaces.

Then there is the feeding apparatus, which carries the cloth along between these two surfaces each successive stitch, so as to make a seam. The feeding apparatus consists, as the patentee describes it, of a piece of metal with points projecting, which are to take hold of the cloth. The power is applied to the metal which has taken hold of the cloth by means of its points, and that metal then, by means of mechanism, carries the cloth with it between the two stationary surfaces. Here is one part for the combination of the feeding, consisting of the plate of metal with points; and the other part consists of the rigid surfaces between which the cloth is passed, in feeding, and which aid in keeping it in place while it is fed. That is the subcombination of the holding surfaces with the feeding mechanism, or the mechanism which moves the cloth. The same holding surfaces also perform another office—that of aiding in making the stitch. This in two ways: First, they successively resist the thrust and the retraction of the needle. The thread may pass through the material both ways, without moving it by friction. It is held between these two surfaces, which operate to keep it from yielding to the action of the needle in its thrust and its retraction. Besides this they aid in forming the stitch, by keeping the cloth in the exact line where it is required to be kept when the stitch is tightened, so that the interlocking of the two threads shall be within the body of the cloth, or closely on the side if desired. The cloth is kept in its position independently of the needle and the shuttle, by these two surfaces, which grasp it and hold it exactly in the line where it should be, and prevent it from being displaced by any agitation or concussion, so that the stitch is sure to be made in the proper place.

These are subcombinations which enter into the general combination. Now, how far did they exist before Howe's invention? We have, in the first place, three American patents introduced,—Greenough's, Corlis's, and Bean's.

Bean's was the crimping machine; it had a stationary needle, and the cloth was crimped by cog-wheels and forced upon the needle, and when drawn out would exhibit a seam, which I call the basting-seam—that is, a thread carried through and along on one side, and then through and along on the other. That machine had very little in common with Howe's. There was a mechanism by which the seam could be formed; but the parts and the combinations were different from Howe's. The stitch was different. The holding surfaces were cog-wheels. The general combination was not Howe's.

The other two, Greenough's and Corlis's, may be classed together. They were both substantially machines by which a stitch was made, called the basting-stitch, exactly the stitch that was made by Bean's machine. There were two threads, each of which made precisely the same stitch. It was the stitch made by harnessmakers and shoemakers. The material under operation was held in clamps, and a hole was made through it, and the threads were carried through that hole, and the stitch was tightened, and the material was carried forward in the clamps, and another stitch was made. There was no interlocking of the threads: each thread acted independently and had the same effect as if the other were not used. There being two threads, merely duplicated the effect. That was a different stitch from Howe's. It is not contended that these machines anticipated Howe's; and it is certain that they did not. They are now produced in evidence for the purpose of showing that there was some kind of mechanism existing before Howe's, by which some stitch was made, and that repeated, so as to form a seam, and that thus the three general elements—namely, some mechanism to form a stitch, some mechanism to hold the material, and some mechanism to move or feed it—existed before. But the kind of mechanism in the particulars I have stated, and various others, was unlike Howe's.

We come then, to the other, or foreign inventions, that have been introduced as narrowing Howe's. The first is the publication in Brewster's Encyclopedia, which only comes to this—that an eye-pointed needle had been described before Howe's invention.

The next in point of time, is the Thimonier —a French machine, invented in 1830. The first observation to be made upon that is, that it has no mechanical feed whatever, and therefore lacks one of the general elements of combination that Howe's possessed. And that, of course, is fatal as to its defeating Howe's invention; for it did not contain that essential part of Howe's invention. It was fed merely by hand. How far it contained certain other portions of Howe's, it is impossible to say with certainty from the means that are afforded to the court. We have a translation of the specification, but we have nothing else as evidence. There is a model produced, not authenticated, and used only as an illustration, as counsel might illustrate by any thing else which they should present to the court; but it is not proved by any expert, mechanician, or otherwise, to truly represent the Thimonier machine described. We have really nothing but the specification. It appears there were holding surfaces in that machine, which resisted the thrust and retraction of the needle, and upon one of which the cloth was fed by hand. Therefore, it had two holding surfaces, performing the office of resisting the thrust and retraction of the needle, and was so far like Howe's; although it is said that the surfaces were very different, one called the foot or nipple, being a mere cylinder surrounding the needle and chamfered down to an edge where it comes down upon the material; but still it seems to have been designed to hold the material down upon the table when the needle, as it is called —crochet-hook, in fact—rises up with the loop of thread through the cloth. Whether or not it held the cloth in place, while the stitch was tightened, has not been satisfactorily shown; nor is it material to the result at which I shall arrive whether it did or not.

The stitch formed in that machine—I call it a stitch because it has been termed so—was different from Howe's; one thread only was used; there was no interlocking of two threads; the thread in loop was brought up through the material, which was laid horizontally upon a table, and then another loop was passed through that loop, and the first drawn close; the first loop being so placed that the second thrust of the needle would pass through it, and so successively. This was the loop-stitch, sometimes called the chain-stitch, being a succession of loops passed one through the other, by a single thread, so that by taking hold of the end of the thread the whole may be pulled out with facility. We have not therefore, Howe's interlocked stitch by means of two threads, nor have we his feeding mechanism in the Thimonier machine.

The next introduced is the English patent of Newton & Archbold, of 1841. That is a patent for ornamenting gloves. The sole purpose for which it was made and used was to put loops of thread upon the backs of gloves as an ornament. The material was held in clamps, and moved with them: and in one modification there was a bent wire pressing upon the fabric against the thrust of the needles, but with no holding surface opposite the wire. A single thread was used, and if it may be said to make a stitch, it was the same as I have already described as made by the Thimonier machine. It had not two threads interlocked. It had not the stationary holding surfaces, with feeding mechanism carrying the material between them as in Howe's. That machine does not anticipate Howe's invention. Experts differ upon the question whether that was a sewing machine. It is insisted by one set of experts

that it makes a stitch, and is, in fact, a sewing machine, though the inventors did not so call it. In order to make a stitch, it is not only necessary that threads should be passed through the material, but the tightening of it is essential; and I do not see evidence that in Newton & Archbold's machine, the thread was tightened, or designed to be, in a manner which would form a stitch, or that the machine possessed the apparatus necessary for that purpose. It was made in 1841. Now, the very gloves, upon which it was used for ornamentation, were required to be sewed; and yet it does not appear that the inventors, or anybody else that ever used it, thought they could sew with the machine.

When it is said that an old machine existed, applicable to a new use; if this want never existed before, we may readily believe that an old instrumentality may meet it; but when the want has always existed, and not only existed but been pressing, and it is said that an old instrument would always have answered the want, the improbability is so great as to require strong evidence to overcome it. Now, sewing is a universal and pressing want, and has always been so. Sewing has been needed from the first pair in the garden of Eden, to the last pair that were ever united. And that, in 1841, a man invented a sewing machine in England, and put it in operation, and did not know it himself; and that all the persons who used it were in fact using a sewing machine without knowing it, is hardly credible. I am not satisfied, from the evidence that it can be deemed a sewing machine, and if it can, it was materially different from Howe's.

We next come to Fisher & Gibbons' machine, letters patent for which were granted in December, 1844, and the specification was enrolled in June, 1845. That machine used two threads, and they interlocked, not exactly in the manner of Howe's; but still there was a mechanism by which one thread was carried by a needle through the material, then another thread was carried by a shuttle between the needle and its thread; and this was repeated in succession. It was not described nor denominated as a sewing machine, but as an improvement in the manufacture of lace. Was that part of Howe's invention, that idea of interlocking the two threads, and the mechanism for carrying that idea into effect anticipated by Fisher & Gibbons' machine? It clearly had not the other parts of Howe's invention, so as to contain Howe's general combination. It had neither the holding surfaces nor the feeding mechanism of Howe. The material was wound from one roller on to another, passing over two bars, and moved in relation to the ornamenting instruments as required by the ornamental figures to be produced. But if Fisher & Gibbons' mode of forming the stitch was in fact the same with Howe's—was it prior, in contemplation of law? This depends upon the construction of our own statute of 1836, c. 357, §§ 7, 15 [5 Stat. 119, 123]. Howe's invention was completed as early as the middle of May, 1845. His application for a patent was subsequent to June, 1845.

It is contended, that although the patenting abroad may not have been before Howe's invention here, yet, if it was before his application for his patent, it would anticipate Howe's patent. Now, if the same invention had been made, and the same patent had been granted here, the invention not being before Howe's, it would not have defeated Howe's, because, by our law, if Howe was the original and first inventor here, and another person had afterward made the same invention, and, by greater speed, had obtained letters patent before Howe, it would not have precluded Howe from having a patent for his prior invention. And it is extremely improbable, to say the least, that congress intended to give more effect to an invention and patent abroad, than to an invention and patent here.

Upon looking at the statute, and comparing its different sections, I am satisfied that the patenting abroad must be before the invention here, and not merely before the application. The reasoning of the learned counsel for the complainant upon that point is satisfactory, and I do not think it necessary to repeat it. It is also understood that Judge Ingersoll decided that point, in the case of Bartholomew v. Sawyer [Case No. 1,070], in New York, in accordance with the views contended for by the complainant's counsel. I hold that the patenting abroad must be before the invention here, in order to defeat the American patent.

But it is contended that this machine was patented abroad prior to the invention here, although the specification of Fisher & Gibbons was not enrolled until after the invention of Howe here. This raises another, and, so far as I am aware, a new question upon the construction of our own statute. The language of the statute is (section 7, before cited), "that it had been patented or described in any printed publication in this or any foreign country,"—and (section 15, before cited)—"had before been patented or described in any printed publication"—"patented in any foreign country." Was this invention of Fisher & Gibbons patented in England before the middle of May, 1845? That depends upon what is to be deemed patenting. What was the patent taken out in December? It was as follows: "Invention of certain improvements in the manufacture of figured or ornamented lace, or net and other fabrics." That was the patent and the whole description; and there is no pretense that it even indicates any invention of a sewing machine.

It is only by virtue of the specification enrolled in June, 1845, that we discover anything as to the stitching mechanism in the machine.

But it is said that when the specification

was enrolled, it took effect from the date of the letters patent, and, therefore, what was specified and enrolled in June afterward, was in fact patented in December, 1844. That is the argument. What is the meaning of the word "patented," in our statute? The English government may give such effect to certain acts of their own as they see fit; they may say letters patent may be granted in general terms, and that the fourteen years they grant may begin at the date of the letters patent, though no specification be enrolled till six months after. That is the law of England—but the question is, what did the congress of the United States intend when they used the words, "patented in any foreign country?" Did they mean that the invention might be patented before it was made? Because under the English law, the letters patent might be granted before the specification was made, and the specification might contain inventions made after the letters patent were granted. There would be some force in the argument, if, by the English law, nothing could be put into the specification but what was invented or known before the letters patent were granted—but that was not so. The truth is, that the patentees had these six months by the terms of the letters patent, to enroll their specification, and during all that time they may have made inventions and improvements; and the very thing that is relied upon here as anticipating Howe, for all that we know, may have been invented after the middle of May, 1845, and put into the specification in June following.

What is meant by congress undoubtedly is, in the first place, that there shall have been an invention; and, in the second place, that it shall have been made patent to the world—patented. Now, we have no satisfactory evidence that the invention was made, and we have positive evidence that it was not made known to the world by being patented, until June, 1845: it was not made patent until after the invention by Howe. I am, therefore, of opinion that Fisher & Gibbons' invention whatever it may have been, was not patented until after Howe's invention, and can have no effect whatever.

Having thus gone through with the prior patents, I next proceed to examine the defendants' machines, and see what there is in them in common with Howe's, and which is new in Howe's.

In some part of the argument, although it was not distinctly stated, it seemed to have been thought that if all the different parts of Howe's could have been found before, in different machines, that would anticipate Howe's. That, of course, can not be maintained, because it is familiar law that a new arrangement, a new combination, may constitute a new invention. If not only all the primary elements, but all the subcombinations, had existed in different machines before, but never before had been brought together to constitute one machine, and co-operating to produce one result, and Howe had brought them together by invention, producing a useful result, he would be entitled to a patent for such combination and arrangement.

We find, then, to look at the Williams machine, in the first place, that it has two holding surfaces, between which the cloth is fed by mechanism—a piece of metal, taking hold of the cloth and carrying it along between these two surfaces. That is the subcombination of Howe's, so far. And that is one material part of defendant's machine, and found in no machine prior to Howe's; the presser-foot is divided into parts operating alternately, one of which is always upon the cloth, and pressing it down upon the table; one part presses the cloth down upon the roughened feeding surface below; the feeding is done by advancing the roughened surface, and then withdrawing it in the same plane; one part of the presser-foot being raised, that it may not press the cloth down while the roughened surface is retreating; the other part, in the mean time, being down, holds the cloth in position while the first is up; these opposing surfaces are holding the cloth all the time between them, for the operation of tightening the stitch, and for resisting the thrust and retraction of the needle, and keeping the cloth in place while it is fed along.

We find, in the next place, that it has two threads, and forms the stitch by the interlocking of these two threads; and so far—without speaking of the minor mechanism by which this is accomplished—so far, it is like Howe's; and Howe's was not anticipated in that respect by any machine prior to his. These subcombinations are like Howe's. The general combination and arrangement are like Howe's. It is testified by the experts that they are identical; and I see no reason to doubt that statement.

We find, then, that the Williams machine has adopted the general combination and arrangement of Howe's, and some, at least, of the subcombinations of Howe's, in which that machine differs from others. Without undertaking, therefore, to go into the minutiae of the mechanism, the Williams machine, in my judgment, contains so much of Howe's subcombinations, and of his general combination and arrangement, that it is an infringement of his patent.

The Sloat machine, in the first place, differs not substantially or scarcely at all from Howe's, in the holding apparatus. It has two surfaces, the table and the presser-foot. The foot presses on the material which is between that and the table, and which is there fed along by the four-motion-feed, as it is sometimes called, not requiring the presser-foot to rise to enable the roughened surface to return. And the same remark applies here as to the Williams machine, that it has these surfaces holding the material for the same operations—the tightening of the stitch—resisting the thrust and retraction

of the needle, and keeping the cloth in its proper place when it is fed.

As regards the formation of the stitch, the Sloat machine also uses two threads and makes the interlocking stitch. The shuttle is not carried between the needle and its thread, but the thread of the needle is carried around the shuttle, thus producing the interlocking—the stitch being substantially the same as Howe's, and produced by these instruments—the needle and the shuttle having each its thread, one carried through the loop of the other, in the manner I have described.

It is my opinion that the Sloat machine also contains so much of Howe's subcombinations or subordinate parts, and of his general combination and arrangement, that it is an infringement of his patent.

There are other parts of these machines, minor and subordinate, which have been elaborately discussed, upon which I do not deem it necessary to express an opinion. The considerations I have stated are satisfactory to my own mind, without going further.

There are two other machines admitted to have been sold by the defendants, Morton & Dermot—the Gibbs machine and the Johnson machine. The complainant has introduced no evidence to the court that these are similar to his. The Johnson and Gibbs machines have been produced by the defendants for the inspection of the court. The only evidence is the machines themselves. That might be satisfactory in some cases; but I do not think that upon a motion for a preliminary injunction, I should undertake to decide the question of infringement upon my own inspection merely of such minute mechanism, even if I had better optics than I have; not being a mechanician I might fall into mistakes. I do not, therefore, decide that either of these machines infringes. I decline to do so from the want of any evidence upon the subject, except the machines themselves.

It will be observed by the counsel that the conclusions to which I have come, have been thus far independent of any allusion to the trial in England. I think, however, I ought not to close without referring to the case of Thomas v. Foxwell [5 Jur. (N. S.) 37], because that trial was upon this very invention, before the court of queen's bench, under Lord Campbell, chief justice of England, and the conclusion I have reached is confirmed and sanctioned by the instructions given to the jury, and by the verdict in that case. The first claim there was very similar in effect to the claim here. The claim there was for the general arrangement of the machinery described, which produced the result of sewing a seam. Here it is a claim for the combination and arrangement of the parts described (naming some of them), which co-operate to form the seam. The court instructed the jury there, that if the defendants used a substantial part of the plaintiff's combination, which was new, it was an infringement; and this instruction was subsequently revised and sanctioned by the whole court. I have not thought it necessary to determine whether our law goes to that extent.

But it may be asked, was the infringing machine there like the machines of the defendants here? It has been proved that it was the Grover & Baker machine that was sued in the case of Thomas v. Foxwell [supra], by the testimony of Baker, of the Grover & Baker Sewing Machine Company, who was in England and aided in the defense of that suit, and of Wilson, the Englishman, who also aided in that defense.

That the Williams machine is like the Grover & Baker machine, is testified by Wetherell, the superintendent of the Grover & Baker Sewing Machine Company's manufactory. This affidavit is wholly uncontradicted. Williams, the defendant, was himself six or seven years in Grover & Baker's employment, making their machines, and must know whether his own is similar to theirs, yet he has produced no evidence to impair the force of Wetherell's testimony. The decision in England, therefore, was upon a machine like the Williams machine, and is pertinent to the present inquiry.

There is one other ground of defense, namely, acquiescence. As I shall make no order in relation to the Johnson & Gibbs machines, the question of acquiescence applies only to the Williams and the Sloat machines. No one of the affidavits says there has been any acquiescence as to either of those machines. The affiants only say, that there has been some sort of machines making some stitch, which they describe, and they never heard that Mr. Howe claimed that it was his. To affect the rights of the complainant by acquiescence, it should at least be shown what that is in which he has acquiesced. There is direct evidence that he has not acquiesced in any adverse use of the Grover & Baker machine; and that Grover & Baker have paid him large sums for the right to manufacture.

The remaining question is, what order should be made? Under the circumstances, I shall not make an order for injunctions, provided the defendants will give bonds to keep an account and pay over. Howe's patent will expire on the 10th of September next. It may or may not be extended. It is stated that Williams has an establishment in which he is making these machines. If all the rights of Howe can be protected, and indemnity can be secured to him without stopping this manufacture between the present time and the 10th of September, I think the court ought to give him and the manufacturers of the Sloat machine the benefit of the contingency, that at that time they may be allowed to go on without permission from Howe, if his patent should not be extended. And I suppose that such protection and indemnity can be secured to

Howe by defendants giving a bond with sureties to account and pay to Howe such amount as the court shall finally order. Howe is not himself a manufacturer; he sells the right to others to make his machine; and there can be little difficulty in determining what will be an indemnity to him for the use of his patented invention in the manufacture of machines by the defendants. I am inclined to this course, too, because the machines of the defendants are supposed to embrace improvements upon Howe's, which could not be used without also using the original upon which they are ingrafted. These improvements may greatly increase the utility of the machine. The court will not unnecessarily prohibit a party from using his improvements. If the defendants will give security to account and pay to the complainant such sum as the court shall decree, injunctions will not issue.

Mr. Giles: I suppose injunction will issue if sureties are not given.

THE COURT: Yes, that is understood, of course.

Mr. Washburn: What course is to be pursued?

THE COURT: The counsel for the parties will confer as to the bond, and amount, and sureties; and if they differ, they may appeal to the court.

[For claims of the patent of Elias Howe, Jr., see Howe v. Underwood, Case No. 6,775. For other cases involving this patent, see Howe v. Williams, Case No. 6,778, and Hunt v. Howe, Id. 6,891.]

Case No. 6,770.

HOWE v. NESBIT.

[Cited in Reed v. Reed, 31 Fed. 52. Nowhere reported; opinion not now accessible.]

Case No. 6,771.

HOWE v. NEWTON.

[2 Fish. Pat. Cas. 531.] [1]

Circuit Court, D. Massachusetts. April, 1865.

PATENTS — PRIOR PUBLIC USE AND SALE—APPLICATION AND ISSUE—ABANDONMENT—INFRINGEMENT—INJUNCTION.

1. Where the patentee made public use and sale of his invention for less than two years before his original application for a patent, but, subsequently, and more than two years after such public use and sale, withdrew such application, and filed a second one, upon which the patent was granted—*held*, that the continuity of the application was not necessarily destroyed; and, in the absence of proof of abandonment or dedication, the patent was not avoided by reason of the public use and sale, for more than two years before the final application.

[Cited in Weston v. White, Case No. 17,459.]

2. The question as to whether the "continuity" of the application is destroyed by the filing of a new application, is, in an action at law, one of fact for the jury.

[Cited in Smith v. Sands, 24 Fed. 472.]

3. When the user and not the maker and vender of an infringing machine is sued, an injunction ought not to issue, if the case is at all doubtful, or unless the balance of inconvenience is clearly on the side of the complainant.

4. The fact that the plaintiff grants licenses at a fixed sum, and that the defendant is a mere user, although a circumstance to be considered, has not, in the first circuit, been considered sufficient reason to refuse the writ, excepting in combination with other circumstances, either of doubt as to title or of hardship in the operation of the injunction.

[Cited in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 805.]

This was a bill in equity, filed [by Jarvis Howe] to restrain the defendant [Otis Newton] from infringing letters patent [No. 19,508], for an "improvement in boot trees," granted to Reuben L. Lewis, March 2, 1858, and assigned to complainant, January 2, 1865.

J. E. Maynadier, for complainant.

F. A. Brooks, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. This bill is filed to restrain the use by the defendant of a boot tree, said to be an infringement of the plaintiff's patent right, and for an account, and comes up on motion for a preliminary injunction. The plaintiff is assignee of the patent granted to Reuben L. Lewis in March, 1858, for an improvement in boot trees, and his assignment is dated January 2, 1865. No question is made now that Lewis was the original and first inventor of the improvement, nor that the defendant's boot tree infringes it, if made without due authority.

The defenses set up at this hearing are two: First. That the patented invention had been in public use, with the consent of Lewis, more than two years before his application. Secondly. That the defendant bought the boot tree, the use of which is sought to be enjoined, from a person having due authority to make and vend it. No evidence is given upon the first point, excepting the record of the case upon this patent, tried in this court, and carried, by writ of error, to the supreme court. See Godfrey v. Eames, 1 Wall. [68 U. S.] 317. From this it appears that the defendant there set up the same defense as is here urged, and it was proved and admitted that the patentee had made public use and sale of the invention for more than two years before the final application upon which his patent was granted, but that his original application had been made very soon after he began such use, and it was ruled in this court, as matter of law, that the later application alone could be considered, and that thereupon the defendant was entitled to a verdict. But the court above reversed the judgment, and held that the applications were both for the same invention, and that the withdrawal of the former and substitu-

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

tion therefor of the latter, did not necessarily break the "continuity of the claim," which continuity was a question for the jury. The case was never tried again, but this was for reasons distinct from the merits of the case itself, in the mind of either party. It is important to observe, however, that the defendant in this case did not contend that the patentee had abandoned his invention, or dedicated it to the public, and there is no evidence whatever before me that he ever did so, nor that the defendant in good faith intends to rely upon any such abandonment, in defense to this action, or upon anything more than was set up in that suit. On the contrary, the allegation here is of a public use for more than two years before the final application, not before the original one. That the inventor went on making his machine, while waiting and expecting the issue of his patent, and after one application for the invention had been made, is the only use shown, and it is one wholly consistent with his patent. When I find, therefore, an explanation which fully accounts for all the facts, and which is the most natural and probable explanation, and which was taken for granted in the former trial, it is my duty to give the patentee the benefit of it, especially when I can not see good reason to believe that there is any state of facts known to the defendant upon which he is willing to say that the point ought to be submitted to a jury or to the court upon its merits.

The second question is, whether the single boot tree prayed to be enjoined, was made and sold by a person duly licensed or authorized in that behalf. It seems that one E. L. Shumway was at one time a partner with the patentee, and had a right to make these patented articles; and it is alleged that he made and sold this one in 1857, and afterward repurchased it and sold it to the defendant, in June, 1865. The precise time at which Shumway's right to license expired is not in evidence, but it was admitted to be since 1857, and before June, 1865, so that the point of fact raised is, whether this boot tree was really made by him in 1857, or whether it was, to all intents and purposes, a new article in the summer of 1865. The defendant declares he bought two boot trees of Shumway as second hand, and states the price for the two. He does not answer, though interrogated, what parts were new and what were old. Shumway says that both were old, and made and sold in 1857.

The complainant admits that one was old, but shows, by several affidavits, that the other appeared to be new. I find the weight of the evidence to be very decidedly in favor of the complainant on this point.

It was suggested for the respondents that Shumway perhaps repaired this boot tree, and that, though the parts made of wood are new, yet the more important portions, which embody the invention, may be old; that these are made of iron, and would not show the marks of wear so much as the outer or wooden parts. It is not improbable that the very general statement of Shumway may be thus explained; but the difficulty is, that he does not himself make the explanation. He swears positively that the boot tree is old and second hand, and he is contradicted by witnesses who could hardly be mistaken. He should not undertake to testify to a conclusion which may be one of law, but should specify what is old, and we could then judge whether, under those circumstances, the article in question could justly be said to be so. This point of fact is a very simple one, and one which is fully in the power of the defendant to explain, and the evidence he produces is not satisfactory. It does not quite meet the points, and as compared with the more explicit statements of the plaintiff, although they are founded on the appearance of the machine, I am much more favorably impressed by the latter.

Upon the whole, I can not think the defendant has raised any sufficient doubt of the validity of this patent admitted for the purposes of this hearing, to be for a new and useful invention, and which is now eight years old, nor upon the question of license to induce me to say that he is entitled to be heard on the merits, before an injunction is granted, but, on the contrary, the complainant's case is clearly made out.

It appears that no special damage will result to the defendant or his business by enjoining this machine. The balance of inconvenience is here on the other side, and the injunction ought to issue. If the case were at all doubtful, I should think the suggestion, that this defendant is not the maker of the article, but only one who uses it, an important one, especially as the maker and vendor, Shumway, has not been sued. Some reasons were given by the complainant for not having brought an action against him, but they were not very satisfactory to my mind. It does not appear, however, that the defendant is in any less favorable position, as to knowledge or otherwise, than Shumway himself, whose affidavit he has produced, and as the case does not appear doubtful, I have not regarded this as a sufficient reason to refuse the writ. The fact that the plaintiff grants licenses at a fixed sum, and that the defendant is not a maker and vendor, but only one who uses the machine, is also of itself, independently of the fact that the maker has not been sued, a circumstance to be taken into account; but it has not been considered sufficient reason, in this circuit, to refuse the writ, excepting in combination with other circumstances, either of doubt as to title or of hardship in the operation of the injunction. The writ is to issue against one boot tree.

[For other cases involving the so-called patent of the defendant, see, as to infringement, Eames v. Godfrey, 1 Wall. (68 U. S.) 78, and as to application and issue, Godfrey v. Eames, Id. 317.]

Case No. 6,772.

HOWE et al. v. SHEPPARD et al.

[2 Sumn. 133.] [1]

Circuit Court, D. Maine. May Term, 1835.

INSOLVENTS — DEBTS DUE THE UNITED STATES — STATUTE OF 1797, C. 74—PLEADING.

1. The statute of 1797, c. 74 [1 Story's Laws, 465; 1 Stat. 515, c. 20], giving a priority to debts of the United States in cases of insolvency, applies to equitable as well as legal debts.

[Cited in Re Rosey, Case No. 12,066.]

2. But the United States cannot enforce such priority in a suit at law, as assignee of a judgment of a private creditor of the insolvent debtor, where the suit is brought in the name of the creditor, and not in the name of the United States.

[Cited in U. S. v. Lewis, Case No. 15,595.]

3. Quaere, whether the United States may not sue at law as assignee of a chose in action or debt, as such an assignment in case of the crown would, by the common law, vest a legal title.

This action was debt, brought on the 14th of December, A. D. 1830, by the United States, in the name of Howe & Howard, on a judgment recovered against Abiel Wood, at a court of common pleas, holden at Boston, in the commonwealth of Massachusetts, on the first Tuesday of January, A. D. 1821, for $4,663.31, the whole of which judgment was, on the 2d day of September, A. D. 1830, duly assigned to the United States by Howe & Howard, in part satisfaction of several judgments recovered by the United States against Howe & Howard, on their duty bonds; and Howe & Howard were released from an equal amount of their debts due the United States. The writ was duly served on Wood, and all his real estate attached on the 23d of March, 1831, when he was duly notified of said assignment to the United States. The action was entered at the circuit court, holden at Portland in May, 1831, and has been continued from term to term, awaiting the action of congress on a petition there pending for the relief of said Wood. On the 26th day of October, A. D. 1834, the said Wood died, and on the 10th day of November, 1834, administration was duly granted to John H. Sheppard, who has represented said estate insolvent,—and said estate is absolutely insolvent. On the 10th day of December, 1834, said administrator was notified of the pendency of this suit of the United States, and that the United States claimed priority of payment of such judgment as should be rendered in this suit, out of the effects of said Wood—all which effects are still in the hands of the administrator. The question now submitted to the court, on an agreed statement of facts, the substance of which is given above, was, whether the United States were entitled to priority of payment out of the effects of the said Wood, in the hands of his said administrator?

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

Mr. Anderson, Dist. Atty., for the United States, argued that, as the whole judgment against Wood was assigned to the United States for a full and valuable consideration, and notice of the assignment duly given to Wood, he became indebted to the United States to the amount due on said judgment. Welch v. Mandeville, 1 Wheat. [14 U. S.] 233; Mandeville v. Welch, 5 Wheat. [18 U. S.] 277; Steele v. Phoenix Ins. Co., 3 Bin. 312. If the debt ascertained by the judgment as due from Wood to Howe & Howard became by the assignment, a debt due to the United States, Wood became a debtor to the United States; and, by the 5th section of the act of 1797, the United States are entitled to priority of payment out of his effects, now in the hands of his administrator. In the case of U. S. v. Fisher, 2 Cranch [6 U. S.] 358, the court say: "On this subject it is to be remarked, that no lien attached by this law; no bona fide transfer of property, in the ordinary course of business, is overreached. It is only priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally if he be dead." In this case, Blight was the indorser of a bill of exchange, which the United States had purchased in the market. If the United States claim priority out of the effects of an endorsee of a protested bill of exchange, which they purchase in the market, they surely may claim priority on an endorser or maker of a promissory note, purchased under like circumstances. The United States have as full and entire an interest in the debt due from Wood to Howe & Howard, by the assignment of the judgment, as they would have had, had Howe & Howard assigned the note on which the judgment is founded; and if the United States would have claimed priority as endorsees of the note, must they not hold it as assignees of the judgment on that note? Wood could not complain. He had as much election as to who should be his creditor in the one case as the other. His paper was liable to assignment,—the judgment on that paper is liable to no more. The action being in the name of the assignors, gives the defendant the benefit of all off-sets he had against the assignors before notice of the assignment, besides he has the benefit of all off-sets he may have against the assignee. Corser v. Craig [Case No. 3,255]. If the priority is not sustained because the action is not in the name of the United States, then a distinction must be made between the interest of the assignee of a judgment on a note of hand or bill of exchange, and that of the endorsee of the note or bill on which such judgment is rendered; for, whether the action is in the name of the United States, or in the name of their assignors, the interest of the United States is the same, and that interest is not effectually protected if

such distinction prevails. The United States prosecute all actions in the name of the postmaster general, for debts due them through the post office department. But the United States are no more party in interest in these actions than they are in this. If they may claim priority of payment out of the effects of an insolvent debtor to the post office department, on a judgment in the name of the postmaster general, may they not claim the same priority of payment of this judgment in which they have as entire an interest? In Hunter v. U. S., 5 Pet. [30 U. S.] 172, it is said: "If the right of the United States to priority of payment covers any part of the property of an insolvent, it must extend to the whole until the debt is paid." It must then extend to a debtor's debtor. Priority must cover enough of a debtor's effects, wherever situated, whether in his own hands or hands of his debtor, to satisfy the debt due the United States, or it cannot be said to extend to all the debtor's effects. The argument that the debtor, or other creditors of the debtor may suffer inconvenience, or perhaps damage, by such priority, where the United States becomes a creditor by assignment, cannot prevail against the "clear and unambiguous words of the law." And it is well known to all merchants, that the United States is at all times the largest creditor in the market, and most probably to be met by them in every distribution of an insolvent's effects,—and knowing from the beginning the rules governing the action of this creditor, they have no right to complain of his severity, provided it is uniformly exercised. If priority does not extend to a debtor's effects in the hands of his debtor, then it is limited to effects in possession, and does not extend to choses in action, which limitation is denied in the case of Hunter v. U. S. By the rigid rules of the ancient common law, no chose in action could be assigned, save by the king, but the necessities of commerce and the good sense of the times have, from time to time, removed the restrictions and limitations formerly put on the assignee, and he is now invested with all the rights, subject to offset against the assignor, that he would have if the action was in his own name. See Master v. Miller, 4 Term R. 341.

John H. Sheppard, pro se, contended that the question of priority must depend on the construction of the act of congress of March 3, 1797 (3 Laws U. S. [By Folwell]) 423 [1 Stat. 515], and particularly of the 5th section of this act, as follows: "And be it further enacted, that where any revenue officer or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied." The defendant is not a debtor to the United States, within the spirit and meaning of this act; nor did the deceased become indebted to the United States, by bond or otherwise in the above suit. (1) It does not appear of record that defendant is the debtor. The plaintiffs are private citizens. The United States are not named in the writ, nor in the judgment which must follow the writ. Nor can they be in the examination. If defendant is then a debtor to the United States, it must be by construction indirectly and not directly—by equity, not by law—and by an ex post facto transaction, and not by the original contract. And the plaintiffs are consequently to be ascertained not by record but by matter in pais. (2) There is no express promise to pay this debt to the United States, by the defendant. Nor could the law raise an implied one. If so, the United States might have brought the suit in their own name. Coolidge v. Ruggles, 15 Mass. 387; Skinner v. Somes, 14 Mass. 108; Doct. & Stud. c. 24, p. 181; Lawes, Pl. (Story's Ed.) 53. (3) It then becomes necessary to examine the legal effect of the assignment of a chose in action. It is an universal principle, recognized without exception in all the United States and state Reports, that an assignment of a chose in action with notice, gives the assignee an equitable interest, which the court will protect. Welch v. Mandeville, 1 Wheat. [14 U. S.] 233, and Dunn v. Snell, 15 Mass. 481. Is the defendant made by this assignment a debtor to the assignee? The decisions do not go to this extent. See Id.; Bebee v. Bank of New York, 1 Johns. 530, 552; 1 Madd. Ch. Prac. 547; 2 Bl. Comm. 442; 2 Com. Cont. 509; Shep. Touch. c. 12, p. 239; 5 Pick. 259, 266, 267; 2 Vern. 699, in note; 1 P. Wms. 782; 2 Strange, 899; 1 Dane, Abr. 289, c. 14, § 21. By the foregoing authorities, it appears that the assignee acquires no new rights—that he stands only in the place of the assignor—that there is no change of the process of the court—that he only appears as an attorney of the assignor, irrevocable, and not as a party, and that the debtor's liabilities and property are not altered nor more exposed, by an assignment of his creditor. The assignee has not even the legal, but only an equitable or beneficial interest. While his rights are protected in obtaining the fruits of his judgment, the debtor's funds or estate, are subjected to no diversion nor inconvenience, other than would have occurred if no assignment had ever been made. For if the defendant could be made the debtor of the assignee, this action is wrongly brought; the United States should have been plaintiffs of record. (4) The construction of the king's prerogative in England, favors the defendant's view of the case. 5 Bac. Abr. tit. "Prerogative," E, p. 554; Com. Dig. "Assignment," D; 5 Petersd. Abr. 283, "Chose in Action." The prerogative of the king is always exercised tenderly, it would seem. For

in 1 Madd. Ch. Prac. 619, it is said: "If there be a debt owing to the king, the court will direct the king's debt to be satisfied out of the real estate, that the other creditors may be let in to have a satisfaction out of the personal estate." "The little finger of the law," says Eunomus (Dialogue 1, vol. 1), "is heavier than the loins of the prerogative." The case of the U. S. v. Fisher, 2 Cranch [6 U. S.] 358, does not settle this question against the defendant. It was there decided that priority extends to all debtors of the United States, whether revenue officers, bondsmen or endorsers of bills of exchange. The defence was, that debtors for public dues, receiptors of public moneys, and accountable agents, were only intended to be included in this statute prerogative of our republic, as it may well be called. Chief Justice Marshall regarded the question as not without embarrassment. Washington, J., dissented from the opinion of the court who decided that all debtors to the United States were included. That case does not touch the present, as the suit there was in behalf of the United States; the record showed that defendant was plaintiff's debtor; the debt was originally contracted with the United States, and the pleadings showed the parties. The defendant in the present case never was a debtor to the United States. The record shows different parties—and an averment against a record is bad pleading. Co. Litt. 260a. Indeed, if the debt had been less than $500, it might have been questioned, if the United States would not have been compelled to come into our state courts for relief in this suit. As to Master v. Miller, 4 Term R. 341, Mr. Justice Buller's opinion was overruled by the rest of the court; at least they thought the form of the action was essential. Priority in a case like this would operate severely on honest creditors. It would open the door to fraud and collusion among collectors and debtors to the United States. The government, by a secret purchase, might slily and suddenly step in as an assignee, and sweep all a debtor's property beyond the reach of other creditors. A principle so harsh and severe, would be more dangerous, than the prerogative of the British king, which Lord Coke says, is not allowed by common law to be exercised to the injury of a subject.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. This case comes before the court upon an agreed statement of facts; and the object is to ascertain, whether, as the estate of Abiel Wood is insolvent. the United States have a right to priority of satisfaction out of his assets, for the judgment debt of the plaintiffs (Abraham F. Howe and another), which was obtained against Wood, and assigned by the plaintiffs to the United States, in the lifetime of Wood. The question, intended to be raised, is not, whether in this form of action (a suit at law on the judgment, brought in the name of the judgment creditors for the benefit of the United States), the priority of the United States can be insisted on. If that were the point, we should have no hesitation in saying it could not; for nothing in the suit can judicially be taken notice of, which shall distinguish the case of the plaintiffs from that of other private judgment creditors, as to rights or remedies. But the real question is, whether in any form of suit, at law or in equity, the United States can, upon such a debt, so assigned to them, insist upon the statute priority.

I am by no means satisfied that this is not a case, where at law, the government might sue the debtor directly upon the assigned judgment in their own name. For at the common law, though choses in action are not assignable, yet in the case of the king, there is an exception; for upon an assignment of a chose in action to the king, he is allowed to sue the debtor in his own name. This is not so much a matter of prerogative, as an exception coeval with the rule, as to the non-assignability of choses in action. So the doctrine is laid down in Miles v. Williams, 1 P. Wms. 252, which cites 21 Hen. VII., 19. Lord Chief Baron Comyns lays down the same doctrine in the clearest terms.[2] And I have a strong impression, that the same doctrine has been recognized, incidentally, by the supreme court of the United States.

But this point is not important to be determined in the present case; because it is clear, that the assignment of the judgment did in equity transfer the debt to the United States; and the government might, by a bill in equity, have enforced the judgment against the debtor. The question, then, comes to this, whether the statute of 1797, c. 74 [supra], giving priority to the government in the payment of debts, applies to legal debts only, or to debts both legal and equitable. The fifth section of that statute declares "that where any revenue officer or other person becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied," etc. Now, in this language, there is not the slightest distinction made between equitable and legal debts. If an equitable debt is due to the United States, is it to be wholly excluded from any payment out of the assets? If such debt is payable out of the assets, what is the order of payment? Is it to be postponed to other legal creditors; or paid pari passu with them? The statute is silent as to any marshalling of assets, except in cases of priority; and it

[2] See, also, Com. Dig. "Assignment," D.

gives that priority in all cases of debts. The words of the statute seem to extend to all cases of debts due to the United States from an insolvent debtor's estate; and if payable at all out of his assets, the rule of priority seems co-extensive with the duty of the executor or administrator to pay.

By laws of Maine (and Massachusetts has the same rule), there is no difference in the dignity of debts. All are equally payable out of the assets, pari passu. And in regard to private creditors, no distinction is taken between equitable and legal debts, any more than between legal and equitable assets. I know of no ground, upon which equitable debts are, or can be excluded from a proportionate dividend of the assets, when such debts are due to private creditors. How, then, can a different rule be applied to equitable debts due to the United States? In the sense of the laws of Maine, and in the sense of the laws of the United States, they are still debts. Suppose an estate solvent as to the payment of legal debts, but not as to the payment of equitable debts also, can it be treated as other than an insolvent estate? And, if insolvent, are not the United States necessarily entitled to a priority as to all their debts by the very terms of the statute?

After reflecting much upon the subject, I am unable to arrive at any other conclusion, than that the priority of the United States attaches to all debts, equitable, as well as legal. Upon any other construction, I cannot perceive, how they are entitled to any payment whatsoever, out of the assets for equitable debts. If they are not debts against the estate in cases of insolvency, neither can they be deemed such in cases of solvent estates, a conclusion which would overturn the best established principles. The district judge concurs in the opinions, which I have thus expressed. The case has been exceedingly well argued, and with great ingenuity. But, after all, it comes back to the simple question already stated. According to the agreement of the parties, the cause will stand continued, in order to enable the administrator to perfect his application for relief to congress.

[See Case No. 6,773.]

Case No. 6,773.

HOWE et al. v. SHEPPARD.

[2 Sumn. 409.] [1]

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

SET-OFF—MUTUAL CREDITS—JOINT AND SEPARATE DEBTS—PARTNERS—ASSIGNMENT OF DEBT.

1. Courts of equity follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statute of set-off, as where there are mutual credits between the parties, or an existing debt on one side, which constitutes the ground of a credit on the other side.

2. Joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity; as where there is a separate debt due from a partner, and a joint debt due to the partnership.

[Cited in The Zouave, 29 Fed. 298.]

[Cited in Day v. Abbott, 15 Vt. 634; Lawrence v. Vilas, 20 Wis. 391.]

3. Quaere—If in a case of mutual credits and debts in the same right, the insolvency of either party will create such an equity as to entitle the other party to a set-off against the debt of the insolvent party.

4. Semble: That a court of equity will not entertain a set-off of a separate debt of one partner against a joint debt to the partnership, upon the ground of the insolvency of that partner.

[Cited in Gordon v. Lewis, Case No. 5,614; Pierpont v. Fowle, Id. 11,152.]

[Cited in Milburn v. Guyther, 8 Gill, 96.]

5. The mere fact, that a case is in conformity with the principles of natural equity and justice is not sufficient to bring it within the jurisdiction of a court of equity. There are many principles of natural equity and justice, which are not attempted to be enforced therein.

6. Where there are mutual debts, which may be set off at law or in equity, the right of set-off is extinguished by a bona fide assignment of one of the debts.

[Cited in Wood v. Carr, Case No. 17,940.]

[Cited in Howe Mach. Co. v. Hickox, 106 Ill. 469.]

7. Howe & Howard recovered a joint judgment against Wood in 1821; Howe, for himself, and as attorney of Howard, on the 22d of September, 1830, assigned the judgment to the United States, and Howard, on the 30th of October, 1830, surrendered all his interest therein to Howe, and authorized him to transfer and assign the same for his own benefit. *Held*, that there was a valid assignment of the joint judgment to the United States, and that the defendant, who was the administrator of Wood, could not set off against it a debt due by Howe alone to Wood, though Howe, ever since the debt accrued, had been insolvent.

This was an action of debt, brought by the United States, and for their sole benefit, in the name of Howe & Howard, on a judgment recovered by the said Howe & Howard against Abiel Wood, in January, 1821, which judgment the said Howe, acting for himself, and as attorney of the said Howard, on the 22d of September, A. D. 1830, assigned to the United States, and the said Howard, on the 30th of October, 1830, assigned all his interest therein to the said Howe, and authorized him to dispose of the same as he saw fit. The defendant [John H. Sheppard], on the death of the said Wood, having taken on himself the defence of the said suit, as administrator, was defaulted, and paid one moiety of debt and interest and costs, and was now heard as to the other moiety upon the following agreed statement of facts: That after the recovery of the said judgment by Howe & Howard against the said Wood, viz. in January, 1826, the said Wood fully paid and satisfied a judgment recovered in October, 1817, by Joseph Hurd, Jr., against Joseph T. Wood, Abraham F. Howe, and the said Abiel Wood, amounting to the sum of $13,-

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

056 damages and costs of suit, which judgment was rendered on a bond executed by the said Joseph T. Wood, as principal, and the said Abraham F. Howe, and Abiel Wood, as sureties. The said Joseph T. Wood died insolvent, leaving the said judgment wholly unsatisfied, and the said Howe has never paid the said Abiel Wood nor his said administrator any part of the said sum so paid and satisfied by the said Wood for the said Howe, and that the said Howe, from the time of the said payment to the present has been insolvent. And the said administrator now prays to have allowed to him so much of the said sum paid by the said Wood for the said Howe as aforesaid, as shall be sufficient to meet and offset one moiety of the said judgment on which the present suit is brought. And the parties agree, that if the court shall be of opinion, that the said administrator can, in law or equity, be allowed the offset aforesaid, then judgment shall be entered for the plaintiffs for costs only. But if the said sum cannot be allowed as aforesaid, then judgment is to be rendered for plaintiffs for the moiety aforesaid, with costs.

Mr. Anderson, Dist. Atty., for plaintiffs.
Mr. Sheppard, pro se.

STORY, Circuit Justice. The present suit is debt, brought against the defendant, as administrator of Abiel Wood; and it is founded on a joint judgment recovered by Howe & Howard against Wood, in January, 1821, for the sum of $4514.07, damage and costs of suit. Howe, for himself, and as attorney of Howard, on the 22d of September, 1830, assigned the judgment to the United States; and Howard, on the 30th of October of the same year, surrendered all his interest therein to Howe, and authorized him to grant, transfer, and assign the same for his own benefit. There is no doubt, therefore, that the assignment to the United States is sufficient to convey the interest both of Howe & Howard; and it seems admitted, though not expressly so stated in the agreement of the parties, that the assignment was made as collateral security for certain debts, due by Howe and others to the United States on judgment. The present action is, therefore in fact, brought for the sole benefit of the United States.

The defendant, as administrator of Wood, insists upon a right to set off a debt due by Howe to Wood, under the following circumstances. In October, 1817, one Joseph Hurd, Jr., recovered a judgment against one J. T. Wood, and Howe and Abiel Wood, for $13,056, and costs of suit, founded on a joint bond, executed by J. T. Wood as principal, and by Howe and Abiel Wood as his sureties. J. T. Wood died insolvent; and in January, 1826, Abiel Wood paid the whole judgment, Howe being then and ever since insolvent. The defendant, as administrator of Abiel Wood, insists, that the moiety of the judgment so paid by Abiel Wood is a debt due to him by Howe; which is not denied. He farther insists, that he has a right to set off that debt in the present suit. If he has such a right, either at law or in equity, then the parties agree to give him the full benefit of it in the present action.

In the first place, it seems very clear, that the debt is not a good set-off at law; for it is not within any statute of set-off. A several debt cannot be set off against a joint debt; for the debts are of different natures and in different rights. This is the established doctrine, and it is founded in reasoning entirely satisfactory. It is unnecessary to refer to the authorities at large, by which it is supported; but they will be found generally referred to in the case of Jackson v. Robinson [Case No. 7,144], and Green v. Darling [Id. 5,765]. The case of Kinnerley v. Hossack, 2 Taunt. 170, fully recognises the general doctrine, and excepts such cases only, where there is a special agreement for the set-off.

Then, how does the debt stand as a set-off in equity? The known rule in courts of equity is, that they follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statutes of set-off, which constitutes the general basis of set-off at law. Such a natural equity does arise, where there are mutual credits between the parties; or where there is an existing debt on one side, which constitutes the ground of a credit on the other side; or where there is an express or implied understanding, that the mutual debts shall be a satisfaction or set-off pro tanto between the parties. I advert in this general way only to the principles of courts of equity on this subject. But many of the authorities will be found collected in the learned opinions of Mr. Chancellor Kent, in Duncan v. Lyon, 3 Johns. Ch. 358, 35-, and Dale v. Cooke, 4 Johns. Ch. 11, 14; and also in the Commentaries on Equity Jurisprudence (volume 2, c. 37, §§ 1430–1438). See, also, Cheetham v. Crook, McClel. & Y. 307.

Now, in the first place, in the present case there is no pretence to say, that the debt due to Wood from Howe, as surety, was a debt contracted upon the credit of the joint debt due to Howe & Howard. The former was clearly in invitum, and arose upon the payment of the judgment upon the joint bond. The debt of Wood against Howe for his contributory share of the joint judgment, was a debt created by operation of law; and arose from a compulsory payment by Wood of that judgment. The debt on which that judgment was founded, was prior in its origin (at least as far as we can see) to that due from Wood to Howe; and, therefore, the latter could not be a credit given on account of the former. It is true, that the payment was made by Wood at a later pe-

riod, viz. in 1826. But there is not the slightest proof, that the parties ever agreed to consider it a set-off to the joint debt, or that the payment was a credit in contemplation of the joint debt. So that, there is a total absence of all circumstances to raise any presumption, that this was a case of mutual credit, or of an agreement for a set-off; and, in this view, cadit questio.

Again. This is the case of an attempt to set off a several debt of one partner against a joint debt due to the partnership. Now, neither at law, nor in equity, can such a set-off be maintained upon that mere footing. The partnership was not liable for the separate debt of one of the partners; nor bound to contribute towards its payment. There is no equity to compel a partnership to pay the separate debts of a partner, founded upon the mere fact of that relation. On the contrary, the doctrine is just as clear in equity, as at law, that joint debts cannot be set off against separate debts, or separate debts against joint debts; for they accrue in different rights. The authorities to this point are abundantly clear (see 2 Story, Comm. c. 37, § 1437; Vulliamy v. Noble, 3 Mer. 617; Whitaker v. Rush, 1 Amb. 407); and they are ably summed up in the cases of Duncan v. Lyon and Dale v. Cooke, already referred to. There must be some other circumstances creating an equity, in order to justify the set-off.

But, then, it is said, that here Howe is, and was insolvent at the time of the payment of the joint judgment by Wood, and that of itself creates an equity for a set-off. Whether, in a case of mutual debts in the same right, as for example, mutual joint debts, or mutual separate debts, the insolvency of either party will entitle the other to set off his debt against the debt of the insolvent party, without any other intervening equity, is a point not necessary here to be discussed or decided. Natural equity would seem persuasively to urge such a set-off in such a case; for otherwise the insolvent party might recover his whole debt; and the other party might recover a dividend only, or indeed nothing. Yet there is great reason to doubt, even in such a case, whether the courts of equity in England ever admitted a set-off founded upon the mere fact of insolvency. In Ex parte Prescot, 1 Atk. 231, Lord Hardwicke affirmed the contrary; and said, that in cases of bankruptcy, before the statute of 5 Geo. II. c. 30, if there were eventual debts, the creditor could not set off the debt due to him against the debt due from him to the bankrupt, even in equity. But, in the case of a joint debt, the same reasoning could not apply in favor of the set-off of the separate debt of one of the partners; at least not, until all the joint debts were paid, and all the equities of the other partner were satisfied. For it is a general rule, that no partner has any separate interest, except in the surplus of the partnership property after the payment of all the joint debts and other equities. If there should be such a surplus, then, perhaps, the same rule might be applied, as in cases of mutual separate debts. So Lord Cowper held in Lord Lanesborough v. Jones, 1 P. Wms. 325, where his lordship said: "If A. and B. are joint traders, and J. S. owes A. and B. on their joint account £100, and A. owes the said J. S. £100 on his separate account, J. S. cannot deduct so much as A.'s proportion of the £100 comes to, out of the joint debt; for that the co-partnership debts of A. and B. are to be first paid before any of the separate debts. But, if there be a surplus beyond what will pay the partnership debts, then out of A.'s share of the surplus, J. S. may deduct the separate debt of A." Lord Hardwicke, in Ex parte Edwards, 1 Atk. 100, appears to have been swayed by the same reasoning, as was Lord Loughborough in Ex parte Quintin, 3 Ves. 248. In Ex parte Twogood, 11 Ves. 517, Lord Eldon appears not satisfied with these latter decisions; and Sir Wm. Grant, in Addis v. Knight, 2 Mer. 117, approved Lord Eldon's doctrine. Mr. Chancellor Kent has also given the weight of his own authority on the same side, in Dale v. Cooke, 4 Johns. Ch. 11, 14. The strong inclination of my mind is, that, according to the present course of decisions, courts of equity in England will not entertain a set-off of a separate debt of one partner against a joint debt due to the partnership, upon the mere ground of the insolvency of that partner: for it must necessarily involve a settlement of all the partnership debts, and an ascertainment of all the partnership equities, before any relief can be given. That was manifestly the opinion of Lord Hardwicke in Ex parte Prescot, 1 Atk. 231; and it seems confirmed by the opinion of the same learned judge, in Bishop v. Church, 3 Atk. 691, and by Lord Eldon, in Ex parte Twogood, 11 Ves. 517. I am aware that the case of Simson v. Hart, 14 Johns. 63, is apparently the other way, and affirms, that insolvency does, or may constitute a sufficient equity to entitle a party, who is a creditor upon a joint judgment, to set off that judgment against a separate judgment debt due by him to one of the joint judgment debtors, both of the latter being insolvent. The ground of the decision seems to have been, that the party having the joint judgment, and who applied for the relief, had the sole interest in that judgment, and might urge it against either of the joint judgment debtors; and therefore might set it off against the separate debt of either, to prevent a manifest and unconscionable injury, which he might otherwise sustain. That ground would not apply in the present case; for here, Howe & Howard had a joint interest in the judgment in their favor; and Howe alone could not insist upon a right to apply it, without the consent of Howard, in discharge of his own separate debt, as the

judgment was a joint security for the benefit of both partners. To bring the present case within the range of the principles in Simson v. Hart, it should appear, either that Howe was the sole owner of the joint judgment at the time, when the set-off was claimed, or that both Howe & Howard then assented to an allowance of the set-off.

The decision in Simson v. Hart, 14 Johns. 63, carries with it the appearance of being in conformity to the principles of natural equity and justice. But this alone is not sufficient to bring the case within the jurisdiction of courts of equity for relief; since there are many principles of natural equity and justice, which are not attempted to be enforced therein. I have not been able to satisfy my own mind, that any such general principle of relief, by way of set-off, has been administered in courts of equity, founded upon the mere insolvency of the party, as that case supposes. On the contrary, after no inconsiderable research, I felt myself compelled to come to a very different (though not to an opposite) conclusion, in Green v. Darling [Case No. 5,765]. My subsequent researches, which have been more extensive, have not enabled me to detect any error in that opinion, or to find in English jurisprudence a single decision, which countenances any such equity for a set-off. In the elaborate judgments of Mr. Chancellor Kent, where the subject has several times undergone a very full review, both of principles and authorities, there is a total silence on the same point. Still, however, I desire not to be concluded on that point, as this cause may well be disposed of, without resting at all upon that ground.

In the present case, the right of set-off could not exist against Howe and Howard, so long as the latter possessed any interest in the judgment. When that judgment was assigned to the United States, the latter were clothed with all the rights and interests of the partnership, provided the assignment made by Howe in his own name and in Howard's name was an operative conveyance as to both; that is, provided Howe had authority from Howard, to make the assignment. That he was without such an authority, is no where asserted in the statement of facts, and is not to be presumed; and the subsequent paper executed by Howard to Howe, relinquishing all interest in this judgment, and authorizing Howe to transfer it for his own benefit, would seem to amount to strong proof of a prior authority, given by Howard, or of a subsequent ratification of the assignment by him. In either view, it would bind both Howe and Howard. And even if it were invalid as to Howard's interest, it was a good assignment of Howe's interest in the judgment, and bound him in equity to procure a relinquishment of Howard's share, which he subsequently did obtain; and so, as to Howe, in the final event, the whole judgment became vested by assignment in the United States.

Now, upon this posture of the case, it seems to me very clear, that the right of set-off on the part of Wood is gone, or rather never had any real existence. That right was not an equity, attached to the original judgment of Howe and Howard. It was a right, which at most could be asserted against Howe only, when he should become the exclusive owner in law or equity of that judgment, and while he was so owner. The assignment of that judgment to the United States extinguished all the legal and equitable interest of Howe as well as of Howard in it; and the United States became bona fide purchasers of it, for a valuable consideration. The equity of the United States, then, is both prior in point of time, and better in point of right than that of Wood, in regard to the judgment. Where there are mutual debts, which may be set off in law or in equity, I take it to be clear, that the right of set-off is extinguished by a bona fide assignment of one of the debts. In the present case, from the statement of facts I cannot find, that there ever was a moment, in which Howe was the exclusive owner of the joint judgment; and unless he was, there never could, according to the principles already stated, exist a right in Wood to set off his separate debt against the joint judgment at law or in equity. It seems to me, therefore, that, according to the agreement of the parties, the plaintiffs are entitled to judgment.

[See Case No. 6,772.]

Case No. 6,774.

HOWE v. SHUMAWAY.

[Cited in Coy v. Perkins, 13 Fed. 112. No where reported; opinion not now accessible.]

HOWE (STORRS v.). See Case No. 13,495.

Case No. 6,775.

HOWE et al. v. UNDERWOOD et al.

[1 Fish. Pat. Cas. 160.] [1]

Circuit Court, D. Massachusetts. Feb., 1854.

PATENTS—INFRINGEMENT—EXPERIMENTS—SEWING MACHINES.

1. There is no evidence in this case that leaves a shadow of doubt, that, for all the benefit conferred upon the public by the introduction of a sewing machine, the public are indebted to Mr. Howe.

2. A machine, in order to anticipate any subsequent discovery, must be perfected—that is, made so as to be of practical utility, and not merely experimental, and ending in experiment. Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial.

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

3. If an invention is an experiment only, and ends in experiment, and is laid aside as unsuccessful, however far it may have been advanced, however many ideas may have been combined in it, which, subsequently taken up, might, when perfected, make a good machine—still, not being perfected, it has not come before the public as a useful thing, and is, therefore, entirely inoperative, as affecting the rights of those coming afterward.

[Cited in Cook v. Ernest, Case No. 3,155; Gottfried v. Phillip Best Brewing Co., Id. 5,633; Allis v. Buckstaff, 13 Fed. 890; Thayer v. Hart, 20 Fed. 694.]

4. Though a prior inventor has gone to a certain extent, if he fall short of making a complete machine, practically useful, those who come after him may secure to themselves the advantages of his invention. The first inventor gave nothing to the public. His so-called invention was only an idea, never carried out in a machine that could anticipate one subsequently invented.

[Cited in Goodyear Dental Vulcanite Co. v. Folsom, 3 Fed. 512; Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 904; Dreyfus v. Schneider, 25 Fed. 481; Kittle v. Hall, 29 Fed. 515; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 127.]

This was an application for a provisional injunction to restrain the defendants from infringing the letters patent [No. 4,750] granted to Elias Howe, Jr., September 10, 1846, for an improved sewing machine, by the use and sale of the Singer machine, so called. The defendants denied the novelty of the invention of Howe, and relied, in support of their denial, mainly upon an alleged invention of Walter Hunt, in 1834. In connection with the evidence upon this point, they exhibited: 1. Some remains of a machine. 2. A new sewing machine, recently made by Walter Hunt, as a restoration of his old machine. 3. A new sewing machine, recently made by Walter Hunt, according to a description contained in his answer to an interrogatory in a previous deposition. The claims of Howe's patent are as follows:

I. The forming of the seam, by carrying a thread through the cloth by means of a curved needle on the end of a vibrating arm, and the passing of a shuttle furnished with its bobbin, in the manner set forth, between the needle and the thread which it carries, under a combination and arrangement of parts substantially the same with that described.

II. I also claim the lifting of the thread that passes through the needle-eye, by means of the lifting-rod, w, for the purpose of forming a loop of loose thread, that is to be subsequently drawn in by the passage of the shuttle, as herein fully described; said lifting-rod being furnished with a lifting-pin, u, and governed in its motions by the guide-pieces and other devices, arranged and operating substantially as described.

III. I claim the holding of the thread that is given out by the shuttle, so as to prevent its unwinding from the shuttle-bobbin, after the shuttle has passed through the loop, said thread being held by means of the lever, or clipping-piece, q, as herein made known, or in any other manner that is substantially the same in its operation and result.

IV. I claim the manner of arranging and combining the small lever, m, n, with the sliding-box, m, in combination with the spring-piece, z, for the purpose of tightening the stitch as the needle is retracted, as described.

V. I claim the holding the cloth to be sewn, by the use of a baster-plate, furnished with points for that purpose, and with holes, enabling it to operate as a rack in the manner set forth, thereby carrying the cloth forward, and dispensing altogether with the necessity of basting the parts together.

Joel Giles, for complainants.
Causten Browne, for defendants.

SPRAGUE, District Judge. This is an application for a preliminary injunction, by Elias Howe, Jr., and another, to restrain the defendants, Orison Underwood and others, from using a sewing machine, which, the complainants allege, is an infringement of their patent. This subject has been before the court on two former occasions; in a trial at law, in 1852, when the same person, Howe, was plaintiff, and in a bill in equity, in 1853, by the same plaintiffs as in this case, against other defendants. The same questions were made in both of those cases that are presented to the court in this case: first, as to the validity of the patent; and second, as to the infringement. As to the last question, however, in the suit at law, the machine complained of was that of Lerow & Blodgett, and was different from that which is now on trial, which is the Singer machine. But in the suit in equity tried last year, the Singer machine was the subject of complaint—a machine similar to that against which an injunction is now sought. The earnestness and zeal with which the contestation has been carried on, as well as the nature of the machine, its effect on the industry of the country, if it prove to be successful to so great an extent as is hoped—show the importance which is attached to the questions involved, and to the rights which are claimed, on the one side or the other. There is no doubt that, if the machine be a successful one, it must be of great importance to the community, and to the individual inventor whose rights are now sought to be enforced. And, on the other hand, if the defendants have a machine which they can use without an infringement of the plaintiff's patent, it must be of great value and importance to them. The parties, therefore, will naturally, so long as there is any ground of hope, carry on a legal contestation. It is the duty of the court to hear everything that may be presented in every new case, especially all the new evidence that may bear upon the questions at issue; to form an unbiased opinion, and announce it clearly and unequivocally, that the parties, at least, may understand

what is the opinion of the court, for their guidance in the future, as well as for the decision of the case now before the court; for, as it has been intimated by the respondents, the court may readily suppose that there are other cases which are dependent, directly or indirectly, upon the decision of this.

There are certain great features in this case, which are settled by the evidence, and about which there really can be no controversy, and which are of great importance in weighing the evidence upon minute questions, where there is controversy as to what took place many years ago, depending solely, in many instances, upon the memory of individuals called upon to give testimony.

This patent of Mr. Howe was obtained in 1846. Up to that time, the public was in possession of no similar machine for sewing. So far as the evidence is presented to the court in this case, such an instrumentality for the saving of labor was not then known. Such an invention had never been practically used—I mean it was not known to the public for any practical or useful purpose. Whether it was known, within the meaning of the law, in the case of Mr. Hunt's machine, the court will consider hereafter. The first machine for practical use was made upon Mr. Howe's patent; and since he obtained that patent, numerous machines have been put in operation—those of Lerow & Blodgett, and those of Singer, which have been before the court on a former and on the present occasion; and, as it has been stated, these machines have entered largely into the industry of the country, and with great benefit, for the purpose of saving labor previously performed by hand-service.

Now to whom is the public indebted for the present useful inprovement or useful existence of the sewing-machine? Upon that, there is no question. There is no evidence in this case, that leaves a shadow of doubt, that, for all the benefit conferred upon the public by the introduction of a sewing machine, the public are indebted to Mr. Howe. The constitution of the United States contains a provision which is the source whence congress derives the power to give to inventors an exclusive right, as against the community; and all the legislation of congress is founded upon that provision, and intended to carry it out. What is that provision? That congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Now, who has promoted this useful art? Who is it, in this case, that comes within the meaning of the constitution, that to promote the useful arts, congress shall have power to secure to inventors their inventions? Unquestionably, Mr. Howe, and no other person. I mean no other person has given to the public this invention, from the evidence before the court. Therefore, if the legislation of congress has carried out the provision of the constitution, which had for its object the promotion of the useful arts, by securing to inventors their inventions, that legislation would naturally give the benefit to Mr. Howe. Still, it may not have done so. The acts of congress may be so framed, that they may fail of carrying out that purpose and that intent of the constitution in this instance, and in other instances; and the court is then called upon to say whether, under the law as enacted by congress, Mr. Howe is entitled to his patent; for the constitution gives him no right; it has only given a power to congress, if congress sees fit, by legislation, to secure to him, for a term of years, the exclusive right to his invention.

Then we look at the legislation of congress, to see what are the requisites to entitle him to a patent, and we find that he must be the first and original inventor; and that the thing which he invents must not be known or used, before he has obtained his patent or made his invention. That has often received a judicial construction; and if there has preceded the invention, for which a patent has been obtained, another invention of the same kind, and that has been perfected within the meaning of the patent law, so as to be of practical utility, and not to end in mere experiment—then it has anticipated the subsequent discovery, or invention, and such invention can not be entitled to the monopoly or exclusive privilege that is claimed by the patent.

The first inquiry here is, whether Hunt's machine, which is alone relied upon as having preceded Mr. Howe's, was ever perfected, within the meaning of the law; and a second is, whether it had not been abandoned and forgotten before Mr. Howe's invention. These are the two questions to which I shall give my attention; because I do not think it necessary to go into the question of the similarity of the Hunt machine to Mr. Howe's. But I go directly to the question whether Mr. Hunt's machine, as he made it, was perfected; or, in the second place, if perfected, whether it was forgotten or abandoned?

The evidence, tending to show that the machine of Hunt was perfected, may be divided into three classes. There is the evidence of its product—what work the old machine did. In the second place, there is the evidence of the recollection of witnesses of what the machine was. And in the third place, there is the evidence derived from the remains of the old machine, produced here, and the opinion of experts, founded upon those remains, of what the machine originally was. These three classes of evidence the defendants have presented for the consideration of the court; and certainly, that evidence would be entitled to great weight and consideration, standing by itself. But it is encountered by certain facts, indisputable and unquestionable, in this case, which

are so entirely inconsistent with some parts of that testimony, that we are called upon to determine which shall yield.

Now, this machine of Mr. Hunt was invented in 1833 or 1834. It does not appear, from the evidence, that there were ever more than two machines made. Mr. Hunt says, himself, there were two or more, but he gives no account of more than two. The inference to be drawn from all his statements is this: that he began one machine and worked upon it for a while, and advanced it, by his own labor and genius and industry, to a certain stage; and then made another machine, which embodied what he had then accomplished; and this was the machine which he transferred to Arrowsmith, and which was subsequently worked upon by Adoniram Hunt, his brother, the remains of which are now produced. The first machine has entirely disappeared, and no one, excepting Mr. Hunt, has testified to ever seeing it, or any part of it, unless some old irons mentioned by Arrowsmith as formerly seen by him, in the shop, may have belonged to that machine.

The only machine, therefore, to which the evidence in this case applies, is that, the remains of which have been produced, as found by Arrowsmith, among the rubbish of his shop. That machine is seen, in 1834, in New York, by several persons; it is then transferred by the inventor, Walter Hunt, to Arrowsmith, who carried on the machine business; and, under Arrowsmith, Adoniram Hunt, the brother of Walter went on experimenting upon the machine for the next year, 1835. During that time it was carried to Baltimore, where Adoniram Hunt went with it, and from which place a considerable portion of the testimony is derived, as to the condition and operation of the machine.

We will now consider the work performed by that machine. The question is, whether that machine was perfected, within the meaning of the patent law, so as to prevent any subsequent invention or discovery being first in the meaning of the law, and so entitled to a patent. The patent law goes undoubtedly upon the ground, that when a man, by his knowledge and skill, has made and perfected a machine, the public are then put in possession of the invention, and have the benefit, in some form, of that knowledge and skill; and that the man who comes afterward can not deprive the public of that benefit, though he may be an original inventor of the machine. He has not given the consideration for an exclusive privilege, because the public had it before; and although he may have the merit of invention, he can not have the right to take from the community that which they possess by the invention of another. A machine, therefore, in order to anticipate any subsequent discovery, must be perfected; that is, made so as to be of practical utility, and not to be merely experimental, and end in experiment. The terms "being an experiment," and "ending in experiment," are used in contradistinction of the term "being of practical utility." Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial. If it is an experiment only, and ends in experiment, and is laid aside as unsuccessful; however far it may have been advanced, however many ideas may have been combined in it, which, subsequently taken up, might, when perfected, make a good machine, still, not being perfected, it has not come before the public as a useful thing, and is therefore entirely inoperative as affecting the rights of those coming afterward. This is important to be understood, because the idea has been carried all along, that if a prior inventor has gone to a certain extent, although he fall short of making a complete machine, practically useful, those who come after him have no right to secure to themselves the advantage of their invention. That is not the law. If Mr. Hunt did not go to the extent of having perfected a machine, although he made many ingenious devices, it was, in the eye of the patent law, a nullity; it gave nothing to the public; it was only an idea never carried out in a machine that could anticipate one subsequently invented. Now, that Mr. Hunt made an ingenious machine, there is no doubt; and that, in many respects, it was like Mr. Howe's machine, there is no doubt; that it had a needle similar to Mr. Howe's, operating upon a vibrating arm, and going through the cloth, then a shuttle that passed through the loop made by the needle thread, and thus making a stitch by drawing it up into one side of the cloth, somewhat like Mr. Howe's, there is no doubt. He advanced so far that he made a machine that would, to a certain extent, sew. The question is, whether it was perfected, within the meaning of the patent law; or did it end in experiment?

Now, there is a class of witnesses called to testify that they saw the work which this machine did. There are a large number of these witnesses—I think ten or twelve. These may be divided into two classes: those who looked at it merely as a matter of curiosity, as a new invention; and those who had some pecuniary interest at stake, either as owners of the machine, or as called upon to take an ownership in it. Many of them are women. One class, which is new evidence in this case, I will refer to, because it is new, and more important as aiding the court, not having been before the jury or the court before: that is the testimony derived from the Johnson family, residing at Baltimore—father, mother, two or three daughters, and Eleazer Johnson, the son. His testimony is of great importance. It is new and un-

questioned. I shall consider that distinctly hereafter.

What is the testimony of this family? It is this: that Adoniram Hunt had this machine at Baltimore, while boarding in the Johnson family, and that one evening while there in 1835, he brought the machine to the house, to exhibit it as a matter of experiment and curiosity, and there sewed what they called unbleached muslin, or cotton cloth; and they described it as having sewed an excellent seam of some length; and the daughters, particularly, speak of it as performing good work, beautiful work, strong work; the mother also speaks of it well. That would seem to be very satisfactory as to the result of that machine; but they are speaking of a transaction which took place in 1835, and giving affidavits in 1853—eighteen years after the event. Their recollection has to be carried back eighteen years, to what took place then, as to the impression upon their minds on seeing a sewing machine—the first one they had ever seen—a great curiosity, carried to their house in the evening, and there shown to them; and they are now called upon to state what was the impression made upon them at that time. Well, if it sewed at all, it would be strange if it did not make a remarkable impression upon them. It was entirely new; the operation of the needle and the shuttle was new to them. The work then done was never used for any purpose whatever; it was never appropriated to any practical use—never designed for any practical use; it was merely an experiment, to show them what the machine would do, and there it ended; and their attention was never called to it afterward, for eighteen years.

Then comes the testimony of Mr. Eleazer Johnson. He speaks of its work while he and Adoniram Hunt were experimenting upon it, and he says that they made certain canvas tools, which were appropriated to a certain use in passing hot air in the shop where he worked. That is the only practical use that any product of this machine was ever put to.

We come, then, to New York, where the machine was invented; where it was owned; where the inventor lived, and where Arrowsmith, who purchased it of him, lived, and where it was left after it came from Baltimore. It was seen by various persons there, and its work examined. Some describe it as sewing well; but in no single instance was the work done for use, of any name or description, and in no single instance was the work done ever put to any use whatever. This machine was never used for any purpose whatever, nor was any person ever known to seek for it, or for its product, to be appropriated to any use whatever. Now, it is a little remarkable, that a perfect sewing machine, such as is described by the witnesses as producing beautiful work, strong work (as some of them say)—a machine perfected, and, as some of the experts say, better than Howe's; and one of them says, a machine in some respects better than any machine he had ever seen; yet never produced work that anybody ever used for any purpose whatever, in the city of New York, or ever sought to use for any purpose, whatever; and that it was laid aside for years, without producing either work, or propagating itself in other machines, ever after—that is a phenomenon that requires to be accounted for.

I have said that there was only one instance in which any product was appropriated to any practical use; and that was in the case of the canvas tubes, spoken of by Eleazer Johnson. The fact is an important one, and his testimony is of great importance in this case. How does he state that fact? In the second deposition obtained by the plaintiffs (the first having been obtained by the defendants), it is stated that Adoniram Hunt lived in his (Eleazer Johnson's) father's family, and worked with him in the same shop; that he himself was a machinist; that Adoniram Hunt was a machinist; that they were together by day and evening; that Adoniram Hunt, under Arrowsmith, was at work, trying to improve that machine, after it went into Arrowsmith's hands; that he worked in the evening, and at odd times of the day, during all the six or eight months that he was at Baltimore, and that the witness assisted him, evening after evening, as a friend, in trying to complete and perfect that machine; and they were experimenting upon it during the whole time that Adoniram Hunt was there.

That is his express language, that the whole time that Adoniram Hunt was there, they were experimenting on the machine; and certainly, it ended in experiment, if he is to be believed. They did nothing but experiment. How came these canvas tubes to be made? He says they sewed those tubes to see the effect of their changes—as an experiment to show how the machine would operate; and having sewed some of them, they were found to be such that they could use them for the purpose of connecting two metallic tubes in carrying hot air, after having soaked them in oil and white lead. He is asked as to the time it took to sew these tubes, and whether the value of the product was equal to the time spent. He answered that the time was of no account; that they were experimenting, and did not, therefore, consider the time, as to the making of these tubes. Now, nothing can be clearer than that that was a mere experiment. They did not sew the canvas tubes for the purpose of getting the product, but for the purpose of seeing what the machine would do under the improvements they were making; and having succeeded in sewing some of them, instead of throwing them away, they appro-

priated them to a use that was in itself temporary—to the conducting of hot air, which consumed them, as is testified, at the rate of one a day. That was the whole extent of it.

I consider Eleazer Johnson's testimony, so far from going to strengthen the case of the defendants, as decidedly going to show that, at Baltimore, the machine was merely experimental, from beginning to end. He says so, in terms. He goes further, and states the difficulty and the defects in the machine, to a certain extent. He says that it would sometimes sew, for six or eight inches, a perfect seam. At other times it would drop stitches, make miss-stitches—the threads would lie along, not being looped together, while the shuttle would stop in the race; and he further adds that they could not ascertain the cause why it stopped. They tried to do it, they experimented, they improved upon it; but he distinctly swears that during the whole time the machine was in Baltimore, that difficulty existed, and that Adoniram Hunt and himself, both machinists, working on it for the purpose, could not ascertain why it was that the shuttle would not go through the race, but would sometimes stop, and sometimes did not stop; thus rendering it entirely uncertain whether the work would be done or not. The needle would continue to operate, and go through the cloth, but the shuttle would not go through the loop, and then, of course, no stitch was made, and there would be a space, longer or shorter, not sewed, and the work was ruined; and from his testimony, nobody could tell when the machine was put in motion, how it would operate. In that condition it was brought back to New York in 1835; and I think there is no evidence to satisfy the court that any improvement was there made. The single piece of evidence that has any tendency to show that there was, is the letter of Adoniram Hunt written in 1836, to Mr. Johnson, at Baltimore, which is mere hearsay, not under oath, which was admitted to be read, because the counsel for the plaintiff did not object to it. In this letter, Adoniram Hunt says, that he had been at work upon the machine, and made it work to a charm. That is his statement, not under oath, in the spring of 1836. But Arrowsmith, who owned the machine, under whom Adoniram Hunt performed the labor, and by whom he was paid, swears he never learned of any improvements he made upon it after it returned to New York. The man who owned the machine, and for whom Hunt was at work, did not know of any improvements. That is under oath; and no other witness deposes to any improvements.

Now, it is not a little remarkable, that if this machine was of value in Baltimore (to take that locality first)—if it sewed as well as is represented by some of these witnesses, after a lapse of eighteen years—it is not a little remarkable that no specimen of that sewing has been preserved, that no offspring of the machine has been presented, and that those people at Baltimore, the Johnsons, never sought to have a copy of the machine made for their own use.

If it was useful for making those canvas tubes, as stated by the son, and saved his mother the trouble of sewing, how does it happen that Eleazer Johnson, having worked month after month, to aid in the experiments in improving the machine, did not ask the privilege of making one for his own use, if it was worth making? How does it happen that the mother and daughters, if it produced such work, did not desire their brother to get one for their own use? The manufacturer was a person in their own family, yet they never expressed a wish for one. There was Arrowsmith, who had the ownership of it; there was Adoniram Hunt, both in Baltimore, but nobody there, or any where else, attempted to obtain, or expressed a desire to obtain, the use of that machine, for any practical purpose whatever.

Then we have the testimony of two witnesses, Mr. and Mrs. Carlock, who testify in reference to the product of the machine. Mrs. Carlock says the work was bad, and gives a particular description of it; that it was what is called a mail-bag stitch. Mr. Carlock states that there were places where no stitches were made, and that the machine dropped stitches; places were left in the work so large that you could put your finger through. That exactly corresponds with the testimony of Eleazer Johnson, as to the particular defect existing in the machine.

As to the description of the machine given from the recollection of the witnesses, there are also two classes of witnesses—the experts and those who are not experts. First, we have the testimony of women, to whom the machine was shown. They would undoubtedly recollect whether there was a machine or not. Their attention would be directed as to whether there was a needle, or a shuttle, and perhaps to some other principal parts. They do not attempt to go further than that. Their testimony as to the construction of the machine gives us no aid on the question we are now considering.

The only persons whose statements as to the character of the machine can be of any value whatever, are those who are machinists, and who examined it as machinists. Of this character are Mr. Walter Hunt, Mr. Wood (who is a new witness), Mr. Eleazer Johnson, and Mr. Arrowsmith. I do not recollect any other persons now who can be competent to form an opinion upon the character of the machine, who have undertaken to speak of it from recollection. Mr. Walter Hunt does undoubtedly go to the extent of undertaking to recollect the whole machine, and to profess to be now able to construct it from recollection. But he is the only one. I say this advisedly, because upon examination of the affidavits of the other witnesses,

I find that they do not assume to be able to do this. Take the affidavit of Mr. Wood—which is the strongest one. He says expressly, that he can not, from recollection, undertake to make that machine again; and that he would not undertake, even with the aid of the old remains, now to make it. He does not undertake to say that he could do it. Of course, his recollection is not entire and complete in regard to that machine. He can go to a certain extent; but he says, in express terms, that he would not undertake to reproduce the machine; of course, if he recollected all its parts, and their operations, he could do it. The absence of one of those parts which he can not recollect now, may be the very thing which prevented it from being a complete machine; and therefore his testimony only advances to a certain stage, and does not reach the point. Eleazer Johnson thinks the machine reproduced here is precisely like the machine which was at Baltimore. Then, upon his own evidence, it is an imperfect machine; because he swears that the machine at Baltimore had defects, and that they had never been able to remedy them. If it be true, as stated by Johnson, that this machine is exactly like the one he saw at Baltimore, then the machine here reproduced will not work without that defect which he swears they could not remedy. On the other hand, if it does work, then Eleazer Johnson is mistaken as to its being like that which he saw at Baltimore. Mr. Johnson is asked the same question, whether he could reproduce that machine, and he says he would not undertake to do it. The recollection of that machine, as a complete invention, rests exclusively with Walter Hunt. Others go to a certain extent; some more and some less. Some say there was a needle and shuttle, cams, driving shaft, and other parts; but when you come to the question, whether they recollect all the parts, there is no man or woman who undertakes to say they do, except Mr. Walter Hunt.

He stands in a peculiar situation. In the first place, he has an interest, because he has bought back his invention from Arrowsmith, with a view to obtain a patent; and besides, he has expressed a deep interest in having the reputation of being the first inventor. In the next place, he is contradicted by four witnesses, as to certain declarations he has made; by Cochran, Gardner, Carlock, A. B. Howe, and also by the affidavit of Elias Howe, the complainant. Now, I shall not go into the particulars of that conflicting evidence. Certainly, there is great force in the argument presented by the counsel for the defense, that some portion of the testimony, as to conversations with Mr. Hunt, is to be received with great caution, as it appears by the letters from Whiting and others to Jackson, that some attempt was made to get Hunt to make declarations inconsistent with his having made a machine which would intercept Howe; and any statements and declarations made in those conversations should be received with caution. But, making full allowance for that, I can not but think that the force of Mr. Hunt's testimony is materially weakened by that opposing testimony. We must recollect, too, the test applied to Mr. Hunt, in order to show his recollection, as to whether he is able to describe his old machine, as in answer to the eighth interrogatory. I do not go into the question now whether a machine made like that description would be an operating machine. That is a contested question. Suppose it would be—how does he stand? After having laid aside his machine, from 1835 to 1851, he comes then to say what that machine was. What has waked him up to that effort and recollection? The invention of Howe is made public by his having obtained a patent—a suit at law is brought by Howe, in order to vindicate his patent; and then Mr. Hunt is called as a witness for the defense in that suit; and it is in proof that Walter Hunt had seen Howe's specification, and had seen Lerow & Blodgett's machine at work—which is admitted to be a copy and an infringement of Mr. Howe's patent. He had then the advantage before he undertook to describe his machine, made in 1834, of having seen a specification of Mr. Howe's machine, and of having seen a machine in successful operation, made by Lerow & Blodgett, now admitted to be an infringement upon Mr. Howe's invention. Now, what test is it of a man's recollection, if he has these aids? Suppose it to be true, as Eleazer Johnson testifies, that there was a defect in that original machine, which caused the shuttle sometimes to stop in the race; and suppose Mr. Howe had made an improvement by which that was prevented, and Lerow & Blodgett's machine showed how that difficulty was obviated—would not Mr. Hunt see, that in a moment—and that single change might make all the difference between the machine being a valuable or worthless one? Then there is the tension on the shuttle-thread. It is insisted by the complainants' experts, that in Hr. Hunt's machine, as described, there was no provision for that tension, so essential for drawing a stitch, and bringing the work together. Suppose there was a defect in Hunt's machine, in that particular, and he saw in Howe's specification how that was remedied—could he not at once incorporate it into his own machine? Might he not think, perhaps believe, that he had something of that sort in his old machine, which he made seventeen years before? He intended to have it—ought to have had it—thinks he did have it. It would be entirely unsafe to rely upon such a test, so many years after the event.

How invariable is it, that after a great invention has been brought before the world, has become known to the public, and been put in a form to be useful, that people start

up in various places and declare that they invented the same thing long before! The cotton-gin, and the ether discovery, are illustrations in point; and others of similar character might be added indefinitely. These pretended prior inventors had thought of such a thing; that they had had the conception of such a thing, perhaps; but they had never carried it to the extent of making it of practical utility, so that the world could obtain possession of it. But when they find that another has completed that which they had begun, they are astonished that they did not see, think they must have seen, all that is necessary, and claim that they have invented it. After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy. I think that this is one of the cases in which several of the witnesses have been led into the illusion of believing that they knew before, what they have learned, or been taught, by Mr. Howe's invention and specification.

We come, then, to another part of the evidence—these old remains. These are very important, undoubtedly; for when a new invention is sought to be intercepted by a former one, the production of a former machine is—I will not say essential—but of very great importance; showing that it does not rest merely in the recollection of witnesses that there was such a thing. These are the remains of a machine, claimed to be invented by Mr. Hunt, as a sewing machine, which was in the hands of Adoniram Hunt, and transferred to Arrowsmith, kept by him, and found by him, as he states, in 1851, in the rubbish of his workshop. They exhibit some of the instrumentalities, but certainly, to the eyes of those who are not experts, but few of the means of forming a sewing machine; and to the eyes of the experts, they present the same deficiency. One, at least, of the defendants' experts, when he was called upon on a former occasion, looked at them, and then testified that there was nothing there from which a sewing machine could be constructed. He says now, that he has changed his mind, upon a more careful examination. At first view, then, they would present no satisfactory evidence of having been a sewing machine. The experts differ materially, as to that old machine. Those for the defendants say that they saw there sufficient to enable them to construct a sewing machine, by the aid—I think all of them put in that—of the reproduction made by Walter Hunt from his memory. I do not think any of them go so far as to say that, from that old machine alone, they could undertake, without other aid, to make a sewing machine that would operate. They thought that, from these old remains, there might have been constructed the machine that is described by Walter Hunt; they thought there was room enough to make such a machine. Then a part of that restored machine rests solely upon the recollection of Mr. Walter Hunt. Now, can any man say, from that old machine, that Eleazer Johnson's testimony is not true, when he says it did not operate? How can any man say that there was not a defect which prevented the shuttle from going through the race?—a defect, of which the persons, and they experts, having the machine entire before them, could not ascertain the cause. Can these experts ascertain the cause, from the mere dry bones of this old machine, divested of its muscles and nerves? They say it must have operated. Their reasoning is evidently the reasoning from analogy, which is very likely to mislead men. The reasoning of Cuvier, by which, from seeing a few bones, he could reconstruct the whole animal, proceeded upon the assumption that the animal was a perfect work, made by a Creator perfect in his operations; and if the animal was a perfect work, then he could see, from its remains, what must have been necessary to make that perfect work. But that would be assuming the point in controversy here. If that old machine was not a perfect work in the hands of Mr. Hunt, how can these experts say, from those remains, how that machine was made—how the other bones, the other operative parts, were placed? Thus, they assume the very question which is here to be tried—whether the old machine was perfect or not.

The experts say that several parts of the old machine are the same as those parts in the new. Undoubtedly, as far as those parts go, they are the same as in the new machine. But how is it with those parts that are not in the old machine? These experts can not say, reasoning by analogy, except upon the assumption that it is a perfect sewing machine. They may say, that in order for a sewing machine to do practical work, it must have had certain instrumentalities; but the very difficulty is to show that the original machine was a perfect one; and it is insisted by the experts, introduced by the complainants, that it could not have been a perfect machine. Those experts say they see nothing there which could satisfy them that it could have been perfect; but, on the contrary, they say, that the restoration made to resemble the old machine is a very clumsy contrivance to obviate difficulties. This old machine may be the imperfect remains of an imperfect machine. That is all it proves itself to have been necessarily.

Then, on the other hand, there are certain great facts which I must advert to now. This invention was appreciated by Mr. Walter Hunt himself, and by Mr. Arrowsmith, to whom he transferred it, to be a matter of great importance. Arrowsmith says he had it in contemplation to get up a company, and if they could succeed in making the machine work, it would make

as much money as he and his associates all would want. Mr. Hunt, when he transferred, as he did at first, half of the machine to Arrowsmith, stipulated for one-half the profit to be derived from it. They then had hopes of perfecting it; and it certainly needed no extravagant imagination in them, to suppose that if they could succeed in perfecting a sewing machine, which should be of practical utility, it would be of great value. They continued to experiment upon it, and endeavored to bring it to perfection.

After Mr. Walter Hunt, the original inventor, had bestowed his time and labor upon it, until he was tired, in 1834, Adoniram Hunt, under Arrowsmith, then worked upon it, more or less, six or eight months, trying to improve it. And what was the result of all this? It was that the other half of the machine was transferred to Mr. Arrowsmith by Walter Hunt. Why did not Walter Hunt and Mr. Arrowsmith take out a patent? Is there any suggestion that they were not able? Certainly not! Walter Hunt was carrying on business at the time he sold his old machine to Arrowsmith. What did he sell it for? He did not sell it for money; for he did not get a dollar for it. He got, in exchange, the interest that Arrowsmith had in certain other machines—in a brad machine, and in a machine for making boxes. There is no evidence here that they were worth a dollar; that they ever came to anything. Well, Arrowsmith took it. What did he do? Did he get a patent for it? Did he sell the right to make? No. Did he get anybody to make a second machine like it? Never. Did he put it to any practical use whatever? Never. He laid it aside; and then, it is said, it was injured at a fire—not by a fire, but at a fire; and the remains are found in the rubbish of his shop in 1851; and from 1835 to 1851, there is no satisfactory evidence that Arrowsmith himself, or that Walter Hunt, the original inventor, or anybody else, ever had any interest or concern in this machine, or took any care or thought about it.

Now, that old machine itself bears upon it indubitable marks of its having been an experimental machine, as it is stated to have been. There are certain marks upon it, which the experts for the complainant say are perfectly unaccountable to them. The explanation given is that the machine was an experimental one, and that these springs and devices were put upon it at an early period, in order to make it operate; but finding they did not succeed, they were abandoned, and some other mechanism substituted for them; and thus it bears the marks of the abandonment of those devices. The very answer of the defendants, therefore, to the difficulties presented by the complainants, show that it was an experimental machine. The question whether this was a perfected machine, or rested only in experiment, and was then abandoned, seems to me clear. What answer is made to the fact, that this very important discovery was thus lost sight of for so many years? Hunt has been living in New York; Arrowsmith is alive, and has been in possession and control of it the whole time; why did they not take out a patent? Arrowsmith gives the answer; and I come to his testimony as to that of the person who knows, better than any other, why it was laid aside, and no patent applied for. He says, it was never so perfected as to be patented; that it would cost from two to three thousand dollars to complete it; that he had not that amount to spend. He says he had money enough to pay for the patent, but he did not have the two or three thousand dollars necessary to perfect it; and that is the reason of his applying to persons to assist him in completing it. But nobody would take any interest in it.

Now, there is evidence brought from Mr. Bennett, in which it is said that Arrowsmith attached a value to the machine as late as 1840, because Mr. Bennett was applied to, to advance money upon it. The only persons who seem to have had an application made to them to take a pecuniary interest in the machine, are Arrowsmith, Carlock, and Bennett; and it is not a little remarkable, that none of them ever did anything with it that was of practical utility, and that two persons applied to, to take an interest, Carlock and Bennett, declined having anything to do with it—Carlock testifying, as the ground of his refusal, that, upon examination, he thought it was valueless. Bennett gives no reason, but states the fact.

Bennett states that, twelve or fourteen years before he gave his affidavit, Arrowsmith showed him some specimens of sewing, and asked him to take an interest in the machine. His impression is that it was fourteen years ago. He had no interest in fixing the date, but thinks it was twelve or fourteen years, perhaps longer. Arrowsmith shows him a piece of sewing done by the machine—perhaps to induce him to advance money upon it. But that is wholly unsatisfactory as fixing the date, and is inconsistent with other testimony. Arrowsmith says that, as far as he knows, he did nothing with it after 1835.

Mrs. Van Buren states, that in 1838, her father, Mr. Hunt, advised her to go into the business of making corsets, with the aid of this machine. If this be correct it would tend to show, certainly, that Walter Hunt might have attached some importance to it. Mrs. Van Buren says that she consulted with some of her female friends, and, on their advice, concluded not to go into the business. Now, Mrs. Van Buren, at that time, was twelve or thirteen years of age; and it is hardly to be supposed that a proposition to go into business on her own ac-

count, with the aid of a new machine, could have been seriously made to a little girl of that age.

The great fact of this machine having been laid aside, as it was, is not accounted for, and is entirely inconsistent with the idea that it was a perfected or valuable machine at that time.

The whole testimony leaves upon my mind no doubt, that however far Mr. Hunt had advanced with his machine, it was never perfected, in the sense of the patent law; that it was only an experiment, and ended in experiment, and was laid aside as an unsuccessful experiment, until the introduction of Mr. Howe's machine.

What I have already said, renders it unnecessary to go into the other point or the testimony, as to whether that old machine was always in the memory and recollection of its inventor, and could be reproduced, or was abandoned and forgotten. I think it would be difficult to maintain that it was known within the meaning of the patent law, when Howe made his invention.

The other question, as to the infringement, remains. I think there can be no doubt upon that point. The plaintiffs' experts, eight in number, have spoken in the most unequivocal, strong and positive manner, in detail, on the question. The defendants' experts have given an opinion to the contrary, on the supposition of a certain construction of the patent law and the patent—an honest opinion, doubtless. They believe there is no infringement.

The weight of testimony, however, as a matter of opinion, is strongly preponderating in favor of the plaintiffs; and from the examination which the court has been able to give to this subject, aided by the evidence, and by the knowledge and experience of counsel, I am unable to arrive at any other conclusion, than that which the experts for the complainants have expressed. The result is, that the plaintiff's patent is valid, and the defendants' machine is an infringement. An injunction is granted.

[For other cases involving this patent, see Howe v. Morton, Case No. 6,769: Same v. Williams, Id. 6,778; and Hunt v. Howe, Id. 6,891.]

Case No. 6,776.

HOWE v. UNION INS. CO.

[See 42 Cal. 529.]

Case No. 6,777.

HOWE v. WADE et al.

[4 McLean, 319.] [1]

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

PROMISSORY NOTES — ACTIONS ON — PAYABLE IN DEPRECIATED CURRENCY—RIGHTS OF CREDITOR.

1. Notes given in Illinois for collection, the proceeds to be applied to the payment of a debt in New York, which notes from the usage and condition of the country, could only be collected in Illinois currency, which was greatly below par in New York; although no special arrangement was made on the subject, the New York creditor is not bound to receive the Illinois notes, but may require the payment to be made in New York in par funds.

2. The agent who made the collections will be allowed his reasonable expenses where suits were brought, commission and the rate of exchange. The agent was one of the New York creditors who were to receive the money collected in proportion to the amount of their claims, but acting as agent for the other New York creditors he is competent, as their agent, to prove the payments to them, under the contract.

At law.

Mr. Chase, for plaintiff.
Mr. Fox, for defendants.

OPINION OF THE COURT. This is a motion for a new trial on two grounds: (1) The verdict is against evidence. (2) The court erred in admitting Fisher Howe to testify as a witness.

From the evidence, it appears that on the 5th of October, 1838, the defendants were indebted to Howe & Co., and the other parties named, in the sum of $4,275.22, and that on the same day Calvin W. Howe & Co. had in their possession funds consisting of promissory notes belonging to defendants amounting to the sum of $4,060, showing a balance due of $215.22 to which if interest be added of $90.39 will make the entire balance due $305.61. At the last term there was a verdict in favor of Kingsland for $386.58, which being added to the verdict in Howe would make the sum of $770. This is 25½ per cent. on the whole amount of the two drafts of Howe & Co., and Kingsland & Company; and it is argued that this is claimed to be occasioned by the difference in exchange, there being no evidence of such difference, and for fees and commissions, without any evidence of payment of commissions, or evidence showing what would be a fair charge for commissions, and it is claimed that no exchange can be recovered unless there was an express contract to cover it.

It must be observed that the securities placed in the hands of Howe & Co., to pay the debts of Howe & Co., and others, all of whom resided in New York, where the debts were contracted and made payable, as of course, consisted of notes of hand on persons in Illinois. Several of these notes could not be recovered by reason of the insolvency of the promisors, and in the collection of others, by suit, expense was incurred. The currency of Illinois only could be obtained on these debts, and the money so soon as it was received entitled the defendants to a credit. And the question, is, whether the currency of Illinois, so received, shall be credited at par on the New York debts. The defendants did not insist or intimate to their agents, Howe & Co., that they should receive

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

nothing but specie or its equivalent, and it was notorious that debts could not be collected in Illinois, in that manner. It was presumed, therefore, that in the collection of the debts by Howe & Co., the currency of the country should be received in payment, as was customary, and they could not expect that such funds would be received at par in the discharge of the New York city debts. So far as these payments are concerned, there must be an allowance of the rate of exchange between Illinois and New York, and as regards the expense of collecting the money, the expense incurred by the employment of counsel, and the payment of costs, by the agents, Howe & Co., there must also be a charge against the defendants, and also, what shall be a reasonable commission for transacting the business. The notes were not received as money, and they were to be collected by the agents, and the proceeds applied in the discharge of the sum due the defendants' creditors in New York. In this view, the above allowances for expenses, exchange and commission, are proper and equitable. And, without deciding in regard to the right of an allowance for exchange in the amount of the judgment recovered, as the balance due, it may be proper to remark that there was no satisfactory evidence before the jury as to the amount of the exchange and commissions and expenses paid, so that on this ground the verdict will be set aside, which will afford an opportunity to procure evidence on these points. The principle on which exchange is allowed is considered in Weed v. Miller [Case No. 17,346].

As the decision of the motion is made on the first ground, it is not necessary to consider the second ground, founded upon the error of the court in admitting Fisher Howe to be sworn as a witness, who, it is claimed, was interested in the case.

To understand the application of the objection, the following facts must be stated: Howe & Co., composed of Calvin W. Howe, the plaintiff, and Fisher Howe, the witness, being partners, sold a bill of goods to Lowry, Wade & Co., and took their note, which is now sued on. In 1837, Lowry, Wade & Co., pledged with the plaintiff and witness, notes amounting to $4,000, the amount to be distributed when collected among the following creditors, pro rata, to wit: To C. Howe & Co., $2,289.50; Kelly & Co., $353.19; Kingsland & Co., $1,049.72; to another person, $308.34. The creditors in New York made Howe & Co. their agents to arrange their debts in the best manner that could be done with the firm in Illinois. And Lowry, Wade & Co., made their arrangement with Fisher Howe, under the authority given to Howe & Co. Upward of three thousand dollars were collected in Illinois paper. There was no dispute as to this amount. The controversy was, as to the allowance of exchange, expense of collections in Illinois, and a commission, etc., and the payment to the other New York creditors a rateable proportion of the money received. To prove this payment to the other creditors in New York, Fisher Howe was introduced as a witness. He was objected to, on the ground that he was interested, in being liable jointly with Calvin Howe, his partner, for the payment over of the money received to the other creditors in New York. Before the trial, it appeared that Fisher Howe had dissolved partnership with his brother, and had no further interest in the partnership concern. At this time Fisher Howe assigned one of the notes given by Lowry, Wade & Co., for the payment of the debts due in New York, the other note having been discharged, and Calvin Howe agreed to pay all costs in the controversy with the Illinois firm; and the question is, whether Fisher Howe is an interested witness. As the agent of the creditors and of the debtors, he is a competent witness, unless he be excluded on account of interest in the demand of Calvin Howe & Co., etc.

It is argued, that the witness is responsible with Calvin Howe, his late partner, for the whole amount collected, and the object is to prove by him the payment over to the other New York creditors, a due proportion of the money received. It must be observed, that Fisher Howe acted, in the collection of the money, as the agent of the New York creditors; is he not, therefore, a competent witness to prove the payment of their due proportion of the money collected? Could not Lowry & Co., call him as a witness for this purpose; and was not a payment to Fisher a payment to his principals in New York? And the necessity for this kind of evidence arises from the defense set up by the defendants, that they have paid to Fisher Howe a greater sum than will cover the debt due to Howe & Co. If Fisher Howe, therefore, would be a competent witness to prove these payments in behalf of the defendants, is he not equally competent in this case to establish the same facts? He swears to nothing which can, by any possibility, be given in evidence in his favor hereafter.

The counsel for the defendants refer to the case of Marshall v. Thrailkill's Ex'r, 12 Ohio, 275, in which case one of the makers was offered as a witness by the plaintiff, merely to prove the hand writing of the maker, and it was decided in bank that he was incompetent. And again, in Armstrong v. Deshler, 12 Ohio, 475, the suit was brought on a note signed by several. Lyon, one of the defendants, living in Missouri, was returned not found, and was proved to be insolvent. His co-defendants released him from all contribution, and deposited one hundred dollars with the clerk to cover costs. But the court held that he, on being offered as a witness to prove the note was usurious, was an incompetent witness, because the plaintiffs had a right to look to the witness

for their whole claim, and that the defendants could not release him from liability. This decision was undoubtedly correct; and the witness might have been excluded on another ground, not sanctioned by some courts, but which is an established rule of decision in the supreme court of the United States, that no individual, whose name appears as maker or indorser upon a bill or note, shall be competent to show that it was obtained illegally or given for an unlawful consideration. But that case is not analogous to the point we are considering. Fisher Howe was only liable to the other New York creditors as their agent, and being so liable, does not exclude him from being a witness to prove that he paid the money to them, in a suit between them and the Illinois firm. "An indorser who, as agent, had received money from the acceptor to pay the bill, was a competent witness for the acceptor, in an action against him by a subsequent indorser to prove payment of the bill; for, otherwise the rule would have excluded every witness who had paid money as agent." Reay v. Packwood, 7 Adol. & E. 917.

It will be observed that Fisher Howe was offered to prove, that in discharge of his duties as agent, he had paid to the creditors their proportion of the money received by him, which does not come within the case first cited from 12 Ohio. Whether he would be a competent witness to prove the amount of commissions he was entitled to, is a different question. He was not examined on that point. We think he was a competent witness to prove the fact for which he was called. A new trial is granted at the costs of the defendants.

At a subsequent term the cause was submitted to the court by the counsel, and the court, from evidence, fixed the rate of exchange, commissions, and amount of expense.

Case No. 6,778.

HOWE v. WILLIAMS.

[2 Fish. Pat. Cas. 395; 2 Cliff. 245.] [1]

Circuit Court, D. Massachusetts. Oct., 1863.

PATENTS — IMPROVEMENT IN SEWING MACHINES — JURY ISSUES — MATTER NOT SET UP IN ANSWER — ADMISSIBILITY ON FINAL HEARING — INFRINGEMENT OF RENEWED PATENT — SIMILAR DEVICES.

1. Original bill filed during the term of the original patent. Patent having been extended pending the suit, a supplemental bill was filed; extended patent having been surrendered, and reissued, the suit still pending, a second supplemental bill was filed, upon which the cause came on for final hearing. Letters patent to Elias Howe, Jr., for "improvement in sewing machines," granted September 10, 1846, extended for seven years, from September 10, 1860, and reissued March 19, 1861, examined and sustained.

2. A motion for jury issues is sometimes granted where the patent is recent, and where the case shows that the originality of the invention is doubtful, or where the merits of the controversy chiefly depend upon contradictory evidence, involving the credibility of witnesses. But where the patent is of long standing, and the inventor has had an exclusive possession under it, the motion for a trial, at law, is seldom received with any favor.

3. The motion for jury issues ought not, in general, to be granted where it appears that a trial at law and a hearing in equity have already been had, and that both have resulted in favor of the complainant.

4. Machines not set up in the answer as matters of defense, cannot be introduced in proof, or be considered upon final hearing.

5. It is no justification of the infringement of a renewed patent, that the infringer had used the invention with impunity before the patent was amended.

[Cited in Jones v. Sewall, Case No. 7,495; McWilliams Manuf'g Co. v. Blundell, 11 Fed. 421.]

6. Devices used by a defendant, differing in form and having different names from those employed by the patentee, but arranged and combined in the same way, performing the same functions, having substantially the same mode of operation, and producing the same result, are infringements of the patent.

Bill in equity [by Elias Howe, Jr., against Charles W. Williams] for the infringement of certain letters patent on a sewing-machine, and praying for an account and an injunction. The bill of complaint, filed on the 9th of August, 1859, was founded on original letters patent dated the 10th of September, 1846. As originally granted the patent would have expired on the 10th of September, 1860, but an extension was obtained on the same for seven years, and on the 7th of September, 1860, a supplemental bill was filed setting forth the extension. Subsequently the patent was surrendered, and a reissue obtained, dated the 19th of March, 1861 This was also set forth by supplemental bill filed the 12th of April, 1861. In his answer to the supplemental bill, the respondent alleged that after filing his answer to the original bill he had obtained letters patent of the United States for an improvement in sewing-machines, invented by him, and which was used in the machines sold by him.

The principal defences were, first, that the complainant was not the original and first inventor of his supposed improvement; and second, that if he was, the respondent had not infringed the same. The respondent first submitted a motion to the court that an order be passed, directing all the proceedings in the court to be stayed, and that the complainant be required to bring an action at law to determine the several matters involved in the suit, or that it be ordered that issues for a jury to settle the same be framed under the direction of the court. Upon the motion, the court said: "Sueh a motion is sometimes

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission. The statement is from 2 Cliff. 245, and the syllabus and opinion are from 2 Fish. Pat. Cas. 395.]

granted where the patent is recent, and where the case shows that the originality of the invention is doubtful, or where the merits of the controversy chiefly depend upon contradictory evidence, involving the credibility of witnesses; but where the patent is of long standing, and the inventor has had an exclusive possession under it, the motion is seldom received with any favor. Washburn v. Gould [Case No. 17,214]; Hill v. Thompson, 3 Mer. 622; Collard v. Allison, 4 Mylne & C. 487. Other examples, where such a motion was granted, are also shown in some of the numerous cases cited by the respondent, but it is a sufficient answer to all such decisions, as applied to this case, to say that the motion ought not in general to be granted where it appears, that a trial at law and a hearing in equity have already been had, and that both have resulted in favor of the complainant; and the motion is accordingly overruled. Goodyear v. Day [Case No. 5,569]."

Several patented machines were introduced by the respondent as showing that the complainant was not the original and first inventor of what he claimed in his specification, namely, the machine of J. J. Greenough, patented the 21st of February, 1842, that of G. H. Corliss, patented the 27th of December, 1843, and that of B. W. Bean, patented the 4th of March, 1843. The above-named were American patents. Two English patents, one to Martin and Archbold, the 4th of May, 1844, another to Foster and Gibbon, the 7th of December, 1844, and one French patent to Thimonier, dated the 17th of July, 1830, were also introduced. A particular description of these is to be found in the opinion of the court.

The following were the claims of the complainant's reissued patent:—First. A sewing-machine, constructed and operating to form a seam, substantially as described. Second. The combination of a needle and a shuttle or equivalent, and holding surfaces, constructed and operating substantially as described. Third. The combination of holding surfaces, with a baster-plate or equivalent, constructed and operating substantially as described. Fourth. A lifting-rod, a clipping-lever, and a receiving-pin, respectively, each constructed and operating to control the threads, substantially as described. Fifth. A baster-plate, constructed and operated substantially as described. Sixth. Holding surfaces constructed and operating substantially as described. Seventh. A grooved and eye-pointed needle, constructed and adapted for rapid machine sewing, substantially as described. Eighth. A side-pointed shuttle, constructed and operating substantially as described.

B. R. Curtis and Causten Browne, for complainant.

It is not enough that the patenting abroad should take place before the application of the American patentee. It must be before his invention. Sprague, J., in Howe v. Morton [Case No. 6,769], March, 1860; Bartholomew v. Sawyer [Id. 1,070], Ingersoll, J. Nor is it enough that the English patent should have been sealed, but it must appear that the specification was enrolled, before the American patentee makes his invention, in order to defeat his patent.

Caleb Cushing and A. C. Washburn, for respondent.

CLIFFORD, Circuit Justice. This is a bill in equity, wherein the complainant alleges that he is the original and first inventor of a certain new and useful improvement in sewing machines, which was duly secured to him by letters patent, and that the respondent, well knowing the premises, has, without his consent and in violation of his exclusive right, made, used, and vended to others to be used, a large number of sewing machines, embracing substantially his patented improvement. Wherefore the complainant prays for an account, and for an injunction. His bill of complaint, founded on his original letters patent, dated September 10, 1846, was filed on August 9, 1859, and on October 3 following, the respondent filed his answer to the same. As originally granted the complainant's patent would have expired on September 10, 1860, but he obtained an extension of the same for the term of seven years from and after that date, and on November 7, 1860, he filed a supplemental bill of complaint, setting forth the fact of such extension. Having secured such an extension of his patent the complainant afterward surrendered the same, on account of a defective description, and it was canceled, and on March 19, 1861, a new patent was duly issued to him on an amended specification, and as he alleges, for the same invention, to continue for the term of twenty-one years from the date of the original patent. Accordingly the complainant, on April 12, 1861, filed a second supplemental bill of complaint, setting forth such surrender and reissue. Respondent filed his answer to the supplemental bills of complaint on June 29, 1861, and, among other things, alleges that since the filing of his answer to the original bill of complaint he has obtained letters patent of the United States for an improvement in sewing machines made and invented by him, which is of great value, and which is used by him in the machines that he sold. His principal defenses to this suit are, first, that the complainant is not the original and first inventor of his supposed improvement; and secondly, that if he is, that he, the respondent, has not infringed the same. Before proceeding, however, to examine the merits of the case, it becomes necessary to consider a preliminary motion submitted by the respondent. He moves the court that an order be passed directing that all proceedings in the cause be stayed, and that the complain-

ant be required to bring an action at law to determine the several matters involved in this suit, or that it be ordered that issues for a jury to settle the same be framed under the direction of the court, as more fully set forth in the record. Such a motion is sometimes granted, where the patent is recent, and where the case shows that the originality of the invention is doubtful, or where the merits of the controversy chiefly depend upon contradictory evidence, involving the credibility of witnesses; but where the patent is of long standing, and the inventor has had an exclusive possession under it, the motion is seldom received with any favor. Washburn v. Gould [Case No. 17,214]; Hill v. Thompson, 3 Mer. 622; Collard v. Allison, 4 Mylne & C. 487. Other examples, where such a motion was granted, are also shown in some of the numerous cases cited by the respondent, but it is a sufficient answer to all such decisions, as applied to this case, to say that the motion ought not in general to be granted where it appears that a trial at law and a hearing in equity have already been had, and that both have resulted in favor of the complainant; and the motion is accordingly overruled. Goodyear v. Day [Case No. 5,569]. Returning to the merits of the controversy the most important inquiry is, whether the complainant is the original and first inventor of the improvement described in the specification and claims of his reissued letters patent. Referring to the concluding part of the specification, it will be seen that the claims are eight in number, and it is proper to remark that they are so plainly and explicitly expressed that they can not be regarded as of doubtful construction. They are all, in fact, substantially included in the first of the series, which reads as follows: First. A sewing machine, constructed and operating to form a seam substantially as described. Particular description is also given in the specification, not only of the mode in which the machine operates, but also of the several devices or elements of which it is composed, and those several devices or elements when taken as an organized whole, constitute the invention specified in the first claim of the reissued patent. Those devices as set forth in the specification, are divided into three classes, and when so classified they constitute a mechanism for manipulating the threads, or an apparatus for stitching, and an apparatus for holding the cloth during that process, and an apparatus for feeding the cloth operating in the same connection, and all acting in combination to form the seam. Separately considered the mechanism for manipulating the threads consists of an eye-pointed reciprocating needle constructed with a groove so as to protect the threads in the rapid movement through the cloth, and a shuttle or its equivalent for detaining and interlocking the loops of thread passed through the cloth by the needle, to which must also be added the lifting rod and clipping lever, and the receiving pin, which may be regarded as appliances for controlling the threads, and for making tension on the same, so that each stitch may be drawn tight by the operation of the machine. Certain opposing local surfaces, as described in the specification, constitute the holding apparatus, consisting of the shuttle box, or one side of it, and of a certain metallic plate, whose upper end, as therein described, is attached to the frame of the machine. Means are also described for adjusting those two local surfaces to the thickness of the material to be sewed, showing conclusively that they are designed to press upon the cloth or other material, in the operation of the machine, and perform the functions of holding devices. Those opposing surfaces sustain the cloth during the operation of stitching, holding it in position against the thrust and retraction of the needle, but they are so adjusted, or may be, that the pressure and retention are not sufficient to prevent the feeding of the cloth for the purpose of spacing the succeeding stitch, preparatory to another corresponding perforation of the needle. They so operate as to make the pressure upon the cloth near the point of sewing, leaving the other parts of the same comparatively free, and they also serve to guide the cloth so that it may be fed in a determined plane, and confining the same in the proper locality, so that the stitch may be drawn tight. Briefly described, the feeding apparatus consists of a metallic plate, supplied with projecting teeth, which take hold of the cloth, and are designed to answer somewhat the ordinary purposes of basting, and the plate is also furnished with a row of small holes, drilled, at regular distance from each other, answering the purpose of rack teeth, so that the plate, as the stitch is taken, may be moved forward between the two stationary holding surfaces, by means of a pinion, which enables the operator to regulate the length of the stitches at pleasure. Explanations, to show that the feed is automatic and intermittent, are unnecessary, and held, as the cloth is, between those two local surfaces, during the forward movement of the metallic plate, it is evident that those devices aid in keeping the cloth in place while the feeding is accomplished, and consequently they must also be regarded as a component part of the feeding apparatus, to the extent that they modify the action of the feeding instrument. Two threads are employed in forming the seam, as described in the specification. One is carried through the cloth by the eye-pointed needle, and forms the loop through which the shuttle passes that carries the other thread. When the shuttle is returned, which is accomplished by means of a device called the shuttle driver, the thread that was carried by the needle is surrounded by that received from the shuttle, and as the needle is drawn out it forces the shuttle thread into

the body of the cloth, forming a seam, which has the same appearance on each side of the cloth, with this peculiarity, that the thread shown on the one side is exclusively that which was given out by the needle, while the thread seen on the other side is exclusively that given out by the shuttle. Such is the general description of the principal devices of the machine described in the specification, and their arrangement and mode of operation. Reference is specially made in the first claim of the patent to the description given in the specification, and of course the several parts of the instrument must be construed together. Like other sewing machines, in use at the present time, the one described in the patent of the complainant is composed of various devices, but the claim is for the organized machine, as an existing whole, and not merely for some or all of the separate devices of which it is composed, or for some or all of those devices as a mere technical combination. Undoubtedly the several devices operate in combination, and consequently the invention itself consists, in a certain sense, of a combination of those various elements, so constructed and molded into harmonious action as to accomplish the described result, but still the invention is not a technical combination of old devices where, in order to maintain an infringement, it is necessary to show that the respondent has pirated the whole. On the contrary, the claim under consideration obviously is, that the complainant is the original and first inventor of the organized sewing machine, whose several devices are described in the specification, when viewed as an existing whole, and operating to accomplish the desired result. Seven other claims, numbered from two to eight inclusive, are also made by the complainant, but having come to the conclusion that the first claim, when properly construed, is for the organized machine as an existing whole, it will not be necessary to enter into any very minute explanations of the other claims. They are substantially as follows: Second. For the combination of the needle and the shuttle, or equivalent, and the holding surfaces. Third. For the combination of the holding surfaces with the baster plate, which is the metallic plate already described. Fourth. For the lifting rod, clipping lever, and receiving pin, constructed and operating to control the threads substantially as described. Fifth. For the baster plate, as constructed and operating. Before proceeding with the enumeration however, it should be remarked, that the complainant does not claim damages in this suit for the infringement of the several devices mentioned in the fourth and fifth claims of his patent, except so far as they constitute parts of the general plan, and enter into the general organization of the machine, and co-operate with other parts to produce the result. Sixth. The claim is for the holding surfaces. Seventh. For the grooved and eye-pointed needle. And, eighth, for the shuttle, called a side-pointed shuttle, constructed and operating substantially as described in the specification. Attention, for the present, however, will be confined to the first claim, not only because it presents the great question in the case, but also for the reason that if the question there presented is decided in favor of the complainant, a particular examination of the other claims is unnecessary.

It is insisted by the complainant that the essential parts, combination and mode of operation of his machine as organized are new, and that, in fact, he is the original and first inventor of the same when viewed as an organized whole. But the respondent denies that proposition, and insists that several organized machines for sewing, both foreign and American, had been invented and patented, before the invention under consideration was made by the complainant. Full proof is exhibited that the complainant invented the sewing machine described in his specification, or "was employed in inventing and making it about December 1, 1844," and it is undeniably proved that the machine was "finished, and in working order, so as to sew firm seams, as early as the middle of May," in the following year. Two suits of clothes were sewed by the machine, so made, about the middle of July, in the same year, and the testimony is, that they wore as well as any hand sewing. Witnesses were examined, who identify the machine, and it was exhibited at the hearing, and operated by the complainant, in the presence of the court. Whatever differences of opinion there may be as to the merits of the controversy, all must agree, I think, that the machine in question, although it was made nearly twenty years ago, compares favorably with the best constructed models of the present time, and that it reflects great credit upon the maker, as a specimen of mechanical ingenuity and skill. Respondent does not deny that the complainant constructed the machine exhibited, and the clear inference from all the evidence is, that he did so without the slightest knowledge of any one of the machines set up in the answer, as superseding his invention. Assuming the fact to be so, then clearly the complainant is the inventor of the improvement described in his specification, and the only question on this branch of the case is, whether he is the first inventor of the same. Most of the machines set up in the answer, have been under consideration in the courts, and on one occasion, at least, where the subject-matter in contest was substantially the same as that involved in this suit. And whenever the subject has been considered the decision has uniformly been, that no one of those machines is of a character to supersede the invention of the complainant. Considering them in the order mentioned in the answer of the respondent, they are as follows:

1. The machine of J. J. Greenough, patented February 21, 1842. 2. That of George H. Corliss, patented December 27, 1843. And, 3, the machine of Benjamin W. Bean, patented March 4, 1843, and all which are American patents. Two English patents, and one granted in France, are also set up in the answer. Those granted in England are the patent to Newton & Archbold, dated May 4, 1844, and the patent to Fisher & Gibbon, dated December 7, 1844, but which was not enrolled until the seventh day of June in the following year. And the one granted in France is the Thimonier patent, dated July 17, 1830—which is much relied on by the respondent as superseding the patent of the complainant. Both parties concede that the machines of Greenough and Corliss, so far as they apply to the issue involved in this case are substantially alike, and, consequently, they may be considered together. Particular examination of the separate devices of those machines will not be necessary, as it is evident that their construction, design, and mode of operation, are substantially different from the machine of the complainant, which will sufficiently appear from a general view of the machines. Obviously they were invented and designed to form the stitch of the harnessmaker, composed of two threads which pass through the material to be sewed at each stitch, and in opposite directions, and they have no shuttle or equivalent device. Holes are first made in the cloth, or other material, by pincers, and the threads are then carried through those holes by a double-pointed needle, grooved each way on both sides near the eye. Eye-pointed needles, such as are exhibited in the complainant's machine, pass only so much of the thread through the cloth as is necessary to form the loop; but the double-pointed needles, shown in the other machines, pass the entire needleful of thread through the cloth, and must do so in order to form and tighten the stitch, and in opposite directions, so that there can be no interlocking of the threads, as in the machine of the complainant. They employ two threads, it is true, but each thread acts independently, and has the precise same effect as it would have if used without the other. And they have no stationary holding surfaces operating, as in the machine of the complainant, to press upon and hold the cloth in the immediate vicinity of the stitching, leaving the residue of the same comparatively free to be governed and controlled by the hand of the operator. Clamps, instead of stationary holding surfaces, are employed in these machines to hold the material to be sewed, and it is fed forward for a succeeding stitch by a ratchet movement of the clamps in which it is so held. Other particulars might be pointed out in which the machines under consideration are different from that of the complainant, but those already suggested are sufficient, I think, to show that they can not be regarded as superseding the complainant's patent.

2. Reliance is also placed by the respondent upon the machine of B. W. Bean, as supporting this ground of defense; but even a cursory examination of the description of it, as contained in the specification, will clearly show that the machine can not avail the respondent for any such purpose. Devices, called cog wheels, combined with other devices, called gear wheels, are employed to crimp the cloth preparatory to the making of what the inventor calls the running stitch, and they also serve to hold the cloth; and after the same is crimped to force it upon a stationary needle, causing it to pass through the folds or corrugations of the cloth, so that, when it is afterward drawn out, it exhibits on both sides of it a basting or gathering seam. Such is a general description of the operation of the machine and some of its principal devices. Taken as a whole, it bears little or no resemblance to the machine of the complainant, except that it has a mechanism for holding and feeding the cloth, and one for making a stitch, but all of the principal devices, as well as the stitch and seam, are very materially different, and so much so that the machine can hardly be regarded as a sewing machine, within the meaning of that term as employed in the patent of the complainant. Regarded as a basting machine, it may have been of some commercial value; but it is quite obvious that it can not in any point of view have the effect to maintain the defense set up by the respondent.

3. Examination must also be made of the foreign machines set up in the answer, of which the machine of Newton & Archbold is the one first mentioned. They describe the subject-matter of their patent as an "invention of improvements in producing ornamental or tambour work in the manufacture of gloves," and evidence is wholly wanting to show that the machine was ever used for any other purpose. Ornament, such as the machine is designed to accomplish, consists of rows of loops or chain stitches on the back of the glove, or of the cut-out material fitted to make that part of the glove. Patentees express a decided preference that the gloves should be made before the ornamenting is attempted, but suggest that it may also be accomplished on the cut-out material before the glove is manufactured, leaving it clearly to be inferred that the sewing of the gloves is not to be performed with the machine, according to the description. Clamps are used by the inventors, to hold the material, and the feeding of the same is accomplished by moving the frame of the clamps in which the material is held. Certain modifications are suggested in the specification, and in one of them a bent wire is mentioned as a device pressing upon the material of the glove to prevent it from being forced up by the needles, but the suggestion does not embrace

any holding surface opposite the wire, and consequently the machine, if so modified, would still be without the stationary holding surfaces found in the machine of the complainant. Machines constructed according to the specification have seventy-two needles, arranged in gangs of six upon twelve vibrating levers, and they are so constructed, or intended to be so constructed, as simultaneously to lay a number of rows of the ornamental loops or stitches. Slots are constructed in the clamps in which the glove, or the material for the back of the glove is placed, and the needles are worked through those slots so that seams, such as are usually made in garments, apparently could not be made without essential modification of the clamps, or other devices of the machine. Single threads are used, that is one thread to each needle, and there is no shuttle or equivalent, nor any apparatus described or suggested for tightening the stitches of the seam. Superadded to all these differences, it should also be remarked, that there is no interlocking of the stitches, as in the machine of the complainant, and can not be, under the present construction of the machine—because single threads are used, and there is no shuttle or equivalent device. Such a machine is doubtless of some value when it is employed to accomplish the special purpose for which the invention was made, but it is plainly not of a character to supersede the sewing machine invented by the complainant when viewed as an existing whole.

4. Pursuing the order already indicated, the next machine to be considered is that of Fisher & Gibbon, which, as described by the patentees, is an invention of certain improvements in the manufacture of figured or ornamental lace, or net, or other fabrics. Two forms of the invention are described in the specification, but it is the second which more especially comes under revision in this case. Confining attention to the latter, it is clear that the design of the machine was to embroider or ornament lace, muslin, or other fabric of similar texture, with gimp or cord. Inventors use two threads to accomplish the work, but the gimp or cord constitutes one of the threads, and the principal ingredient of the ornament or embroidery. They also describe the complicated apparatus employed to effect the result, which, among other devices, consists of a series of needles and shuttles, arranged in sets, each set having a needle and a shuttle, and the series being sufficiently multiplied to extend the work over the entire width of the material to be ornamented or embroidered. None but thin fabrics are used as the material for the foundation of the work, and the material is placed on two rollers, so arranged that the material may be wound off from one on to the other, in order, at proper intervals, to bring forward fresh surfaces to be ornamented; and being drawn over bars, between the rollers, which are at considerable distance apart, it is kept stretched, as it passes from one roller to the other, in the operation of the machine. All the needles have a curve or crook in the length, and are attached to a bar, and that same bar operates the whole series. Drawings also are annexed to the specification, which show what the construction of the shuttle is, but it is only necessary, upon that subject, to say that it is the common ribbon shuttle, as contended by the complainant. Gimp, or cord, it will be remembered, is used in the shuttle instead of thread, and the description of the operation is that the shuttle passes through at the bend of the needle, and between the thread of the needle and the needle itself, every time the needle passes up through the material to be ornamented.

Broad loops of the thread carried by the needle are necessary, in order to secure the passage of the shuttle between the thread of the needle and the needle itself, as described in the specification, and on that account the needle is required to be formed with a curve or crook in its length, and it is obvious that a compliance with the requirement is essential to the operation of the machine, because without the additional space between the needle and its thread, which is obtained at the bend by the curve or crook in the same, the shuttle would not at all times pass between the needle and its thread, and consequently would fail to perform its functions in a manner to accomplish the result described in the specification.

Minute description is also given of the several devices employed for driving the shuttle, but it is not necessary to enter into the particulars of the narration, as the apparatus described bears little or no analogy to the devices employed for that purpose in the machine of the complainant. Suffice it to say, that the shuttles are moved to and from the back and front of the machine, for the purpose of carrying the gimp or cord, and of performing certain other functions in connection with the operation of the needle in sewing down the gimp or cord. Explanations have already been given to show that the needle, in its first movement, comes up through the material to be ornamented, and that the shuttle passes between the needle and its thread as often as the needle ascends. Notice should also be taken of the fact that the needle with its thread is employed to sew down the gimp or cord, carried by the shuttle on to the foundation material, and of the further description of the operation by which it is accomplished. Having described the operation of the devices which cause the first ascent of the needle, the inventors state that just after the shuttle has been moved from the front to the back of the machine, the needle descends, "sewing down" the gimp or cord "laid by the shuttle;" and, continuing the description, they also state that the needle then ascends again, when the shut-

tle is moved toward the front of the machine, until it is taken by the front catches and carried back, and then the needle again descends, which completes the operation. Laying the gimp or cord, therefore, is the principal result accomplished by the shuttle, but the sewing down of the same is accomplished by the needle. Compare the analysis given of the specification of the machine under consideration, with that given of the specification of the complainant's machine, and it is clear that the two are different in every material respect. One employs needles with a curve or crook in the length, and a common ribbon shuttle, while the other employs straight needles and a shuttle of peculiar construction; and those differences are characteristic and essential to the respective combinations in which they exist, and can not be obliterated, in the one or the other, without affecting injuriously the operation of the particular machine. Stationary holding surfaces are employed by the complainant, but there are no such devices in the other machine, and the apparatus for feeding the material and tightening the stitches, found in the machine of the complainant, are totally different from any corresponding mechanism described in the specification of the other machine. Marked, however, as the differences are, in respect to the devices employed, they are even more palpable and striking in respect to the mode of operation, as sufficiently appears from the explanations already given, which need not be repeated. Complainant's machine is suited to rapid sewing, and may be used to sew firm seams in garments; but the other machine can not accomplish any such result, and can not be made to do so without essential modifications, because, in point of fact, it is an embroidering machine, and not a sewing machine. Such a machine can not supersede the machine of the complainant, and having come to that conclusion it is not necessary to determine the question whether, in a case like the present, the foreign patent must be considered as taking date from the sealing of the letters patent, or from the time of the enrollment of the specification.

5. Great reliance also is placed by the respondent upon the Thimonier machine, which was patented in the kingdom of France. Reference to the general elements of the combination, however, will be sufficient to show that the machine bears no substantial resemblance whatever to the machine of the complainant. First. It has no feeding apparatus of any kind, and consequently will not make a single stitch unless aided by the operator of the machine. Secondly. It has no shuttle or equivalent device, and employs but one thread in the stitching. Thirdly. It uses a crochet or hooked needle, instead of the needle employed in the complainant's machine, and a device termed in the patent an "accroucheur," which operates to lay the thread on to the hook of the needle after it has passed through the cloth. Fourthly. The material to be worked is laid upon a horizontal table, and so fed forward and guided by the hand of the operator. Fifthly. It has no mechanism by which the length of the stitch is regulated, automatically, and the evenness of the stitching depends chiefly upon the skill and experience of the person who guides the material. Sixthly. There is no apparatus for the interlocking of two threads, and if there was, it would be useless, because one thread only is used in forming the seam. Seventhly. The stitch itself is widely different from that produced by the machine of the complainant. Experts describe it as the chain stitch, and the machine is denominated as one "suitable for the production of seams called chain stitching upon all sorts of stuffs and cloths." Considering that the dissimilarity in this respect is admitted, it will be sufficient to add, without entering into particulars, that the stitch consists of a succession of loops, one through another, by a single thread, forming a continuous seam on the surface of the material employed as the foundation of the work. Eighthly. The holding apparatus is also substantially different in its mode of operation, and in its combination with the other devices, especially with those constituting the mechanism for feeding. They are the horizontal table on which the cloth is laid, and a device, called in the patent an "onglette," which is a small, thin tube or rim surrounding the crochet hook, and which at times presses upon the cloth and holds it down upon the table, operating to prevent the cloth from following the hook in its retraction. Such pressure, however, only occurs when the crochet hook descends for a loop, and of course the effect is upon the previously-made loop, as well as upon the cloth, keeping it open so that the hook may pass through it without catching as it is retracted to bring up the new loop. While the pressure continues, the "onglette" obviously performs the function of a holding surface, and it is also an efficient adjunct of the stitching mechanism; but when the new loop has been brought up and the cloth is to be moved forward, the device in question, instead of co-operating to feed the cloth, as is the case in the machine of the complainant, is withdrawn altogether from the cloth and becomes entirely inoperative. For these reasons, I am of the opinion that the machine has no tendency to show that the complainant is not the original and first inventor of his improvement.

6. Nothing need be remarked respecting the W. Hunt machine, described in Brewster's Encyclopedia, except to say that the former was a failure and the latter was a tambour-machine, for ornamenting goods in the web, and was designed to work with a series of crochet needles extending across the entire width. Suggestions, however, are therein made that a needle with an eye near the point may be used, in combination with

the hook, instead of the crochet needle, as described. Proper devices to work with it in combination, in order to enable it to accomplish the result, are not described; and there is no suggestion that it should be grooved for the protection of the thread. Giving the suggestion the utmost force to which it can be entitled, in any point of view, it merely shows that an eye-pointed needle was known before the complainant invented his organized sewing machine. Suppose that be granted, still the concession would not maintain the present defense, because the suggestion is of an untried invention, and is wholly unaccompanied by any explanation to show that it could be constructed and adapted for ordinary rapid machine sewing, or for sewing firm seams, as in garments.

7. Special reference was also made at the argument to the machine of Henry Bock, and also to the machine of William Sneath, but upon examination, it appears that neither of those machines is set up in the answer, and consequently they are not in the case. Copies of the patents, however, were furnished to the court at the hearing, and in order to prevent any misapprehension upon the subject, it may perhaps be well to say that they have been examined, and I am of the opinion that if they had been duly set up in defense, they could not have benefited the respondent. But the objection to their introduction as evidence was seasonably taken, and clearly they can not be admitted, as it would operate as a surprise upon the complainant.

8. Abandonment is also set up by the respondent, which is the next ground of defense to be considered. Among other things, he alleges that machines producing the chain stitch, and two needle machines have been, with the knowledge of the complainant, extensively manufactured, used, and sold in public, and that he has deliberately acquiesced in such manufacture, use, and sale, whereby he has surrendered and abandoned any right or title he may have had to any exclusive property under his patent. He also alleges, that in consequence of such manufacture, sale, and use, and of the acquiescence of the complainant, he, the respondent, was led to believe, and did believe, that the manufacture of his machines would not be deemed to be an infringement of the complainant's patent, and was thereby induced to make large expenditures for carrying on his business as a maker of sewing machines, which will be wholly lost if he is enjoined in this suit. Argument is unnecessary to show that the matters pleaded in the answer are in avoidance of the claim of the complainant, as set forth in the bill of complaint. Such an allegation in the answer is not evidence, but the facts therein stated must be proved, and the burden of proof is upon the respondent. Hart v. Ten Eyck, 2 Johns. Ch. 88; 2 Story, Eq. Jur. § 1529; 3 Greenl. Ev. § 287. Testimony was introduced by the respondent, which shows that needles for machine sewing, with grooves, had been known for about five years, and one of the witnesses stated that he had known them to be used in a very large number of chain stitch and shuttle machines. Inquiry was also made of a third witness, who stated that he had frequently seen such machines, but he was not able to state what number he had seen, nor could he state how extensively they had been in use, or on sale. They do not state where they saw such machines, nor any of the attending circumstances, nor when or where they were manufactured, used, or sold. Knowledge on the part of the complainant, of such use and sale, is alleged in the answer, but there is not one of the witnesses that undertakes to testify to any such fact, or to state any circumstances from which any such presumption can properly arise. Acquiescence, therefore, on the part of the complainant in such manufacture, use, and sale, is not proved, nor is it shown that the respondent had any reasonable ground to believe that the manufacture, use, and sale of machines like those of the complainant, would not be deemed to be an infringement of the complainant's patent. Claim was not made for the grooved needle, in the original patent, and, of course, the complainant, under that patent, could not maintain a suit against any person for using such a device, although it was a part of his invention, and was fully described in his specification. Suits for an infringement, whether at law or in equity, must be founded upon letters patent, and the plaintiff or complainant, as the case may be, can only recover for the invasion of what he has claimed in his patent, however much less the claim may be than his actual invention. Where the claim is narrower than the invention, and the description is given in the specification, the patent may be surrendered, and a reissue taken out, correcting the error, and that is what the complainant did in this case, and then, and not before, he was in a condition to enforce his right to that part of the invention. Judge Grier held, in Goodyear v. Day [Case No. 5,566], that it is no justification of the infringement of a renewed patent that the infringer had used the invention with impunity, before the patent was amended, and the supreme court also held in Stimpson v. Railroad Co., 4 How. [45 U. S.] 202, that no prior use of a defective patent can authorize the use of the invention after the defect is corrected, and the patent has been duly reissued. Complainant's patent, therefore, must be considered as valid, and I am of the opinion that he is the original and first inventor of the organized sewing machine described in his specification, when viewed as an existing whole. He also alleges that the respondent has infringed his patent, and

the testimony shows that the respondent did make and sell a machine introduced in the case as the machine of the respondent, and the answer admits that he has made and sold one hundred and seventy-five of similar construction and mode of operation, so that the only remaining question is, whether the machine produced embraces the improvement of the complainant, or any substantial and material part thereof, as alleged in the bill of complaint. Whether it does so or not can only be determined by a comparison of the two machines. Examination of the machine of the complainant has already been made, and it now becomes necessary to examine that of the respondent. His machine also carries two threads, and the stitch is formed by interlocking the same, substantially, in principle, as in the machine of the complainant, differing only in the fact that the under thread, carried by the shuttle or equivalent devices, is interlocked in a loop or bight, instead of a single thread, as in the machine of the complainant, making the difference between the stitches of the respective machines, as explained by one of the experts, about the same as that between a bow knot and a hard knot. Each machine has a grooved eye-pointed needle, which is employed to carry the thread for one side of the cloth, and which perforates the cloth as a step in the making of the stitch, and for the purpose of forming a loop of the thread which it carries. Loops are formed of the thread carried by the perforating needle, in the same manner, and the functions performed by the needle, and the needle itself, are the same in both machines. Substantial similarity therefore is certainly shown in all the particulars mentioned, but the respective machines employ two threads, and it becomes necessary to attend pretty carefully to the description given of the manipulation of the second thread, and of the several devices employed to accomplish the work. As already explained, the complainant's machine carries the thread for the other side of the cloth, by means of a side-pointed shuttle, so constructed and arranged that it will catch the loop formed of the thread carried by the perforating needle, and open and spread it as it passes through the loop. On the other hand, the machine of the respondent carries the second thread, or the thread for the other side of the cloth, by the means of a thread carrier, in form resembling a needle, and called by one of the experts a thread controller, which is also employed for looping its own thread through the loop previously formed of the thread carried by the perforating needle, instead of carrying the end of the shuttle thread through the loop formed of the needle thread, as is done in the machine of the complainant. Attention to these explanations will show very clearly what is meant by the experts, when they describe the difference between the stitches of the respective machines as about the same as that between the bow knot and the hard knot.

Every loop made of the thread carried by the perforating needle must be opened after it is formed, in order that the second thread, in the complainant's machine, or a loop of the second thread in the respondent's machine, may be passed through it, so that the two threads may be interlocked, as required, to form the seam. Such opening of the loop, formed of the thread carried by the perforating needle, is accomplished in the machine of the complainant entirely by the shuttle, which also carries the second thread. Shuttles are not used in the machine of the respondent, either to carry the second thread or to open the loop formed of the thread carried by the perforating needle. Other devices, however, are found in his machine which perform the same functions, and which stand in the same combination as that in which the shuttle is arranged in the complainant's machine; and the question is whether or not those devices are to be regarded as equivalents of the shuttle. Instead of the shuttle, the respondent employs the second needle or thread carrier, already described, which evidently performs the same functions in carrying the second thread, and also in looping it through the loop previously formed of the thread carried by the perforating needle, because, the interlocking of the thread is the characteristic principle of the manipulation in the formation of the stitch; and clearly it can not benefit the respondent to show that he first loops the second or shuttle thread, and then uses it double, or in loop, instead of single, as in the machine of complainant.

His second needle, or thread carrier, also commences to open the loop formed of the threads carried by the perforating needle, and continues to perform the function until an auxiliary device, called a hook, catches the partly-opened loop and completes the operation, opening and spreading it precisely in the same manner, and quite as effectually, as the function is performed by the shuttle in the machine of the complainant. Different devices, or devices differing in form, and having different names, are certainly employed by the respondent for that purpose; but the plan or idea, the arrangement, combination, and result are the same; and it is clear to a demonstration that every one of the functions performed by the shuttle in the machine of the complainant, is accomplished in the machine of the respondent, by the lower needle, called the thread carrier, or controller, with the aid of its auxiliary device, the hook; and I am of the opinion that the two combined are the equivalent of the shuttle; though it may be that they perform the work better. Holding surfaces, stationary in their character, are also found in the machine

of the respondent. They are the table, or platform, on which the cloth is laid, and the divided presser foot, and they hold the cloth as well for resisting the thrust and retraction of the needle as for the operation of tightening the stitch, and also to keep the cloth in place while it is moved forward, so that it may be fed in a determined plane. Speaking of the holding surfaces, it will be convenient to distinguish them as upper and lower, as was done at the argument. Upper holding surface, in the machine of the respondent, is the presser foot. Undoubtedly it differs in form from the metallic plate, which is the corresponding device in the complainant's machine, because it is in two parts; but those parts operate alternately, so that one of them is always upon the cloth, pressing it down upon the table, or, in other words, when one part is raised to assist in feeding the cloth forward, the other is kept down to retain the cloth in the proper plane; thus securing constant action, as in the machine of the complainant. Explanations are hardly necessary to show that the table, and the side of the shuttle box, when employed as holding surfaces, are equivalent devices, as it is quite obvious that the difference is a mere formal one, resulting from the substitution of a horizontal for a vertical position of the material to be sewed. Both the machines have the means of adjusting the upper holding surface to the thickness of the material. Springs are employed in the machine of the respondent, and hence it is said to be self-adjusting; but the adjustment is accomplished in the complainant's machine by a screw, and, consequently, the hand of the operator is required to accomplish the result. Looking at the respective devices under consideration as holding surfaces, and testing the question by the function or duty performed by each apparatus, and the mode of the operation, I am of the opinion that the apparatus employed by the respondent is substantially the same as that used in the machine of the complainant. Sufficient description has already been given of the feeding apparatus employed in the complainant's machine. Respondent, in his machine, uses a reciprocating notched bar, and a presser foot, and the feeding is accomplished by advancing the notched bar while the cloth is pressed down upon it, and then when the presser foot is raised by withdrawing it in the same plane. Palpable differences are observable in the form of the devices employed in one of the machines as compared with the other, but they perform the same functions, have substantially the same mode of operation, and accomplish the same result; and I am of the opinion that the devices, when considered together, and viewed as a feeding apparatus, are substantially the same as the feeding apparatus in the machine of the complainant. Complainant is entitled to a decree for an account, and when the amount to be recovered is ascertained, a perpetual injunction will be granted.

[For other cases involving this patent, see note to Howe v. Underwood, Case No. 6,775.]

HOWE v. WILLIAMS. See Case No. 6,769.

HOWE INS. CO. (CURTIS v.). See Case No. 3,503.

HOWELL (BARCLAY v.). See Case No. 975.

Case No. 6,778a.

HOWELL v. CRUTCHFIELD.

[Hempst. 99.] [1]

Superior Court, Territory of Arkansas. Jan., 1831.

MANDAMUS—RIGHT OF SUPERIOR COURT TO ISSUE.

1. Under the act of 22d October, 1828, the superior court was made an appellate court only. Acts, 34.

2. The writ of mandamus is an original writ, and incident to original jurisdiction, and hence the superior court have no power to issue it.

Motion for a rule.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

ESKRIDGE, J. This is a motion made by Orson V. Howell, an attorney at law of this court, for a rule against Peter T. Crutchfield, the judge of the county court of Pulaski county, to show cause why a mandamus should not be granted by this court, commanding him to amend the record in a certain proceeding in the county court against O. V. Howell, for an alleged contempt offered by him to the county court. The plaintiff in this motion states in his affidavit that the record of the proceedings in the case above stated is imperfect and incomplete, and entirely omits and fails to show several material parts of the proceedings, and mistakes others which were had in open court in the case, and that he believes it to be material to his rights and privileges as a man, as an attorney at law, and as a citizen, that a true and perfect record of all the proceedings in the case, upon two certain processes, purporting to be attachments against him, should be fully set forth in the records of the county court. He further states that he applied to the judge of the county court, by motion in open court, to have the records of the proceedings so amended as to have all the acts of the county court fully stated, but that the judge refused to hear his motion. The prayer is for a rule to show cause why a mandamus shall not issue to the judge of the Pulaski county court, commanding him at the next term of the court, to amend and alter the records of the last term, so as to set forth fully the proceedings before men-

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

tioned, or to signify something to the contrary to this court.

A preliminary question touching the jurisdiction of this court, to grant a mandamus in this case, has been made, and it is this question alone that we are called upon to decide at present. The act passed on the 22d of October, 1828, by the legislature of this territory, contains the following provisions: "That from and after the taking effect of this act, the superior court of this territory shall in all cases at law and equity be exclusively an appellate court, and shall not have original jurisdiction in any civil case, unless such as arise under the laws of the United States, or take cognizance of any criminal cases alleged to have been committed within this territory." Acts, 34. To enable this court to issue, then, a mandamus, it must be shown to be an exercise of appellate jurisdiction. In the case of Marbury v. Madison, 1 Cranch [5 U. S.] 137, the supreme court held that a mandamus to the secretary of state was an exercise of original jurisdiction, and discharged the rule. In the case of Daniel v. Warren County Court, 1 Bibb, 496, the court of appeals of Kentucky, held that a mandamus is an original writ, not an appellate process; that it is an emanation from and an incident to original jurisdiction only; that in its nature it is not necessary to the revision of a cause already adjudged or decreed, but does in itself create that cause, and on that ground overruled the motion. These cases are in point to show that the motion for the rule must be overruled.

Case No. 6,779.

HOWELL v. HARTFORD FIRE INS. CO.

[6 Biss. 163.] [1]

Circuit Court, N. D. Illinois. July, 1874.

COMPARISON OF HANDWRITING.

A party has no right to an instruction to the jury, allowing them to take to the jury-room a letter, the genuineness of which is denied, for the purpose of comparing it with a genuine letter; such comparison is only permissible during the progress of the trial.

[Action by Martin A. Howell against the Hartford Fire Insurance Company. Plaintiff moves for a new trial.]

E. A. Storrs, for plaintiff.

Wirt Dexter, for defendant.

BLODGETT, District Judge. This is a motion for a new trial, in which the plaintiff alleges several errors committed by the court in the progress of the trial of the case, as grounds why he should have a new trial. I have examined these grounds very carefully, and without going elaborately into a discussion of the points made by the learned counsel, and the very ingenious and able arguments which have been filed in the case, I must say, as I was impressed at the time of the previous arguments in the case, that the point is not well taken. The main point relied on is this: After the court had read its charge to the jury, the charge being in writing, Mr. Storrs asked the court to charge the jury that they might take the Shaw letter, which was in the case legitimately for other purposes and as general evidence, and compare it with the Foster letter, the genuineness of which is denied by the plaintiff, and draw their own conclusions as to whether the Foster letter was genuine by comparing it with the Shaw letter, and by comparing the formation of the letters, the spaces between the lines, and the general contour of the letters. The court refused to give this charge in these words to the jury, and stated that it did not think a comparison of the handwriting was allowable. The authorities cited, and which were not in my mind at the time, undoubtedly go to sustain the proposition that a comparison of handwriting may be allowed for the purpose of determining the genuineness or want of genuineness of a paper put into a case, where one of the papers is confessedly in the handwriting of the party. I think the distinction to be made here is, that the court was not asked to adopt this comparison upon the trial of the case, but was asked to instruct the jury that they might make that comparison in the jury-room in secret on their retirement, without having been asked to make the examination and comparison before the court during the progress of the trial. Now the authorities clearly go to show that if upon the progress of the trial the plaintiff had insisted that the jury should have the privilege of comparing the Shaw and Foster letters together and determining their genuineness, they should both be passed to the jury, and they should have the privilege of examining them. I think that was the proper time for examining them, for this reason: that the counsel and court would have had the privilege of pointing out a resemblance or want of resemblance in the two writings, and calling the attention of the jury to such facts in regard to the writings as bore upon the question of the genuineness or want of genuineness of the paper in question. That the jury should blindly be told to take this paper, and that the court should lay down the rule by which they should determine whether the Foster letter was or was not genuine, by the general arrangement of the characters and so forth, was asking for a comparison of handwriting to be made at an improper time and asking the court to lay down the rule by which the comparison should be made, and the genuineness tested. The court holds, therefore, that there was no error committed

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

by the court in refusing to charge the jury as asked, and that, therefore, no new trial can be granted. With regard to the other errors assigned, the court does not think that any of them were well taken. The motion for a new trial is, therefore, refused.

NOTE. It is competent for the court and jury to compare the handwriting of a disputed document, with any others which are admitted or proved to be in the handwriting of the supposed writer. Griffith v. Williams, 1 Cromp. & J. 47; Perry v. Newton, 5 Adol. & E. 514; Rex v. Morgan, 1 Moody & R. 134, note; Allport v. Meek, 4 Car. & P. 267; Bromage v. Rice, 7 Car. & P. 548; Best, Ev. § 239, note, and cases cited. A jury may judge of disputed handwriting by comparing it with other documents in for other purposes and admitted to be in the handwriting of the other party. Solita v. Yarrow, 1 Moody & R. 133. See, also, 2 Saund. Pl. & Ev. pt. 1, p. 160.

Case No. 6,780.

HOWELL v. HARTFORD FIRE INS. CO.

[3 Ins. Law J. 649.]

Circuit Court, N. D. Illinois. Sept., 1874.

FIRE INSURANCE — WARRANTY — EXECUTORY UNDERTAKING—FRAUD—PROOF THEREOF—PREPONDERANCE OF EVIDENCE—TESTIMONY OF ACCOMPLICES.

1. The application stated that there was being constructed a force pump, etc. It was dated on the 25th of May, and the fire occurred on the 3d of October the same year. *Held*, that this was not a warranty on the part of the plaintiff, but only an executory undertaking, and the defendant could have protected itself by rescinding the contract after making a demand on the plaintiff to have the pump put in working order, and, no demand having been made, there was no breach of warranty. *Held*, that where the policy contains this clause, "All fraud or attempt at fraud on the part of the assured shall cause a forfeiture of all claims under this policy," the question of fraud is to be decided by a preponderance of evidence, and the rule in civil cases is to be followed.

2. The charge that the plaintiff burned or caused to be burned the property insured, must be satisfactorily proved, and though not so as to exclude all reasonable doubt, yet the weight of evidence must be in favor of the defendant, to vitiate the policy.

3. In weighing the testimony of parties who state that they were accomplices of the plaintiff in the alleged arson, the jury should consider the motives they may have had in falsely charging the plaintiff with the crime, whether their statements are consistent and true, whether it agrees with the statements of other witnesses, and whether the character of these witnesses is such that they would be fit instruments for such a crime.

4. The evidence of these accomplices must be supported by extrinsic facts and circumstances.

5. Any proof of fraud in the valuation of the property insured would vitiate the policy.

[Cited in Shaw v. Scottish Commercial Ins. Co., 1 Fed. 765.]

6. The offer of counsel to allow the jury to examine a hotel register by means of a microscope during the argument was made too late, and should have been made before the evidence was all in.

At law.

BLODGETT, District Judge (charging jury). The plaintiff in this case seeks to recover upon a policy of insurance issued by the defendant, bearing date the 15th of June, 1869, countersigned by the defendant's local agent on the 26th of August, 1869, whereby the defendant insured the paper-hangings manufactory of the plaintiff, situated at Marseilles, in this state, against damage by fire to the amount of five thousand dollars, for the term of one year from the date of said policy. To sustain this claim the plaintiff, in opening, proved the issue of the policy; the fact that his building was burned on the 3d of October, 1869, during the lifetime of the policy; that the loss was total; and that he had at that time furnished the defendant the notice and proofs of loss required by the terms of the policy, and claiming that this evidence made out a prima facie right to recover, and the plaintiff rested. By way of answer to the case thus made out by the plaintiff, the defendant contends: First. That the plaintiff applied for the policy in question upon the property in question by a written application dated the 25th day of May, 1869, which application is, by the terms of the policy, made part thereof, or is made a warranty; that the plaintiff had violated the terms of his warranty in not putting a force pump into the building within a reasonable time after the application was made; and that by reason of such violation of his warranty the policy had become and was avoided at the time of the alleged loss. Second. That the plaintiff had procured policies of insurance upon the building and contents to the aggregate amount of about ninety thousand dollars, which, in the whole, exceeded the value of the property, and then caused the building and contents to be burned, with the intent thereby to defraud the defendant and the other insurance companies who had issued policies upon the property.

By the first point the defendant raises a question of law in regard to the plaintiff's right to recover. But the policy refers in express terms to the application therefor which had been made by the plaintiff, and declares said application to be a part of this policy and a warranty on the part of the insured. By reference to the application, which has been produced in evidence, it appears that among other questions in the application to be answered by the assured is the following: "Q. 25. Is there a force pump upon the premises expressly for the purpose of putting out fire, and is it a good pump, and at all times ready for immediate use?" To which plaintiff replied in writing, opposite the question: "One constructing to flood every floor by open cocks and power applied outside of the building, in constant use for

pumping water for washing purposes.". It is one of the admitted facts in this case that, at the time of the fire which destroyed the building, no force pump had been put in, and no vertical pipe for conducting the water from the pump to the various stores, nor lateral pipes in each story to distribute the water through them, and upon these facts the defendant insists that the plaintiff cannot recover, because the statement, in the application in regard to the force pump, is a warranty or covenant that said pump shall be constructed within a reasonable time, and inasmuch as the application is dated the 25th of May, 1869, and the fire occurred on the 3d of October, over four months afterward, and as the defendant's affirmative proof tends to show that the pump could have been put in place within a very short space of time, therefore more than a reasonable time had elapsed, and the policy had become void by reason of this breach of warranty.

Without taking time to discuss at length the position of the learned counsel for the defendant in this case on this point, it will be sufficient for me to say that I find no words in the policy or application which expressly or by implication restrict the policy from taking effect until the force pump is completed. The language of the application, when question and answer are taken together, is that a force pump is in process of construction, which will flood every floor. He does not say there is a force pump there already, which would amount to a warranty of the fact, but says one is constructing, and there is no language which indicates an intention that the policy was not to be operative until the pump was constructed. I think, therefore, and so instruct you, that the policy was not suspended nor prevented from becoming operative by the delay in constructing the force pump, even beyond a reasonable time. It may be that the true construction of the clause of the application requires the plaintiff to put in the pump and pipes for flooding the building, as described, within a reasonable time, as is contended by the defendant, but I think, if the contract of insurance once took effect and became operative, the defendant could not avoid it by the plaintiff's delay in putting in his pump, without first making a demand upon the plaintiff to comply with this part of his undertaking, and giving notice that the contract would be rescinded if he did not so comply. This part of the plaintiff's undertaking was executory, to be performed within a reasonable time; but what is a reasonable time is a question of fact to be controlled by the circumstances shown by the proof, and, if the delay was unreasonable, the defendant could at any time protect itself by notice or demand of compliance with this clause, and by rescinding the contract if the plaintiff refused to comply by putting in the pump; or the defendant might have exercised its reserved right, cancelling the policy under the cancellation clause in the policy itself. To illustrate: This same application contains a question as to whether there are lightning rods on the building, and the answer is, "We will erect rods soon, no rod at present." Now this would be taken, it seems to me, merely as a promise that the plaintiff will put up lightning rods at some future day, and even if the building had been burned by a stroke of lightning, for want of a rod, it could not avoid the policy, if the defendant acquiesced in the delay in putting up the rod. If the plaintiff had stated that the pump was already put into the building, or a lightning rod erected, such statements would have been a warranty, and, unless waived by the company, would have avoided the policy, if not true, even if the loss had not happened by reason of the breach of such warranty. This proposition I deem sound in law, but not applicable to this case, because the undertaking of the plaintiff is to construct a pump, and not that one is already constructed. This policy shows upon its face that it was not to become binding until countersigned by the defendant's agents at Marseilles, and that it was not so countersigned until August 26th, from which time it seems to me the delay must not be deemed to have been unreasonable; but that is a question of fact for you to pass upon, as to whether it was reasonable or unreasonable, if such a question of fact were submitted to you. I therefore charge you that no demand being shown by the proof for the construction of the pump by any specified time, and no steps taken to avoid the policy by reason of the delay in putting up the pump, the policy must be considered as in full force at the time of the fire, notwithstanding the plaintiff's delay in the construction of the force pump.

I now refer to a point in which I deem it the province of the court to instruct you, touching the main question raised by the defense, and, in the outset, I will say that the defendant, on this branch of the case, has the laboring oar. The plaintiff, by the production of the policy showing the undertaking of the defendant, and his proof showing the fact of his loss, and its extent, and his compliance with the prerequisites of the policy, has made out a prima facie case. The defendant has undertaken to show that the plaintiff, for the purpose of defrauding the defendant and the other insurance companies who had issued policies on the contents of the building, has caused the building to be set on fire. The policy in question contains the following clause: "All fraud or attempt at fraud on the part of the assured shall cause a forfeiture of all claims under this policy." So that without invoking any general principles of law as to what would be the legal effect of such acts of fraud on the part of the assured, in absence of a special clause on the subject, the express terms of the contract in this case make all claims

under the policy void if the assured has been guilty of any fraud or attempt at fraud in connection with the alleged loss; that is, if the loss had been brought about by his fraudulent or criminal act. The clause quoted is undoubtedly capable of a wider application than is sought in this case, because if the assured is guilty of fraud in the proofs of loss, thereby attempting to recover or collect more than the actual loss chargeable against the insurer, he has forfeited his claim. But this further application does not arise in this case, because it is not insisted that the plaintiff has attempted any over-valuation of the building covered by the defendant's special policy, this policy being upon the building alone, and not upon its contents. In criminal cases, where the defendant is on trial for an offense of the kind here charged, the rule is that the guilt of the accused must be made out beyond a reasonable doubt, but in civil cases the rule is different. The case is to be decided upon the weight or preponderance of evidence, and the court charges you that it is not necessary that the degree of proof be the same in this case as if the plaintiff was on trial under an indictment for wilfully burning or procuring the burning, of the property insured, for the purpose of defrauding the insurance companies. On the contrary, as between the rule in criminal cases and the rule in civil cases, as it is defined, it is the rule in the civil cases that is to be your guide. But the charge against the plaintiff is too grave a one,—the charge is one which men in general will not commit, but of which men are sometimes guilty, —in view of which the court instructs you that, in order to justify you in finding that the plaintiff himself burned or caused the property to be burned, the legal evidence, taken altogether, must be such as to clearly satisfy you of the truth of the proposition. It need not be such as to exclude all reasonable doubt, but there should be a clear preponderance in favor of the defendant, so that your minds and judgments are satisfied that the plaintiff did, or procured the doing of, the incendiary act. I may with propriety say here that both parties have tried or discussed this case upon the assumption that the fire was the work of an incendiary. The real question in dispute throughout this tedious trial has been, was the plaintiff privy to this burning? did he employ the persons who say they committed this act? is there any motive shown for any person to have done it, and does the proof show that he procured the act to be done? The evidence by which the defendant seeks to establish the issue on its part, is, first, the direct testimony of two witnesses, Morris D. Smith and Felix Seigler, tending to show that they, or one of them, set the building in question on fire, at the instance and by the procurement of Howell, the plaintiff. Second, evidence or facts and circumstances tending to corroborate the testimony of Smith and Seigler, and their evidence, tending to show that the plaintiff submitted to the defendant and the other insurance companies who had issued policies on the property contained in the building, exaggerated and fraudulent statements to prove the value of the property so destroyed.

With regard to the first class of evidence, —that of Smith and Seigler, tending directly to show that the building was fired by the plaintiff's procurement,—I have to say, that by their own statements they were accomplices with the plaintiff in the commission of the alleged crime, and their testimony is to be received with the utmost caution, and the jury ought not to find for the defendant upon their testimony, unless corroborated in material facts, or, in other words, their evidence should be so corroborated by extrinsic facts and circumstances as to satisfy your minds that these men have substantially sworn to the truth. In weighing and deciding upon the testimony of these men, you should carefully consider: First, what motives they had, or could they have, for falsely charging the plaintiff with the crime. Second, are their statements consistent and coherent, and do they, when taken together, impress you with the conviction of their truth in material particulars? Third, do their statements cohere and agree with the material facts admitted in the case already proven by witnesses worthy of belief? Fourth, the character of the men as fit instruments for such a crime, and the plaintiff's knowledge of them as such, so far as shown by the proof, and also the probability that they may have been suborned, and committed perjury for the purposes of the defense. You should also consider, in connection with the testimony of these men, the facts and circumstances shown by the evidence, which tend to corroborate and support their statements. Much of the evidence in the case has but slight, if any, significance, except as it tends to corroborate or overturn the evidence of these two men; but, for that purpose, most of it is worthy of careful consideration and critical comparison and analysis. I have already told you that you should not believe these witnesses, Smith and Seigler, unless they are corroborated. I will further say that you are to look for such corroboration to the outside testimony, and not for one to sustain the other. They must be sustained by extrinsic facts and circumstances. To make myself more clear, it will not do to say that you must believe Smith because he is sustained by Seigler, or that you must believe Seigler because he is sustained and corroborated by Smith, but, if either one of them is sufficiently corroborated by other testimony to satisfy you that he has testified to the truth, then you will be justified in believing him; but they cannot sustain each other, only so far as their respective stories com-

mend themselves to your understanding from their inherent probability and consistency.

Prominent among the corroborating circumstances insisted upon by the defendant is the evidence tending to prove the suspicious conduct of the plaintiff both before and after the fire; his frequent visits to and interviews with these men; the arrest of Seigler, and his hearing and trial before the magistrate Lockwood; his obtaining the affidavits, or attempting to obtain them, charging various persons with having knowledge of the burning of the building; his payment of Seigler's attorney's fees upon his hearing, and providing for bail if he should be held to bail, and also providing witnesses for him in regard to his character, and suggesting the importance of calling such witnesses; his writing letters over fictitious signatures; his meeting with Smith, apparently on terms of confidence, at times when he was charging him with the crime of burning his building, and associating with Smith, apparently upon confidential terms, while thus charging him; his taking Seigler away, and keeping him for a long time under his control and influence, in a distant state; all these circumstances, the defendant insisted, tend to show the consciousness of guilt on the part of the plaintiff, and are only explained consistently upon the theory that he was guilty as charged. I will here say that it is not my province to even say that these circumstances are proven; it is for you to weigh and pass upon all this proof, and decide whether it really establishes the fact it tends to prove or establish. But if these circumstances are proved by the evidence to your satisfaction, it will then be for you to determine how far they corroborate the statement of Smith and Seigler, or either of them, and how far they tend to show the guilt of the plaintiff, even without Smith's and Seigler's testimony.

In the same connection you should also consider the testimony in regard to the value of the property destroyed. The defendant's policy was upon the building alone, but much of the testimony adduced by the defendant bears upon the value of the machinery and property contained in the building. This testimony is mainly material upon this trial, because if true, it tends to develop a motive on the part of the plaintiff to secure the burning of his property. If his property in the building was not in fact worth over $25,000 or $30,000, as the proof tends to show, while it was insured for over $80,000, the motive for the commission of the alleged crime is developed, or rather a motive which might lead to commit such a crime, according to our common experience and knowledge of human nature. The evidence in regard to the over-valuation is conflicting and contradictory in many particulars, and, it is for you to reconcile these where such a result is possible, and where you cannot reconcile or harmonize them, it is for you to say which you will believe. In weighing or canvassing this testimony, you should consider the intelligence of the witnesses on the subject when they respectively testified to their experience and knowledge, and above all the motives which may have influenced or controlled them. If from all the evidence produced upon this point you are satisfied that the plaintiff attempted to obtain an over-valuation of this property to secure a payment from these insurance companies on the basis of such over-valuation, such fact, if established, should be deemed a pregnant circumstance tending to establish the defense. And here it is but right that I should say a word in regard to the necessity of holding the assured to strict truthfulness in his proofs of loss. The nature of the insurance business is such that companies cannot know at the time they issue their policies the exact value of the property insured, especially goods or personal property. A business man asks for a certain amount of insurance on his goods in his store, warehouse, or factory. The fact that he pays premiums in proportion to the amount insured is supposed, in the case of most men, to be a guarantee that he has property of the value insured; but in proofs of loss the amount to be paid is to be fixed at the value of the property destroyed, so that it is the amount on hand at the time of the fire that becomes material. This can only be known with any degree of certainty through the assured himself. He is therefore held to a strict and truthful statement as to the value of the property destroyed, and any intentional over-valuation, or any such valuation as displays a reckless and dishonest disregard of the truth, in regard to the extent of the loss, is deemed fraudulent and causes forfeiture of all claims under the policy. I do not mean to say that a mere difference of opinion in regard to the value of the property destroyed would alone be such a fraud as would defeat the claim, because men may honestly differ in regard to the value of a particular piece of property, but there must be such an over-estimate as shows a manifest design to defraud.

To rebut this evidence introduced on the part of the defendant, the plaintiff has offered evidence which may be classed as follows: First, evidence tending to contradict the defendant's proof, both as to the main facts and the corroborating circumstances. Second, evidence tending to discredit or impeach the witnesses introduced by the defendant. And this impeaching testimony may be aptly divided into two classes: First, evidence tending to show that some of defendant's witnesses are unworthy of belief, by reason of their bad reputation for truth and veracity. I think in this case there has been testimony introduced on this trial in regard to the bad reputation of but one of the defendant's witnesses,—that is, Smith,—and none in regard to Seigler. Second, evidence tending to

show that the witnesses have on other occasions, either under oath or without oath, made different statements of the transactions to which they testify, to that which they now testified on this trial. The law devolves upon you the duty of weighing, reconciling, and sifting all this contradictory and impeaching evidence; you are to pass upon the credibility of the various witnesses whose testimony is adduced, and determine the credit you will give to their respective statements. In doing this the motive and degree of intelligence of the witnesses should be carefully considered by you. In regard to the impeaching witnesses, the bad reputation of a witness for truth and veracity, no matter how bad it may be proved to be, does not necessarily require you to reject or disbelieve his testimony, if, from all the evidence in the case, you are still satisfied that he has sworn to the truth on this trial, because very bad men, and very great liars, may tell the truth, but it is for you to say whether they have done so on this trial. The evidence of bad reputation should be considered rather as a notice or caution, not to implicitly believe the witness, and calling upon you to scrutinize the testimony in the light of the fact that it comes from an impure source, and only to believe it when you are satisfied it is true from all the evidence adduced in the case.

In regard to the evidence which seeks to impeach the witnesses by showing that they have at other times stated and sworn differently from what they have testified on this trial, I will say, this evidence goes to the credibility of the witnesses, and it is for you to say whether, from all the circumstances and explanations in regard to the conflicting statements, it is probable they have told you the truth on this trial. The former statements may have been untrue, and the evidence delivered to you may have been the truth, or vice versa, or all may be false,—this is for you to consider and to determine from all the proof in the case. You should carefully weigh and canvass all the circumstances and influences under which the conflicting statements were made, and decide for yourselves which, if either, is true. You are not compelled to reject the evidence of the witnesses, although the contradictions are still admissible and entitled to consideration. During the progress of this trial the plaintiff has himself been upon the witness stand, not only to deny the charges of defendant's witnesses, but also to explain some of the circumstances, which, unexplained, tended against him. I deem it but due to you to say that this evidence should be received with extreme caution. You can appreciate the strong temptation upon him to pervert the truth of the whole facts which would damage his case. Not only is he pecuniarily interested in the result of the trial, but his moral, social, and business standing for his future life is involved in your finding, and you could hardly expect from your knowledge of human nature, that a man in such straits would tell the truth, if the truth would injure his case. I do not say his testimony is incompetent, but it should be received with care, in view of the temptations which surround him. While the law has allowed him to become a witness in his own case, but has wisely left his credibility to be considered and passed upon by the jury, his testimony, like that of those who claim to have been his accomplices in the alleged crime, should be received with caution, and only believed when it is corroborated, or so consistent and coherent as to commend itself to your judgment from its own intrinsic probability.

I also deem it my duty to say to you that you are to treat this case solely on the evidence. The result of former trials which have been had involving these same questions should have no influence on your minds, for you and I only know this case in the light of its own evidence, and do not know what evidence or influence controlled the jury and the action of the court in the other case. It was impossible, in the nature of things, to keep from you the facts as to the result of the arson trial at Ottawa, but that verdict should not influence your minds in the decision of this case. It is your duty to decide this case upon the evidence which has been presented in the case, and not by the result of any other trial. Much of what is called the corroborating testimony, both of the plaintiff and the defendant, consists of coincidences, and the relations which they bear to the actions of the various actors in the transaction which you are investigating. The value of the coincidences depends upon their naturalness, and if you are satisfied that any apparent coincidence of time or place or event has been brought about by artificial means or factitious causes, for the purpose of using it as evidence, its value as corroborative evidence is not only impaired, but wholly destroyed. This remark is especially applicable to the proof in regard to the hotel register. That proof shows that, on the former trial of this case, the plaintiff, for the purpose of proving that he was not in this city at the time the Foster letter was written or mailed, offered in evidence the register of the Clifton House, at Ottawa, on which the name of the plaintiff appeared as a guest of that house on the evening of the 3d of September. If you are satisfied from the evidence that this entry of the plaintiff's name upon the register has been made since that time, for the purpose of manufacturing evidence in the plaintiff's behalf, it should weigh strongly against the plaintiff, because the attempt to put false testimony into the case justly causes doubt as to the justice of the case itself. A righteous cause needs no support of falsehood or perjury.

From the nature of this case, the evidence is voluminous and complicated, and in a remarkable degree contradictory. The law devolves upon you the task of compar-

ing, combining, and sifting the whole proof, and evolving all the material facts you consider as proven. The fact that the plaintiff's factory and contents were burned is undisputed, and it may, under the instruction I have given you, be taken as a conceded proposition that the defendant is liable upon the policy of insurance unless the defense set up has been established by the proof to your satisfaction. If the evidence in the case satisfies you by clear preponderance that the plaintiff did procure the burning of the building, or that he was privy to its destruction, for the purpose of defrauding the insurance companies, no matter who was his agent in the performance of the act, then your finding should be for the defendant. I do not mean to say that you must reconcile all the conflicting evidence on trivial and immaterial points, because that might be not only impossible, but unnecessary. The great central question is, does the proof satisfy you, to the degree I have stated, that the plaintiff procured the burning of the building in question? Has the evidence of Smith and Seigler on that point been so far corroborated by the facts and circumstances testified to by other witnesses as to satisfy your minds that they have told you the truth? If the evidence has produced this result upon your minds, then the defense is established, and you should find for the defendant. If that result is not accomplished by the proof, then the plaintiff is entitled to a verdict at your hands.

A single word, gentlemen, in regard to the character of some of the testimony in this case: For the purpose of showing that the hotel register had been altered and tampered with, the testimony of three distinguished microscopists has been introduced. They testified that they subjected the writing in question to an examination under a microscope of great magnifying power, and gave you the result of their investigation. The testimony comes within the class known as "scientific testimony." The witnesses are experts, and give in evidence the result of their scientific examination. This testimony is not to supersede your own senses, but only to aid and throw light upon the matter by which the defense claims that the unaided senses would not get at the truth. On argument, the plaintiff's counsel requested the jury to examine the writing through an ordinary magnifying glass. I did not permit this, because I think the glass comes within, to a certain extent, the same rule as the microscopic testimony, and should have been offered before the proof closed, so that any difference between the results disclosed by the two modes of examination might be explained by the defendant, if it chose to make an explanation, or if such were deemed necessary. It may be that a glass of comparatively small magnifying power may disclose enough for the plaintiff's purpose, but not enough to meet the point made by the defendant, so that I only ruled that the magnifying glass would have been admissible if offered at the proper time, but that it could not be used upon the argument of the case. With regard to another class of testimony, which comes within, to some extent, the same rule,—that of experts in regard to handwriting,—you, as business men, have already, in your experience as jurors and about courts, come probably upon sufficient information on that subject, and need no special instructions from the court. In the nature of the case the only method of proving handwriting is by experts who have seen the party write, and who consider themselves sufficient judges of his handwriting to form a reliable opinion upon the subject, and that class of testimony is always received by the court as the only testimony establishing the fact of whether the handwriting is genuine or not, subject to the further rule, however, that it is competent, of course, for the plaintiff in this case to deny the signature or writing alleged to be his, and then it becomes a question of fact as to which you will believe, that of experts and persons familiar with his handwriting, or that of the plaintiff denying the handwriting, under all the circumstances of the case.

You have now, then, gentlemen of the jury for nearly three weeks sat patiently while the complicated testimony in this case has been exhibited and discussed before you. It now becomes your duty to carefully consider all this proof without prejudice, and with an earnest and determined effort to arrive not only at a verdict, but at a just verdict, under the evidence as given you from the witness stand, and the law as propounded from the bench. You should forget who are the parties in this case, and consider only what has been proven, and what is the law governing that proof. You should forget the circumstances or condition of either party. It makes no difference, for the purposes of this case, that the defendant is a moneyed corporation. I trust that in considering the features of the evidence you will treat this case as fairly, as I believe you will, as in a case submitted to you between two persons or individuals. With the consequences to either party you or I have nothing to do. The only question is, what facts are established by the proof, and what conclusion does the law deduce from these facts?

The form of your verdict will be, "We, the jury, find the issues for the plaintiff," or "the defendant," as you shall determine. If for the plaintiff, you will assess the damages at the amount of the policy, as the loss is admitted to have been total, with interest at the rate of six per cent. from the time it ought to have been paid, which is

sixty days after the time the proofs of loss were furnished to the company by the plaintiff. That date you will ascertain, when it becomes material, by reference to the proofs of loss produced. If you find the issues for the defendant, or, in other words, if you find that the defendant has established the issues relied upon, you will say, "We, the jury, find the issues for the defendant."

Verdict for the defendant.

Case No. 6,781.

HOWELL et al. v. PHILADELPHIA MUT. INS. CO.

[25 Hunt, Mer. Mag. 80.]

Circuit Court, D. Maryland. July, 1851.

MARINE INSURANCE — SALE BY MASTER AS UNDER NECESSITY—ABANDONMENT, WHEN JUSTIFIED.

[1. A sale by the master as under necessity cannot bind the underwriters, unless the circumstances antecedent to the sale are such as to authorize an abandonment.]

[2. There is no right to abandon under policies which fix the value of the ship, when the estimates of repairs do not exceed one-half of such valuation.]

[This was an action by Howell & Lemmon against the Philadelphia Mutual Insurance Company.]

Messrs. Glenn and Talbot, for plaintiffs.
Charles F. Mayer, for defendants.

Before TANEY, Circuit Justice, and HEATH, District Judge.

In this case, among other points, the defendants contended that there can be no sale, as under necessity, by the master, which can bind the underwriters where the circumstances antecedent to the sale do not authorize an abandonment; and that there was no right, in these cases before the court, to abandon, as the estimate of necessary repairs did not exceed half of the amount at which the ship was valued in the policies; these containing a clause that fixes the policy valuation as the only standard, in any case of loss, constructive or actual. THE COURT decided all these positions for the defendants, and recognized the policy valuation as the only and binding value under the special clause referred to for claims of loss. The authority to sell from necessity as given to the master by various decisions, so as to implicate insurers in a total loss with salvage, has rested on very vague grounds hitherto. But this decision of establishing that as to insurers it is only the right to abandon that makes the necessity, justice, gives definiteness to the principle of "necessary" sales in, at least, a very large class of cases of loss.

Case No. 6,782.

HOWELL v. SAULE et al.

[5 Mason, 410.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1829.

VENDOR AND PURCHASER—CONVEYANCE BY SPECIFIC BOUNDARIES.

1. A conveyed to B, by deed, a certain piece of land by specific boundaries, and then added, "it being the same land given by my honoured mother to him the said B, by her last will and testament, said land containing about five acres."

2. The devise in the will was of "a piece of plain land, of about four or five acres, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch."

3. It was *held*, that the latter clause did not control the specific boundaries in the deed, even supposing the will would admit of narrower limits, or was of doubtful construction.

[Cited in Lee v. Follett, 29 Vt. 118; Drury v. Morse, 3 Allen, 446. Distinguished in Wilson v. Underhill, 108 Mass. 363.]

Ejectment [by Martha Howell against Henry Saule and others]. Plea, the general issue. Both parties claimed the estate in question, under Martha Brown, wife of Elisha Brown. On the 1st of July, 1760, she, being then a feme covert, made her will, which upon her death was proved in the probate court in October, 1765; and among other items, she made the following devise. "Item, I give and devise to my son, Jeremiah Brown, two small lots, part of the aforesaid estate. lying southwestwardly from the southwest end of the back street of said Charlestown (part of Providence), number the first and second lots on said map (a map before referred to in her will); also a piece of plain land, of about four or five acres, parcel of said estate, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch, (which) is a boundary line of lands assigned for dower to the widow Sarah Smith, to be and remain to him and his heirs for ever." Her will being, by reason of her coverture, invalid to pass real estate, the devise became void; and the whole estate descended, according to the then law of Rhode Island, to her eldest son, John Brown, as her heir at law. John Brown, on the 19th of January, 1768, with a view, (as it should seem,) to carry into effect his mother's will in this respect, made a deed to his brother, Jeremiah Brown, and thereby granted to him "one certain piece or parcel of land, lying and being situated in Providence aforesaid, in the southwesterly part of a place called Charlestown, being part of the mill estate, joining easterly on Daniel Smith's land, southerly on Robert Gibbs's land, westerly on Samuel Thurber's land, northerly on an old ditch on my own land; it being the same land given to him, the said Jeremiah Brown, by my honoured mother. Martha Brown, deceased, in and by her last will and testament, said

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

land containing about five acres." The old map referred to in the will bears date in 1754, and was produced and admitted at the trial, without objection. It contains a series of lots on the eastern side of the land, numbered from No. 1 to 19, &c., beginning at the southern side, and proceeding northerly. The action was for a parcel of land called No. 7, in the lots laid off on the map, and the plaintiff claimed title to it under John Brown, as not having passed by his deed in 1768. The defendants claimed title to the premises under Jeremiah Brown, as having passed to him by the same deed. The whole controversy turned upon the true construction of the terms of that deed, as connected with the will of Martha Brown.

R. W. Greene, for plaintiff.
Mr. Pratt, for defendants.

STORY, Circuit Justice. It is admitted, that the boundaries stated in the deed of 1768, from John Brown to his brother Jeremiah, include the premises now demanded, if we stop at the clause in that deed, which refers to his mother's will. But it is contended by the demandant, that these boundaries are controlled by this last clause, so as to include such land only, as the mother devised to Jeremiah. The whole piece of plain land contains about five acres; but cut down, as the demandant contends for, it will include only three and one half acres.

Let us, then, first consider the terms of the devise made by the mother. After devising two lots, she proceeds to devise a piece of "plain land, of about four or five acres, parcel of said estate, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch," &c. The description is obviously incomplete, giving, correctly enough, the general direction in which the land lies, and bounding it only on the northwesterly side by a ditch, the same boundary, which is given in the deed. The only additional circumstance stated in the will, to help the generality of this description, and to enable us to ascertain the extent of the land devised, is the statement of the number of acres it contains. It is stated to contain "about four or five acres." So that if we adopt the construction of the demandant, the devisee takes less than the testatrix supposed; if we follow that of the tenant, he takes no more than the testatrix supposed. In this respect, then, the deed comports with the apparent intent of the will. But suppose the quantity intended to pass by the will were doubtful, the parties had a right to give it such an interpretation as in their judgment best comported with the mother's intentions. They adopted the interpretation, which was most favourable to the devisee. If, as has been supposed at the bar, the grantor intended to carry into effect the object of his mother, his deed has reduced to certainty, that which the argument supposes before to have been left somewhat in uncertainty. It was undoubtedly competent for the grantor to adopt such a liberal construction. In the interpretation of deeds the general rule is, to construe the uncertain, as nearly as possible, in conformity to that, which is certain. If the court can find out the general intent, it will carry that into effect, notwithstanding any repugnancy in another part of the description. A fortiori, the court will give effect to that, which is certain in description, rather than leave the deed inoperative, because there are other references in it, obscure, imperfect, or inexact.

But in the present case, we do not think, that the deed furnishes any real grounds for debate. The grantor has in his deed stated with certainty the exact boundaries and quantity of the land, which he conveys to his brother. He then adds, that it is the same land devised by his mother. This is not a clause controlling the legal effect of the preceding description, or intended to narrow its purport. It is a mere explanatory clause, expressive of his view, that the land is the same, which was devised by his mother. He does not say, that he grants what was devised by her, and no more; but he grants a certain piece of land, containing five acres, by specific boundaries, and then adds a statement of what he supposes to be a fact. Suppose none of the land had been devised in his mother's will; would the grant have been utterly void? Certainly not. We think there is no repugnancy between the will and the deed; and that in the most favourable view for the demandant, the parties have put a construction upon the terms of the will, that it included the five acres specified in the boundaries of the deed. But if this were not sufficient, still the deed operated as a grant of the land included in the specific boundaries, and the subsequent clause ought not to control or narrow it. It is not immaterial to add, that the subsequent occupation and claims by the respective claimants under the grantor and grantee in that deed have been, as far as the written evidence goes, in perfect conformity with this construction of the terms of the deed.

The plaintiff discontinued her suit.

Case No. 6,783.

HOWELL et al. v. TODD et al.[1]

Circuit Court, D. Connecticut. May 27, 1876.

NEGOTIABLE INSTRUMENTS — NOTE PAYABLE IN MERCHANDISE—UNCERTAIN AMOUNT—BANKRUPTCY—FRAUDULENT PREFERENCES.

[1. A note which, during four of the five years it has to run, may, at the maker's option, be paid in buggies at wholesale prices, is not a negotiable instrument. Neither is a note which, in addition to interest, provides for the payment of taxes, the amount of which must necessarily remain uncertain until they are assessed and imposed by law.]

[1] [Not previously reported.]

[2. Note and mortgage given to certain creditors to induce them to come into a composition on the footing of apparent equality with other creditors, create a fraudulent preference, and may be avoided by the assignee.]

[Appeal from the district court of the United States for the district of Connecticut.

[This was a suit by Alfred Todd and another, assignees in bankruptcy, against Theodore P. Howell and others, to set aside a note and mortgage as in fraud of the bankrupt law (14 Stat. 517). The district court rendered judgment for complainants, and defendants appealed.]

Mr. Alling, for appellants.
Mr. Baldwin, for respondents.

JOHNSON, Circuit Judge. If the paper signed by Newhall, and dated June 1st, 1868, is not a negotiable promissory note, then the appellants hold it subject to all the defences and infirmities which attached to its inception. There are two grounds, each of which appears conclusive against its being regarded as a negotiable promissory note. The first is that at the option of the maker it could, for four years of the five which it had to run, be paid in buggies of the manufacture of Newhall, at wholesale prices. In addition to the authorities referred to by the district judge, the case of Dinsmore v. Duncan, 57 N. Y. 576, reports the note, and cites cases in support of it, showing that when there is an alternative mode of payment, and the option is with the debtor, the instrument is not a negotiable promissory note. The second ground is that the amount to be paid is uncertain, for it provides for the payment, not only of interest which is certain, but also of taxes, the amount of which must necessarily be uncertain until they are assessed or imposed according to law. The instrument in question quite certainly is not a negotiable note. This question being decided against the appellants, there is little room to question the correctness of the judgment of the district court. Newhall's note and the mortgage to secure it were given fraudulently, both in fact and in law. They were the means whereby creditors who were induced to consent to a composition on the footing of equality were defrauded, being given by way of preference to the Chapmans. Doughty v. Savage, 28 Conn. 146. Thus they were induced to hold themselves out to the other creditors as coming into the compromise agreement on equal terms. That the security may be avoided by the assignee in bankruptcy is well settled. Bean v. Amswick [Case No. 1,167]. Those who were creditors of Marshall at the time of the composition, are still at liberty to prove their debts, for at the time of the commencement of the bankruptcy proceedings six years had not elapsed, and the statute of limitation did not then bar them. That period fixed the rights of the creditors in regard to the statute. In re Eldridge [Id. 4,331]. But the assignees could also maintain their bill as representing subsequent creditors, the note and mortgage having been fraudulent in fact. Merrill v. Meacham, 5 Day, 341; Norton v. Norton, 5 Cush. 524.

The decree of the district court must be affirmed with costs.

HOWELL (UNITED STATES v.). See Case No. 15,406.

HOWELL (WARNER v.). See Case No. 17,184.

Case No. 6,784.

HOWE MACH. CO. v. EDWARDS.

[15 Blatchf. 402; 7 Reporter, 420.] [1]

Circuit Court, S. D. New York. Dec. 11, 1878.

POWER OF COURT TO REFER SUIT TO A REFEREE —CONSENT OF BOTH PARTIES.

1. This court has no authority to refer a suit at common law to a referee for trial, without the consent of both parties to the suit.

2. Such authority is not conferred by section 5 of the act of June 1, 1872 (17 Stat. 197), now section 914 of the Revised Statutes of the United States, although, in a like suit in the courts of the state of New York, there might be such a reference without the consent of both parties.

[This was an action at law by the Howe Machine Company against John N. Edwards.]

Branch & Branch, for plaintiffs.
Childs & Hull, for defendants.

BLATCHFORD, Circuit Judge. In this suit, the plaintiffs move for an order that this action be referred to one or more referees, to hear and determine all the issues in the cause. The action is one at common law. The ground of the motion is, that the trial of the issues in the action will necessarily involve the examination of a long account. The issues are issues of fact, joined by proper pleadings. Section 1,013 of the Code of Procedure of the state of New York provides, that the court may, on the application of either party, without the consent of the other, direct a trial of the issues of fact by a referee, where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law.

This suit was commenced in a court of the state, and was removed into this court under the act of March 3, 1875 (18 Stat. 470). The 3d section of that act provides, that, when the cause reaches this court, it shall proceed here in the same manner as if it had been originally commenced in this court. The 6th section of the act is to the same effect. The view on the part of the plaintiff is, that as, by section 914 of the Revised Statutes of the United States, the practice, pleadings and

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 420, contains only a partial report.]

forms and modes of proceeding in this cause are required to conform, as nearly as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in the courts of record of this state, this court has the power to order the reference that is asked for, against the consent of the defendant. The defendant does not consent to the reference, either orally or in writing, but opposes it, and insists on his right to a trial by a jury in this case.

Prior to the passage of the act of June 1, 1872, the provisions of the 5th section of which (17 Stat. 197) are now embodied in section 914 of the Revised Statutes, it was well settled, that a circuit court of the United States had power, with the consent of the parties to a cause, to refer a cause to a referee, to hear and determine all the issues therein. Alexandria Canal Co. v. Swan, 5 How. [46 U. S.] 83, 89; Heckers v. Fowler, 2 Wall. [69 U. S.] 123. But no case can be found which holds that a court of the United States could make such a reference against the will of a party, or without his consent. On the contrary, in U. S. v. Rathbone [Case No. 16,121], in this court, it was held that a federal court had no power to order a cause to be referred, without the consent of the parties, although it might do so with their consent. In that case, the district court, on the ground that the case would require the examination of long accounts, had ordered a reference, without the consent of the plaintiffs, on the application of the defendants. This court, on writ of error, held that the district court had no such power. Mr. Justice Thompson, in his opinion in that case, cites the provision of the seventh amendment to the constitution of the United States, which provides, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." He also cites the provisions of the 9th and 12th sections of the judiciary act of September 24, 1789 (1 Stat. 77, 80), that the trial of issues of fact in the circuit and district courts, in suits at common law, "shall be by jury." He then says: "These provisions are too plain to be mistaken, and too positive to be disregarded. If the power to order a cause referred to referees, in any case whatever, is possessed by the courts of the United States, where is the limitation of that power to be found? There is no act of congress on the subject, even admitting the constitution not to stand in the way of such a law. There is no law restricting this power to cases involving the examination of long accounts; and, if the power exists at all, it may be exercised in every case, and the trial by jury abolished by the courts." He then refers to the 34th section of the act of 1789, which provides, that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," and says that that section has no application to the case, so as to require the adoption of the state law on the subject; and that the state law falls within the cases excepted in the section, because the constitution and laws of the United States have provided for the trial of issues of fact by a jury, instead of by referees. These views are sanctioned by the opinion of the supreme court, in Bank of Hamilton v. Dudley's Lessee, 2 Pet. [27 U. S.] 492, 525.

It is provided by section 648 of the Revised Statutes, that "the trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section." Section 649 provides for the waiving of a jury by a stipulation in writing, and for the trial of issues of fact, in civil cases, in a circuit court, by the court, without a jury, when such a stipulation waiving a jury is made. After the act of 1872 and section 914 of the Revised Statutes were enacted, it was provided by the act of March 3, 1875 (18 Stat. 471, § 3), that "the trial of issues of fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury."

In view of the foregoing decisions and statutes, it cannot be held, that this court has the power to order a reference in this case, or to deprive the defendant of his right to a trial by jury, without his consent. The question of the right to a trial by jury, in such suits at common law as are mentioned in the seventh amendment to the constitution of the United States, is not such a matter of practice, or such a form or mode of proceeding, as is referred to in section 914 of the Revised Statutes. Congress has no power, directly or indirectly, to deprive a party, without his consent, of the right to a trial by jury, which such amendment says shall be preserved; and it is not to be presumed, that congress intended, by section 914, to do such a thing. Such right has always been studiously preserved, and its waiver has always been made to depend on the consent of the party. These views of the scope of section 914 are sanctioned by the observations of the supreme court, in regard to that section, in Nudd v. Burrows, 91 U. S. 426, 441, and in Indianapolis R. Co. v. Horst, 93 U. S. 291, 299.

It follows, that the motion for a reference must be denied.

Case No. 6,785.

HOWE MACH. CO. v. HADDEN et al.

[8 Biss. 208; 6 Reporter, 136; 6 Cent. Law J. 446; 2 Month. Jur. 136; 18 Alb. Law J. 294; 24 Int. Rev. Rec. 236; 25 Pittsb. Leg. J. 204.] [1]

Circuit Court, D. Indiana. April Term, 1878.

BILLS AND NOTES—EXTINGUISHMENT OF LIABILITY OF INDORSER.

Where A., the payee of a note, indorsed it to B., who in the course of trade re-indorsed it to A., and then A. indorsed it to the plaintiff: *Held*, that the re-indorsement from B. to A. created no liability on the part of B. to A. nor to the plaintiff.

Action by the Howe Machine Company against Hadden, Good, and Fisher on four notes of $500 each, executed by Hadden to Good. The latter assigned the notes by indorsement to Fisher, who afterwards assigned them by indorsement to Good, who assigned them by indorsement to plaintiff. The third note was past due before any of the indorsements were made on it. In each paragraph of the petition it is alleged "said Good indorsed the same (note) to the defendant Fisher, who in course of trade indorsed the same to said Good, who in like manner indorsed the same to the plaintiff." Copies of the notes and indorsements were made part of each paragraph. The defendant Fisher demurred.

Baker, Hord & Hendricks, for plaintiff.
Dye & Harris, for defendants.

GRESHAM, District Judge. It is clear that Good could not maintain an action against Fisher on the latter's indorsements. The law presumes from Good's possession of the notes, after their re-indorsement to him by Fisher, that they were paid by Good as the first indorser. And further, if Good could sue Fisher on the latter's indorsement, Fisher could turn round and sue Good on his prior indorsement. To prevent this circuity or multiplicity of actions, the law in such cases, allows the liability of the first indorser to extinguish the liability of the second. Byles, Bills, 154; Bishop v. Hayward, 4 Term R. 470. Fisher's liability being extinguished as between him and Good, can the plaintiff, Good's indorsee, recover from Fisher? In reason it would seem not unfair to say that the indorsement and possession of Good, the payee, was prima facie evidence that he had got the notes back by payment or purchase. But if the indorsements on these notes were in blank there is authority for saying the presumption would be that Fisher had signed for the accommodation of Good. If a bill or commercial note be bought from the maker or some prior indorser before maturity, in good faith, the indorsement being in the usual form, in blank, the presumption is that the subsequent indorsements were made for the accommodation of the maker or prior indorser. Palmer v. Whitney, 21 Ind. 58; Runyan v. Reed [5 Clark (Pa.) 439]; Mauldin v. Branch Bank, 2 Ala. 502. The third note in suit was past due some time before any of the indorsements were made on it; as to it there is no ground for presuming that Fisher indorsed for Good's accommodation. The indorsements on the first, second, and fourth notes are without date, and the presumption is that they were made before maturity. But it will be observed that all the indorsements are special. Good, Fisher, and the plaintiff are the only persons who have held the notes. Good, the payee, indorsed to Fisher, who re-indorsed to Good, who then indorsed to the plaintiff. The plaintiff had no right to infer that Fisher had indorsed for the accommodation of Good. In fact, the special indorsements were notice to the plaintiff to the contrary, and informed it that Good had come into possession of the notes by payment or purchase. Knowing this, the plaintiff had no more right to buy the notes from Good, expecting to hold Fisher liable, than if it had known that Good had released Fisher for a consideration. It will not do for the plaintiff to insist that Fisher must be held to have indorsed for accommodation of Good, when in each paragraph of the complaint it is alleged that "said Good indorsed the same (note) to the defendant Fisher, who in course of trade indorsed the same to said Good, who, in like manner indorsed the same to this plaintiff." Demurrer sustained.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 18 Alb. Law J. 294, contains only a partial report.]

HOWE MACH. CO. (WOOSTER v.). See Case No. 18,037.

Case No. 6,786.

HOWENSTEIN v. BARNES et al.

[5 Dill. 482; 9 Cent. Law J. 48; 8 Reporter, 326; 1 Wkly. Jur. 249; 8 Am. Law. Rec. 163; 20 Alb. Law J. 318.] [1]

Circuit Court, D. Kansas. May, 1879.

NEGOTIABLE PAPER—ATTORNEY'S FEES—CONFLICT OF LAWS.

1. An instrument in writing, purporting to be a promissory note, is none the less a promissory note because it contains a stipulation to pay attorney's fees if suit be instituted on the note.

[Cited in Wilson Sewing Mach. Co. v. Moreno, 7 Fed. 808; Merchants' Nat. Bank v. Sevier, 14 Fed. 663; Farmers' Nat. Bank v. Sutton Manuf'g Co., 3 C. C. A. 1, 52 Fed. 195.]

[Cited in Benn v. Kutzschan (Or.) 32 Pac. 764; Trader v. Chidester, 41 Ark. 242; Dorsey v. Wolff, 142 Ill. 592–597, 32 N. E. 495.]

[See Bank of British North America v. Ellis, Case No. 859.]

2. In the construction of contracts, any interpretation or construction applicable or in-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 8 Reporter, 326, and 20 Alb. Law J. 318, contain only partial reports.]

cidental to their performance should be governed by the law of the place of performance, while such as go to their execution or validity should be determined by the law of the place where they are made.

3. A paper writing for the payment of money in Missouri was executed in Kansas. By the law of Missouri, such writing was not negotiable; by the law of Kansas, it was: *Held*, that the paper was negotiable.

At law.

J. Brumback, for plaintiff.

Peck, Bryan & Johnson, for defendants.

Before MILLER, Circuit Justice, and FOSTER, District Judge.

FOSTER, District Judge. The defendants made two certain promissory notes, as follows: "2,040.20. Medina, Kas., March 4th, 1877. Thirty days after date we promise to pay to the order of Powers, Lynde & Co. two thousand and forty and twenty one-hundredths dollars, at the First National Bank of Kansas City, Missouri, with interest at twelve per cent per annum after maturity until paid, and ten per cent attorney's fees if suit be instituted on this note. The drawers and endorsers hereof jointly and severally hereby waive demand, protest, and notice of non-payment of this note; value received. Barnes & Haynes."

The other note was like this, excepting the date and amount, being dated January 30th, 1877, and for the sum of $2,020. Both these notes were by the payees endorsed and transferred to the First National Bank of Kansas City, within six days after their respective dates, said bank discounting the notes at their face, less the interest for the time they were to run, and placed the money to the credit of Powers, Lynde & Co., who afterwards checked it out. The defendants, a few days before the respective notes fell due, remitted the money to pay the same to Powers, Lynde & Co., not knowing that they had transferred the notes. Afterwards the First National Bank failed, and Howenstein was duly appointed receiver, and he brings this suit to recover against the makers. These notes appear to have been made in Kansas, and delivered to the payees at the place where they were made. They were made payable in Missouri, at the First National Bank of Kansas City, and were endorsed and transferred to said bank before maturity.

The supreme court of Kansas has decided that such notes are negotiable instruments. Seaton v. Scovill, 18 Kan. 435. The supreme court of Missouri has decided that they are not negotiable instruments. First Nat. Bank v. Gay, 63 Mo. 34. Neither of these decisions is founded on any statutory provision, but both rest upon constructions of the general principles of the law merchant. The defendants insist, however, that, as the contract was to be performed in Missouri, the parties are presumed to have contracted with reference to the law as decided by the supreme court of that state.

The purpose of interpretation in any case is to ascertain the intention of the contracting parties. But if the intention of the parties cannot be determined from the language of the instrument itself, it is to be sought for in the situation of the parties and the subject matter of the contract, aided by certain rules of construction which are presumed to be in accordance with the intentions of the parties. Story, Bills, § 143; Edw. Bills & N. p. 166. Undoubtedly the place of payment was fixed, in this case, for the convenience of the payees in the notes, as they resided in Kansas City, and held business relations with the bank where payment was to be made. There seems to be some uncertainty as to what rule governs in the construction and interpretation of contracts made in one state to be performed in another. It has been held that the law of the place of performance is to control as to the construction and interpretation of the contract; and, again, it has been as clearly held that a contract legal by the laws of the place where made is valid, and will be enforced in other jurisdictions. Story, Prom. Notes, 179; Tilden v. Blair, 21 Wall. [88 U. S.] 247. From the authorities which I have been able to examine, the true rule of construction is this: Any interpretation or construction applicable or incidental to the performance should be governed by the law of the place of performance, and such matters of construction or interpretation as go to the execution and validity of the contract are determined by the laws of the place where the contract was made. This is the rule established by the supreme court in the case of Scudder v. Union Nat. Bank, 91 U. S. 406. Now, if this case is such a one as calls for the application of this rule of construction, I should say the laws of Kansas would control, because the question is simply this: Are these writings promissory notes? The supreme court of Kansas says they are; the supreme court of Missouri says they are not. They were made in Kansas, and the laws of that state must determine their legal effect. It is a question touching their validity, and goes back to the execution of the papers. It is not reasonable to suppose that the contracting parties intended, by making these notes payable in Kansas City, to restrict their negotiability. If such had been the purpose, a stroke of the pen over the words "the order of" would have effected that object completely. Suppose the payees had transferred these notes, while in Kansas City, to a citizen of Kansas, could it be urged against him, because the courts of Missouri hold the paper non-negotiable, that he could not recover in the courts of Kansas? I think not. But it seems to me this case rests upon the general commercial law of the country, and this court is not bound to speculate upon the effect of these conflicting

decisions of Kansas and Missouri. Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 96. Both of them cannot be good law; one is right and the other is wrong. The parties are presumed to have contracted with reference to the law as it really is; and it really is the same in both states, for it is a part of the common law of the land, and this court must base its decision on that law. And it seems to me the only way the defendants can be relieved from liability would be to hold that, under the commercial law of this country, these contracts are not promissory notes, because not drawn for an amount certain, by reason of the provision for an attorney fee. And in support of that proposition there are several very respectable authorities. First Nat. Bank v. Gay, 63 Mo. 34; Samstag v. Conley, 64 Mo. 476; Woods v. North, 84 Pa. St. 407; Lowe v. Bliss, 24 Ill. 168. On the other side, there are many equally respectable authorities. Gaar v Louisville Banking Co., 11 Bush, 180; Sperry v. Horr, 32 Iowa, 184; Stoneman v. Pyle, 35 Ind. 103; Wyant v. Pottorff, 37 Ind. 512; Walker v. Woollen [54 Ind. 164]; Seaton v. Scovill, 18 Kan. 435, and cases therein cited. The reasoning upon which the Kentucky, Iowa, and cases following rest their decisions appears to me to be correct, and the conclusion reached is more in accordance with the advanced views of the present time, and with the general principles established by the supreme court of the United States in Mercer County v. Hacket, 1 Wall. [68 U. S.] 95, and other cases, sustaining the negotiability of municipal bonds.

The sum of money for which these notes were made is fixed and certain. The amount due at the maturity of the paper—the date when the makers promised to pay—was in no manner indefinite. At all times during the period these notes would have been negotiable were the provision for an attorney fee omitted—i. e., until they were due—they called for a definite and fixed sum of money, and it was only on the contingency there should be a breach of the promise and a suit brought to enforce it that it imposed a further liability. These notes stipulated for interest at twelve per cent per annum after maturity. Here is a further liability if not paid when due, and if we are to look beyond the day of payment fixed in the note, what prophetic vision can foretell what exact sum would be due when the note goes to judgment, or is voluntarily paid before judgment; but no one would contend but it is nevertheless a negotiable promissory note.

It is a hard case for the defendants to be compelled to pay these notes again, and it would also be hard for the creditors of the bank to have to lose the amount; but one party or the other must suffer, and in equity the one most in fault should be the loser. There was a want of caution by the defendants in sending the money direct to Powers, Lynde & Co. before due, without knowing they still held the notes, and being different from the place of payment named in the paper. Undoubtedly they had implicit confidence in the payees, and believed them to be honest men, and so sent the money directly to them in good faith; but that confidence was misplaced, and the defendants are the losers by it. Judgment must go for the plaintiff. Judgment accordingly.

Case No. 6,787.

In re HOWES et al.

[7 Ben. 102;[1] 9 N. B. R. 423.]

District Court, S. D. New York. Jan., 1874.

SURRENDER TO REGISTER — SEIZURE BY MARSHAL —ISSUING WARRANT.

1. A petition in involuntary bankruptcy was filed on December 6th, 1873, on which an order to show cause was issued, returnable December 13th. On that day the bankrupts appeared by attorney, and the matter was adjourned to the 20th, on which day an adjudication of bankruptcy for want of an answer was made. The warrant was not issued to the marshal till January 3d, 1874. On the 22d of December, the bankrupts, by a formal instrument in writing, surrendered to the register all of their property, and requested him to take possession of it, which he did. On receiving the warrant, the marshal applied to the register to deliver up the property in his possession, which he refused to do. The marshal thereupon applied to the court for an order directing the register to deliver up the property: *Held*, that the register must deliver up the property to the marshal.

2. In cases of involuntary bankruptcy, the warrant to the marshal should be issued forthwith upon the adjudication.

[Cited in Re Tifft, Case No. 14,031.]

3. There is no such thing as a surrender of property by a bankrupt to the register, in a case of involuntary bankruptcy.

[In bankruptcy. In the matter of Reuben W. Howes and Charles A. Macy.]

James C. Carter, for the motion.

Lucien Birdseye, opposed.

BLATCHFORD, District Judge. On the 6th of December, 1873, a petition in involuntary bankruptcy was filed against the bankrupts, on which an order to show cause was issued, returnable on the 13th. On that day the bankrupts appeared by attorney, and the matter was adjourned to the 20th. On the 20th an adjudication of bankruptcy for want of answer after appearance was made. The warrant was issued and put into the hands of the marshal on the 3d of January, 1874. It designates the 24th of January as the day for the first meeting of creditors. On receiving the warrant the marshal ascertained that a large part of the estate of the bankrupts was in the possession of the register to whom the case was referred by the order of adjudication. The marshal demanded of the register the surrender of the same to him, and the register refused to surrender it

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

to the marshal, claiming that it had been surrendered to him by the bankrupts after the adjudication and before the warrant was issued, and that he had a right to retain it until an assignee should be appointed, to whom he could and would transfer it. The marshal now applies to the court for an order directing the register to deliver the property forthwith to the marshal, to be held by him under the warrant. On the part of the register it is shown that the bankrupts, after their adjudication as such, by a formal instrument in writing, signed by them, surrendered to the said register all of their property, except exempt property, and requested the said register to take possession of the same. This instrument is dated December 20th, but was executed December 22d. It was made with the assent of the petitioning creditor, and after consultation with the register. Prior to making it, the bankrupts, who had not opposed the adjudication, had made preparations to apply to the court for an order respecting their property, which consisted largely of moneys on deposit in trust companies, on interest, and in a bank. Money was being paid in on debts for which collateral securities were held by the bankrupts, and in respect of which action was necessary. Suits were pending against the bankrupts, and likely soon to go to judgment and be in a condition to be enforced against the property of the bankrupts. The schedules to be prepared on the part of the bankrupts would be voluminous, complicated, and difficult to prepare, and would require much time for their completion. These considerations induced the bankrupts to make, and the register to accept, the surrender. Thereupon the register took the property into his possession and custody. The schedules have been completed, and show about 1,100 different creditors. They were not completed until the day the warrant was issued. It is represented that because of the number of the creditors and the difficulty of preparing the schedules, the time for the first meeting of creditors could not until then be fixed. It is also stated that after the surrender the state sheriff claimed to seize the property, and was prevented from doing so by the fact that the register had possession of it. It is also stated that the bankrupts were preparing a petition and schedules to go into voluntary bankruptcy when the involuntary proceedings were commenced, but that such intention was unknown to the petitioning creditor, and his intention to file his petition was unknown to the bankrupts.

I have no hesitation in holding that the order applied for by the marshal must be made. By the 42d section of the act [of 1867 (14 Stat. 537)] the court is required, on an adjudication in involuntary bankruptcy, to forthwith issue a warrant to take possession of the estate of the debtor. The form of the warrant is prescribed by form No. 59. That form is, by general order No. 32, required to be observed and used. It requires the marshal to take possession of all the estate, real and personal, of the bankrupt, except such as may be by law exempt from the operation of the act, and of all his deeds, books of account and papers, and to keep the same safely until the appointment of an assignee. This is the form of the warrant issued in this case. General order No. 13 makes it the duty of the marshal, as messenger, to take possession of the property of the bankrupt, and to prepare, within three days from the time of taking such possession, a complete inventory of all the property, and to return it as soon as completed, subject to the power of the court to enlarge the time for making the inventory and return. It also requires the marshal, in case the bankrupt is absent or cannot be found, to prepare a schedule of the names and residences of his creditors, and the amount due to each, from the books or other papers of the bankrupt that may be seized by him under the warrant, and from any other sources of information.

These positive provisions of the statute, and of the general orders, constitute an entire scheme of procedure. The possession of the property, in a case of involuntary bankruptcy, is given to the marshal, as messenger, eo nomine, not merely for safe custody, but with a view to the performance of certain duties. In a case of voluntary bankruptcy, the debtor files his petition, which must be accompanied by schedules containing an inventory of his property and a list of his creditors, and a surrender of the property to the register is for nothing but custody. In a case of involuntary bankruptcy, the marshal is required to make an inventory of the property seized, and return such inventory to the court, and, if the bankrupt cannot be found, so as to make a schedule of his creditors, the marshal is required to make such schedule, and to make it from the books and papers which he has seized under the warrant. No power is given to any other officer to make the inventory or the schedule of creditors. If the bankrupt does not, as required by the order of adjudication, form No. 58, make and transmit to the marshal, as messenger, a verified schedule of his creditors, the schedule of creditors so to be made by the marshal, under general order No. 13, from the books and papers of the bankrupt seized under the warrant, is the schedule, and the only schedule, which can be used in serving notices under the warrant for the first meeting of creditors. Unless the marshal makes the seizure of the books and papers he cannot make the schedule. Unless he makes the schedule he cannot execute so much of the warrant as requires the notices to creditors to be given by him, or make return of its execution; and, if the notices are not duly given (section 12), there can be no election of an assignee. The warrant for the seizure of all the property is as authorita-

tive as the warrant for the seizure of the books and papers. There is no provision for the making of any inventory of property or schedule of creditors by the register. If the register has the books and papers, the marshal cannot perform his duty of making a schedule of creditors. There is no provision for using, in giving notices to creditors, a schedule of creditors made by the register, or for putting on the files of the court, for the use of creditors, any inventory of property, except one made by the marshal. The court has no discretion to vary this mode of procedure, or to substitute the register for the marshal as the officer to act.

Moreover, the marshal, from the moment the warrant is delivered to him, becomes responsible to the creditors for the performance of the commands of the warrant. One of them is, to seize all the property of the bankrupt. The fact that it is in the possession of the register does not relieve the marshal from his responsibility, if the property is not properly in the possession of the register, and if he has no authority of law for holding it.

It is urged, that the provision of section 4 of the act, that the register shall have power, and it shall be his duty, "to receive the surrender of any bankrupt," and the provision of general order No. 5, that the register to whom the case is referred may perform the acts which he is empowered to do by the act, and conduct proceedings in relation to, among other matters, when uncontested, "receiving the surrender of a bankrupt," authorized the register in this case to do what he did. But, in view of the provisions referred to in regard to the proceedings in a case of involuntary bankruptcy, it is evident that such is not the proper construction of the provisions of section 4 and general order No. 5. They must be limited in their scope so as to be consistent with, and not conflict with, the provisions in regard to involuntary bankruptcy. There is no such thing as a surrender in involuntary bankruptcy. There is a seizure of property. In voluntary bankruptcy, the petition (section 11) is required to state that the debtor is willing to surrender all his estate and effects for the benefit of his creditors, and, with a view to such surrender, he is required (section 11) to annex to his petition an accurate inventory of his estate, describing it and stating where it is. The filing of this petition is declared (section 11) to be an act of bankruptcy, and he is eo instanti, in contemplation of the act, adjudged a bankrupt. He brings his estate into court with him, when he files his petition, and surrenders it to the court, and puts it under the protection of the court. It is this surrender which the register, as the designated officer of the court for the purpose, is empowered to receive. When, therefore, the act gives authority to the proper register to receive the surrender of any bankrupt, or, as it is expressed in general order No. 5, to receive the surrender of a bankrupt, it only means, the surrender of a bankrupt who is authorized by the act to make a surrender. The theory of the involuntary part of the act is opposition, resistance, proceedings against the will of the debtor. If the debtor is adjudged a bankrupt on an involuntary petition, it can make no difference whether he is so adjudicated by default, or for want of answer after appearance, or after the trial of an issue. Such an adjudication, even though uncontested, does not make him a voluntary bankrupt, or give him the privilege of making, or the register the power of accepting, the surrender which only a voluntary bankrupt can make. Nor can it make any difference that, after an uncontested adjudication in an involuntary case, the bankrupt desires to make a surrender. The machinery of an involuntary case having been set in motion, the case must proceed as an involuntary case.

The suggestion is made that, the register being an officer of the court, his possession of the property is the possession of it by the court, and that it is not for one officer of the court to take property which is in the custody of another officer of the court. The answer is, that the statute and the general orders designate the register as the custodian in cases of voluntary bankruptcy, and the marshal as the custodian in cases of involuntary bankruptcy.

If the duty of the register, under section 4 of the act, to receive the surrender of any bankrupt, requires him to receive the surrender of any involuntary bankrupt who desires to make a surrender, such bankrupt might as properly surrender his property to the register after the marshal had seized it as before, and the register might claim to take it out of the hands of the marshal.

But, in the view that the surrender is only one which is to be made before the marshal has seized the property, it is urged that cases of exigency may arise where, after adjudication and before the marshal can seize under the warrant, or even before the warrant can be issued and reach the marshal, it may be very important and indispensable that the register, as a recognized officer of the court, should take possession of the property; that, in practice, the warrant cannot issue until the day for the first meeting of creditors can be fixed; and that that cannot be fixed until the list of creditors is made out, showing where the creditors reside, so that a day sufficiently distant to admit of notice being given to distant creditors, may be fixed. There is no force in these suggestions. The 42d section provides that, on an adjudication in an involuntary case, the court shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant is to issue instantly, to take possession of the property. A day for the first meeting of creditors can be named in

it, although the schedule of creditors has not been prepared. That day (section 11) must be not less than ten, nor more than ninety days after the issuing of the warrant. By the warrant the marshal is required to publish a general notice of the first meeting, as well as to serve a special notice thereof on each creditor whose name shall be set down in the proper schedule of creditors. If, on the day named, the notice required to be published has been properly published, but the notices required to be served have not been served, because of the failure to prepare the proper schedule of creditors in time to allow a proper length of notice to be served, the proper course is to adjourn the meeting to a day certain, and to direct the giving for the adjourned day of a new notice in respect of the serving of notices, but not in respect of the publication. In re Scheppeler [Case No. 12,452]. The warrant and the seizure under it remain in force. There is, therefore, never any propriety in delaying, after adjudication, the issuing of the warrant in an involuntary case. On the contrary, it ought to be, and can be, issued forthwith, as the statute requires, so that the property of the bankrupt may under it be forthwith taken possession of by the marshal, as the messenger of the court. In this way the rights of all parties interested will be preserved, and the action of the court and its proper officer will be prompt and efficient, and there will be no occasion for a resort to unauthorized proceedings.

The register and all parties concerned have acted herein not only in good faith and with a view to what seemed to be the best interests of the estate, but they had not, so far as I am aware, any express decision, as a guide or precedent. An order must be entered, directing the register to deliver the property to the marshal.

Case No. 6,788.

In re HOWES.

[21 Vt. 619; 2 N. Y. Leg. Obs. 271; 6 Law Rep. 297.]

District Court, D. Vermont. Aug., 1843.

REPEAL OF LAW—WHEN IT TAKES EFFECT.

1. The statute repealing the bankrupt act took effect the day it was approved, which was March 3, 1843 [5 Stat. 614], and, as there can be no fractions of a day in a question of this nature, it must be considered as being in force from the first moment of that day.

[Cited in Westbrook Manuf'g Co. v. Grant, 60 Me. 95.]

2. The presenting and filing of the petition is deemed to be the commencement of a proceeding in bankruptcy; and where the petition was presented March 3, 1843, it was held, that no order could be taken upon it, other than to dismiss it.

[Cited in Re Welman, Case No. 17,407.]

This was a petition by David Howes, declaring himself to be unable to meet his debts and engagements, and praying for the benefit of the bankrupt law. The petition was presented and filed March 3, 1843; and it was moved that an order of notice to creditors and others be issued thereupon, to show cause why the petitioner should not be declared a bankrupt.

PRENTISS, District Judge. The act passed at the last session of congress, repealing the bankrupt law, was approved on the third day of March, and of course the act became a law and took effect as such on that day. As there can be no divisions or fractions of a day in a question of this nature, the act, in construction of law, must be considered as having relation to, and as being in force from, the first moment of the day on which it was approved; and, consequently, the bankrupt law was repealed, and ceased to have any operation, except what is reserved to it by the proviso to the repealing act, from and after the day preceding.

The proviso, so far as is material to the question under consideration, merely declares, that the act shall not affect any case or proceeding in bankruptcy, commenced before the passage of the act, but every such proceeding may be continued to its final consummation in like manner as if the act had not been passed. The effect of the proviso being simply to qualify and limit the enacting clause, so far as to save from its operation, and allow it to be continued and prosecuted, such cases in bankruptcy, as were commenced and pending before the passing of the act, that is in legal consideration, as we have seen, before the day on which the act was passed, no case or proceeding in bankruptcy is saved by the proviso, except such as was commenced before that day. The presenting and filing of the petition is deemed to be the commencement of a proceeding in bankruptcy; and as the petition in the present case was presented and filed, not before but on the day, on which the repealing act was passed, and so not before the passage of the act, the proceeding was not commenced in time, and no order can be taken upon the petition, other than to dismiss it.

Case No. 6,789.

HOWES et al. v. McNEAL.

[15 Blatchf. 103; 3 Ban. & A. 376; 15 O. G. 608.] [1]

Circuit Court, N. D. New York. Aug. 8, 1878.

PATENTS — IMPROVEMENT IN GRAIN SEPARATORS AND SCOURERS—ABANDONMENT TO PUBLIC —REJECTED APPLICATION.

1. The reissued letters patent granted to Simeon Howes, Gardner E. Throop, Alpheus Babcock, Norman Babcock and Carlos Ewell, March 5th, 1872, for an "improvement in grain

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 376, and here republished by permission. 15 O. G. 608, contains only a partial report.]

separators and scourers," and extended for seven years from March 16th, 1872, the original patent having been granted to Howes and Throop, March 16th, 1858, are valid.

2. The first claim of said reissue, namely, "The combination with a suction fan, scouring mechanism, perforated inclosing shell, and outer tight casing, of a draught passage connecting the chamber outside of said perforated shell directly with the fan case, said passage being provided with auxiliary air inlets or openings, substantially as and for the purpose set forth," is infringed by a machine which embodies in combination all the elements which make up such claim, they being combined in substantially the same way and for the same purpose, and having the same combined mode of operation as in the patent, although in the infringing machine the direction of the current is at first reversed, and the refuse is carried through an opening in the inner wall, and then through an auxiliary fan into another upward passage, to reach the main fan, instead of, as in the patent, being at first carried directly upward through the draught passage, to reach the main fan, and although, in the infringing machine, the increased supply of air is brought into the inside of the scourer, and through the perforations into the annular space between the scourer and the outer casing, instead of, as in the patent, coming through auxiliary air inlets in the bottom of the outer casing.

3. The application for the patent was filed in January, 1855, and rejected in March, 1855. In June, 1856, the inventors filed a paper stating that they withdrew their application, and requesting the return of $20. The withdrawal was made for the purpose of filing a new application. The $20 was refunded in June, 1856. At that time one of the inventors directed E., a patent agent, to prepare a new specification. E. neglected to do so till April, 1857. At that time a new specification was sworn to by both inventors, and sent to E. with his fee, and the patent office fee, and a power of attorney to E. The application was not filed by E. till February, 1858. The patent was issued in March, 1858. *Held*, that there was no abandonment of the invention to the public, and no consent to its use by the public for more than two years before February, 1858; and that there was, in judgment of law, a continuous application.

[Cited in Lindsay v. Stein, 10 Fed. 913.]

4. A rejected application for a patent is, of itself, no evidence of the existence of a perfected invention at the date it was filed, in the absence of any other evidence of the construction and operation at that date of a machine embodying the invention described in such application.

5. The second claim of said reissue, namely, "In a combined scourer and grain separator, the arrangement of two wind trunks side by side, in the manner shown and described, and for the purpose herein set forth," is valid, although each of its two separators is, in and by itself, like a separator in a prior machine.

[In equity. Bill by Simeon Howes and others against Charles McNeal for infringement.]

Sprague & Hyatt, for plaintiffs.
William S. Farnell, for defendant.

BLATCHFORD, Circuit Judge. This suit is brought for the infringement of reissued letters patent [No. 4,793] granted to Simeon Howes, Gardner E. Throop, Alpheus Babcock, Norman Babcock and Carlos Ewell, March 5th, 1872, for an "improvement in grain separators and scourers," and extended for 7 years from March 16th, 1872, the original patent [No. 19,637] having been granted to Howes and Throop March 16th, 1858. The specification of the reissue says: "The improvements relate to that class of combined machines which both scour the grain and also separate the heavy grain from the light grain and screenings, and the cheat and light grain from the dust, chaff and other refuse. The object of the invention is to effect a more perfect cleaning and separation of smut and other refuse from the full grains and from the cheat and lighter grains than has heretofore been accomplished, and at the same time render the machine more compact, simple and cheap in construction, and enable it to be more conveniently operated and regulated than other machines. The invention consists, first, in the combination with a suction fan, a perforated inclosing shell or cylinder, and an outer tight casing, of a draught passage leading directly from the inclosed space outside of the scouring shell to the fan case, and provided with auxiliary air inlets, whereby the particles of smut and other impurities, as they are detached from the grain and drawn or forced through the perforations of the cylinder, will be removed and conducted directly to the fan; second, in the combination with a grain scourer and suction fan, of two separating wind trunks, arranged side by side, one receiving the grain before it enters the scourer, and effecting what is termed a preliminary separation, and the other receiving the grain as it is discharged from the scourer, and effecting what is termed a subsequent separation, each wind trunk effecting three separations in a similar manner; first, of the full or plump grain; second, of cheat and light or shrunken grain; and third, of the smut, dust, chaff and other refuse, the products of the second separation from both wind trunks being discharged near each other on the same side of the machine, whilst the products of the third separation (the refuse material) are conducted from both wind trunks into the eye of the fan." The drawings contain four figures. Figure 1 is a vertical section through the preliminary separating wind trunk. Figure 2 is a vertical section through the subsequent separating wind trunk. Figure 3 is a vertical cross-section, made at right angles to the sections in figures 1 and 2. Figure 4 is a horizontal section. The specification says: "Like letters of reference designate like parts in each of the figures. A is the frame of the combined machine; B, the perforated smutting or scouring shell or cylinder; and C, the surrounding case, leaving a space, D, between the two, into which air is admitted through narrow auxiliary openings, c, at the bottom. E is the central vertical shaft, to which is secured, within the scouring shell or cylinder, a beater cylinder, F, provided with radial wings or beaters, f. G are the fan blades, keyed to the upper end of the shaft; and H, the fan case, with an opening or eye, h, in

[Drawings of reissued letters patent No. 4,793, published from the records of the United States patent office.]

Fig. 1.

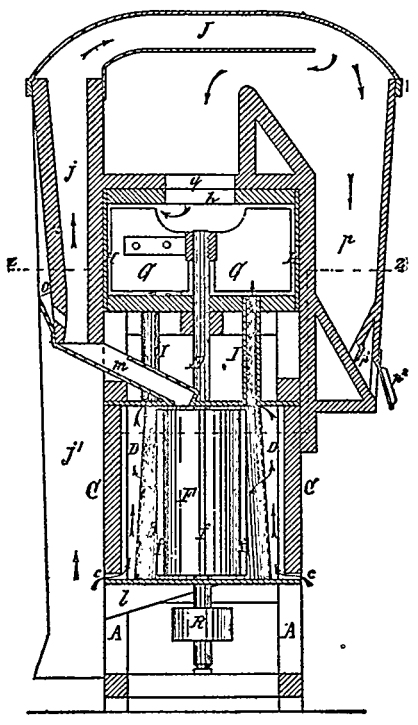


Fig. 2.

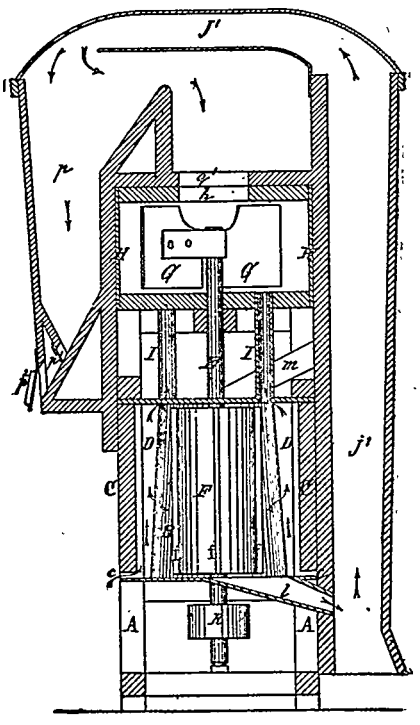


Fig. 3.

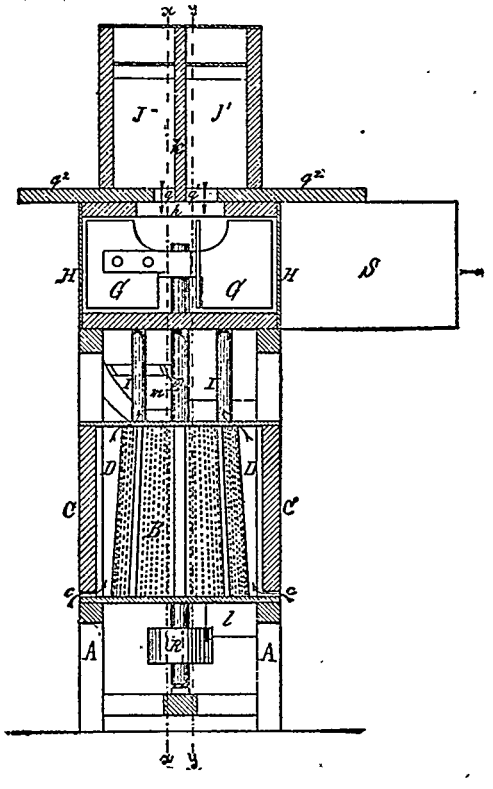
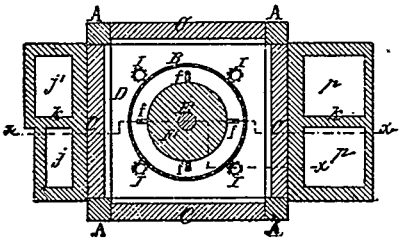


Fig. 4.



its top. II are air pipes or passages, which connect the chamber, D, outside of the scouring cylinder directly with the fan case. J is the preliminary and J' the subsequent separating wind trunk, arranged side by side and separated by a partition, k. They are similar in construction, except that the ascending leg, j, of the subsequent separator extends downward nearly to the floor, so as to permit the grain from the scouring cylinder to be discharged through a spout, l, into it, as shown in figure 2, while the ascending leg j of the preliminary separator terminates a little above the top of the scouring cylinder, and is provided with a spout, m, through which the grain, fed into the leg by means of a spout or hopper, o, is conducted into the top of the scouring cylinder. On the opposite side of the machine each of the wind trunks is constructed with dependent chess hoppers, p, each provided with two flap-valves, p^1, p^2, which are closed by atmospheric pressure, except when forced open by the weight of the accumulated grain therein. Both wind trunks communicate with the eye of the fan through openings q, q^1, provided with slides, q^2, for regulating the size of the passages and force of the air currents. Motion being communicated to the shaft E by means of the driving pulley R, exhaust currents of air through the wind trunks, chamber D, and passages I leading to the fan, are induced in the direction indicated by the darts. The grain fed through the hopper o into the ascending leg of the wind trunk J is met by the upward current of air therein, which arrests the smut-balls, chaff, dust, and most of the chess and lighter grains, and carries them upward with it over to the opposite side of the machine, to the enlarged mouth of the chess hopper, into which the cheat and light grains descend by gravity, (owing to the reversal of the air current and the weakened draught occasioned by the enlargement of the hopper), while the smut-balls, chaff and other refuse take the reversed direction of the air current and are conducted through the opening q into the eye of the fan. The plump grain descends from the hopper o, through the spout m, into the scouring cylinder, where it is subjected to the action of the beaters and the inner surface of the perforated cylinder, which rubs off and detaches from the kernels the smut and other adherent matter, which is forced and drawn by the centrifugal action induced by the beaters and by the suction in the space D, through the perforations of the scouring cylinder, into the chamber D, and conducted thence through the passages I directly to the fan, without commingling with, or again coming in contact with, the scoured grain. This is of the greatest importance, as the pulverulent smut is of such a sticky and adhesive nature, that, if the kernels become besmeared with the same, it becomes practically impossible to remove it by any subsequent operation of the machine; and especially is this the case in damp weather and when the grain is not thoroughly dry. The auxiliary inlets c supply the requisite amount of air to the space D to create, in connection with the fan, the necessary draught. The scoured grain passes from the scouring cylinder, through the pipe or spout l, into the ascending leg of the spout J', near its lower end, where it is again met by an ascending current, which removes the light grains, chaff, dust, &c., remaining therein, and separates and deposits the light grains on the opposite side of the machine, in the same manner as the preliminary separation in the wind trunk J was effected. The smut, dust and other refuse are ejected from the fan case into a trunk, S, by which it is conveyed out of the apartment or building, as required. The combination, broadly, in a smut machine and grain separator, of an air passage, connecting an inclosed space outside of a perforated scouring cylinder with a fan, is not claimed as new; neither is the combination of two wind trunks for effecting a preliminary and a subsequent separation in such combined machine, broadly claimed." The claims of the reissue are as follows: "1. The combination with a suction fan, scouring mechanism, perforated inclosing shell, and outer tight casing, of a draught passage connecting the chamber outside of said perforated shell directly with the fan case, said passage being provided with auxiliary air inlets or openings, substantially as and for the purpose set forth. 2. In a combined scourer and grain separator, the arrangement of two wind trunks side by side, in the manner shown and described, and for the purpose hereinbefore set forth."

The machine of the defendant has a suction fan arranged above the scourer; a scouring mechanism consisting of revolving wings or beaters attached to the same shaft to which the fan is attached; a perforated shell inclosing the revolving beaters; an outer tight casing surrounding the perforated shell, but so as to leave a space or chamber between such outer casing and such shell; a draught passage connecting such chamber directly with the fan case, in such manner that the smut and other adherent matter which pass through the perforations in such shell into such chamber, are conducted to the fan without commingling with, or again coming in contact with, the scoured grain; and auxiliary air inlets, in the shape of holes in the upper end of the scouring shell, instead of holes through the outer casing, as in the plaintiffs' machine. In the plaintiffs' machine, the refuse, after passing through the perforations, moves upward through the draught passage to reach the fan, and does not again come in contact with the grain, and the greater portion of the air which operates to make the necessary draught through the space outside of the scourer is that which comes through the auxiliary air inlets in the bottom of the outer tight case, and which inlets are at the end opposite the outlet. In

the defendant's machine, the refuse, after passing through the perforations, moves downward into an auxiliary fan, by which it is forced upward through a draught passage into the fan above the scourer, and does not, after leaving the perforations, again come in contact with the grain, and the greater portion of the air which operates to make the necessary draught through the space outside of the scourer is that which comes through the holes in the upper end of the scouring shell, and which holes are at the end opposite the outlet. This description of the defendant's machine shows plainly that it infringes the first claim of the plaintiffs' patent. It embodies, in combination, all the elements which make up such first claim, and they are combined in substantially the same way and for the same purpose, and they have the same combined mode of operation, as in the plaintiffs' machine. The differences are formal and not substantial, so far as regards the plaintiffs' combination. Reversing the direction of the current at first, and carrying the refuse out of the chamber through an opening in the inner wall, and then through the auxiliary fan, into another upward passage, to reach the main fan, and bringing the increased supply of air into the inside of the scourer, and through the perforations into the annular space, is no change from the principle of the construction and operation of the plaintiffs' combination. In both machines, the auxiliary air inlets are at the farthest point from the outlet into the draught passage which leads to the fan. In both, the refuse is discharged through the perforations, and then, by a current induced in the annular space, is carried to the fan without again coming in contact with the grain. If there be any advantage or improvement in the modifications introduced by the defendant, still they are subordinate to, and embody and infringe, the plaintiffs' combination. Nor is this view affected by the fact that the defendant's beaters are not attached to a solid cylinder, as are the plaintiffs', and that by reason of their arrangement, and of other minor details, the grain may be more perfectly scoured in the defendant's machine than in the plaintiffs'.

In regard to the second claim of the plaintiffs' patent, the defendant's machine has two wind trunks arranged side by side, each provided with a separate valve or regulator, and each effecting the three separations set forth in the plaintiffs' specification, namely, first, of full grain, second, of cheat and light grain, and, third, of refuse, the refuse being conducted into the eye of a suction fan, which is arranged above and on the same shaft with a scourer, both wind trunks being connected with the fan, and the scourer having a perforated case which operates to separate the greater portion of the refuse as it is detached from the grain, and the arrangement of the wind trunks, in the combined scourer and grain separator, is substantially the same, and operates in substantially the same manner, and accomplishes substantially the same results as the arrangement covered by the second claim of the plaintiffs' patent. The difference in shape of the chess hopper in the defendant's wind trunk, the projecting forward and curving downward into the chess hopper, of the bottom board of the horizontal part of the wind trunk, in the defendant's machine, the regulating valve in the wind trunk, in the defendant's machine, and other minor modifications which are alleged to effect a more perfect separation in the defendant's machine, if improvements, do not relieve the arrangement from the charge of infringement.

Howes and Throop, on the 27th of January, 1855, filed in the patent office an application for a patent for an "improved separator and smut machine." The application was sworn to by Howes on the 2d of January, 1855, and by Throop on the 22d of January, 1855. The model was filed on the 28th of February, 1855. The drawings accompanying this application were, in all substantial and material particulars, like the drawings of the reissued patent sued on, except that there was no drawing, figure 4, of a horizontal section. The specification in such application states the invention as follows: "This invention relates to a new and improved separator and smut machine, and consists, 1st, in a peculiar arrangement of the blast spouts, as will be hereafter fully shown, whereby the grain is subjected to two blasts, one before entering the scourer or smut mill, and the other after leaving the scourer or smut mill, and all dust, chaff, smut, straw, chess and imperfect or light grain is thoroughly separated from the sound or heavy grain, and the chess and imperfect grain is also separated from the dust and trash. 2d. The invention consists in the peculiar arrangement of the fan in relation with the blast spouts and scourer or smut mill, or the box which incloses it, as will be hereafter fully shown, whereby all the dust that enters the machine is drawn into the fan box and ejected therefrom, thus keeping the grain, both the sound and the light, perfectly clean and free from dust." The specification describes, and the drawings show, the perforated shell; the cylinder within the shell, with beaters on it; the fan, in a case and with a discharge spout; the passages leading from the upper part of the chamber outside of the perforated shell to the lower part of the fan case; the curved trunk, divided by a vertical partition into two compartments, which communicate with the fan case; the slides to regulate the force of the blast; the horizontal bottom plate in the wind trunk; the spout leading into the inside of the scourer; the spout leading out of the scourer; the close outer case around the shell; and the auxiliary air inlets through the bottom of the

outer case. The specification states, that the grain to be cleansed and separated passes through a hopper and a spout into the scourer; that, as the fan rotates, a blast passes upward between the shell and the outer case, and through the draught passages into the fan case, in consequence of a vacuum being formed in the fan case by the rotation of the fan, the air entering through the apertures at the lower part of the outer case; that a blast is also generated by the same cause in the wind trunks; that, consequently, as the grain passes to the scourer, it is subjected to a blast, and all loose dirt and smut, straw and light chess passes up the first wind trunk, and the dirt, smut and light particles are drawn into the fan case through the opening at its eye, while chess, being heavier, is not controlled by the blast and passes downward in the first wind trunk and out at its lower end; that the grain is thus separated from loose impurities or foreign matter before entering the scourer, and, in passing through the scourer, all smut is broken or pulverized, and dirt, &c., is thoroughly removed from the grain and passes through the perforations in the shell into the space between the shell and the outer case, whence it is drawn up into the fan case and ejected through the discharge spout; and that the grain passes from the lower end of the scourer into a spout by which it is conducted into the lower end of the second wind trunk, the heavy and sound grain falling from the spout while the smut, dirt, &c., which was scoured from the grain while passing through the scourer and escaped through the perforations in the shell, is carried up the second wind trunk, drawn into the fan case through its eye, and ejected through the discharge spout. This specification calls the tight case which surrounds the shell, a box. The draught passages or air pipes which pass from the chamber outside of the scourer to the fan case, it calls spouts. The compartments in the wind trunks it calls blast spouts. It proceeds: "Thus it will be seen that the grain may be thoroughly cleansed and separated, the sound grain and chess being kept distinct or separate from each other, and the dirt, smut, &c., being removed from both." The inventors, in the claim, claim, first, the trunk, divided into two compartments or spouts, and arranged specifically as shown, with the fan, so that the grain will be subjected to two blasts, generated by one and the same fan, to one before entering the scourer and to the other after leaving the scourer, "and the chess or light grain separated from each other, and the dust, smut, etc., from both," the dust being drawn into the fan case and ejected therefrom; second, connecting the fan case with the box which contains the scourer, and also connecting the fan case with the two blast spouts, as shown and described, "whereby all dust that enters the machine is drawn into and ejected from the fan case, and thereby prevented from mixing with the cleansed grain." On the 8th of March, 1855, this application was rejected by the patent office. The letter of rejection said: "For substantially the same arrangement of devices, see the patent grain scourer and separator of Benjamin Rutter and Henry Rouzer, October 4th, 1853." On the 11th of June, 1856, Howes and Throop filed in the patent office a paper signed by them, in which they said, addressing the commissioner of patents: "We hereby withdraw our application for a patent for improvements in grain separators, now in your office, and request that twenty dollars may be returned to us by mail, agreeably to the provision of the act of congress, authorizing such withdrawal." The paper also requested that the money should be sent to the address of Throop, at Chicago. It was sent to him by the patent office, by mail, on the 11th of June, 1856. The withdrawal was made for the purpose of filing a new application. The application of 1855 was made through Munn & Co., as agents. In the forepart of June, 1856, Howes went to Washington city to look after the matter. He there consulted Mr. Everett, a patent agent, who examined as to the cause of the rejection, and advised that the application should be withdrawn and a new one made. Howes directed Everett to have the application withdrawn, and to prepare a new specification and send it, with the drawings, to Throop and himself. Everett told Howes at that time that the drawings and model used in the application of 1855 could be used, or had better be used, in making the new application. In consequence of neglect on the part of Everett, arising from a difficulty between himself and his partner, or otherwise, the new specification was not sent to Howes and Throop, to be sworn to, until April, 1857. It was sworn to by Throop on the 16th of April, 1857, and by Howes on the 23d of April, 1857, and Howes then sent it by mail to Everett, at Washington, with the money for his fee and the patent office fee, and a petition signed by both of them, and a power of attorney signed by both of them, appointing Everett their attorney and agent to alter or modify the specification and drawings in their application as he might deem expedient, and to withdraw the application should it be deemed advisable. Notwithstanding this, Everett did not file the application. Consequently, in the latter part of February, 1858, Throop went to Washington and saw Everett, and complained to him of the delay, and received as an excuse a difficulty between Everett and his partner. While Throop remained in Washington the application was filed, on the 26th of February, 1858, the model of the application of 1855 being used as the model for the new ap-

plication. On this application a patent was issued March 16th, 1858, a full fee of $30 having been paid to the patent office. The drawings of this patent were substantially identical with the drawings of the original application of 1855, and were, in all substantial and material particulars, like the drawings of the reissue, except that there was no drawing, figure 4, of a horizontal section. The specification says: "Our improvements relate to that class of machines which clean the grain, and also separate the heavy grain from light grain, cheat, &c., and remove from the various qualities the dust and other refuse, and thereby utilize much which would otherwise be wasted. The machine is constructed and arranged as follows: A is a rectangular frame, having a box or casing, B, within it, which surrounds a perforated concave or shell C, which is permanently secured concentric with the vertical shaft E and the cylinder D. This cylinder is fixed to the shaft E, and is provided with several vertical radial projections or beaters a. The sides of the box B do not extend to the bottom board upon which the shell C is placed, but leave narrow openings c^1, for purposes to be hereinafter explained. The revolving shaft E is placed in the centre of the machine, supported in a box at c and by a step b. It receives its motion through the driving pulley P to which the power is applied. Above the box B are placed two or more tubes, which open a direct communication with the fan case G and the space in the box B outside of the shell C. Within the case G, upon the upper end of the shaft E, is placed a suction fan F, composed of any suitable number of leaves connected by arms with the shaft E. J is a curved trunk or flue which extends over the fan case G. This is divided into two compartments, K and K^1, by a vertical partition L. The upper part of the fan case G communicates with both compartments by openings shown at a^1, where two slides, a^2, are placed to regulate the size of the opening. It has also an outlet H, which may be extended to another apartment, or to the outside of the building, to convey the dust and refuse ejected from the fan case. M is a horizontal plate which extends over the fan case G, within the trunk J, and in both compartments K and K^1. K extends downwards at one side of A nearly to the floor, while the opposite side extends downwards about half way. K^1 terminates at an inclined spout N, which leads into the space between the cylinder D and the shell C, and conducts the grain to be operated upon, from the hopper O. Q is an inclined spout leading from the bottom of the concave shell C to the lower part of the compartment or blast spout K, which is gradually narrowed down to that point. The shaft E, being put in motion in the proper direction and at the required speed, the fan produces powerful currents of air in the direction of the darts 1. The wheat or other grain passing from the hopper O through the spout N is subjected to the action of the upward current in K^1. This takes up smut-balls, chess, light grains, chaff, dust, &c., &c., and carries them over the plate M. The dust and light refuse passes in the direction of the darts 2 into the fan, whence it is ejected through the outlet passage H, while the heavier portion descends by its gravity and passes out at the valve V, which only opens when the accumulation overcomes the atmospheric pressure, which tends to keep it closed. The heavy but uncleaned grain passes, by its gravity, to the top of the revolving cylinder D, which distributes it equally by centrifugal force, as it falls into the mill. It is then subjected to the action of the beaters, which, by their rapid motion, not only rub the grains against each other and the perforated shell, but generate outward currents through the perforations, driving the smut and dust through into the space between the shell and its casing B, whence it is immediately taken up through the tubes I into the fan case and discharged through H, without again mixing with the cleaned wheat. It is highly important that the smut should not again come into contact with the grain after it has been cleaned or scoured, as much of it would again adhere, especially in damp weather, or if the grain is not thoroughly dry. The openings c^1 admit a supply of air to create, in connection with the fan, the necessary draft. The cleaned grain passes out of the mill through the inclined spout Q into the blast spout K, where it is met by an upward draft, which carries up all light stuff and refuse which may have escaped the previous operations, and treats it in a similar manner to that which passes through compartment K^1." The claim is as follows: "The combination of the tubes I and the outer casing B, when so constructed and arranged in connection with the fan case G, as to prevent the smut, &c., from coming in contact with the cleaned grain, as herein specified."

The patent of October 4th, 1853, to Rutter and Rouzer, referred to by the patent office as the ground for the rejection of the application made by Howes and Throop in 1855, was a patent for a "machine for cleaning and separating grain." The specification of that patent says: "The objects of our invention are to thoroughly cleanse wheat, or other grain, of all impurities, and also to separate the imperfect grains (which are of some use for feed, &c.,) from both the good grain and from the dirt. In the accompanying drawings fig. 1 is a vertical section through the feed tube, &c. Fig. 2 is a vertical section through the discharging spouts. Fig. 3 is a horizontal section through the scouring cylinder and concave, a is a suitable frame, b is the feed aperture

opening into a tube c, whose bottom is furnished with a funnel g, leading into a spout or hopper d. A directing board e, reaching down obliquely from the top of the tube, conducts the grain into the funnel g, while at the same time the straw, chaff and loose dust are driven up through the tubes on the other side of the board e, and ejected as hereafter described. The grain from the tube falls first upon a curved and obliquely placed screen f, along which it spreads in descending, so as to give the greatest possible scope to the atmospheric action just spoken of. From the lower edge of the screen, the grain drops through the funnel g into the sloping hopper d, which conducts it through the floor h on to the top of a conical scouring drum i, and revolving within a case or shell k, fluted or corrugated as represented in the horizontal section. The grain, in descending through the annular space between the drum and case, is violently beaten between the wings j on the drum and the ridges l on the inner side of the shell. From the bottom of this space, the grain and dust, now effectually loosened and disengaged from each other, drop together into the lower end of the spout m, where, meeting with a sharp upward draft of air, the dust is at once drawn up through the spout, by the action of the fan hereafter explained, and the grain is scattered on a curved and sloping screen n similar to the one f at the entrance passage, and for a similar object, with reference, in this instance, to dust and light grain, rather than chaff. From this screen the good grain finally escapes at the lower entrance of the spout, which is narrowed just enough to give the rapidity or force of draft requisite to carry up the light grain and dust but to allow the good grain to descend. The draft is produced by a fan o, of usual construction, revolving within a case p. This fan case communicates at its centre with an upper chamber q. This chamber has communication both with the entrance tube e and with the draft spout m; with the former by the aperture r, and with the latter by the circuitous channel s, t, u. The communication with the entrance tube is capable of being either partially or entirely closed by a damper v, according to the condition of the material being operated on, with respect to the quantity of chaff and other loose matters which it is desired to eject in the first instance, and also according to the amount of draft which is needed at the bottom of the draft spout, to carry up the light grain. These objects are still further facilitated by means of another damper w, by which the opening into the fan case may be enlarged or diminished, but never entirely closed. The draft spout m is continued along the top of the machine in the form of a channel s, whence the passage comes downwards and backwards at b, and the lighter particles, such as dust, &c., pass through the throat u and are drawn into and discharged by the fan, while the light grain, descending by its greater specific gravity, comes in contact with the ledge x, and, sliding down the incline y, escapes through the spout z. This spout is provided with two valves 1, 2 (one near its entrance and the other near its discharging end) for the purpose of modulating the discharge of the contents."

Howes and Throop, during the latter part of the year 1853, became agents, jointly, for the sale of territory and machines under the Rutter and Rouzer patent. The claim of that patent was this: "The narrowing of the spout near the grain-discharge m, in combination with the curved passages s, t, u and z, which receive and discharge at their respective apertures the light grain and trash taken from the grain-discharge aperture m." As such agents, they, in January, 1854, sold the right to the Rutter and Rouzer patent, for 15 counties in the western part of New York, to E. Montgomery & Sons, of Silver Creek, N. Y., for $2,000. Pursuing their business of selling Rutter and Rouzer machines, they put up one of the machines on trial in a mill in Watertown, N. Y., and, finding defects in its working, they invented jointly and embodied in it, in actual working by early in June, 1854, the improvements claimed in the reissue. In the same month Throop went to Chicago and engaged in making machines with such improvements, and he continued to do so there and elsewhere until after the reissue was obtained. In the summer of 1854 Howes induced E. Montgomery & Sons to add such improvements to the Rutter and Rouzer machines which they were building. For two years from the spring of 1856 Howes was a partner with the members of the firm of E. Montgomery & Sons, under the name of Montgomery & Co., in making the machines with such improvements. He then sold out his interest to the other partners, and made an agreement with them, in pursuance of which, after the patent of March, 1858, was obtained, he assigned to them all his interest in it. Since that time Montgomery & Co., and their successors, Howes, Babcock & Co., the latter firm composed of the plaintiffs in this suit, of whom the patentee Howes is one, have continued to make and sell machines embodying the improvements patented in the reissue.

The Rutter and Rouzer machine was intended to make three separations—into good grain, imperfect grain, and refuse. It had a preliminary separator, in which, by the action of a fan, as the grain entered the machine and before it reached the scourer, the straw, chaff and loose dust were blown out of it to some extent, while the grain descended by its greater weight, the refuse passing off through the eye of the fan. In the scourer the dust was de-

tached from the grain by wings on a revolving drum, the shell or exterior case being fluted. The grain and detached dust fell together through a spout into the lower part of a subsequent separator, which was a wind trunk acted upon by the fan before named, and in which there was an upward draught, the effect of which was to draw up dust and light grain, and all but good grain, the latter going by gravity out of the machine. The arrangement of the upper part of the interior of the subsequent separator was such, that the action of the fan drew into its eye the dust and lighter particles, not grain, while the light grain passed entirely over and came out on the other side. This machine had no perforated shell surrounding the scouring drum. The smut and refuse which was detached from the grain in the scourer, passed out with it through one and the same spout in the bottom of the scourer, and was free to attach itself again to the grain. It was clearly a valuable improvement to perforate with holes the shell surrounding the revolving beating instrument in the scourer, and cause, by the action of the fan, the matter detached by the scourer to pass through such holes. To do this required that there should be a tight case around the shell, and that the space between the two should be connected with the fan in such manner, by a draught passage, that the detached matter in such space would pass out through the fan, and not again come in contact with the grain. To effect this result satisfactorily, the auxiliary air inlets were necessary. It was, also, undoubtedly, an advantage to make the preliminary separator alike in construction and arrangement to the subsequent separator in the Rutter and Rouzer machine. This is what Howes and Throop did. They placed side by side two separators or wind trunks, each like the subsequent separator in the Rutter and Rouzer machine.

The defence of a want of novelty in the inventions covered by the reissued patent of the plaintiffs is set up. In order properly to consider this question, it must be determined what is the proper construction of the claims.

The specification, in respect to the first claim, disclaims the mere combination, broadly, in a smut machine and grain separator, of an air passage connecting an inclosed space outside of a perforated scouring cylinder, with a fan. But the first claim is a claim to the combination with a suction fan, scouring mechanism, perforated inclosing shell and outer tight casing, of a draught passage connecting the chamber outside of said perforated shell directly with the fan case, said passage being provided with auxiliary air inlets or openings, when the combination is arranged substantially as is described in the specification, and for the purpose set forth therein. The specification requires that the arrangement shall be such that the particles of smut and other impurities, after they are detached from the grain and drawn or forced through the perforations of the cylinder, will be removed and conducted to the fan, without commingling with or again coming in contact with the scoured grain. To effect this result requires an adequate arrangement of the air passages which furnish air for the blast through the draught passage to the fan, so that there may be a sufficient supply of air for the purpose. It is plain that no such combination is shown in the Rutter and Rouzer patent. It shows no perforated shell surrounded by an outer tight casing, and no draught passage such as the plaintiffs', and what is scoured off from the grain in the scourer leaves the scourer with the grain and not through a separate exit for itself, and, therefore, has an opportunity to re-attach itself to the grain.

The patent granted to Nelson Platt, May 20th, 1851, for "improvements in smut machines," is adduced to destroy the novelty of the plaintiffs' first claim. The machine shown in that patent appears to be a very complicated arrangement, and there is no evidence to show that it ever was or could be a practically useful machine. It has, abstractly, a suction fan, a scouring mechanism, a perforated shell, an outer tight casing, a draught passage connecting the chamber outside of such shell with the fan case, and air inlets for supplying air to such chamber and such draught passage. But these various parts are combined and arranged and operate in a manner not substantially the same as the combination in the first claim of the plaintiffs' patent, and for a purpose not substantially the same. The operation of the Platt machine is not such as to prevent the smut and dust which have been scoured from the grain from again coming in contact with the grain. On the contrary, in the Platt machine, smut and dust which have been detached come in contact with the grain.

The patents granted to Bedwell in October, 1854, to Horton in November, 1856, and to Canby in May, 1857, are subsequent in time to the date of the inventions of Howes and Throop, and the inventions shown in the patents granted to Bone in June, 1854, and to Sanders in June, 1854, are not shown to have been made and perfected earlier than the date at which the inventions of Howes and Throop were perfected. No earlier dates than the dates of those patents are assigned to the inventions described in them, even if those inventions could be regarded as the same as those of Howes and Throop. The rejected applications for patents put in evidence are, of themselves, no evidence of the existence of perfected inventions at the dates of the filing of the applications, in the absence of any other evidence of the construction and operation at those dates of

machines embodying the inventions described in such applications, and those dates are dates subsequent to the date of the perfecting of the inventions of Howes and Throop.

As to the second claim of the plaintiffs' patent, the specification of the reissue states that the patentees do not claim broadly the combination of two wind trunks for effecting a preliminary and a subsequent separation in a machine composed of a smut machine and a grain separator combined. The Rutter and Rouzer machine was a combined smut machine and grain separator, and it had two wind trunks, which effected a preliminary and a subsequent separation. But the second claim of the plaintiffs' reissue states that they claim, "in a combined scourer and grain separator, the arrangement of two wind trunks side by side, in the manner shown and described, and for the purpose hereinbefore set forth." It is true that the preliminary separator in the plaintiffs' machine is, in and by itself, like the subsequent separator in the Rutter and Rouzer machine, and the subsequent separator in the plaintiffs' machine is, in and by itself, like the subsequent separator in the Rutter and Rouzer machine. But the arrangement and operation of the two wind trunks, in respect to the material operated on, in connection with and in reference to the grain scourer, involve novelty over and beyond anything that is found in the Rutter and Rouzer machine. The invention covered by the second claim of the plaintiffs' patent cannot be regarded as a mere duplication of the subsequent separator in the Rutter and Rouzer machine. The claim is one to the arrangement side by side, of two wind trunks, such as those described, in connection with a scourer, substantially as described, in such manner that there will be a preliminary separation into three parts of the material fed into the first wind trunk, substantially in the manner and by the means described, with means of regulating the air current in such first wind trunk by an independent damper, and so that the grain will then pass through the scourer and enter the second wind trunk, and be there operated upon for a separation of the material into three parts, substantially in the manner and by the means described, with means of regulating the air current in such second wind trunk by an independent damper, the air currents being produced by a suction fan arranged on the same shaft as, and above, the revolving beaters in the scourer, and with a divided eye into which the two wind trunks discharge. On this construction of the claim, it is not anticipated by what is found in the Rutter and Rouzer patent, or in the Platt patent, or in any of the other patents or applications adduced by the defendant.

In so far as the third claim in the application for a patent filed by Montgomery and Howes in January, 1857, covers anything now claimed by Howes and Throop to have been invented by them previously to that application, it is quite apparent, on the whole evidence, that such third claim was inadvertently made, and without any design on the part of either Montgomery or Howes to make it, and without any consciousness on the part of either of them that it was made.

The construction and arrangement covered by the claims of the reissued patent are fully shown and described in the specification and drawings of the original application, and in those of the original patent. This appears clearly by a perusal of those papers, as above set forth. Therefore, there is no foundation for the assertion that the reissued patent is invalid because it claims what is not shown or described in the original patent.

It is contended for the defendant, that Howes and Throop, by withdrawing, in June, 1856, the application which they had before made, and, by not filing a new application until February, 1858, abandoned their invention to the public, and consented to its use by the public for more than two years before February, 1858; and that, therefore, their patent of March, 1858, was invalid. But the facts shown, as before recited, demonstrate that there was no abandonment and no consent to public use. There was, in judgment of law, a continuous application. The direction to withdraw was accompanied by a direction to renew. The old model was used, as previously filed, for the new application. The party cannot be made to suffer for the neglect of his attorney. There is no evidence of any intention to abandon, or of any act of abandonment, or of any declaration of abandonment, or of any consent to, or allowance, of public use, or of any such laches on the part of the patentees, as can amount to an abandonment, at any time prior to February, 1858. The case falls, I think, within the principles determined in Godfrey v. Eames, 1 Wall. [68 U. S.] 317, and Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486.

The evidence satisfactorily establishes that the defendant was engaged in manufacturing, prior to the bringing of this suit, machines embodying the patented inventions.

There must be the usual decree for the plaintiffs for an injunction as to both claims of the patent and for an account of profits.

[For another case involving this patent, see Howes v. McNeal, 4 Fed. 151.]

HOWES (NEW YORK BALANCE DRY DOCK CO. v.). See Cases Nos. 10,201 and 10,202.

Case No. 6,790.

HOWES v. NUTE.

[4 Cliff. 173; 4 Fish. Pat. Cas. 263.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

PATENTS — SUIT FOR INFRINGEMENT AFTER EXPIRATION — PATENT AS PRIMA FACIE EVIDENCE — SUFFICIENCY OF DESCRIPTION — DEFENCES NOT SET UP IN ANSWER — BURDEN OF PROOF — SIMILARITIES — ADDITIONS.

1. Suits in equity to recover gains and profits, or actions at law to recover damages for the infringement of letters patent, may be maintained, in a proper case, after the patent has expired, if the alleged infringement took place during the term for which the patent was granted, and the suit was commenced before the right of action was barred by the statute of limitations.

[Cited in Gordon v. Anthony, Case No. 5,605; Atwood v. The Portland Co., 10 Fed. 284.]

2. When a patent has been duly granted, the introduction of it in evidence, accompanied by proof of infringement by the respondent, puts the defendant upon his defence.

3. The question as to the sufficiency of a description must be determined like a question of construction, from what is written, aided by the drawings, and, if need be, by the patent-office model.

4. Particular passages in a description must not be separated from what precedes or follows them in the same connection; but one part of the instrument must be compared with another, and the whole considered together, in order to determine whether it is incomplete and ambiguous, or sufficient to uphold the claim.

5. If the drawings are clear, reference to them may be made in the written description, to aid in an understanding of the nature of the invention.

6. Defences not set up in the answer will not be considered by the court in rendering its decision.

7. Want of novelty and non-infringement being set up in the answer, the burden of proof on these issues is upon the respondent.

8. Similarities in construction are usually found in inventions relating to the same subject, and they may cover every device but one in the latest patent, and yet the last improvement be one of great value.

9. Where there were several similarities between an older patent and the one in suit, but still essential differences showing to the court that complainant's apparatus was not the same as the former patent, complainant's patent was *held* essentially different in construction and operation, from the former patent.

10. Additions may be made to a patented invention, but those do not entitle the respondent to use that of the complainant in connection with such additions, and for such use of the patented invention the respondent is liable.

This was a bill in equity, filed to restrain the defendant from infringing letters patent [No. 11,125] for "extra yards for topsails," granted to complainant June 20, 1854. The claim of the patent was as follows:

"The application of an extra yard, supported by truss, crane, or brace, as herein described, or any other substantially the same, and that will produce the same effect."

[The suit was brought by Frederick Howes against James Nute.]

James E. Maynadier, for complainant.

James N. Hudson, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. The letters-patent bear date June 20, 1854, and it appears that the patent was granted for the term of fourteen years from that date, and the complainant alleged that the respondent, on Jan. 1, 1860, at Boston, in this district, and at various other places in the United States, constructed, used, and sold many articles embracing the improvement so secured by the letters-patent. Suits in equity to recover gains and profits, or actions at law to recover damages for the infringement of letters-patent, may be maintained, in a proper case, even after the patent has expired, if the alleged infringement took place during the term for which the patent was granted, and the suit was commenced before the claim was barred by the statute of limitations. Claims of the kind may be barred by the statute of limitations; but no such defence is set up in this case, and the point may be dismissed without further remark. Granted in due form, as the letters-patent introduced by the complainant were, they afford a prima facie presumption that the patentee was the original and first inventor of what is therein described as his improvement, and the charge of infringement being proved, the letters-patent are unquestionably sufficient to put the respondent upon his defence. Two defences are set up in the answer to the merits of the claim made by the complainant.

That the complainant is not the original and first inventor of the improvement which he has described and claimed in his letters-patent. That even if he is, the complainant is not entitled to a decree, as the respondent has not infringed the same, as alleged in the bill of complaint. Certain other defences are also set up in the answer, and as they are in their nature preliminary, they will be briefly noticed before proceeding to examine the merits of the controversy. They are in substance and effect as follows: That the description of the invention, and of the manner of constructing the same, is incomplete, ambiguous and insufficient to show what the invention is, or to enable persons skilled in the art or science to which it appertains, or with which it is most nearly connected, to make and construct the invention.

That the description and specification contain more than is necessary to produce the described effect, and that the addition beyond what was necessary for that purpose was made to deceive the public. Evidently the

[1] [Reported by William Henry Clifford, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Cliff. 173, and the statement is from 4 Fish. Pat. Cas. 263.]

question as to the sufficiency of the description and specification must be determined, like a question of construction, from what is written, aided by the drawings, and, if need be, by the patent-office model. Particular passages in the description must not be separated from what precedes or follows them in the same connection, but one part of the instrument must be compared with another, and the whole considered together, in order to determine whether it is incomplete and ambiguous, or sufficient to uphold the claim of the patent, and when properly examined in accordance with those suggestions, the court is of the opinion that the first objection is without any foundation. Even the introductory explanation of the patentee is a sufficient answer to every element of the objection, as stated in the answer. He states that he has invented a new and improved mode of applying and supporting a second or extra top-sail yard, by means of a truss, to the cap of the lower masthead, and also a crane or brace to the heel of the topmast top, or trestle-trees to the lower mast, and he refers to the accompanying drawings, as containing a full and exact description of the invention, and it is difficult to see what more is needed to render the description complete, unambiguous and sufficient for all practical purposes. Had he stopped there, the objection could not prevail, but he proceeds and states that his invention consists in applying an extra yard to any topsail, and supporting it upon the cap of the lower masthead by a truss and crane as "hereinafter described," so that the upper topsail yard may be lowered down in close proximity to the said extra yard. Satisfactory explanations are also given as to the construction of the topsail, and as to the mode in which the improvement operates, and the same is somewhat minutely compared with the old mode, for the purpose of showing the utility and superiority of the improvement over what existed before, and reference is again made, in that part of the specifications, to the drawings, as explanatory of the mode of operating the described improvement.

Specific directions are then given, to enable others skilled in the art to make and use the invention, and the patentee then proceeds to describe with minuteness its construction and operation. Governed by that description, and aided by the drawings, to which reference is made for every ingredient of the invention, it seems to the court that even mechanics who have never seen salt water, would be able to construct and use the improvement. Any reproduction of that part of the specification in this connection is unnecessary, as the description is plain and easy to be understood without any explanation, except what is derived from the drawings.

Defences not set up in the answer will not be examined, and all such may be regarded as overruled on that account. Much time, it is claimed, is saved by this improvement in reefing the sail, and that the desired result may be accomplished by one third of the number of men required when the improvement is not employed, as the upper yard, under this improvement, may be lowered to the new yard, and the upper part of the topsail, as divided, drops behind the lower half, so that when furled, or taken in, the lower half may be closed in by the usual tackle, and in the ordinary way. What the patentee claims is the application of an extra yard supported by a truss, crane, or brace, as described in the specification, or any other substantially the same, and which will produce the same effect. Stripped of all mere verbiage, the invention, as claimed, is for the extra yard applied and supported by a truss and crane as described in the specification and drawings. They show a yard attached to the cap by means of a truss supported by a crane or brace; but the invention is not the truss or crane, nor merely of the extra yard; but the claim is for the application of an extra yard supported by truss and crane or brace, or, in other words, for the method as shown in the means employed of rigging the yard as described, so that it shall be applied at the proper place, and there be held securely at a proper distance from the mast, and in such a manner that it will allow the upper topsail yard to be lowered in close proximity to it, substantially as described. Construed in this way, as the letters-patent must be, the only questions which remain to be considered are those involved in the merits. Both the novelty of the invention and the charge of infringement are denied by the respondent.

Want of novelty being set up by the respondent, the burden is upon him to prove the allegation, as the prima facie presumption is the other way; and in this connection reference will be made, in the first place, to the apparatus described in the foreign patent granted to Daniel Tonge, as the patent in that case is the exhibit mainly relied on by the respondent in support of that issue. Similarities between the two are certainly apparent, both in the specifications and drawings, and it must be admitted that those similarities have been skilfully invoked by the respondent to support his view of the controversy; but similarities in construction are usually found in inventions relating to the same subject, and they may comprehend every device but one in the machine, and yet the second improvement may be one of great value. Grant that there are several similarities of construction between the two contrivances in this case, still there are essential differences also, which show to the entire satisfaction of the court that the apparatus of the complainant is not substantially the same as that of the foreign patentee, either in construction or mode of operation. Complainant's extra yard, which may be constructed in any of the known forms, is sup-

ported by a truss as shown in the drawings, and the same is attached to the cap connected to the after part of the yard by iron bands, also shown in the drawings, and on the forward part by a brace or crane, the upper end being connected to the band by a swivel head, and the lower end of the brace or crane is attached to the band by a pintle. Concede that the foreign invention employs an extra yard, that it describes a sail divided into two parts, the topsail head being permanently attached to the upper yard and the topsail foot to the extra yard, yet the patentee states in his specification, that in rigging his second or extra yard, he adopts the usual mode of rigging topsail yards where one yard only is used, which of itself shows that the invention of the complainant is substantially different. Arranged in that way, the patentee, in that patent, states that a single brace will answer for the upper yard, as he proposes to employ a double one for the lower yard, and he also states that he furnishes "both the yards with the usual appendages of halyards, lifts, braces, and foot-ropes." Slight attention to the description of the respective improvements as given in the specifications will show conclusively that the extra yard in the foreign patent, if it is capable of any beneficial use, must be applied and supported in a very different manner from that described in the specification of the complainant, and that the effect produced by the complainant's invention is much better than that produced by the other invention, and that the complainant's invention, as compared with that, is plainly both new and useful, as the upper topsail yard may without inconvenience be lowered quite down to the extra yard, so that the upper half of the topsail will drop entirely behind the lower half of the sail.

Compared with care, both the descriptions and drawings of the inventions show very clearly that the apparatus of the complainant is applied and supported in a manner widely different from that described in the foreign patent, as the extra yard of the complainant's invention is supported by a truss attached to the cap, which is connected by iron bands to the after part of the yard, and on the forward part by a brace or crane, the upper end being connected to the band by a swivel head, while the lower end of the brace or crane is attached to the band by the means and in the manner set forth in the specification. Other essential differences between the two inventions might also be pointed out, as, for example, that the extra yard in one is applied at the cap, and that in the other it is applied above the cap, that in one it is stationary, and that in the other it hoists and lowers, and that in one it is trussed out from the cap, and that in the other it is held close to the topmast by pawls; but it does not seem to be necessary to pursue the subject, as the differences already pointed out and suggested are quite sufficient to show that the apparatus under consideration cannot be regarded as superseding that of the complainant. Special examination of the other devices introduced in evidence, as superseding the complainant's invention, does not appear to be necessary, as it is clear that the explanations already given are sufficient to show that no one of them is of a character to defeat the right of the complainant to recover in this suit. Some of them are subsequent in date, and all are substantially different in so many obvious particulars, that it would seem to be a waste of time to enter into any details upon the subject. Construed as the patent is by the court, an inspection of the apparatus made by the respondent is sufficient to show that it infringes the invention of the complainant as described in his specifications and drawings. Additions have perhaps been made to the patented apparatus by the respondent; but he has taken the entire invention of the complainant, and for that he is accountable.

Decree for complainant.

HOWES v. SPALDING. See note to Case No. 4,043.

HOWES, The MARY A. See Case No. 9,193.

Case No. 6,791.

In re HOWLAND.

[2 N. B. R. 357 (Quarto, 114); 1 Chi. Leg. News, 163; 2 Am. Law T. Rep. Bankr. 53.] [1]

District Court, N. D. New York. 1868.

INVOLUNTARY BANKRUPTCY — PETITION AGAINST MARRIED WOMAN—SEPARATE ESTATE.

A petition in involuntary bankruptcy was filed against alleged bankrupt, a married woman, having separate estate, grounded on the non-payment of certain promissory notes of her hand. *Held*, that inasmuch as it did not appear on the face of the notes that it was her intention to bind her separate estate, and there being no allegation that it was given for the benefit of the separate estate, or in course of trade, petition must be dismissed, with permission to amend on payment of costs.

This was an involuntary petition against Mrs. Howland as a married woman. The petition, after the usual allegations of indebtedness, set forth that Mrs. Howland was a married woman, possessed of real and personal property in her own right, separate and apart from her husband; and that, in the execution and delivery of the notes before mentioned, she intended to bind her separate estate, and make the payment thereof a charge upon the same. Upon the return of the order to show cause, F. E. Cornwell, Esq., for the respondent, moved to dismiss the petition on the ground that upon its face it did not show an indebtedness of a character to be a charge upon the separate estate

[1] [Reported from 2 N. B. R. 357 (Quarto 114), by permission. 1 Chi. Leg. News, 163, and 2 Am. Law T. Rep. Bankr. 53, contain only partial reports.]

of Mrs. Howland. C. R. Berry, Esq., for the petitioner, argued that the allegations were sufficient, and that since the act of 1862 [Laws N. Y. 1862, p. 343] a married woman might sue and be sued entirely as if unmarried.

HALL, District Judge. That in accordance with the decision of the court of appeals in the case of Yale v. Dederer [68 N. Y. 329], it must either appear upon the face of the note that it was the intention of Mrs. Howland to bind her separate estate thereby, or else that there must be an allegation that the note was given for the benefit of her separate estate. That under the act of 1862 a promissory note given by a married woman engaged in trade and in the course of her business, might be enforced against her separate estate under the same allegations as if she were single. That in this case there was no intention expressed in the note, which is the foundation of the petition, to bind Mrs. Howland's separate estate; and there being no allegation that it was given for the benefit of the separate estate, or in the course of her trading transactions, the petition must be dismissed, with permission to amend in twenty days, on payment of twenty-five dollars costs.

Case No. 6,792.

HOWLAND v. BLAKE et al.

[7 Biss. 40.] [1]

Circuit Court, E. D. Wisconsin. Oct., 1874.[2]

EFFECT OF PAROL AGREEMENT UPON ABSOLUTE DEED—PAROL EVIDENCE TO CHANGE TERMS OF WRITTEN INSTRUMENT.

1. A parol statement of a mortgagee when foreclosing that he "only commenced the suit for the purpose of perfecting the title; that the plaintiff's interests should not be affected by it; and that he would carry out a previous arrangement made that he would pay the debt out of the rents and profits," is not of such a nature as would make an absolute deed obtained by the mortgagee on foreclosure a conditional one, and would not render such a deed a continuation of the mortgage.

[See Amory v. Lawrence, Case No. 336; Andrews v. Hyde, Id. 377.]

2. The rule which allows parol evidence to be introduced to show that a deed absolute on its face is a mortgage, should not be enlarged, but should be strictly construed, and the evidence should be very strong.

[See note at end of case.]

[This was a bill in equity by Eugene Howland against Lucius Blake and others, involving the title of plaintiff to certain mortgaged real estate.]

Dixon, Hooker & Palmer, for complainant. Fish & Lee and Fuller & Dyer, for defendants.

DRUMMOND, Circuit Judge. The facts of this case may be briefly stated: Eugene Howland was the owner of a block in the city of Racine, which he mortgaged to Isaac Taylor to secure a loan made to him by Taylor.

The mortgagor, or rather his agent and brother, Richmond W. Howland, who seems to have acted for the plaintiff not only in the purchase of the property, but in the construction of the building which was put upon it and also in connection with the loan, came to the conclusion that the loan could not be paid except by the rents of the property, and Mr. Taylor was put in possession with a view of receiving the rents and profits, and so paying for the loan. This was done under a written contract or minute of possession.

Mr. Taylor accordingly took possession, leased the property, received the rents, paid the taxes and insurance, and took general charge of it. The loan matured, and was not paid. The arrangement when Taylor took possession was, that when the money was paid, the property should be re-conveyed to the plaintiff. It not being paid at maturity, Taylor instituted proceedings to foreclose the mortgage. While they were pending in the state court, it is alleged that an arrangement was made between the brother of the plaintiff and Mr. Taylor, by which after the foreclosure Taylor was to hold the property as before and collect the rents, and when an amount was received sufficient to pay the debt, the property was to be re-conveyed to the plaintiff. The whole of that arrangement is stated by Richmond W. Howland, and it may be proper to refer to his testimony.

He states it as follows: "Shortly after the suit was commenced—that is the suit to foreclose—I called on him—(Taylor)—with reference to the foreclosure, at which time he assured me that the plaintiff's interest should not be affected by it; that he only commenced the suit for the purpose of perfecting the title. He also stated he would carry out in good faith all arrangements he had made previous to that. He agreed to bid in the property, pay the amount due on the judgment, and I was not to make any delay in the suit. He was to continue in possession, and apply the rents or earnings as he had done previously. After the debt was paid, the property was to revert back to the plaintiff. There was to be a conveyance made to him."

That seems to be the substance of the arrangement made, according to Richmond W. Howland. I do not know that there is anything in the evidence to change the account which is thus given by him.

Now, the question is whether, under the circumstances of the case, it is competent for the plaintiff thus to establish that the title which Taylor took under this sale was a mortgage, and that he held it subject to the

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

[2] [Affirmed in 97 U. S. 624.]

same equities on the part of the plaintiff, as he did prior to the commencement of any proceedings to foreclose the mortgage.

I think the weight of the evidence may be —although it is subject to a good deal of criticism inasmuch as a large part of it consists of admissions or statements made by Taylor, who is now dead—that perhaps some arrangement was made. But I am of opinion that it is not competent for the plaintiff to make out, under the circumstances in this case, that this second title was a mortgage precisely as it existed before the commencement of the foreclosure suit, and therefore I hold that all this testimony is incompetent. And it seems to me that this is a case where the court ought to be somewhat stringent in relation to parol testimony.

The mortgagee, the purchaser under the proceedings in the foreclosure suit, is dead. He cannot speak for himself. Parties come forward who state what he agreed to do and what he said, and in that way it is sought to make out something different from what appears upon the face of the papers.

It is of course well settled that a deed absolute upon its face may be shown by parol to be simply a mortgage, a security for a debt. There may be some question as to the propriety of the adoption of that rule, but I suppose it may now be considered as settled that is the rule of equity upon the subject.

But where a mortgage is given and that mortgage is foreclosed, and the mortgagee is the purchaser and an absolute deed is made to him, the equity of redemption being foreclosed by judicial proceedings, I hold that the proof ought to be just as strong to make the second deed a mortgage as it would have been in the first instance, and perhaps even stronger.

Now, what are the facts under which it is sought to make out a new and independent contract by which this second title was to be held as a mortgage and not an absolute deed? What did Taylor do? What new fact occurred? Who was in possession of the property? Who remained in possession? As to that, there was no change. The only thing that could be said to operate upon the parties in order to create a new arrangement, was that Richmond W. Howland was to do nothing to delay the proceedings. "I was to make no delay in the suit," he says. That is all there was. Now the question is whether that of itself constitutes such a new contract, or modifies or changes the old in such a way as to destroy the effect of the proceedings which actually took place.

It may well be asked, What was the object of Mr. Taylor in foreclosing this mortgage if things were to remain precisely in statu quo? He certainly had some motive in putting an end to the equity of redemption. And yet it is claimed that the equity of redemption still existed after the foreclosure, decree, sale and deed.

I have been referred to the case of Paine v. Wilcox, 16 Wis. 202, which was not cited at the argument. That case was something like this. There was a mortgage of some land. The mortgage was foreclosed, a decree was entered, and the mortgagor made an arrangement with the mortgagee by which he agreed not to take an appeal from the decree of foreclosure, and placed the mortgagee in possession, and the mortgagee agreed upon the payment of the amount of the debt to re-convey the property. But that case proceeds upon this ground:—without criticising the case itself, which perhaps might well be done—that there was a new contract made so as to entitle the party to a specific performance of the contract; that there were circumstances in the case which took it out of the statute of frauds, and enabled the mortgagor to come into a court of equity and ask for a specific performance of the contract.

The court held that the relinquishment of the further litigation, and omitting to stay the sale, were such acts of part performance as would take the agreement out of the statute of frauds, and that under such circumstances it was no obstacle to the enforcement of the agreement.

They also say that the party—the mortgagee—could not adopt the act of his attorney so far as to hold the title acquired at such sale, and repudiate as unauthorized the agreement by which the sale was allowed to take place, which seems rather a singular proposition; that a client is obliged to adopt an agreement made by an attorney simply because he is employed to foreclose a mortgage, and the force of which I do not very well understand.

Now, in this case, if the party is entitled to relief at all, it is because things were unchanged and the title was no more than it had been, that it was still a mortgage. I do not feel inclined to hold in a case such as this, where a mortgagee forecloses his mortgage, and the equity of redemption is ended by the decree of a competent court, and he has taken an absolute title to the property, that he still is a mere mortgagee.

And it seems to me that the case in itself constitutes a very strong illustration of the propriety of not enlarging the rule which already exists, and which enables a party to show that a deed absolute upon its face is nothing but a mortgage.

The result would be that parties could go on without limit, and it might in effect be said that there never could be a foreclosure of the mortgage. Deeds might be made, foreclosures take place, and still it would be a mortgage. I am entirely willing to place the decision upon what is alleged to be the arrangement made between Mr. Taylor and Mr. Richmond W. Howland, and to say that it is not of such a character as to enable a party by parol to show that it was simply a mortgage or simply a security for a debt.

Now, I leave out of view the conduct of

Mr. Taylor, which, of course, is entirely inconsistent with the theory claimed by the plaintiff, his treating the property as his own, making repairs upon it, paying the taxes and insurance, and selling it to these defendants, declaring that his title was a good title, making covenants of warranty, &c. I think it is quite possible that this may be the explanation of a good deal that was said by Mr. Taylor, and so may be consistent with the truth of a portion of the testimony, namely, that he did not want this property himself, but the payment of his debt, and that he may have said in some loose way, from time to time, that was all he cared about. But, it is unlikely under the circumstances that a man should make an absolute contract, binding upon him for an indefinite time, to treat that which was a perfect title simply as a defeasible title. The bill will therefore be dismissed.

[NOTE. An appeal was then taken by the plaintiff to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Hunt, who said that the burden was on the plaintiff to show by testimony entirely plain and convincing, beyond reasonable controversy, that the writing does not express the will of the parties, and should be reformed by the court; that such evidence not having been produced to show the alleged promise, and the plaintiff's continuing interest in the land, the parol agreement was void, under the statute of frauds. 97 U. S. 624.]

HOWLAND (BUCHANAN v.). See Case No. 2,074.

Case No. 6,793.

HOWLAND v. CONWAY.

[Abb. Adm. 281.] [1]

District Court, S. D. New York. May, 1848.

SEAMEN—SUITS FOR REDRESS — PROBABLE CAUSE —IMPOSITION OF COSTS—WITNESS—IMPEACHMENT OF TESTIMONY.

1. It is the course of admiralty courts not to impose costs upon seamen when they establish probable cause for instituting suits for redress.

2. The practice formerly prevailing in this court and in the circuit court, allowing the impeachment of a witness by proof of declarations made by him out of court, contradictory to his testimony, without requiring that he should be first examined with respect to them,—commended.

3. The rule more recently introduced into the English practice, and adopted in many of the state courts of the United States, which prohibits the impeaching of a witness by proving declarations of his contradictory to his testimony, unless he has been previously questioned in respect to such declarations, and afforded the opportunity to explain them,—disapproved.

But see note at the end of this case, on the rule laid down by the supreme court of the United States, in Conrad v. Griffey, 16 How. [57 U. S.] 38.

[1] [Reported by Abbott Brothers.]

This was a libel in personam, by Daniel Howland, one of the crew of the ship Elisha Denniston, against Andrew Conway, master of the vessel, to recover extra wages, by way of damages for being put on short allowance. There were two other suits against the same respondent, brought by B. M. Travers and Henry Ware respectively, also members of the same crew. All three suits arose out of the same facts, and the other two were, by stipulation, made to abide the event of this. The facts in proof bearing upon the libellant's claim are fully stated in the opinion. The principal question discussed, however, related to the propriety of impeaching a witness by proof of declarations made by him out of court, inconsistent with his testimony, without first calling the attention of the witness on cross-examination to the alleged discrepancy, and giving him an opportunity to explain. The facts on which this question arose were as follows: The libellants, to prove their case, read in evidence depositions of several of the crew, who testified that the bread served out to the crew on the voyage in question was wormy, dusty, filled with cobwebs, and not suitable or wholesome for food. To meet this testimony, the respondent introduced a witness, who testified that he was a custom-house officer, and had charge of the ship on her arrival at this port from the voyage; that he saw the several members of the crew whose depositions were read on behalf of the libellant at the time when they were paid off; that he heard them make statements in reply to questions asked them by the captain, to the effect that the bread supplied to the crew on the voyage was good. This testimony was relied on by the respondent as impeaching the credibility of the depositions. For the libellant it was contended that evidence of these contradictory statements out of court should not be regarded unless the witness sought to be impeached was, upon his examination, questioned as to his prior statements, and allowed an opportunity to explain.

C. Donohue, for libellant.
W. R. Beebe, for respondent.

BETTS, District Judge. This was one of three suits brought by several of the crew of the ship Elisha Denniston against her master, for short allowance of bread on a voyage from New York to New Orleans, Mobile, Liverpool, and back to New York. The gravamen of the action is that the bread was wormy, dusty, and filled with cobwebs, and was not suitable or wholesome for food.

Two of the libellants and four others of the crew, all being colored men, and examined upon deposition, testified strongly to the badness of the bread, and their statements support the allegations of the libel. It is, however, proved by the custom-house officer, who had charge of the ship on her

return to this port, that these latter four seamen distinctly declared that the bread supplied to the crew on the voyage was good, and that there was no ground of complaint in regard to it. The bread which was left over of the ship's stores after the voyage was ended, was carefully examined by bakers in this port, and they found it to be then sound and good, equal to the best quality of bread, except pilot bread, furnished to merchant vessels at this port, and to be greatly superior to that supplied to English vessels in English ports. These facts, if considered in connection with the testimony showing statements made by the witnesses for the libellants in contradiction of their testimony, displace all foundation for any claim for wages by way of damages for short allowance. For it appears that the ship had an ample supply of suitable bread on board; twelve or fourteen barrels were taken from her after the voyage ended, and the quality is proved to have been then marketable and fair.

The libel must accordingly be dismissed on the demand for damages on the ground of short allowance; and as the other two suits were to depend on the decision of this, the same decree must be entered in them also.

The other question raised, whether the wages due to the libellants under the shipping agreement have been fully paid or not, is not properly before me upon this hearing.

The only point really requiring any consideration is the award of costs to be made. I consider that a color for the claim of extra wages is afforded, as it appears that the master ordered the bread to be baked over at Liverpool. This, as the evidence on the part of the master himself shows, is the usual course in case bread is wormy or mouldy; and it is reasonably to be inferred that the expense and trouble of rebaking the bread would not have been incurred in this regard, if it had been, during the whole voyage, pure and wholesome. It is shown in the proofs that the best and finest bread will occasionally breed worms, and require purifying by rebaking. As the ship had an abundant supply of bread, the officers ought to have taken pains to select that which was not so affected, and to have avoided serving out vitiated provisions. It is sufficiently evident, upon the whole case, although the important points in the charges and proofs of the libellants are refuted and discredited, that the complaint is not wholly groundless or malicious; for, in addition to these facts, several of the men swear that the mate was told the state of the bread, and that it was shown to him, yet his evidence is not put in by the respondent. It may be that the wormy bread was given out from inattention; but it was the master's duty to see that none but fresh provisions were used. The course of admiralty courts is not to charge costs upon sailors when they establish probable cause for instituting suits for redress; and I shall accordingly award no costs against them in these cases.

And if the witnesses not interested in the suits were, upon sound and safe principles of law, entitled to credit in these cases, I should allow the libellants summary costs against the master, upon the ground that although technically he could not be held chargeable for short allowance, yet his conduct in permitting bad bread to be given out to the men should be regarded as blameable and wrongful.

But deliberate declarations of these witnesses, made in direct conflict with their testimony, are proved against them; and their evidence, under such circumstances, will not, in law, justify a judgment in conformity to it, unless it be corroborated and supported by other proofs.

It was insisted that this evidence of contradictory declarations of the witnesses was to be disregarded, because the witnesses were not previously cross-examined in reference to such statements. And this view is sustained by the rule of evidence on this point, laid down in the Queen's Case, 2 Brod. & B. 315, 6 E. C. L. 149. In that case, certain questions of evidence arising out of the proceedings against Queen Caroline, were put to the judges of England by the house of lords. One of those questions was, whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, ... it would be competent to the party accused to examine witnesses in his defence to prove such declarations, without first calling back such witness examined in chief, to be examined or cross-examined as to the fact whether he ever made such declarations? The judges were unanimously of opinion that, "according to the usage and practice of the courts below, and according to law as administered in those courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof." Chief Justice Abbott, in delivering the opinion of the judges, speaks as follows: "The legitimate object of the proposed proof is to discredit the witness. Now, the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: if it be intended to bring the credit of a witness into question, by proof of any thing he may have said or declared touching the cause, the witness is first asked upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any

there be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterward of contending that the matter of the declaration or speech is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to gives any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance, also, his subsequent opportunity of the matter which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness who has been examined, and has no reason to suppose his further attendance requisite, often departs the court, and may not be found or brought back till the trial be at an end. So that if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness, or to the party producing him, great injustice might be done, and in our opinion might not unfrequently be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects in the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

The same rule was laid down on the authority of the Queen's Case [supra], but with greater precision in Angus v. Smith, Mood. & M. 473, 22 E. C. L. 567. Chief Justice Tindal there says: "I understand the rule to be, that before you can contradict a witness by showing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that upon the general question he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said."

I am aware that since the decision of the Queen's Case, many of the state courts in this country have adopted the practice thus indicated.[2]

Thus in Kimball v. Davis, 19 Wend. 438, the supreme court of the state of New York follows the ruling of the Queen's Case and of Angus v. Smith, applying it to the special case of a witness examined upon commission by interrogatories and cross-interrogatories, whose deposition was sought to be impeached by proof of counter statements made by the witness out of court. And the court answer the objection raised, that in the case of depositions taken under a commisssion there is no opportunity to call the attention of the witness to the inconsistent declarations, by remarking that there is no reason for a distinction between this and the case where the discovery of the evidence occurred after the cross-examination was ended, and the witness had left court and could not be brought back—a case which all the judges in the Queen's Case refused to make an exception;—and by the further suggestion that there is an additional reason for the appli-

[2] The rule in the Queen's case is still followed in England. Macdonnell v. Evans, 10 Eng. Law & Eq. 484. For the course of American decisions on the subject, consult Tucker v. Welsh, 17 Mass. 160; Brown v. Bellows, 4 Pick. 188; People v. Moore, 15 Wend. 419; U. S. v. Dickinson [Case No. 14,958]; Everson v. Carpenter, 17 Wend. 419; Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co., 11 Gill. & J. 28; Able v. Shields, 7 Mo. 120; Doe v. Reagan, 5 Blackf. 217; M'Intire v. Young, 6 Blackf. 496; State v. Marler, 2 Ala. 43; Weaver v. Traylor, 5 Ala. 564; Goode v. Linecum, 1 How. (Miss.) 281; Garrett v. State, 6 Mo. 1; McAteer v. McMullen, 2 Pa. St. 32; Kay v. Fredrigal, 3 Pa. St. 221; Sharp v. Emmet, 5 Whart. 288; Sealy v. State, 1 Kelly, 213; Regnier v. Cabot, 2 Gilman, 34; Downer v. Dana, 19 Vt. 338; Palmer v. Haight, 2 Barb. 210; Story v. Saunders, 8 Humph. 663; Howell v. Reynolds, 12 Ala. 128; Clapp v. Wilson, 5 Denio, 285; Wilkins v. Babbershall, 32 Me. 184; Williams v. Turner, 7 Ga. 348; Johnson v. Kinsey, Id. 428; Williams v. Chapman, Id. 467; Moore v. Bettis, 11 Humph. 67; Clementine v. State, 14 Mo. 112; King v. Wicks, 20 Ohio, 87; Sprague v. Cadwell, 12 Barb. 516; Carlisle v. Hunley, 15 Ala. 623; Nelson v. Iverson, 17 Ala. 216; Armstrong v. Huffstutler, 19 Ala. 51; Powell v. State, Id. 577; Titus v. Ash, 4 Fost. [N. H.] 319; Hedge v. Clapp, 22 Conn. 262; Bryan v. Walton, 14 Ga. 185; Smith v. People, 2 Mich. 415; Wright v. Hicks, 15 Ga. 160; Wiggins v. Holman, 5 Ind. 503; Patchin v. Astor Mut. Ins. Co., 3 Kern [13 N. Y.] 268; Ware v. Ware, 8 Greenl. 42.

From these cases it would appear that the rule of the Queen's Case has been adopted in the states of New York, Alabama, Georgia, Ohio, Michigan, Maryland, Missouri, Indiana, Illinois, and Tennessee; having, also, been expressly applied to the case of depositions, in New York, Alabama, Georgia, and Tennessee. That it has been disavowed in Massachusetts, Maine, New Hampshire, Connecticut, and Pennsylvania. That it has been adopted in Vermont; but with the exception that it is there held to be inapplicable to the case of depositions, whether taken with or without notice, and whether or not the adverse party attended at the taking or not. In case of deposition, the adverse party may, without previous inquiry, prove any inconsistent declarations or conduct of the witness. Downer v. Dana, 19 Vt. 338.

cation of the rule in the case of depositions, as otherwise a strong temptation would exist to tamper with witnesses to pervert or manufacture conversations after the execution of the commission, and when explanation would be impossible. Id. 441.

So, also, Mr. Justice McLean, in the U. S. circuit court, adopts the same rule of evidence as the one prevailing in Ohio, and as therefore obligatory upon the courts of the United States sitting within that state. McKinney v. Neill [Case No. 8,865]. But it would seem to be the usage of the court upon that circuit to regard the practice of the local courts as governing that of the federal courts there held. And see remarks of Story, J., in Beers v. Haughton, 9 Pet. [34 U. S.] 362.

The circuit court in this district, however, upon mature consideration, declined to adopt the rule of the Queen's Case, considering the subject to be merely matter of practice resting in the discretion of the several courts. It was so treated by the judges who assigned their reasons, in the house of lords, for the rule. The argument in its support was not based on common-law principles of evidence. This view of the subject seemed to us also to be consonant to authority. Phil. Ev. c. 8, 230; 2 Cow. & H. notes, 773; Tucker v. Welsh, 17 Mass. 166. We regarded the rule which we considered to have prevailed in England and in this state, prior to the Queen's Case, to be recommended by considerations of higher weight than those adduced in support of the rule declared in the Queen's Case; but which was not directly sanctioned by the New York supreme court, previous to 1838. It is clear, from the decision in 1836 (People v. Moore, 15 Wend. 419), that at the date of that decision, the courts of this state had not adopted the rule of the Queen's Case, which had been promulgated as early as 1820; nor was that rule observed in the early practice of the English courts. 1 Phil. Ev. (Ed. 1820) 212; Peake, Ev. 89; 1 Starkie, Ev. (1st Ed.) 1451; 2 Esp. 601; Hawk. P. C. bk. 2, c. 46, § 14; 1 McNally, Ev. 378. Nor had it prevailed, at least to any great extent, either among the courts of the several states of the United States, anterior to the Queen's Case,—1 Hayw. (N. C.) 437; Tucker v. Welsh, 17 Mass. 166; 4 Pick. 441; 1 Serg. & R. 526; 2 Esp. N. P. (Ed. 1811) 540; Baker v. Arnold, 3 Caines, 279; People v. Vane, 12 Wend. 79; 8 Greenl. 42,—or among the courts of the United States,—Lamalere v. Caze [Case No. 8,003]; U. S. v. Thompson [Id. 16,487]; Wright v. Deklyne [Id. 18,076]. We discerned nothing in the reasons governing the Queen's Case to induce us to change the practice heretofore adopted in the circuit court and in this court, to conform to that decision. It seemed to us that the more sound and consistent course was to require the party whose witness was impeached by proof of his contradictory statements, to assume the burden of producing the witness again to explain his own declarations. The case of Judson v. Blanchard, 4 Conn. 557, is an authority allowing that to be done. The testimony of the witness in court may be the occasion of recalling to the memory of others what he had said elsewhere; and thus contradictory statements may often, as we considered, come, for the first time, to the knowledge of the party interested to produce them, after the examination and the cross-examination of the witnesses had closed, and very probably after he was out of the recall of such party, and thus even life be saved against the testimony of unscrupulous and perverse witnesses.

These considerations, with others, satisfied the court that the old and familiar practice in this respect was to be preferred to that established by the Queen's Case, as a means for unmasking fictitious evidence, and protecting property, life, and character exposed to peril by the oaths of reckless witnesses. This rule is more emphatically important in respect to evidence given under commissions or by deposition, than to that given orally in open court. We accordingly have held that the credibility of a witness may be impeached by proving his declarations made out of court, and contradictory to his testimony, without a previous examination.[3]

I am accordingly of opinion that the depositions offered by the libellants, in support of their libel, may be impugned by evidence of the contradictory declarations made by the witness not on oath, and that upon the whole evidence the equity preponderates in favor of the respondent, upon the question of his liability to the libellants for costs. The libel must therefore be dismissed, without costs, unless, upon the report of the commissioner, a balance of wages earned under the shipping articles shall be found due to the libellants. Decree accordingly.

HOWLAND (DE WOLF v.). See Case No. 3,852.

HOWLAND (DONAHAY v.). See Case No. 3,978.

HOWLAND (EMERSON v.). See Case No. 4,441.

HOWLAND (FRATES v.). See Case No. 5,066.

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[3] The rule laid down in the text, prevailed in both the circuit and district courts in this district, until the decision of the supreme court of the United States, in Conrad v. Griffey, 16 How. [57 U. S.] 38, decided in 1853. In that case it was held, Mr. Justice McLean delivering the opinion of the court, that the rule of the Queen's Case is a salutary one, and should be followed in the courts of the United States. That rule has, therefore, now become the law governing the practice of the United States courts in this district; but it was thought proper to preserve the history and reasons of the change therein, established in 1853.

Case No. 6,794.

HOWLAND et al. v. HARRIS.

[4 Mason, 497.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.

CUSTOMS DUTIES—LIABILITY OF GOODS FOR—SALE OF GOODS AT SEA—PASSAGE OF TITLE—RIGHT OF PURCHASER TO MAINTAIN TRESPASS.

1. The second proviso of the 62d section of the collection act of 1799, c. 128 [1 Story's Laws, 627; 1 Stat. 673, c. 22], makes the consignee of goods liable as owner for the duties thereon: but it does not prevent the consignee from passing, by sale or otherwise, a good title to the same goods, subject only to the payment of the duties thereon. If the consignee owes other bonds for duties, which are due and unpaid, he is entitled to no credit for duties at the custom-house; but the goods themselves may pass by sale, and are liable only for the duties payable thereon, and not for other duties due and unpaid.

2. Where goods are sold while at sea, the vendee acquires, without actual possession, a constructive possession, sufficient to maintain trespass against any wrong-doer.

3. When goods are imported in a ship, after such sale, and, before they are unladen, an inspector is put on board, his custody thereof, to secure the lien of the United States for duties, is not a divestment of the title and possession of the vendee as against a wrong-doer.

Trespass de bonis asportatis [by Gardner G. Howland and others, against Samuel D. Harris]. The case came before the court, upon a statement of facts agreed by the parties.

C. G. Loring, for plaintiffs.

G. Blake, Dist. Atty., for defendant.

STORY, Circuit Justice. Upon the statement of facts, the main question resolves itself into the consideration of the true construction of the second proviso of the 62d section of the collection act of 1799, c. 128 [1 Stat. c. 22]. The goods in question were attached by the defendant, the marshal of this district, as the property of George D'Wolf, who was the original owner and consignee, and before the arrival of the same in port, assigned the same bona fide for a valuable consideration, and as security for a prior advance of $5,000, to the plaintiffs. The assignment was made of the original cargo of the ship New Packet, belonging to G. D'Wolf, then absent on a voyage, and expected to arrive from the Mediterranean. The goods are the proceeds of the sales of the outward cargo, regularly made in the course of the voyage. The plaintiffs made the earliest efforts to obtain possession of the goods, after their arrival in port, giving due notice of their title; and the defendant took them under an attachment, at the suit of the United States against G. D'Wolf, for debts then due by him for duties. If, under all the circumstances, the goods, by the operation of the proviso above referred to, are, so far as the duty bonds due by the consignee are concerned, still to be deemed the property of George D'Wolf, notwithstanding the assignment, then the defendant is entitled to judgment in his favour; if otherwise, then the plaintiff is entitled to recover, unless some other objections stand in his way, partaking of a technical character.

The court may then at once address itself to the interpretation of the 62d section. The section begins by providing for the manner in which duties, on goods imported, shall be paid. When the duties do not exceed fifty dollars, they are to be immediately paid in cash. When they exceed that sum, the party is entitled to a certain credit, either by giving a bond with sureties, or by substituting for sureties a deposit of so much of the goods imported, as the collector shall, in his judgment, deem sufficient security. The section then proceeds to provide for the mode of selling the deposited goods on failure of due payment. Then follows this proviso, "that no person, whose bond has been received, either as principal or surety, for the payment of duties, or for whom any bond has been given by an agent, factor, or other person, in pursuance of the provisions herein contained, and which bond may remain due and unsatisfied, shall be allowed a future credit for duties until such bond shall be fully paid or discharged." If the clause stopped here, there would not seem to be any reasonable doubt as to its meaning or effect. The clause creates no lien on the goods imported for any antecedent duty bonds then due by the importer. It purports simply to deny any future credit upon goods imported until such bonds are paid. The consequence is, that the importer must pay the duties on such newly imported goods immediately in cash. He can obtain no credit, and is entitled to none, until his prior due bonds are satisfied. But upon such payment of duties in cash, he is clearly entitled to a delivery of such newly imported goods, for the act authorizes and countenances no detention of goods except for the duties payable on the same. The legal lien of the United States is extended no further, although a dozen bonds may remain due and unpaid. This is the necessary result of law, arising upon the construction of the act, in the absence of any positive provision for a more extensive lien. It was the received construction of the collection act of 1790, c. 62, § 41 [1 Story's Laws, 145; 1 Stat. 168, c. 35], where the same clause in substance occurs. And the case of Olney v. Arnold, 3 Dall. [3 U. S.] 308, demonstrates, in an unequivocal manner, that the clause was supposed to operate as a mere denial of credit. The true question there was, whether a collusive transfer, prior to the entry, did not entitle the assignee, under the transfer, to the usual credit as importer. The court, upon the clearest principles, held, that such a collusive transfer did not entitle the assignee to such credit. And it is more than probable, that this very question was the immediate

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

cause of the introduction of the new and additional clause, which now follows the preceding, in the 62d section of the act of 1799. c. 128 [1 Story's Laws, 627; 1 Stat. 673, c. 22]. It is in these words: "And to prevent frauds arising from collusive transfers, it is hereby declared (not enacted), that all goods, wares, and merchandise, imported into the United States, shall, for the purposes of this act, be deemed and held to be the property of the persons, to whom the said goods, &c. may be consigned, any sale, transfer, or assignment, prior to the entry and payment or securing the payment of the duties on the said goods, &c. and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding." The argument on behalf of the defendant is, that the operation of this clause is, to preserve the original ownership of G. D'Wolf in the goods in question, not only as to the credit for duties, but to the extent of authorizing an attachment of them, and taking them in execution, as the property of G. D'Wolf, in any suit brought upon any of his bonds for duties then due and unsatisfied. If this be the true exposition of the clause, it completely intercepts the legal effect of the assignment, and denies the power to sell any goods, so as to pass the property against the United States.

My opinion is, that this exposition is not well founded in point of law. It appears to me inconsistent with the professed objects of the statute, and is not called for by any sound public policy aimed at by its provisions.

In the first place, there is in no other part of the statute any provision that declares, that goods, entered by a consignee, shall be deemed his exclusive property, so far as the rights and remedies of the United States are concerned. Nor is there any general lien created, as has been already intimated, by which any imported goods are made security for the duties due upon any antecedent importations of the consignee. The true meaning and effect of this particular clause must, therefore, be sought in its own terms, and the context, with which it stands connected. In this view it is material to consider, that it stands in a section, the principal object of which is to provide for the payment of duties, and for the credit to be allowed for them; that it is part of a proviso, which denies such credit, where the party, as principal or surety, has any bond then due and unsatisfied. It forms, then, in its connexion, a qualification or explanation of the effect of that proviso. Its avowed object is to enforce the denial of such credit, and "to prevent frauds arising from collusive transfers." What were these frauds? Certainly not collusive transfers, in a general sense, affecting the general rights of creditors; but such as went to defeat the particular provisions of the statute. It was perceived, and indeed the case had already occurred, as Olney v. Arnold, supra, demonstrated that transfers would be made for the purpose of obtaining the credit for duties, where the terms of the proviso meant to prohibit it. It was important, therefore, to declare, that such transfers should be unavailable; and to prevent the embarrassing inquiry, what transfers were, or were not collusive, the legislature wisely directed, that the consignee should, "for the purposes of the act," be deemed the owner. It cannot be presumed, that the legislature meant to interfere with the question of ownership generally, or to enact, in such a summary way, a general statute of frauds. The very language of the clause shows, that such an intention is not to be attributed to it. The goods, &c. shall, "for the purposes of this act," be deemed and held the property of "the persons, to whom the said goods, &c. may be consigned," &c. The transfer, then, is suspended in its operation only so far as the purposes of the act require. And these purposes nowhere appear to go beyond the point of a denial of credit for duties. In my judgment it would be a most dangerous precedent, to give to the general words of a proviso, which, in ordinary acceptation, only qualifies the enacting clause, so broad and sweeping a construction as that contended for. It would be creating, by implication, on the property of third persons, a lien for duties, which did not exist in the case of the original owner. If the legislature intended to raise such an universal and overreaching right for security of duties, it would have spoken in terms more direct and unequivocal. It would not have worked such a mighty prerogative into the conclusion of a mere disabling proviso. My judgment accordingly is, that the goods in question were not, in virtue of this clause, the property of G. D'Wolf, so that they were liable to be attached and taken in execution for his debts, antecedently due and unpaid at the custom-house.

The next question, which has been suggested, rather than argued, on behalf of the defendant, is, whether trespass lies against him under the circumstances of the case. The assignment passed a legal title to the original cargo, and the present goods, being the admitted proceeds of that cargo, by operation of law, passed to the plaintiffs. Actual delivery and possession of the goods was not indispensable to complete the plaintiff's title, the goods being then at sea, and the plaintiffs asserted their right, and gave due notice of it as soon as the ship arrived in port, and before the attachment was made. The possession of the master was indeed, under these circumstances, as he was a mere carrier, the possession of the plaintiffs. But a constructive possession, flowing from general ownership, and present immediate vested right of possession, would be sufficient for this action. The law, on this subject, is laid down with great clearness and accuracy by Mr. Justice Ashhurst, in delivering the opinion of the court in the case of Smith v. Milles, 1 Term

R. 475, 480. "To entitle a man to bring trespass (says he), he must, at the time when the act was done, which constitutes the trespass, either have actual possession in him of the thing, which is the object of the trespass, or else he must have a constructive possession, in respect of the right being actually vested in him." And he puts various cases to illustrate the latter position. It is unnecessary to refer to them, because they will be found at large in Bac. Abr. "Trespass," c. 2, which contains an excellent summary of the doctrine. And Ward v. Macauley, 4 Term R. 489, 490, shows, that in the case of a carrier, his possession is the possession of the owner. Lord Kenyon there said: "In the case put of a carrier, there is a mixed possession; actual possession in the carrier, and an implied possession in the owner." See, also, 1 Chit. Pl. 166, 167; 2 Phil. Ev. p. 133, c. 12, § 1; Putnam v. Wyley, 8 Johns. 337.

The general doctrine has not been much, if at all, contested at the argument. But it is supposed, that the application of it is varied by the circumstance, that an officer of the customs had boarded the ship before the attachment was made, and that though he was not on board at the time, he must be considered as having possession and custody of the ship and her cargo in behalf of the government, to secure their rights, in the same way, as if he had been actually on board, it being the received usage at the custom-house in Boston, to consider the vessel in the custody of an inspector from the time when she is so boarded. Now, without entering into any nice consideration of the question, whether any usage can establish such a possession and custody, contrary to the real fact, it is sufficient to say, that such possession and custody of an inspector is not an ouster of the owner, or incompatible with his constructive possession and right to the property. In the most favorable view the inspector cannot be deemed more than a bailee for the public, with the consent of the owner, and holding a joint and mixed possession for them both. This would certainly constitute no bar to the owner's maintaining trespass against any other person, who should wrongfully displace such possession. A mere wrong-doer, or stranger, has no authority to interfere with, or to encroach upon the rights of the owner, on this account. The possession of the government, for one purpose, cannot justify the goods being taken out of the proper custody, under an authority wholly adverse to the rights of the owner, and under color of overturning his proprietary interest. This is not like the case, where the possession is in a bailee, having an usufructuary interest; but it is at most a naked custody for public purposes. Strictly speaking, the United States have not a lien on the goods for the duties on their arrival; for the owner may elect not to enter them but to go abroad with them in the ship, within the fifteen days allowed for this purpose by law. The most that can be properly said is, that they cannot be unladen without a permit and securing the duties, or giving a lien by a deposit in lieu thereof; and that, until regularly landed, the government have a right to place an officer on board, to prevent frauds, and to secure due fidelity in the unlivery of the cargo. It was therefore not inaptly said, at the bar, that the inspector was rather a guard than a bailee. The master of the ship still remains in possession for the benefit of his owners.

It is unnecessary to consider, whether an inspector of the customs, actually on board, can be considered, in a legal sense, a bailee. What his rights and duties and powers are, depends upon the provisions of law; and they are not to be extended by any loose implications, or usage. The 53d and 54th sections of collection act of 1799, c. 128 [1 Stat c. 22], contain an enumeration of his rights, duties, and powers, or at least of the principal of them, as applicable to vessels and cargoes in the predicament of the New Packet. I search in vain in them for any proofs of such an exclusive possession or custody of property, in the predicament of the present, as would defeat the possessory title of the real owner, or disable him from maintaining trespass against a wrong-doer. In a legal sense the defendant was, upon the facts stated, a wrong-doer, and my opinion is, that the plaintiffs have maintained their action.

I meddle not with several questions, which might arise upon cases of this sort. Whether goods arriving in port, before an entry and permit to land them, are attachable by the sheriff or marshal; whether either of them have a right to enter them at the custom-house, or give security for duties. These are grave questions, fit to be argued upon other occasions; and sufficiently embarrassing not to be decided incidentally, but upon full consideration. Judgment for the plaintiff.

HOWLAND (HAZARD v.). See Case No. 6,280.

Case No. 6,795.

HOWLAND et al. v. The HENRY HOOD.

[2 Betts, D. C. MS. 11.]

District Court, S. D. New York. June 8, 1841.

ACTIONS FOR INJURY TO PERSONAL PROPERTY — COMMON CARRIER—WHEN LIABILITY CEASES.

[Where the consignee of a cargo of bricks came to the vessel and ordered them put on a wharf, the liability of the master as a common carrier ended when they were placed there, and he is not responsible for any injuries not shown to have been received previous to such delivery.]

[This was a libel in rem by Gideon Howland and Gilbert Howland against the bark Henry Hood (William M. Cameron, claimant) for failure to deliver a cargo of brick

under the terms and conditions of a bill of lading.]

BETTS, District Judge. This action is grounded on a bill of lading signed by the claimant on the shipment of a cargo of fire brick at Liverpool, England, in favor of the libellants. The essential averments of the libel are, that the bricks were shipped in good order, and were not delivered here in conformity to the stipulations of the bill of lading, and damages are demanded to the amount of $918, being $15 per thousand, the supposed difference between these bricks in good order and the condition in which they now are. The bricks were purchased by the libellants, by sample, and were sold again by the same sample at $45 per thousand; but it is clearly proved, on the assertion of the libellants themselves and other testimony, that the bricks were intrinsically of an inferior quality and worth less by from $10 to $20 per thousand than the samples. If, then, a case for recovery was established by the libellants, the standard of valuation would be to be placed to that extent lower than is claimed by them. The bricks received injuries, impairing their value to a considerable extent, probably to the amount at least of $10 per thousand, but the evidence is insufficient to show that these injuries were received in their transportation on board the vessel. It is to be assumed upon the bill of lading, in the absence of proof on the part of the master showing the contrary, that the bricks were laden on board in merchantable order. The vessel is accordingly bound to deliver them in like condition (2 Kent, Comm. 207), saving the exceptions in the bill of lading, none of which apply to this case, unless it be in respect to breakage, which will be more particularly noticed hereafter. What, then, is the extent to which the responsibility to deliver is carried? Does it embrace storage on shore (or piling, in this case) or is it satisfied on unloading of the cargo, or at most by placing it on the wharf, there to be taken charge of at the risk of the owner?

The weight of evidence in this case is, that the bricks received their material damage after they were passed from the vessel to the wharf, and in the way they were handled and used in the piling there. Some of the witnesses assert there was great carelessness in landing the bricks, and that they were let fall and otherwise so handled as to subject them to serious injury. The persons most particularly engaged in the business, and whose attention was immediately directed to it, testify that the delivery was made with all reasonable care, and that the injuries occurring in that respect were but trivial, and no other than must necessarily happen in like cases where ordinary prudence and care are employed. If this degree of injury was designated or could be measured by the proofs, the libellants would undoubtedly be entitled to recover for it, however small, because the liability of the vessel as a common carrier would upon general principles be deemed yet continuing; but the general evidence will not authorize even a reference, because the vessel took on board and landed 1,000 brick more than were specified in the bill of lading, and accordingly, if the court might upon the proofs infer that some 50 or 100 were broken in landing, and five times as many fractured in the corners or otherwise injured, it would not be justified in attaching such injuries to the parcel stipulated to be conveyed, and the vessel must be regarded as having fulfilled her contract under the bill of lading, by landing in good order the number therein specified. No witness estimates the number of brick broken or lost at so great as not to leave full 61,000 in the quantity landed, and therefore the whole controversy must turn upon two considerations: First, whether arranging and securing the bricks in ranks and piles on the dock is part of the delivery, and over which the responsibility of the vessel continues to the same degree as for their carriage; or, second, if the delivery is not complete, so far as the liability of the vessel is concerned, by passing the bricks to the wharf or shore, then, whether it is established upon the evidence that the libellants had assumed upon themselves the risk of the delivery in the particular manner in which it was made.

The rule of law seems well settled, when vessels are loaded or discharged in public docks or places where wharfingers or warehousemen have charge of the cargo whilst it is not in the vessel, that the responsibility of the vessel ends when theirs begins, and, vice versa, commences when theirs terminates. Avery v. Fox [Case No. 674; 5 Durn. & E. [5 Term R.] 397; 4 Durn. & E. [4 Term R.] 581; 8 Cow. 223. Any peculiar usage or custom of the port will also determine the sufficiency of a delivery unless specific directions are given the master requiring a different one. Avery v. Fox [supra]; Holt, Shipp. pt. 3, c. 3, § 30. This port being governed by no specific law in this respect, and no custom or usage being shown, the rule of the common law applicable to common carriers governs the delivery. 2 Kent, Comm. 605, note. A common carrier is ordinarily held responsible for the goods until put in possession of the party to whom they were to be delivered. But this possession need not be actual or positive. It may be constructive or implied. Accordingly it has been contended by great weight of argument that a delivery of goods on the usual wharf by a ship trading from one port to another discharges the carrier. 5 Durn. & E. [5 Term R.] 389. But this is at least made doubtful by later authorities, as their bearing seems to indicate that unless

there is some custom of trade or some contract or direction to the contrary governing the particular case, that the liability of the carrier continues until an actual delivery of the goods. Story, Bailm. 346; 2 Kent. Comm. 625. It would seem important that a point so material to the conveniency of foreign trade and navigation should be definitely settled. The adjudications heretofore rendered in England and this country (Story, Bailm. 346, 347; 2 Kent, Comm. 604, 605) have rested upon special classes of facts without the occasion yet occurring calling from the courts a declaration of the rule applicable to a vessel having on board goods from a foreign port, when the consignee fails or refuses to point out the mode of delivery. I am persuaded that when the doctrine is fully considered it will be determined that the spirit of this species of contract is that the carrier would then be only bound to convey the goods safely to the port of delivery and to pass them from his vessel when demanded, and that the bailor must take charge of their ulterior disposition, either by his agent or by directions to the master, who will in executing them act as an agent or factor, and not under the responsibility of a common carrier. The character of common carrier in principle continues from the place of departure to the place of destination, and covers the transportation merely. The cases are not now analyzed to ascertain whether their fair bearing does not support this doctrine, because the facts brought out in this case do not demand of the court an adjudication upon this point. Many of the English and American cases throw light on the subject, yet without defining with exactness and precision the responsibility of the ship or owner after the transit is ended. The more recent English cases would rather import that the shipowner was to be placed on the same scale of responsibility with the carrier by land in trucks, wagons and coaches, and do not seem to allow weight to the distinction, so forcibly noticed by Mr. Justice Buller, that the ship has not the means of carrying goods on land, so as to deposit them personally with the party to whom they are directed. 3 Durn. & E. [3 Term R.] 389. And the new method of interior transportation by railroads, must necessarily attach to the great proportion of land carriage the same difficulty of actual delivery. The necessities of business will soon exact from the courts or legislatures a rule upon this head that shall be clear, positive, and in conformity with the conveniences of trade. That rule may probably be deduced from the principles already adjudicated or discussed in the later cases. 2 Moore, 500; 4 Bing. 476; 15 Johns. 39; 4 Pick. 374; 1 Rawle, 263; 3 Dana, 92; 6 Cow. 767; 8 Cow. 223; 14 Wend. 216; 21 Wend. 189. At least it will be found authoritatively declared that a delivery conformable to the directions of the owner or consignee will be a discharge of the carrier, whether the goods are actually received by the proper party or not. Avery v. Fox [supra]; 8 Cow. 223.

The testimony here shows that the libellants came personally to the vessel, and first ordered the brick delivered on board a boat or lighter, and directed the stevedore, if the lighter was not alongside to receive them, to land them on the wharf, and added "he might hustle out the bricks as quick as he pleased." The libellants also made a contract with the stevedore to pile up the bricks after they were landed, and the proof is clear that, the men not being able to arrange the ranks as fast as the bricks were passed out, they were thrown down promiscuously in a heap within the enclosure prepared for that purpose, and that the libellants saw the mode in which the business was done, and expressed to the stevedore their satisfaction with the manner in which he conducted it. I hold, then, upon this evidence that the liability of the master as common carrier ceased when the bricks were landed upon the dock, and that there is no proof that the injuries complained of were received previous to such delivery. The injury consists in the clippings and breakings of the edges of the brick. The manner of handling them by the stevedore under the special employment and instruction of the libellants would be much more likely to cause that injury than the passing them from the hold and across the deck of the vessel, from hand to hand, by men stationed a few feet apart. Without, however, deciding the cause upon the relative weight of these probabilities, it is sufficient to say, that the libellants fail to prove that the bricks received the injuries complained of previous to their delivery. I do not proceed upon the special terms of the bill of lading, which exonerates the master from accountability for breakage, because, in my opinion, if that does not embrace the clippings and breaks of edges, which the bricks received, yet, for the reasons already assigned, the libellant cannot recover therefor, upon the proofs he has given. Decree that bill be dismissed, with costs.

Case No. 6,796.

HOWLAND et al. v. KELLY.

[Chase, 427.] [1]

Circuit Court, D. South Carolina. May, 1869.

BOND — PAYMENT IN CONFEDERATE CURRENCY—LIABILITY OF EXECUTOR—NECESSARY PARTIES.

1. An executor receives payment of a bond given before the war, in Confederate currency, on October 26, 1862. If liable at all, he is only liable for the value of the Confederate currency as of that date.

2. In a suit against the obligor in the bond to cause him to deliver up the bond and pay it again, the executor is a necessary party.

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

Mrs. Monefeldt died in 1857, leaving a will in which she appointed a Mr. Jervey her executor, and made certain specific legacies. The will then directs, "The rest and residue of my estate, of whatever nature or kind the same may be, I do hereby direct my executor hereinafter named, or whoever may qualify on this my will, to convert into cash, and invest the same in such bonds or stocks as he may deem most advisable, and to divide the interest arising therefrom equally among my seven grandchildren, share and share alike (naming them), for their maintenance and support until the youngest grandchild living shall attain the age of twenty-one or marry. Then, I do hereby direct my said executor, or whoever qualifies on this my will, to divide the said estate among my said grandchildren, share and share alike." Jervey qualified as executor, delivered the specific legacies, settled his accounts as executor, and reduced the residue of the estate to cash. Among these assets was a bond of Kelly, the defendant, for three thousand seven hundred and fifty dollars, with interest, payable in three annual installments from April 6, 1858, on which there was a balance of three thousand dollars due when he qualified as executor. Kelly paid to Jervey one thousand and twelve dollars and fifty cents, on account of principal and interest on this bond, April 12, 1859. He paid on same account, April 27, 1860, two hundred and ten dollars; on April 27, 1861, he paid also two hundred and ten dollars interest due. On October 26, 1862, he paid Jervey in a check on the bank of South Carolina, the balance due, principal and interest, three thousand three hundred and thirty-five dollars and eighty-three cents, and the bond was delivered up to him. About the same time the mortgage given to secure this bond was entered, satisfied, and cancelled. In 1868 the complainants filed their bill in this court, stating the terms of Mrs. Monefeldt's will; that they were the grandchildren provided for in it; charging that Jervey, after paying debts and legacies, took the residue of the estate as trustee for their benefit; that he had accounted for and distributed to them all the funds except this bond of Kelly's, which he claimed to have been discharged by Kelly in Confederate treasury notes, and he offered to give them Confederate bonds as representing the money paid by Kelly. They charged that they were, and had been during the war, residents of the states adhering to the Federal government, and beyond the Confederate lines, so that no communication could have been had with them; that some of them were minors, one a feme covert; that these facts were known to Jervey and Kelly, and that therefore they both knew the pretended payment of this good debt in worthless currency was against the wishes and interest of Jervey's cestui que trusts, the complainants. The bill alleged that Jervey had settled his whole trust except this bond of Kelly's; that therefore it was unnecessary to make Jervey a party, and it prayed that Kelly might be decreed to return the bond and to pay it.

To this bill Kelly answered, denying any knowledge of Jervey's trust, or that complainants lived out of the state or beyond Confederate lines, and claimed that his payment was a good one, being made in good faith; and he demurred to the bill, because of the nonjoinder of Jervey. The cause was heard on this demurrer.

McGrath & Lowndes, for complainants.
Mr. Porter, for respondent.

CHASE, Circuit Justice. The executor who took the bond is a necessary party in this case. The bond was taken by Mr. Jervey as trustee or executor, and received for the benefit of the grandchildren of Mrs. Monefeldt.

The property was to be divided among the children when they became of age. That event did not take place until the year 1866. It then became the duty of the executor to divide the estate. The proceeds of the bond were not distributed because the executor had received payment in Confederate currency.

The most that could be said of this would be, that the executor is accountable for the value of the Confederate currency at the time it was received. It also appears that the bond had been received from Mr. Gray, master in equity, and was secured by a mortgage upon property in King street. The object of this proceeding is to obtain control of this property for distribution, and to accomplish that all the parties interested must be brought before the court. The executor is a necessary party. The demurrer must be sustained, and the complainants have leave to amend their bill by joining the necessary parties, on payment of the costs of the term.

Case No. 6,797.

HOWLAND v. The LAVINIA.

[1 Pet. Adm. 123.] [1]

District Court, D. Pennsylvania. 1801.

SEAMAN—WAGES.

A seaman carried off, vessel taken and retaken, paid salvage, and earned freight. Wages for the voyage claimed and allowed.

[Cited in Giles v. The Cynthia, Case No. 5,424; Bork v. Norton, Id. 1,659; The Zenobia, Id. 18,208; Passenger Cases, 7 How. (48 U. S.) 539; Race v. Nine Thousand Six Hundred and Eighty-One Dry Ox Hides, Id. 11,520.]

[Cited in Cope v. Dodd, 13 Pa. St. 35; Ogden v. New York Mut. Ins. Co., 35 N. Y. 420, 421; Griggs v. Austin, 3 Pick. 21; Brown v. Harris, 2 Gray, 360.]

John Howland was forcibly taken out of the vessel, and carried off by the capturing

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

privateer. The brig was retaken, paid salvage, and returned to Philadelphia, having earned her freight. Wages were claimed for voyage, deducting a proportion of salvage.

BY THE COURT. I have so often determined this point, that it is needless to enter into any further discussion of it. It must be settled on appeal by a superior court, if parties are dissatisfied with my opinion.[2]

I have cited, on former occasions, principles of the common law, (in which I still believe) in support of the doctrine influencing my judgment. These principles are to be found in the oldest and most venerable common law authorities. I did not exclusively, or in any important degree rely on them; though I call them in as auxiliaries. I am well aware that modern opinions clash on this subject—I have looked into the oldest books as being nearer the time of the establishment of common law principles, "Melius est petere fontes, quam sectare rivulos." It is well known that many of the principles of the civil and Roman law are engrafted into the system of the common law; though, as principles of the civil law, common lawyers will not acknowledge them. I do not think that the difference of opinion, in the case of a servant, is important in this question. A seaman is not in a similar predicament; no fund is peculiarly appropriated for payment of wages, to servants or labourers; but a seaman is entitled or not to his wages, according to the fate of a particular fund, to wit, freight. If this fund is lost, he suffers with the merchant, and reaps not the rewards of his dangers and his toils.

The soundness of the law maxim is proved by a just transposition of its terms, "Qui sentit onus, sentire debet et commodum." He loses also his right to this, by fault, negligence, fraud, or non-performance of contract, flowing from wilful malfeazance, misfeazance, or gross neglect. But he ought not to suffer, or have his risk or responsibility increased, by circumstances he cannot control, where the fund, though temporarily in danger, is ultimately safe.—Decree for the libellant.

An incident in this cause, produced an examination into the subject of passage money, and the court delivered the following opinion:[3]

BY THE COURT. On principle, the same rules are to be applied to passage money as are established on the subject of freight. Moll. 256, 260. This vessel had touched, without intending to end her voyage, at a port distant from the port of destination, but was obliged to unlade, and could not proceed. No passage money is due before the passenger arrives at the port of destination, unless compensation pro rata itineris, is agreed to be paid. His expenses, or the means of proceeding to the place of destination, must be paid, or tendered, to a passenger. On refusal to proceed, compensation pro rata is demandable. If the passage money has been paid before hand, it ought to be refunded, on the principles before stated. So freight on goods is not payable, 'till delivery at the port for which they are shipped. If by stress of weather, or other cause, a ship puts into another port, and unlades, or if she is wrecked, and goods saved, these must, at the expense of the owners of

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[2] Since the points here determined, I have continued to decide whenever they have occurred, on the same principles. In the case of The Friends (Dec. 11th, 1801) 4 C. Rob. Adm. 143, Sir W. Scott determined in the case of a belligerent British seaman, that the capture extinguished the contract, which the recapture did not revive. But I conceive the situation of a neutral seaman, one of the crew of a neutral ship, carrying in for adjudication, and taken away from his ship by the vis major, is not similar to the case of the sailor as determined by Sir W. Scott; and so I continue to decide, respectable as his opinion most assuredly is. The neutral seaman was not captured and carried off as a subject liable to the hazards of war, but as a citizen of a friendly nation, whose vessels must submit to search and adjudication. He was brought into the difficulty "in the service of the vessel," and, on that account, his case stands in the same equity with that of one sent in the service of the ship, on special mission, and taken by rovers or pirates, or wrecked. His misfortune occurred on account of his service, connected with and as it related to, the ship, and not to the nation whereof he is a citizen. A belligerent seaman is a subject of capture by the enemy of his nation in any ship, but the neutral mariner, only by being found in the vessel subjected to search, restraint and adjudication. Though the vessel may be condemned for unneutral conduct, the person of the mariner is free. If the vessel be acquitted, he is bound, if present, to continue his services, not under a new contract, but in conformity with his original agreement. The recapture, as it is called, by one belligerent, of a neutral in possession of another, and the payment of salvage, is most frequently arbitrary, and settles no principle on which the first contract is dissolved. I have therefore thought it just that the seaman should pay his proportion of salvage; because that was the price by which the fund out of which his wages are payable, was redeemed from temporary, and too frequently unwarrantable, restraint. I cannot perceive a similitude in the case of seizures of neutral ships, to those of prizes taken from each other by nations at war. —Less similar are the cases of individual mariners who are neutrals, to those of subjects of belligerent parties.—1804.

[3] This was an incident arising out of, and connected with, the general affairs of the ship; the original cause being incontrovertibly within admiralty jurisdiction. However applicable some general principles may be to its being within the jurisdiction of the admiralty, as a contract made on land "to be performed on the sea," I have always leaned against taking jurisdiction in disputed cases; such as freight, &c. though ancient authorities would justify me in so doing. It will be seen, in decisions hereafter, that in the distribution of remnants and surplus of monies in court, I have avoided taking cognizance of claims, unless liens were precedently attached to the things, from which the monies were produced. In transactions, where the commencement and consummation of the contract were, exclusively, on land, I have held it, in general, very disputable, at least, whether the jurisdiction attached, though the intermediate and indispensable portion of performance, was on the sea.—July, 1806.

the ship, be transported to their destined port before freight is payable. The subject of passage money produced in a case mentioned by Photier 315, 409, a curious discussion.

NOTE. Freight here is to be understood "full and entire freight." Freight pro rata itineris is payable in certain cases. See Luke v. Lyde, 2 Burrows, 882, 884; Com. Dig. 230, 231, and cases cited.

Case No. 6,798.

HOWLAND v. MARINE INS. CO. OF ALEXANDRIA.

[2 Cranch, C. C. 474.] [1]

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

MARINE INSURANCE—STRANDING OF SHIP—ABANDONMENT TO UNDERWRITERS—NEGLIGENCE OF MASTER—ACTION ON POLICY.

1. The mere stranding of a ship on a bar will not, of itself, justify the abandonment of the ship to the underwriters, but the master and crew are bound to use their best exertions to get her off.

2. If the stranding were produced by the want of skill on the part of the master, or by the want of that degree of care and prudence which a skilful and prudent master of such a vessel would exercise in similar circumstances, or, if after she was stranded he neglected to use all reasonable means to save her, the loss is not covered by the policy; but if the captain and crew were competent, and all reasonable care was used to avoid the accident, and all reasonable exertions were used, honestly, and with good faith, to prevent the wreck and destruction of the property, and it was, nevertheless, lost, then the loss is within the policy.

[Cited in Franklin Ins. Co. v. Humphrey, 65 Ind. 557.]

3. If the stranding was of such a character, as to render it, in the exercise of good judgment, hopeless to get the vessel off, then the abandonment was justified, and the loss was within the policy.

4. If the bar, on which a vessel is stranded, is out of the due course of the voyage insured, and the deviation were voluntary, or produced by want of skill in the navigation of the ship, or by want of that degree of care and diligence on the part of the master and crew, which a prudent and skilful master and crew would use in like circumstances, the insurers are discharged.

5. The court will not instruct the jury upon a question of art depending upon nautical skill, and upon which the court could not give an opinion without consulting persons skilled in nautical matters.

6. The question of negligence of the master of a vessel in conducting the voyage is to be left to the jury under all the circumstances of the case as they appear in evidence.

7. Upon a valued policy, by which, "T. H. H. on account of himself and J. J." caused a ship to be insured by the defendants in the sum of $10,000, T. H. H. may alone maintain an action, in his own name, and recover judgment for the whole amount insured, although the declaration avers that the plaintiff and the said J. J. were interested in the ship to the amount insured.

This was an action upon a policy for $10,000 on the ship New Jersey, valued at the sum insured, on a voyage to and from Liverpool to Alexandria, by which policy "Thomas H. Howland, on account of himself and John Jackson," caused insurance to be made, &c., and the declaration, which was in the name of T. H. H. alone, averred that the plaintiff and the said John Jackson were interested in the ship to the amount insured, and that in the prosecution of her voyage she was stranded on the 10th of August, 1820, and totally lost by the perils of the sea. On the 10th of August, she stranded on Southampton bar, on the shore of Long Island; the cargo was taken out, and she floated over the bar into the inlet between the bar and the shore of Long Island, where it was found so difficult to get her off, and she was supposed to be in so dangerous a situation as to justify her sale for the benefit of all concerned. She was sold for $1,000, and in less than a week was totally destroyed by a storm. She was abandoned to the underwriters, of which they had notice on the 17th of August. The defence set up was negligence and want of skill in the master, and want of proper exertions to get the ship off.

THE COURT (THRUSTON, Circuit Judge, absent), on the prayer of the defendant's counsel (Mr. Swann and Mr. Jones), instructed the jury, that the mere stranding or grounding of the ship on the bar, was not, of itself, a loss or accident which justified the abandonment of the ship; but the master and crew were bound to use their best exertions to get her off and save her, notwithstanding such accident; that if the stranding were in the first instance produced by the want of skill or care of the master; or if, after she was stranded, he neglected to use the proper and necessary means and exertions to save her from consequent wreck and destruction, then the loss is not within the policy, and the plaintiff is not entitled to recover.

THE COURT, also, at the prayer of the plaintiff's counsel (Mr. Wirt), instructed the jury, that if they should be of opinion from the evidence, that the stranding of the ship was of such a character as to render it, in the exercise of good judgment, hopeless to get the vessel off, then the said abandonment was justified, and the loss is within the policy. That the master and crew of the said vessel, were, after she was stranded, bound to use their best exertions to get her off. That if the stranding were produced, in the first instance, by the want of skill on the part of the master, or by the want of that degree of care and prudence which a skilful and prudent master of such a vessel would exercise in similar circumstances; or if, after she was stranded he neglected to use all reasonable means and exertions to save her from consequent wreck and destruction, the loss is not within the policy, and the plaintiff is not entitled to recover; but if the captain and crew were

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

competent, and all reasonable care was, in the first place, used to avoid the accident, and, after it occurred all reasonable care and exertions were used honestly and in good faith to prevent the wreck and destruction of the property and to save it for the benefit of the concerned, and it was, nevertheless, lost, then the loss is within the policy, and the plaintiff is entitled to recover.

THE COURT, also, on the prayer of the defendants, instructed the jury, that if the bar, on which the ship was stranded, was out of the due course of the voyage insured, and the deviation were either voluntary or produced by the want of skill in the navigation of the ship, or by the want of that degree of care and diligence on the part of the said master and crew which a prudent and skilful master and crew of such a vessel would use in like circumstances, the insurers are discharged.

Mr. Jones, for defendants, then prayed the court to instruct the jury, that if the master and crew, with such assistance as was offered and might have been obtained from the shore, could, by discharging the cargo, have got the ship over the bar, or if there was a reasonable prospect of so doing, they were bound to have made the experiment of so lightening the ship before they proceeded to dismantle her and treat her as irrecoverably lost; and if, in fact, it be found that the ship did float over the bar, and was safely anchored within, as soon as she was unloaded, and was then sold at auction for $1,000 and upwards; and if, in that situation it be found that the chances of saving her would have been increased by having kept her equipments on board, and by having preserved her in the best order for sailing that was practicable under all circumstances without dismantling her, then the jury may, and ought to presume that the loss was produced by so dismantling her before or at the time of unloading her; unless the jury shall be satisfied by the evidence, that it was, under all circumstances, impracticable to have retained her sails, rigging, tackle, and furniture on board, or such of her tackle and equipments as were necessary to enable her to put to sea and make a safe port, and that the stripping her of such equipments was, under all circumstances necessary to the preservation of the ship, or ought, under all circumstances to have been presumed by the master, in the exercise of a sound discretion, to have been necessary to that end.

But THE COURT (nem. con.) refused to give the instruction, having already instructed the jury, in effect, that the master and crew were bound to exercise that degree of care, skill, and diligence in the navigation of the said ship, and in the circumstances in which she was stranded, which a prudent and skilful master and crew of such a vessel would have exercised in like circumstances; and because the court is required to instruct the jury upon a question or act depending upon nautical skill, upon which the court could not give an opinion without consulting persons skilled in nautical matters.

Mr. Swann, for defendants, then prayed the court to instruct the jury, that if, from the evidence, they should be satisfied that no survey was had, or requested to be had by the master of the said ship while she was upon the bar, and that if they should be further satisfied from the evidence that the master had been advised that she might be gotten off at an expense of one or two hundred dollars, and that assistance had been repeatedly offered to him to get her off from the bar into the open sea, then the omission of the master to make the said attempt was evidence of negligence on his part sufficient to justify the jury in finding a verdict for the defendants.

But THE COURT (THRUSTON, Circuit Judge, absent) refused to give the instruction; being of opinion that the question of negligence was a question to be left to the jury under all the circumstances of the case as they appear from the evidence.

Verdict for the plaintiff for the amount insured.

Mr. Swann, for defendants, moved in arrest of judgment,

1st. Because the suit was brought in the name of Thomas H. Howland, for his individual use, upon a policy set forth in the declaration for the joint benefit of him and John Jackson; and

2d. Because the verdict has given the whole amount of the sum insured upon a declaration in which it is apparent that the plaintiff was entitled to but one half.

3. Because the suit is misconceived; it appearing by the declaration that the contract was a joint, and not a separate contract.

Mr. Swann also moved for a new trial on the ground that the verdict was against the weight of evidence, and because it was for the whole amount insured.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled both motions.

Case No. 6,799.

HOWLAND et al. v. MAXWELL.

[3 Blatchf. 146.] [1]

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

CUSTOMS DUTIES—ENTRY—PENALTY FOR UNDERVALUATION—APPRAISAL.

1. Where an invoice of goods not purchased in a foreign market, but belonging to their producer, was entered at the custom-house by their consignee, and, before any action was taken to determine the value of the goods, a corrected invoice was given to the collector by the consignee: *Held*, that it was the duty of the collector to take the valuation in the corrected invoice as the entry valuation, and that it was illegal for him to impose a penalty, as for

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

undervaluation, because of the difference between the two invoices.

[Cited in Carnes v. Maxwell, Case No. 2,417; Schneider v. Barney, 6 Fed. 151.]

2. Where, under such circumstances, the appraisers, without any valuation of the goods, added to the first invoice prices, exactly the difference between the two invoices, and a penalty of 20 per cent., for undervaluation, was imposed, because such difference exceeded 10 per cent.: *Held*, that, under sections 16 and 17 of the act of August 30, 1842 (5 Stat. 563, 564), an actual appraisal of purchased goods, as of the time of purchase, must be made, to authorize the imposition of a penalty of 20 per cent. for undervaluation.

This was an action [by William E. Howland and others] brought in the supreme court of New York, to recover the following moneys exacted by the defendant [Hugh Maxwell] as collector of the port of New York, under color of the revenue laws, to wit: for weigher's fees, $21 17; for penalty, $483 60; total, $504 77; and interest thereon. The cause was removed into this court by certiorari. An invoice of sugars, dated Havana, March 15th, 1850, was entered on the 2d of April thereafter, at the custom-house, by the plaintiffs, as consignees thereof. Weigher's fees, to the amount of $21 17, were charged, and paid, under protest, on the 10th of May. On the 13th of April, before the goods had been appraised at the custom-house, the plaintiffs received from the owners of the sugars in Havana, a correct invoice, which was filed with the collector about the 17th of April, with a notice that the first invoice had been made out in the absence of the owner, by his agents, and that this one had been forwarded to the plaintiffs in correction of the former one, before the plaintiffs had made any communication to the owner on the subject; and the plaintiffs asked leave to amend the entry on the first invoice to correspond with the values set forth in the corrected one. The first invoice stated the prices of the sugars at 2 cents per pound; the second, at 3¼ cents. The collector refused to allow the amendment or correction, and handed the second invoice to the appraisers, who, without any valuation of the goods, wrote up the first invoice prices, by adding to them exactly the difference between the two invoices, and, this difference exceeding 10 per cent., the collector imposed an additional duty or penalty of 20 per cent. The plaintiff applied to the treasury department, requesting to have the proceeding rectified, and that they might be allowed to enter the goods on payment of legal duties upon the corrected invoice. This application was denied. On the 10th of May, they paid the duties and penalty imposed by the collector, under protest, in due form of law, against the exaction of the penalty. On the argument of the cause, the question respecting the weigher's fees was not pressed, and the case was put before the court upon the right of the collector, under the facts, to impose the additional duty of 20 per cent.

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

BETTS, District Judge. The oath of the consignees upon the entry having made it their duty to make known to the collector the second invoice received by them in relation to the importation, and, that invoice having been filed by them in the custom-house before any action had been taken there, on the entry, to determine the value of the goods imported, the plaintiffs had the right, on a question of duties merely, to claim that the valuation of the importations should be made upon the corrected invoice, and not on the one first produced. Had the goods been seized for a fraudulent undervaluation, or had an appraisal been made upon the entry before the corrected invoice was produced, the question on this point might stand on different grounds.

Under sections 16 and 17 of the act of August 30, 1842 (5 Stat. 563, 564), an actual appraisal of purchased goods, as of the time of purchase, must be made at the custom-house, to authorize the levy of an extra or additional duty of 20 per cent., for an undervaluation in their invoice. In this case the importation was made prior to the act of March 3, 1851 (9 Stat. 629), and, upon the proofs, the goods were exported by the producer, and not by the purchaser in the foreign market. Judgment for the plaintiffs, for the penalty and interest thereon.

HOWLAND (RENNER v.). See Case No. 11,700.

Case No. 6,800.

HOWLAND et al. v. SOULE.

[Deady, 413.] [1]

Circuit Court, D. California. April 16, 1868.

TAXES—SUIT TO RESTRAIN COLLECTION.

Section 10 of the act of March 2, 1867 (14 Stat. 152), amends section 19 of the act of July 13, 1866 (14 Stat. 475), by adding thereto as follows: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." *Held*, that this prohibition included a suit to restrain the collection of any sum by authority of the United States, having the form and color of a tax, by any means authorized by law for the collection of taxes.

[Cited in Alkan v. Bean, Case No. 202; Kensett v. Stivers, 10 Fed. 522; Snyder v. Marks, 109 U. S. 193, 3 Sup. Ct. 160.]

[Certiorari to the Fourth district court of the state of California.

[This was a bill in equity by William H. Howland, Horace B. Angell, Irwin T. King, and Cyrus Palmer against Frank Soule, as collector of internal revenue, to enjoin him from the collection of certain taxes.]

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[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

George Turner, for complainants.
R. F. Morrison, for defendant.

DEADY, District Judge. The complainants are the proprietors of the Miners' Foundry, in San Francisco. The defendant is the collector of internal revenue for this district. From September, 1862, until October, 1865, the complainants, as manufacturers, made monthly returns, and paid the taxes levied upon such returns. About October 1, 1865, the assessor for the district went upon the premises of the complainants, and upon an examination of their books and materials, determined that their returns, anterior to that time, were false; and thereupon said assessor made a re-assessment of their manufactures for the period between September, 1862, and October, 1865. The taxes levied upon this assessment, and the penalties for the prior fraudulent returns (amounting in round numbers to $20,000), were delivered to the defendant for collection. The defendant gave notice to the complainants that unless the amount was paid, he should proceed to collect the same by distraint of their property as provided by law. On October 10, 1867, the complainants commenced this suit in the Fourth district court of the state, to enjoin the defendant from collecting the tax by distraint. On petition to this court by defendant, the cause was removed here—October 14, 1867—by certiorari. In the meantime a preliminary injunction was allowed in the state court, which injunction was subsequently continued in this court, by order of the district judge. The cause has been heard on bill and answer, by consent of parties. The complaint alleges that the returns of the complainants were correct and accepted by the assistant assessor then in office and authorized to receive the same; and also that the question of their correctness has been adjudicated in an action by the United States against the complainants for sundry penalties, alleged to have been incurred by complainants, on account of the incorrectness of such returns. The answer denies the correctness of the returns, and avers that they were false and fraudulent; and also that the additional assessment was correct and made in pursuance of law. For the purposes of the hearing, the answer is taken to be true. In the course of the argument various questions were discussed by counsel which I do not deem necessary to consider.

By section 10 of the act of March 2, 1867 (14 Stat. 152), section 19 of the act of July 13, 1866 (14 Stat. 475), is amended by adding thereto as follows: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." In my judgment this clause prohibits the maintenance of this suit. I cannot see how it can be otherwise construed. Counsel for the complainants admits the statute and its validity, but seeks to avoid its application to this case. His argument is twofold, and may be briefly stated thus: I. This is an illegal tax, and therefore no tax. A suit to enjoin the collection of this demand is therefore not a suit to restrain the collection of a tax. II. This suit is not brought to restrain the collection of a tax, but only to prevent its collection by force—without action—by distraint. Admitting that a court might determine this tax to be illegal or erroneous, it does not follow that a suit to restrain its collection is not within the prohibition of the statute. The object of the statute is to prevent the assessment and collection of the public revenue from being hindered or delayed by judicial proceedings, at the instigation and upon the representation of parties interested to avoid or resist the payment of taxes. The statute would be wholly inadequate to that object, if such parties were allowed to maintain suits to enjoin the collection of a tax, because, as they say, the proceedings in the revenue department were erroneous or illegal. A person not pleased with a tax will readily conclude that it is illegal or erroneous, and a suit for injunction follows. His neighbor soon catches the infection, and the result would be that the wheels of government would be stopped by injunction and revenue would cease to flow into its treasury. "To tax and to please, no more than to love and be wise, is not given to man." The statute prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy—an action at law to recover back the amount paid. This is a tax within the meaning of the statute. It has the form and color of a tax. It was assessed upon manufactured articles liable to a duty, by a person in office and clothed with authority over the subject matter. The tax has come to the defendant for collection, in due course of office and from the proper authority. The defendant is the person authorized to collect such taxes, and by the means proposed—the seizure and sale of the complainants' property.

As to the second branch of the argument for the complainants, little need be said. The mere statement of it, appears to me, to be a sufficient refutation of it. It assumes that to prevent the defendant from using the specific means provided by law for the collection of a delinquent tax, is not restraining the collection of that tax. The defendant is not authorized to collect the tax by action except in special cases upon the express directions of the revenue bureau. But if it was entirely optional with the defendant, whether to collect by distraint or suit, to enjoin him in the use of either would be contrary to the manifest spirit and purpose of this statute. There must be a decree dismissing the bill and for costs and expenses.

[For a decision under the nineteenth section of the act of July 13, 1866, see Hendy v. Soule, Case No. 6,359.]

Case No. 6,801.

HOWLAND et al. v. TWO HUNDRED AND TEN BARRELS OF OIL.

[7 Law Rep. 377.]

District Court, D. Massachusetts. Oct., 1844.

SALVAGE—DERELICT—AMOUNT.

1. The rule allowing a moiety to salvors in cases of derelict, is not inflexible.

2. Under the extraordinary circumstances of this case, considering the desperate situation of the property, abandoned by the crew, at a distance of one thousand miles from any country where assistance could be procured, the great risk incurred in saving it, the forfeiture of insurance by the salvors, and the nature of the voyage, it was decreed, that the salvors should receive $5,740.36, and the claimants $1,000.

In admiralty.

This was a libel for salvage. It appeared that the ship London Packet sailed from New Bedford on the 24th of November, 1841, fitted for a voyage of three and a half years in the sperm whale fishery. On the 18th of August, 1842, having taken one thousand barrels of sperm oil, she discovered the wreck of the whale ship Benezet, on a reef about forty miles from the Fejee Islands, a place dangerous to navigation from sands, calms and currents. The captain of the London Packet, hoping to save the crew, went in his boat to the wreck, and at some hazard succeeded in getting on board. None of the crew were found. He took some coils of warp from the wreck, and returned to his own ship. On the two following days he boarded the wreck again, and took some articles of her apparel. He cut a hole through the deck in order to take oil from the hold, but without success, and cut away the masts in order to prevent her going to pieces. On the night of the 20th the wreck went to pieces, and the next day the crew of the London Packet picked up about two hundred and twenty-four barrels of oil, and some sails and rigging, adrift from thirty rods to a mile from the reef. The following night the ship in a calm was carried by the swell and current within twenty or thirty rods of the reef, and was relieved from her perilous situation by the springing up of a breeze. The salvors described the weather, after the discovery of the wreck, and before picking up the oil, as rough and squally. Having been carried by the current some distance from the wreck, the London Packet beat back in two or three days, and took some other articles from the remnants of the wreck. On the 27th they picked up at sea a cask of oil containing six barrels. On returning to the reef about the 3d of September, no vestige of the Benezet or cargo remained. The captain and crew of the Benezet reached the Bay of Islands, New Zealand, about a thousand miles distant from the wreck, in a whale ship called the Hoogly; at what time did not distinctly appear, although there was evidence tending to show that it was in the month of August. The master, after advertising ten days, sold the Benezet and cargo at auction, for the sum of fifty-five shillings sterling. The London Packet arrived at the Bay of Islands about the 18th of October following. The purchaser was then preparing to send a small schooner to the wreck, but, upon information then received, abandoned the enterprise. The London Packet arrived at New Bedford on the 27th of June, 1844, with two thousand one hundred and fifty-five barrels of sperm oil, including that which had been picked up. She could have carried about two thousand two hundred barrels. She was insured for the voyage at six per cent. for three years, and pro rata for a longer time, and, at the time of the salvage, was, with her cargo, worth $40,000.

Mr. Coffin, for libelants.

Mr. Page, for claimants.

SPRAGUE, District Judge, in giving judgment, stated that although, in cases of derelict, a moiety only is generally given to the salvors, yet this rule is by no means inflexible. It yields to extraordinary circumstances. In this case should be considered on the one hand, (1) The desperate situation of the property; deserted by the master and crew of the Benezet—the Hoogly not choosing to go to the wreck to endeavor to save anything, although she took up the master and crew; the trifling sum for which the Benezet and cargo were sold by the captain's order, at public auction, after advertising ten days—the distance of the wreck from any country where assistance could be procured, being about one thousand miles—while the vessel and cargo actually went to pieces and disappeared. (2) The meritorious conduct of the salvors, in boarding the vessel for the humane purpose of saving life, and the personal hazard incurred by the master and crew. (3) The risk of the London Packet and cargo while rendering the salvage service. (4) The forfeiture of her insurance, the new insurance for the residue of the voyage being worth four or five per cent. on $40,000, equal to $1600 or $2000. (5) The situation of the London Packet, the nature of her voyage, the place she was in, her prospects of obtaining a cargo from whales, being then twenty-one months out, on a voyage for three years and a half, having already taken one thousand barrels of oil, on whaling ground, and with good prospects. On the other hand; (1) That not more than one-tenth or one-twentieth of the vessels engaged in the business get full cargoes; the average being about two-thirds of a cargo. (2) That they actually returned, having been three years and seven months out, with two thousand one hundred and fifty-five barrels, including the property saved, while they could have carried forty-five barrels more, and, if they had been able to take more, might have sent these casks home by

another vessel. (3) That time and expense would have been required to take the same amount of oil from whales.

THE COURT then adverted to the opinions of a number of witnesses which had been given in evidence, as to the amount which would be a just compensation for salvage; and proceeded to say, that although it had been suggested that the oil was sold on the arrival of the vessel, and brought ninety-two cents a gallon, the salvors had no right to sell, and there was no evidence that they had sold. The marshal's return showed it to be in custody. It was therefore to be estimated at the market price, which was proved to be ninety-six cents per gallon. The oil, calculated at six thousand seven hundred and forty-one gallons, at ninety-six cents, would amount to $6,471.36, and the other articles saved, estimated at $269, would make the amount $6,740.36. In conclusion, THE COURT said, on consideration of the circumstances, particularly the desperate condition of the property, the remote part of the world where it was found, the nature of the voyage of the London Packet, the actual hazard incurred, the forfeiture of her insurance, on so large an amount of property, a case was presented requiring a wide departure from the usual rule of a moiety, and decreed $1000 to the claimants, $5,740.36 to the salvors.

HOWLAND (UNITED STATES v.). See Case No. 15,406.

Case No. 6,802.

HOXIE v. CARR et al

[1 Sumn. 173.] [1]

Circuit Court, D. Rhode Island. June Term, 1832.

BILL IN EQUITY TO WIND UP PARTNERSHIP—WHO ARE PROPER PARTIES — ABATEMENT OF SUIT — TRANSFER OF INTEREST PENDING SUIT—SUPPLEMENTAL BILL—PARTNERSHIP PROPERTY—RIGHTS OF PARTNERS AND CREDITORS UPON DISSOLUTION —REAL ESTATE—RESULTING TRUST—NOTICE.

1. All persons in interest must be made parties to proceedings in equity before a decree.

[Cited in Bryant v. Russell, 23 Pick. 523; Norris v. Bean, 17 W. Va. 661.]

2. The mortgagees, under a conveyance made before the filing of a bill in equity in relation to the premises mortgaged, should be made parties; as should also the mortgagor; but their omission is no necessary cause of abatement of the suit.

[Cited in Taylor v. Rasch, Case No. 13,801; Chester v. Chester, 7 Fed. 4.]

3. The abatement of a suit in equity is merely an interruption to the suit, suspending its progress, until new parties are brought before the court.

4. Where there is a transfer of interest pendente lite, a supplemental bill may be filed by or against the purchasers.

[Cited in Bajorques v. U. S., Case No. 761; Miller v. Rogers, 29 Fed. 402.]

5. Creditors are not necessary or proper parties generally in a bill between partners to wind up the partnership concerns.

[Cited in Tracy v. Walker, Case No. 14,129.]

[Cited in Chester v. Dickerson, 54 N. Y. 7; Johnson v. Hersey, 70 Me. 74.]

6. In the absence of fraud and breach of trust, property purchased with partnership funds does not of necessity become partnership property, if that is not the intention of the parties.

7. The circumstance, that the payment for property purchased has been made out of the partnership funds, especially if the property be necessary for the ordinary operations of the partnership, and be actually so employed, in the absence of controlling circumstances, will be decisive, that it was intended to be held as partnership property.

[Cited in Smith v. Burnham, Case No. 13,019.]

[Cited in Tillinghast v. Champlin, 4 R. I. 206; Ebbert's Appeal, 70 Pa. St. 80; Alkire v. Kahle, 123 Ill. 504, 17 N. E. 693.]

8. Upon a dissolution of a partnership, each partner has a lien upon the effects, as well for his own indemnity against the joint debts, as for his proportion of the surplus; but the creditors of the partnership, as such, have no lien upon the partnership effects for their debts.

[Cited in Thrall v. Crampton, Case No. 14,008.]

[Cited in Ferson v. Monroe, 21 N. H. 468; Lang v. Waring, 25 Ala. 625; Crooker v. Crooker, 46 Me. 260; Arnold v. Wainwright, 6 Minn. 370 (Gil. 241); Johnson v. Hersey, 70 Me. 76; McMillan v. Hadley, 78 Ind. 594; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 450.]

9. Where real estate is purchased for partnership purposes, and on partnership account, let the legal title be vested in whom it may, as where the conveyance is taken to the partners as tenants in common, it will, in equity, be deemed partnership property, and, like other effects, personal estate; and the partners are the cestuis que trust. But a court of law must view it, in general, only according to the legal title.

[Cited in Macy v. De Wolf, Case No. 8,933.]

[Cited in Sage v. Sherman, 2 N. Y. 429; Buchan v. Sumner, 2 Barb. Ch. 201; Jarvis v. Brooks, 27 N. H. 67; Tillinghast v. Champlin, 4 R. I. 212; Buffum v. Buffum, 49 Me. 111; Butterfield v. Beardsley, 28 Mich. 425; Foster's Appeal, 74 Pa. St. 395; Hardy v. Norfolk Manuf'g Co., 80 Va. 417.]

10. Semble, that as between the executor or administrator of a deceased partner and his heir or devisee, it is considered, in equity, as personalty.

11. Rules as to the creation of resulting trusts.

[Cited in Hutchins v. Heywood, 50 N. H. 498; Sherwood v. St. Paul & C. Ry. Co., 21 Minn. 130; Hudson v. White, 17 R. I. 523, 23 Atl. 57.]

12. Semble, that the exception in the statute of frauds in England and Massachusetts, as to resulting trusts, is merely affirmative of the general law, and does not create a saving of resulting trusts, which would otherwise have been cut off, unless in writing. Accordingly, in Rhode Island, where the statute of frauds contains no such exception, resulting trusts are on the same footing as in England and Massachusetts.

13. Where purchasers of real estate, at the time of their purchase, have actual or constructive notice, that it was partnership propererty, it will be chargeable in their hands with

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

the payment of the partnership debts, even though they have no notice of the existence of these partnership debts. If they have no notice that it was partnership property, they are exonerated to the extent of the purchase-money already paid by them; and, so far as the purchase-money has not been paid, that is a substituted fund, chargeable in their hands with the same burthens as the real estate.

[Cited in Jones v. Van Zandt, 5 How. (46 U. S.) 225.]

[Cited in Dyer v. Clark, 5 Metc. (Mass.) 566.]

14. Circumstances under which notice will be implied.

This was a bill in equity, framed with a double aspect. It stated a partnership between Joseph Hoxie, the plaintiff, and Simon Reynolds, one of the defendants, in the manufacture of cotton cloths, under the firm of the West Greenwich Manufacturing Company; and the possession and purchase of certain real estate, including the factory, and other appendages, out of the joint funds of the partnership, which were occupied, used, and improved, for the benefit of the partnership; a dissolution of the partnership in March, 1826, with large debts owing by the company; a parol contract for the sale by Reynolds to Hoxie, upon certain conditions, of all his share in the partnership property, and a part-performance in June following of the conditions of the contract of sale on the part of Hoxie, and an offer to perform the residue; a possession of the premises under the sale by Hoxie; a subsequent sale by Reynolds to Nathan Carr and Jesse Carr (two of the defendants) of his share in the real estate aforesaid; which last sale it charges to be fraudulent, and with notice of Hoxie's contract, and with intent to defraud creditors; and it charges a subsequent payment by Hoxie of a large part of the partnership debts; and the insolvency of Reynolds. It then prays for a specific performance by Reynolds, and a conveyance by his grantees according to his contract with Hoxie, and for an injunction, &c.; or, if that cannot be done, it prays for an account of the partnership debts, and that the real estate may be charged with the amount; and for further relief. The answers admitted the partnership; denied the contract of sale to Hoxie, and part-performance; and asserted that the conveyance to the defendants, the Carrs, was bona fide, and without notice; and that the real estate so sold was not partnership property; but, though paid for out of the partnership funds, was purchased and held by the partners as tenants in common, and not otherwise. The owners also admit the possession by Hoxie, but insist that it was by wrong, and not by contract. The answer of Reynolds also asserted, that Hoxie, in December, 1827, (before the filing of his bill) had mortgaged to certain persons (Hopkins, Arnold, and Briggs) the half of the premises asserted to be bought of him, whereby Hoxie was now disabled to perform the contract set up by him. Other matters not now material to be mentioned occurred in the answer of one of the defendants, Nichols. By a supplementary answer, the defendants further alleged, that since the commencement of the suit and the filing of the answers, viz. in July, 1830, Hoxie had executed a conveyance to one A. Hopkins of all the right, title, interest, and claim, which he had in the premises in the bill mentioned; and also, that the sheriff's sales of two of the lots of the real estate in the bill mentioned, had been made under executions against Hoxie. The bill, so far as it respects Amos Reynolds, to whom one lot of the real estate in controversy was conveyed, was dismissed, since he has never been made a party by the service of any process upon him. The general replication having been filed, and evidence taken, the cause came on to be argued upon the merits; and at the argument the following points were presented for the consideration of the court: First, whether it was competent for the plaintiff to maintain his bill after the mortgage made by him as stated in the original answers; and if it was, whether the conveyances, pendente lite, do not abate the suit. Secondly, whether the parol contract by Reynolds with Hoxie for a sale, was sufficiently established in point of fact; and if so, whether, in point of law, the party under the circumstances was entitled to a decree for a specific performance. Thirdly, whether the real estate would, under all the circumstances, be deemed partnership property, since the conveyances thereof were to the partners, as tenants in common; and if it was to be deemed partnership property, whether the plaintiff was entitled to any relief against the present defendants, who were purchasers.

Richard W. Greene and J. Whipple, for plaintiff.

J. L. Tillinghast and N. Searle, for defendants.

STORY, Circuit Justice. This cause has been most fully and elaborately argued upon all the points, and, since he is now no more, I may be permitted to say (what I should feel compelled to suppress in regard to the living) by one of my brethren,[2] whose loss we all deplore, with the consummate skill and profound learning, which always distinguished him. As to the first question, I think, that the objection is well founded in principle, though not to the extent of the line of the argument. It is impossible, that a decree can be made in favor of the plaintiff to bind the mortgagees under the conveyance made before the bill filed, unless they are made parties. They have an interest, which cannot be overlooked by the court, not wholly displacing that of the plaintiff, who, as mortgagor, still retains an interest, but concurrent with it. It would be hard upon the defendants to compel them

[2] Mr. Searle is here alluded to by the court.

to go on to a decree, which, whether in favor of or against them, would still not be binding on the mortgagees. The latter, in every possible aspect of the case, have an interest in the matter of the bill, whether it be viewed as a bill for a specific performance, or a bill for a settlement of the partnership accounts, and a charge upon the real estate. Suppose there should be a decree charging the estate, as partnership property, with the partnership debts, how could the court proceed to decree a sale to satisfy those debts, unless the mortgagees were made parties? The general rule, that all persons in interest must be made parties before a decree, is clearly applicable to the present case. But the omission of such parties is no necessary cause of abatement of the suit. That can arise only from matters subsequent to the bill. It may be ground, at the hearing, for a dismission of the bill without prejudice for want of proper parties, or for an order, that the bill shall stand over to make new parties, with leave to file a supplemental bill. See Coop. Eq. Pl. pp. 63, 64, 73–75, c. 1, § 4; Id. p. 214, c. 3, § 4; Goodwin v. Goodwin, 3 Atk. 370; Whitcomb v. Minchin, 5 Madd. 91; Foster v. Deacon, 6 Madd. 59; Bishop of Winchester v. Beavor, 3 Ves. 314. As to the conveyance of the plaintiff, as well as the sheriff's deeds executed pendente lite, if they had disposed of all the rights of the plaintiff, there would certainly have been an end to his bill for a total defect of merits; for it is very clear that no party can stand before the court for a decree, who has no farther interest in the suit, either formal or real. Coop. Eq. Pl. p. 166, c. 3, § 2; Id. p. 196, § 3; Id. pp. 210–212, § 4; Harris v. Pollard, 3 P. Wms. 348; Benfield v. Solomons, 9 Ves. 77. And where the interests of new parties intervene, pendente lite, having derivative titles under the plaintiff, there the suit may abate or become defective (Coop. Eq. Pl. pp. 63, 64, 76, 77, c. 1, § 4; 1 Cooke, Bank. Laws, 4th Ed., p. 558, c. 14, § 3; Williams v. Kinder, 4 Ves. 387); though it would, or might be different in the case of derivative titles under the defendant, pendente lite (Bishop of Winchester v. Paine, 11 Ves. 194; Metcalfe v. Pulvertoft, 2 Ves. & B. 200). But the nature of an abatement in equity seems to have been misunderstood at the argument. It is not, necessarily, a destruction of the suit, like an abatement at law, where a judgment, quod cassetur, is entered. It is merely an interruption to the suit, suspending its progress, until the new parties are brought before the court; and if this is not done at a proper time, the court will dismiss the suit. Coop. Eq. Pl. pp. 63, 64, 74–77, c. 1, § 4; Brown v. Higden, 1 Atk. 291; Williams v. Kinder, 4 Ves. 387; 1 Hov. Supp. p. 344, note to case, 4 Ves. 387; Anon., 1 Atk. 89; Id., 263, and note of Sanders. But in any case of a purchase, or transfer of interest, pendente lite, the proper parties may be brought before the court. Coop. Eq. Pl. pp. 76, 77, c. 1, § 4; Merywether v. Mellish, 13 Ves. 161. So that the question is brought to this, whether the present cause shall stand over for the purpose of allowing a supplemental bill to be filed by or against the purchasers. If the plaintiff has any interest remaining in the suit, or is a proper party in equity to give effect to any decree in the premises, affecting the purchasers, I am clearly of opinion, that this should be done to save expense and further litigation. And upon looking at the bill, I do not well see, how it can be doubted, that the plaintiff is a necessary party, since he has a residuary interest in settling the partnership concerns under either aspect of the bill. So far as the bill goes for a specific performance, the title of the purchasers of the real estate is, or may be materially concerned; for it may be made valid, or otherwise, at least as to some of the purchasers, according to the event of the suit. And, so far as it regards the other point, of the real estate being subject to partnership debts, they are all interested in the ultimate settlement of the accounts, and the ascertainment of the amount of the charges, if any, of the partnership debts on the real estate. How is an account to be taken, unless both partners are brought before the court? And how can the plaintiff make good his conveyance to the purchasers under him, unless he can procure a decree for a specific performance, or some other equivalent relief? I think, therefore, he is a proper and a necessary party in the future progress of the cause. But, as an expression of opinion on the other points of the cause, or at least on one of them, may save much future litigation, and as they have been fully argued, I purpose to consider, in the next place, the point last argued; and that is, whether the real estate is to be deemed partnership property; and if it is, whether it is chargeable in the hands of the defendants, who are purchasers, with the partnership debts. It is certainly matter of regret, that the bill intending to raise these questions is not framed with entire exactness or precision. The bill does not pointedly allege, that the real estate in controversy was purchased with the company funds for the company, and for their use, and on their account. The allegation is much more loose and inartificial. It states, that "the aforesaid lots of land and other property constituted the bulk of the property of said company; that the same was purchased and paid for principally by the joint funds of the company," (not saying exclusively for the company's use or on their account,) "occupied, used, and improved," (that is, in point of fact, and subsequently, occupied, used, and improved) "for the benefit of the company, and not for the sole and individual benefit of either of said partners;" all of which statements may be true, and yet the property not have been purchased on the company's account, as company property. Then, again, as to the charge against the

purchasers, (the Carrs,) it is not alleged, that they, at the time of their purchase, had notice, that the real estate was company property, liable, as such, to be charged with the company debts; but the allegations on this head mainly point to notice of the contract of sale, and its incidents. So that, in both respects, there is a defectiveness of allegation, which requires amendment, (though the charges may be met in their broadest sense and inferences, by the answers,) before the court can properly make a decree.

Some things may in the present discussion be assumed as settled, because, both upon principle and authority, they may now be treated as reasonably free from doubt. In the first place, property purchased with partnership funds does not of necessity become partnership property, if that is not the intention of the parties; at least, in all cases steering wide of fraud and breach of trust. See Ex parte Emly, 1 Rose, 64. One partner may certainly withdraw a part of the partnership funds for a separate purchase on his own account; and all may join in a purchase of real estate, for purposes wholly independent of the partnership, intending to hold their shares severally on their individual account. And the fact, under such circumstances, that the payment is made from the partnership funds, will not change the nature or operation of the purchase. It will take effect, as the parties intend. See Gow, Partn. c. 2, § 1; Id., c. 5, § 2; Smith v. Smith, 5 Ves. 189. But the circumstance, that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business, and be actually so employed, will afford a very cogent presumption, that it was intended to be held as partnership property; and in the absence of all countervailing circumstances, it will be absolutely decisive. See Gow, Partn. pp. 48–50, c. 2, § 1; Id., p. 286, c. 5, § 2, etc.; Thornton v. Dixon, 3 Brown, Ch. 199; Crawshay v. Maule, 1 Swanst. 508, 521; Smith v. Smith, 5 Ves. 189; Forster v. Hale, 3 Ves. 696, 5 Ves. 308; Featherstonhaugh v. Fenwick, 17 Ves. 298; Mont. Partn. p. 97, note; McDermot v. Laurence, 7 Serg. & R. 438. We shall presently see the application of this doctrine to the facts of the case before the court, and how far it is modified by the statute law of Rhode Island. In the next place, upon a dissolution of partnership, each partner has a lien upon the partnership effects, as well for his indemnity against the joint debts, as for his proportion of the surplus. Gow, Partn. p. 333, c. 5, § 3; Harvey v. Crickett, 5 Maule & S. 336; Ex parte Rowlandson, 2 Ves. & B. 172. But the creditors of the partnership, as such, have no lien upon the partnership effects for their debts. Their equity has been truly said to be the equity of the partners, and is to be worked out through the rights of the latter. The creditors, therefore, are not necessary or proper parties generally in a bill between parties to wind up the partnership concerns; but they may, nevertheless, have indirectly the benefit of the proceedings under the bill, since a sale of the partnership effects, and a payment to them, is the ordinary result of the decree. This was strongly laid down by Lord Eldon in Ex parte Ruffin, 6 Ves. 119, where his lordship said, that joint creditors had no lien whatsoever upon the partnership effects. They had a power of suing, and, by process, of creating a demand, that would directly attach upon the partnership effects. But they had no lien upon, or interest in them, in point of law or equity. But, when the partnership is dissolved, the partners have a right to have the business wound up; and, to wind it up, it is indispensable that the debts should be paid, and the surplus be distributed in proportion to the different interests. In all such cases, the equity is not the equity of the joint creditors, but that of the partners with regard to each other, which operates to the payment of the partnership debts. The same doctrine was acted upon in Ex parte Williams, 11 Ves. 3, Ex parte Kendall, 17 Ves. 514, and Ex parte Rowlandson, 2 Ves. & B. 172; and indeed is too firmly established to admit of a doubt.

In cases where the real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial in the view of a court of equity, in whose name or names the purchase is made, whether of one partner or all; whether in the name of a stranger, or of one of the firm. In either case, let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are the cestuis que trust. A court of law may, nay, must view it, in general, only according to the legal title. And if the legal title is vested in one partner, a bona fide purchaser from him of the real estate, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any partnership claim. But if the purchaser has such notice, he is clearly bound by the trust, and takes the property cum onere, like every other purchaser of a trust estate. See Forde v. Herron, 4 Munf. 316; McDermot v. Laurence, 7 Serg. & R. 438. A question often arises, whether real estate, purchased for a partnership, is to be deemed for all purposes personal estate, like other effects. That it is so, as to the payment of the partnership debts, and adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in the view of a court of equity. Ripley v. Waterworth, 7 Ves. 425, 434. But whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee, is quite a different question, upon which learned judges have entertained opposite opinions. The whole doctrine, as between such claimants, must turn upon the presumed intention of the deceased partner;

whether, by leaving it in the state of being real property, he meant, as between his personal representatives and his heirs and devisees, that it should retain its true and original character; or whether, having appropriated it as partnership property, it should assume the artificial character belonging to the other personal funds of the firm. In Thornton v. Dixon, 3 Brown, Ch. 199, which was a question between the heirs and distributees, Lord Thurlow said, that he had always understood, that where partners bought land for the purpose of a partnership concern, it was to be considered as a part of the partnership funds, and consequently distributable as personal estate. But upon the cause coming on again, his lordship held, that the nature of the agreement between the partners in that particular case was not sufficient to vary the nature of the property; and, therefore, that after the dissolution, the property would result according to its respective nature, the real as real, and the personal as personal estate. That doctrine was followed by Sir William Grant, master of the rolls, in Bell v. Phyn, 7 Ves. 453, and Balmain v. Shore, 9 Ves. 500. But it has been repeatedly denied by Lord Eldon, who has held the opposite doctrine, that real estate purchased on the partnership account ought, on the death of one of the partners, to be held to be personal estate. Townsend v. Devaynes, Mont. Partn. in notes, p. 97; Crawshay v. Maule, 1 Swanst. 508, 523, 527; Selkrig v. Davies, 2 Dow, 242. In Coles v. Coles, 15 Johns. 159, the court seem to have adopted the doctrine of Lord Thurlow, though that case might have been disposed of upon its own peculiar circumstances, without any absolute expression of such an opinion. In McDermot v. Laurence, 7 Serg. & R. 438, the court held, that real estate used by the partnership for partnership purposes, but the conveyance being to them as tenants in common in fee, was, as between the creditors of the partnership and a mortgagee, without notice from one of the partners, to be deemed real estate, and liable, in the first instance, to the mortgagee's debt. The reasoning of the court admits, by a natural implication, (though not necessarily,) that if the property had been purchased out of the partnership funds, on account of the partnership, and the mortgagee had had notice, the decision might have been different. The case of Forde v. Herron, 4 Munf. 316, is to the same effect as McDermot v. Laurence. But Edgar v. Donnally, 2 Munf. 387, admits, that notice would have varied the result as to the mortgagee. Mr. Chancellor Kent, in his learned Commentaries, adopts the doctrine of these latter cases, admitting, that notice to the mortgagee would have affected him with a trust for the partnership. 3 Kent, Comm. 14–16. See, also, Hovenden's Supp. to Ves. Jr. note to case of Ripley v. Waterworth. The case of Goodwin v. Richardson, 11 Mass. 469, is much more difficult to dispose of upon the principles of any other case, decided either in England or America on this subject. In that case there was a mortgage to two partners for a partnership debt, and a foreclosure; and then one of the partners died; and the question was, whether the real estate after such foreclosure remained partnership property. The court seem to have held, that it did not so remain, but was by the foreclosure vested in the partners as tenants in common; and on the death of the partner was, as to his moiety, to be treated as his separate estate. It is, however, material to state, that the sole question submitted upon the statement of facts agreed by the parties was, whether the estate, after the death of the partner, would be deemed a joint tenancy (as mortgagees are held in Massachusetts to be joint tenants, notwithstanding the statute of 1785, c. 62. Appleton v. Boyd, 7 Mass. 131. And see, on this subject, Randall v. Phillips [Case No. 11,555]) or whether the foreclosure made them tenants in common. The latter was the opinion of the court. Now this was a decision upon a mere question at law upon the legal title. But in a court of equity it is impossible, (I think,) that the property should not have been deemed partnership property, and distributable accordingly among creditors, whether the partners held it at law in joint tenancy, or as tenants in common. The cases already cited are full to the point, and they have the unhesitating approbation of Mr. Chancellor Kent. 3 Kent, Comm. 14–16. So that the case in Massachusetts turns upon a mere point of local law, under a local statute, and does not dispose of the equities between the parties resulting from general principles.

The question, however, in the present case, is not, whether real estate, when it is partnership property, becomes, to all intents and purposes, in cases of intestacy and wills, personalty; but whether it is so treated in equity, as between the partners themselves and the creditors of the partnership. It seems, (as has been already stated,) to be the established doctrine of courts of equity, that it is to be treated as personalty, as between the partners and their creditors, in whosesoever name it may stand on the face of the conveyances. It has been supposed at the argument, that the circumstance, that a conveyance is taken to the partners as tenants in common in fee, varies or ought to vary the application of the general doctrine, and that, at all events, under such circumstances, it is inapplicable to titles of real estate in Rhode Island. One ground relied on is, that where on the face of the conveyance it is a tenancy in common, parol evidence, that it is partnership property, contradicts and controls the legal operation of the words of the deed. But this argument is not well founded. The evidence is not introduced to establish any fact inconsistent with the legal operation of the words of the deed; but

merely to ingraft a trust upon the legal estate. Indeed, partners in a legal sense are either tenants in common of the partnership property, or joint tenants without the benefit of survivorship, which is the nearest possible approach to a tenancy in common. The circumstance, that the conveyance is in the names of the parties, as tenants in common, may afford some presumption, in the absence of countervailing presumptions, that the conveyance is not designed to be on partnership account; but, per se, it is very slight, and never decisive. In some of the cases already cited the conveyance was to the partners, as tenants in common; Balmain v. Shore, 9 Ves. 500; Forde v. Herron, 4 Munf. 316; McDermot v. Laurence, 7 Serg. & R. 438; but that circumstance was not relied on as conclusive. Then again, it is said, that the statute of conveyances and the statute of frauds of Rhode Island contain no exception in favor of resulting trusts, (as the statute of frauds in England, and the corresponding statute of Massachusetts do,) and, therefore, such a trust cannot be varied by operation of law in favor of the partnership. But it does not appear to me, that the statutes of Rhode Island vary the common rule; for they respect trusts created by the acts of the parties, and not trusts created by operation of law. Dig. Rhode Island Laws, 1822, pp. 202, 366. See West v. Randall [Case No. 17,424]; Powell v. Monson & Brimfield Manuf'g Co. [Id. 11,356]. My impression is, that the exception in the statute of frauds, in England and Massachusetts, as to resulting trusts, has been deemed merely affirmative of the general law, and not as creating a saving of resulting trusts, which would otherwise have been cut off, unless in writing. But it is the less necessary to decide this point absolutely on this naked ground; for if the property were purchased with partnership funds and for partnership purposes, and thus it became an executed contract between the partners, it would be a fraud upon the partnership, afterwards to appropriate it to the private use of either of the partners, without the assent of the others. See Forster v. Hale, 3 Ves. 696, 5 Ves. 308, 314. And purchasers claiming under him with notice would be in the same predicament as the partners so misapplying the funds. No one will doubt, that a partner cannot shelter himself, in a court of equity, from responsibility for a fraud, under cover of a statute to prevent frauds. That would be, (as has been often said,) to convert the very statute into an instrument of fraud. Whether the doctrine on this head has not been carried too far by courts of equity, is not now matter open for discussion; for the authorities are exceedingly cogent and pointed in its application. I agree to the doctrine asserted at the bar, that, to create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or at least at the time when the contract for the purchase takes effect, and is executed by an appropriation of it as partnership property. And I further agree, that, as a general rule, a resulting trust cannot arise in contradiction to the terms of the deed. See West v. Randall [supra]; Powell v. Monson & Brimfield Manuf'g Co. [supra]; 3 Kent, Comm. 14–16. But it does not appear to me, that the resulting trust, asserted in the present case, is liable to any exception on either of these grounds. It neither contradicts the deed, nor has a commencement posterior to the partnership purchase and appropriation.

The question, then, is, whether there is sufficient evidence to establish, that the real estate in controversy in the present case is property belonging to the partnership, I do not say, at law, but in equity. In the first place, it is admitted, that the real estate was principally, if not altogether, purchased with the partnership funds. That is of itself a very strong circumstance; and, in the absence of all controlling circumstances, would be ordinarily decisive, to the extent of the partnership investment. In the next place, it was property necessary for the business of the partnership, and was appropriated to the use and benefit of it, during the whole period of its existence. The cotton mill, and other factory establishments necessary for the business, were erected on it. I do not say, that the whole of the real estate was thus used; but a great portion of it, and that which was of chief value, (to wit, the lot on which the factory was erected,) was thus used, and indeed was indispensable for the manufacture of cotton. In the next place, recurring to the original articles of partnership, of January 8th, 1814, (which included four other persons, who have since withdrawn from it,) it is stipulated, that a capital stock should be raised of six thousand dollars. The real estate, (or the principal part,) had been antecedently, (in November, 1813,) purchased in the name of three of the partners for $1600, and a conveyance made to them "as tenants in common in equal proportion, their heirs and assigns for ever." The whole stock was divided into tenths, of which the new partners took four tenths, and received from the other three, on the same day, a conveyance of their shares accordingly in a three acre lot, parcel of the premises, on which stands the principal factory and improvements; and the conveyance stated, "the same being for the use of a mill or mills for spinning cotton." The articles of partnership further provide, that "the books shall be kept, and the business carried on, in the name of the original proprietor; this capital stock shall be together, as joint property (of) tenants in common; and no dividend struck, until there be a surplusage of money; thought by the company unnecessary to be kept any longer." The language is very inartificial and loose;

but it is apparent that the intention was, that the capital stock so raised should be exclusively held for partnership purposes, the partners all being tenants in common thereof, the business being carried on in the name of the original proprietor, that is, (I suppose,) of the original partners named in the deed. It seems, that the factory, mill-dam, and other improvements were erected after the purchase out of the partnership funds. In the next place, there is a total absence of any proof in the partnership books of any charges for the real estate against the several partners, as upon a purchase made on their separate and individual accounts. Under such circumstances it seems difficult to resist the conclusion, that the real estate was contemplated by the partners, as a part of their capital stock; and, as such, was governed by the express clause of the articles respecting the disposal of the joint stock.

Against these circumstances there does not seem to be any thing on the other side of very great weight and significancy. It is true, that all the answers assert, that the property, though purchased with partnership funds, was purchased for the partners, as tenants in common. But for this allegation the defendants, who are purchasers, do not pretend to rely on any facts within their own knowledge; but mainly on the purport of the language of the conveyance, and upon information from other collateral sources. Reynolds, (the partner,) does indeed positively assert, that the real estate was purchased and held by the plaintiff and himself, "as tenants in common, but not as copartners; and that the same never constituted any part of the copartnership stock." And he adds, "that the said lands were paid for out of the company property, each tenant in common being charged by the company with the amount paid for his half of said lands." But no such charge appears, (so far as the court has any means of knowledge,) in the company books; and therefore the answer is not in this respect sufficiently maintained by proof. The circumstance, that the deeds of conveyance are to the partners, as tenants in common, though certainly of some weight, is not sufficient to overturn the strong presumptions the other way. There are yet some collateral circumstances, which give great strength and cogency to the presumption, that the three acre lot, (on which the factory was erected,) was, from the time of the formation of the partnership in January, 1814, treated by all the partners as partnership property. In the deed of H. R. Greene, (one of the partners,) to the plaintiff and the defendant, Reynolds, of his one third of the joint purchase, he expressly bounds the thirty-seven acre lot on the three acre lot, as an abuttal. The language is, "until it comes to the lot, belonging to the West Greenwich Manufacturing Company," meaning the three acre lot. And again, in the deed of the defendant, Reynolds, to the other defendants, the Carrs, conveying his share of the whole forty acres, the description concludes thus, "containing by estimation forty acres, be the same more or less, together with one undivided half part of one cotton factory, machinery therein, dams, flumes, trenches, waters, and water privileges, and apparatus to said factory belonging, with three dwelling-houses and other buildings thereon standing, being the same establishment heretofore owned by the West Greenwich Manufacturing Company." This language applies, indeed, to the whole forty acres; and it is still stronger as to the three acre lot, from its minute enumeration of the buildings and privileges thereon.

Upon the whole I cannot say, that I see any solid ground of doubt, that the three acre lot was, from the very commencement of the partnership, held and used by all the partners, and understood by them to be held and used, as company property, and part of the capital stock thereof. The evidence is less stringent as to the remaining thirty-seven acre lot, and slighter still as to the other lot, on which the picker-house stands. As to these last lots, I perceive no objection to refer it to a master to consider and report upon the facts, whether they were partnership property, or not, if either party should desire the inquiry to be made. The next question is, whether this real estate, so held on partnership account, is chargeable in the hands of the present purchasers with the payment of the partnership debts. That depends, in my judgment, wholly upon the point, whether they had actual or constructive notice at the time of their purchase, that it belonged to the partnership. If they had notice, it is so chargeable; if not, then they are exonerated to the extent of the purchase money already paid by them. I say, to that extent; for clearly, so far as the purchase money has not been paid, that is a substituted fund, chargeable in their hands with the same burdens as the real estate. See Potter v. Gardner, 12 Wheat. [25 U. S.] 498, 5 Pet. [30 U. S.] 718. It is admitted by the answers, that the purchase was made for $1,600, of which $200 have since been paid, and a note given for $1.400, upon which about $500 have been paid; so that there remain due of the purchase money about $900. No ground is stated, upon which this sum is exempted from a charge for the partnership debts. If this be so, then it is clear, that, if the proper parties are brought before the court, an account may be taken of the partnership funds, and a decree be had against the purchasers for such an amount as, with reference to the partnership debts, the purchase money is, ex aequo et bono, chargeable with. But the more important question is, whether the purchasers had not notice, actual or constructive, that the real estate was partnership property; for it is not material, whether they had notice of the existence of the partnership debts. They were

put upon inquiry of the latter fact, if they had knowledge of the former, and are bound to all the consequences; since they could take only such equity in the estate, as the partner, from whom they purchased, was entitled to. Now, it is not an insignificant circumstance, that one of the purchasers, (Nathan Carr,) is the son-in-law of the partner, Reynolds, and lives in the immediate neighborhood of the factory; and that the other purchaser, (Jesse Carr,) is the father of Nathan Carr. In the next place, it is admitted, by their answers, that the partnership was in fact, though not formally, dissolved before the purchase, and that the plaintiff (Hoxie) in March preceding the purchase, "took exclusive possession of the company's property, and excluded Reynolds from the same, and from the mill, in which he and his family had then before labored, and has ever since retained possession of the same against the consent of said Reynolds." And in regard to debts due by the partnership, their answers farther state, that they do not know the amount of the company property or debts; but that they have understood and believe, that, if the company concerns were justly settled, the company property would be more than sufficient to pay the company debts. So that they do not assert their ignorance, that there were at the time of their purchase any debts due by the partnership. Under such circumstances the fact, that one partner was in the exclusive possession, holding out the other, was of itself calculated to awaken suspicion, and some inquiry on the part of any diligent and watchful purchaser. In the next place, it is most material, that the very title deed, under which they claim, does (as has been already stated) refer to the estate as "being the same establishment heretofore owned by West Greenwich Manufacturing Company." If owned by them, the purchasers must or ought to have known, that without a joint conveyance, or release, from all the partners, no absolute title could be acquired by their grantor, Reynolds. They were put upon inquiry to ascertain, whether any such conveyance or release had been made; and they cannot now set up their ignorance of law to excuse their want of diligence. Upon the slightest inquiry they could not but have found out, that the company was greatly in debt; and that Hoxie claimed a right in the property, not merely as partner, but under a contract of purchase previously made by him with Reynolds, for the purpose of liquidating the company debts. In the next place, I think it sufficiently appears from the testimony and other evidence in the case, that the partnership was largely indebted at the time of the dissolution; and that it had been notoriously straitened, if not embarrassed, in its circumstances before the purchase by the Carrs. And it is incredible, that the fact should not have come to their knowledge, considering their local residence and connexion with the parties. I do not advert to the testimony respecting the supposed contract between the plaintiff (Hoxie) and the defendant (Reynolds); though if notice of that contract could be brought home to the Carrs, it would be conclusive upon the very point now under consideration. I mean, in relation to the embarrassments of the company, and the necessity of applying the real estate, as an appropriate fund, to discharge the partnership debts. But in the view, which I have taken of this case, it is wholly unnecessary to go into the consideration of the matter of the contract; since, with reference to the other point of partnership, there seems a clear ground of equity, upon which the court ought to retain the bill, and, if the proper parties can be brought before it, to proceed to farther inquiries, and a farther decree.

HOXIE (CARR v.). See Case No. 2,438.

HOXIE (UNITED STATES v.). See Case No. 15,407.

HOY v. The JOSEPH STEWART. See Case No. 13,070.

HOYE (STIEBER v.). See Case No. 13,441.

HOYL (AULD v.). See Case No. 652.

Case No. 6,803.

In re HOYLE.

[9 Am. Law Rec. 65; 1 Cr. Law Mag. 472; 12 Chi. Leg. News, 279.]

District Court, D. California. 1879.

FEDERAL AND STATE COURTS — CONFLICTS OF JURISDICTION—HABEAS CORPUS—INTERSTATE EXTRADITION.

[1. A federal court will not presume, before the event, that a state court will disobey the act of congress relating to the rendition of fugitives from justice from other states (14 Stat. 385), when it shall be made to appear to such state court that the alleged fugitive is held under authority of the federal statute.]

[2. A person charged with crime in another state and arrested in California by the state authorities, under the provisions of the Penal Code, to await the requisition of the governor of such other state and the issuance of a warrant of extradition by the governor of California, pursuant to the act of congress, cannot be said to be held under the authority of the United States, so as to authorize the issuance by a federal court of a writ of habeas corpus to inquire into the legality of his detention.]

HOFFMAN, District Judge. Whatever be the limit or scope of the act, there is no question but in the United States courts we are distinctly limited by the statute which confers the power on us. The first question, and that on which the circuit judge entertained some doubt, and called my attention to it, is that application for writs of habeas corpus shall be made to the court of justice, authorized to issue the same by complaint in writing, signed by the person for whose

relief it is intended. Section 760, Rev. St., provides that the petitioner or the party imprisoned or restrained may deny any of the facts, seeming to contemplate that the petitioner may be one person and the party restrained another. I should be very reluctant to give so narrow a construction of this act as will preclude from its benefits all persons who are by the circumstances of their restraint deprived of the opportunity of signing the petition, and where good cause is shown that the petition could not be signed. But here I have an application admitted to be novel, perhaps without precedent. It is to take a man from the possession of the sheriff, who holds him under a warrant of a court having competent jurisdiction to inquire preliminarily into the matter, and hand him over to certain persons who claim to be entitled to his custody, under a warrant issued by the governor of this state in compliance with a requisition from the governor of the state of Georgia. The application is admitted to be without precedent. There are cases bearing some analogy where a man who has been held in custody by the marshal, and has been taken out of the custody of the marshal, under a warrant from the state court. That is a clear contempt of the authority of the original tribunal which committed him, and the court would, in habeas corpus, recover possession of the prisoner and restore the custody to the marshal, as it appears they have done. So in the case of a man convicted under the same jurisdiction and imprisoned. The court brings him before it for further sentence by habeas corpus, in the same way as it would by habeas corpus if his testimony was required, there being no conflict of jurisdiction, and the whole proceeding being a process by which a man confined in custody under the authority of a sovereign power can receive further sentence. I presume the same object might be effected by a simple order of the court, or direction to the jailer to bring the prisoner before the court, there being no conflict of jurisdiction, and it being a mere modus operandi of bringing a person confined in prison, and subject to jurisdiction, before the court.

I am now asked to decide that this writ may be issued to take a person, contrary to his will, from the custody in which he is content to remain, and to hand him over to other persons who claim the right to hold him. I must first observe that no action of this court can be founded on any presumption that the state court is not as competent and as willing to observe the laws as this court. My personal knowledge of the judges induces me to say as much, and any other presumption or ground of action on my part would be ungracious, and inconsistent with the comity which prevails between tribunals exercising separate and independent powers within the same territorial limits. I do not doubt myself that if it shall be made to appear to the court at Los Angeles that this party is held under the authority of the United States, or under color of that authority, that they will say that they have no power to proceed further. The exercise of that authority can only be examined into by the tribunals of the sovereign whose authority is exercised. I hope they will not disregard the emphatic decision of the supreme court. The supreme court have, in several cases, gone so far as to advise the marshal holding a person in custody, that he should disregard a writ of habeas corpus, or any warrant from a state court, but should return the facts to the court without producing the party, and should resist any attempt on the part of the state court to take out of his custody any prisoner held under the laws and by the authority of the United States. The supreme court has gone so far as to hold that the state courts have no right to inquire into the legality of the enlistment or detention of a soldier or a sailor, and the circumstances of their right to be discharged can only be decided by a United States court. I take it for granted, therefore, when it is made to appear to that court that this man is held under the authority of the United States, that they will recognize the principles which have been laid down by the decisions of the supreme court of the United States, and will desist from any further action in the matter.

I do not see that it has yet been made to appear that the prisoner is held under the authority of the laws of the United States. The preliminary warrant under which he was arrested to await the requisition of the governor of Georgia, is a warrant issued under the laws of this state. The act of congress confers no power upon any officer to issue such a warrant. It comes into activity only where the governor shall have made the proper requisition, and the governor of the state shall have, pursuant to the act, issued his warrant of extradition. At present this man is held for embezzlement under the laws of the state of California,—an embezzlement which, it is admitted, was not committed here,—but he is held, under authority of our Penal Code, to arrest and hold a man awaiting the requisition of the governor. If the court, contrary to expectation, goes behind the fact, when it is made to appear that he is held by authority of the United States, it will be time enough to consider then what remedy the agents of the state of Georgia have. If they obtain the custody of the prisoner, and claim to hold him under the governor's warrants, under the act of congress, and he should be discharged by the state court, I do not say, then, that this court might not then have power to interfere. The better way, perhaps, will be to exhaust all remedy furnished by the state court, and, by a writ of prohibition, to endeavor to restrain the superior court from usurping a jurisdiction to discharge a prisoner held under the laws of the United States. At present this man

does not appear to be held by virtue of any authority derived from the United States. The sheriff's return is that he holds him under a preliminary warrant issued under the laws of this state, and under the order of the court of this state, issued under a writ of habeas corpus. It was plainly the right and duty of the state court to examine into the authority by which he was held. They are in the exercise of their undoubted jurisdiction in inquiring into the cause of his imprisonment. I do not perceive that as yet it can be made to appear that he is held under the governor's warrant. The agents of the state of Georgia, whom that warrant empowers to take and hold the prisoner, have not succeeded in obtaining possession, and do not now hold him. When a claim to his custody shall be set up under that warrant, it is to be presumed that the state court will recognize that the authority so claimed is under the constitution and laws of the United States precisely as heretofore in the case of a fugitive slave, and that the regularity and propriety of its exercise can only be inquired into in the national tribunal.

I decide this matter thus summarily, not because I desire to evade the exercise of any jurisdiction which this court may possess, but because the sheriff stands between two fires. He is not learned in the law. His official duty is to obey the orders of his immediate superiors. He is directed to do one thing by one court and another thing by another court. I shall relieve him of a divided duty, between which he is, at his peril, compelled to elect, and is placed in a dilemma from which he cannot escape without being in contempt of one court or the other. If it should at any time appear to the state court that this man is held under a warrant issued by the governor of the state, under the authority of the constitution and laws of the United States, it is to be presumed that that court will desist from any interference with the execution of those laws. Until such an authority is attempted to be exercised, it appears to me premature for this court to command the sheriff to bring the prisoner before it, and to enter into an inquiry founded upon the hypothesis that the state court is not going to obey the paramount law of the land.

Now, with regard to the pure technical question first adverted to, I think it open to grave doubt whether, under the narrow and restricted terms by which jurisdiction in cases of habeas corpus is conferred, whether the writ can be used to transfer a prisoner, contrary to his wishes, and on the application of parties claiming his custody, from the custody of the persons holding him to those who claim him. To apply the writ to such a purpose, the language of the statute must receive a very liberal construction. On this point, however, I express no opinion. It will arise when the agents of the state of Georgia have executed the warrant of the governor, and obtained possession of the prisoner, and an application to discharge him is made to the state tribunal. If he shall be liberated from the custody of the sheriff, I see no reason why the agents of the state of Georgia cannot take him under the warrant of the governor. And, if then he sues out a writ of habeas corpus to relieve him of that restraint, it may be that this court could interfere; but that question will only arise when the state courts, being advised that he is held under a warrant issued by the governor, shall proceed to inquire into the legality of his arrest. My judgment now is that the prisoner be remanded to the custody of the sheriff.

The prisoner was thereupon remanded to the custody of the sheriff of Los Angeles county.

HOYLE, The J. R. See Case No. 7,557.

HOYM (UNITED STATES v.). See Case No. 15,408.

Case No. 6,804.

Ex parte HOYT.

[3 App. Com'r Pat. 297.]

Circuit Court, District of Columbia. April 11, 1860.

PATENTS—IMPROVEMENT IN MILLSTONES.

[Hoyt's invention of an improvement in millstones, consisting in uniting the segments of the upper stone by molten lead or other molten metal, and binding the same together by a leaden band, is one of novelty and great utility, and not anticipated by Harrison's patent for fastening the segments of the lower stone by cement, and binding them with a metal band.]

Appeal [by Samuel Hoyt] from the decision of the commissioner of patents refusing to grant him letters patent for his improvement in constructing millstones.

MORSELL, Circuit Judge. The applicant states his claim thus: "What I claim as my invention, and desire to secure by letters patent, is the use of lead solder or other similar molten metal for the purpose of uniting the sections of a millstone and binding the same together at the eye and circumference, and at the same time giving increased weight to the stone, substantially in the manner herein described." The commissioner adopted for his decision the report of the examiners, dated January 27, 1860, which in substance is as follows: "The affidavits filed in this case controvert no position, we are disposed to assume. They are therefore simply irrelevant. The only question in this case is whether the use of lead to hold together the sectional parts of millstones can be considered a legitimate subject for letters patent because it is applied in a particular manner. We are decidedly of the opinion that it cannot. And for this reason the reference to Harrison's millstones establishes the fact that the mere use of lead in such form of application as nec-

essarily attains the object contemplated by applicant, though perhaps Harrison had another object in view, is not new, and we do not think the variation as to the mode of applying the lead that is proposed by applicant amounts to anything more than would obviously suggest itself to any mechanic of ordinary skill; such a variation in fact as is only colorable, and therefore not patentable. But if we are wrong in this regard, there is another view, as we look upon this invention, which is equally fatal to the claim. It is this: A comparison of Harrison's plan of applying lead with applicant's plan develops the fact that the latter has adopted with respect to each section of his millstone the identical mode shown by the former's model as respects the whole millstone; hence it follows that applicant has merely duplicated Harrison's plan in order to produce the only difference which exists between his plan as applied to the whole millstone and Harrison's plan as thus applied. We recommend the final refusal of a patent."

The commissioner says the foregoing report is confirmed, and a patent refused, January 30th, 1860. To this decision the appellant filed sundry reasons of appeal, too extended in the length to be here recited. Suffice it to say that they in detail fully cover all the objections that were intended to be raised to the decision. The commissioner in his report in reply to said reasons in substance says that the applicant states his invention to consist in running lead, solder, or other suitable liquid, &c. (as hereinbefore stated). For the reasons of rejection, the commissioner refers to the letters of rejection and the report of the appeal board. He proceeds: "There is nothing new in making burr millstones of sections of burr stone fitted and cemented together. This has for ages been the common mode; the sections of stone being cemented together with plaster for which the burr stone has a great affinity, and the whole secured with cast-iron eyes, with flanges and iron bands around the circumference. The applicant was told this, and also that the sections of stone had often been cemented in cast-iron covering, the back of the stone as well as its circumference; thus holding its sections together with all the tenacity of the iron casing. This casing as effectually adds weight to the stone as the device of the applicant, and, besides this, lead had often before been inserted in the stone itself for the purpose of balancing it, but still it was adding weight to the stone; and, this being a well-known device, there was no patentable novelty in running lead between the sections of a stone in order to make it heavy, when lead had before been imbedded in millstones for a different purpose, yet accomplishing precisely the same object, or in covering the back of a millstone with lead, imbedding the stone in a casing of lead, when it had before been encased in cast-iron, &c. For these reasons, and the known fact that there is no affinity whatever between lead and stone, for lead may be cast on stone, and, as soon as cold, be as readily removed as if cast on the ground, the applicant's case was rejected, and various references given. Iron banisters are secured to granite steps by means of lead, but not by any affinity existing between the lead and stone, but simply by making the holes in which the iron supports are to be placed larger at bottom than at top, and then filling them with molten lead. It is the form of the cavity that secures the lead and iron in place; and so with the sections of stone, if the cavities in the burr blocks were larger at bottom than at top, and the lead could be run into them, then, upon the principle above stated, they would to some extent hold the sections together. But the tenacity or strength of lead being far less than a common hempen rope, or than most kinds of woods, even if it could be used as the applicant proposes, would make it a very poor substitute for the more efficient means heretofore adopted. Buch. Mach. p. 253, giving examples of the strength of materials, shows that the sections of stone if encased even in wood, would be far more securely held together than if incased as proposed in lead. But the question here is not of utility, but of patentable novelty, and it is respectfully submitted that the references given show a substantial anticipation of the device of the applicant. He urged before the examiner, and laid great stress on the fact, that in making his millstone he did not cement the sections of stone in a casing previously cast, as had before been done, but that he arranged his sections of stone together, and then cast the casing over them. But the case of Edward Harrison, to which he was referred, fully covers this view of his case. Harrison, in describing the mode of making his millstones says: 'The runner is formed of a united metallic back D, and hub W, combined with a disk X, X, X, composed of the requisite quantity and quality of stone. The said back may be made of soft material, and be cast upon the back and within the eye of a prepared stone, or be formed of cast-iron, and the stone face to be fitted and cemented to the back and around the hub of the same.' The suggestion here made to cast the back on the segments of stone in place of first casting the back and cementing the sections of stone in it, and to make the back when cast on and around the sections of stone of soft metal, embraces lead, solder, &c., as claimed by the appellant, and shows a substantial anticipation of his device. The affidavits filed in this case are not regarded as affecting the question of patentability at issue, and therefore have not been specially referred to, the case having been

decided on the reasons and references herein stated."

The affidavits just alluded to appear to have been acted upon by the commissioner and their truth and credit not denied, but the commissioner supposes them to be inapplicable to the issue in the case, which he says is as to the patentability of the invention. The first two witnesses, Howell and Gibbs, are practical millers, and acquainted with the business of constructing millstones. They say that they have had the invention of Samuel Hoyt, of Wilmington, Delaware, fully explained to them; that they understand said invention to consist in uniting the burr sections readily with lead, and lining the eye of the stone with lead, and surrounding the circumference and covering the top of an upper running stone with lead; that they are firmly of the belief that the uniting of the sections of the cellular burr stone with lead is a far superior method to that of uniting the sections with the cements usually employed, because the lead that enters the cells is stronger than the cementing materials commonly used, and because there are no perceptible contracting or expanding properties in lead, and because the corrosive properties in the lead have a tendency under the influence of the atmosphere to increase its bulk, and consequently the sections are continually being forced more tightly together; that the radial ribs of lead connecting the eye circumference and top in Samuel Hoyt's invention give the stone throughout a more solid and compact character than is imparted to a stone made in sections, and united with cement, and faced on its bottom, and lined in its eye, and encircled at its circumference with lead; that in practice it is essentially necessary to cement with plaster or some substance the sections of burr stone radially notwithstanding a lead base, lead eye, and lead encircling band are employed, and even if an iron band be employed; that Samuel Hoyt's invention, above described, unquestionably does overcome a long existing difficulty, to wit, getting a proper amount of weight in a small circumference, and at the same time weight answers as a good means whereby to unite radially the burr sections together; that these advantages are not obtained in a bottom-running stone which has its eye lined, and its under face covered, and its circumference surrounded with lead because no radial ribs are provided, and also because the lower running stone, by being thus weighted, retards, instead of aiding, the grinding operation, the extra weight acting only as a resistance to the driving power; that they have no interest whatever in Samuel Hoyt's invention, &c.

Benjamin Price, another witness, a master miller in a very respectable establishment for nine years, and who had been engaged in the business for upwards of twenty years, says that he has been shown by Mr. Samuel Hoyt a model of a mill burr stone fastened together by means of lead cast around the several parts or divisions of said stone which model was then before him; that he thinks from his own personal experience in his business that this kind of stone so finished is superior to, and must necessarily take the place of, those now in common use. "Some few days since I was running one of our stones, made in the usual manner, the balance rind fastened with calcined plaster, and a small portion of lead in it, which we had to take out and fasten with lead, as we found the calcined plaster would not hold without cleaning out the plaster and casting in the lead which we find prevents the stone from separating or working foul. Deponent verily believes that means of cementing throwing around or over with lead in place of calcined plaster a stone is infinitely stronger and better for the purposes of grinding as represented in this model." Another witness (William Kellow) says "that the four pieces of marble set or fixed in the lead box or frame now before him were brought to him by a certain Samuel Hoyt; that deponent cast the lead around said pieces of marble, and finished the model of the burr mill stone as now shown; that he subjected said model to a revolution of from two to three hundred times per minute in the finishing. The said model, after finishing, was then given a velocity of from fifteen hundred to two thousand revolutions per minute, which said deponent believes was a severe test; and that the stone now before him is the one he finished and tested; and he believes it impossible to separate or break a stone so constructed under any speed of revolutions. Deponent further declares and says that the said Samuel Hoyt, in his presence, subjected said model to a pressure sufficient properly to grind wheat, crushing and grinding wheat by such pressure." The last witness, Charles Smith, says: "That a certain Samuel Hoyt employed him to furnish marble for a mill-burr model divided into four pieces, forming, when set together, a circular form of diameter of five inches and seven-eighths of an inch. The piece of marble now before me set in lead are the four pieces I furnished said Hoyt. My own opinion is that the marble pieces so set in lead would resist ten times greater wear, force of blows, hammering, or other pressure than if in a solid piece. My own experience as a worker in marble and stone using lead and other substances for holding, staying, or supporting and otherwise, has been for the past twenty years, during which time I have been constantly engaged in such business."

This was the state in which this case was presented to me by the commissioner, who delivered all the papers, documents, and evidence therein according to previous notice given of the time and place appointed for the hearing of said appeal, when and where also the appellant appeared by his attorney, and, having filed his argument in writing,

submitted the case. The five witnesses whose testimony has just been stated appear to stand fair and unimpeached, to be competent practical millers, some of them skilled, and acquainted by long experience and practical knowledge in the business of constructing mill stones, and all of them experienced in the subject claimed as an improved invention in this case. They speak of the invention in this case as known to them as possessing a character for uniting, holding, staying, and supporting the burr mill stones far superior, stronger, and better than the common plaster of Paris cement and of the method and result as a valuable improvement in mill stones. That according to this method the lead that enters the cells is "free from contracting or expanding, and because of the corrosive properties in the lead have a tendency, under the influence of the atmosphere, to increase its bulk, and consequently the sections are continually being forced more tightly together," thus developing a principle never before known in their application, and a new and valuable result. Other parts of the method (particularly the provision of radial ribs). as peculiar, are also described as perfecting the invention; also as new and valuable, "getting a proper amount of weight in a small circumference at the same time of uniting," &c. In noticing this part of the subject, the commissioner says: "The affidavits controvert no position we are disposed to assume. They are therefore simply irrelevant." In other parts he says that the invention claimed in this case is nothing more than a duplicated Harrison's plan; a mere colorable contrivance. Now, that there is some difference between the two is admitted by the commissioner. It is admitted that the purpose or object in view were not the same, but very different. Harrison does not pretend to claim it as a part of his invention. The suggestion in Harrison's specification alluded to by the commissioner relates to the lower stone, which in his invention is the runner, and the upper stone is stationary. This of itself makes an essential difference in the application of the contrivance. Again, the sections of stone at their radial joints are cemented together by plaster of Paris, and are bound at the circumference by an iron or brass band. This cement is altogether dispensed with in appellant's method, which consists of uniting the burr sections at the radial meeting surfaces as herein before stated. It is also worth noticing that two of the witnesses, who appear to be experts, say, as before stated, that it would be impracticable to apply to advantage this method to Harrison's bottom stone runner. They say "that these advantages are not obtained in a bottom-running stone, &c., because no radial ribs are provided &c."

The foregoing views appear to me to be correct, and show that there is error in the decision of the commissioner, and that it must be reversed, which is hereby accordingly done, and it is ordered that letters patent be issued to the said appellant as prayed.

HOYT, Ex parte. See Case No. 17,051.

Case No. 6,805.

In re HOYT.

[3 Biss. 436.] [1]

District Court, W. D. Wisconsin. Jan., 1873.

LIEN OF MECHANIC RELATES BACK—PRIORITY.

1. Under the mechanics' lien law of Wisconsin, the liens relate back to the commencement of the building, without reference to the time when the work was actually done or materials furnished.

[Cited in Thomas v. Mowers, 27 Kan. 268; Bassett v. Swarts, 17 R. I. 217, 21 Atl. 352; Bryant v. Small, 35 Wis. 208.]

2. Such liens take precedence of a mortgage given after the commencement of the work.

3. But as between mechanics there can be no priority.

This was a petition filed by mechanics to obtain priority of payment out of the funds in court as against the mortgagee of the same premises. About the middle of April, 1871, the bankrupts commenced the building of a hotel at Chippewa Falls, and on the 10th day of July, 1871, they gave a mortgage to Romeo H. Hoyt for $15,000, upon the premises covered by the hotel building then in process of erection, which mortgage was recorded on the day following. Work was continued on the building after the giving and recording of the mortgage, and new contracts were thereafter made for work and materials therefor. The bankrupts not paying such debts either for materials or work done before or after the mortgage, the parties filed liens upon the building in pursuance of the provisions of the statute of the state. Subsequent to the completion of the building, the proprietors were proceeded against in bankruptcy and adjudged bankrupts, and the property, by this court, ordered to be sold free and clear of all liens. The Wisconsin mechanics' lien law will be found in Re Cook [Case No. 3,151].

J. M. Bingham, for mechanics.

Bartlett & Hayden, and A. G. Safford, for mortgagee.

HOPKINS, District Judge. The question now presented is, which has priority, the mortgagee or the mechanics? The mechanics and material men claim that their liens take precedence of the mortgage, as well those growing out of contracts entered into after the giving of the mortgage as before; that in both cases their liens take effect by relation from the commencement of the building under the mechanics' lien

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

law of this state. Tayl. St. 1871, p. 1762. By the first section of that act it is provided that mechanics and others shall have a lien for work and materials used in the construction of any building, "before any other lien which originated subsequent to the commencement of the building." The question depends upon the proper meaning of that clause. I do not find that it has been directly passed upon by the supreme court of this state.

In Rees v. Ludington, 13 Wis. 276, and Jessup v. Stone, Id. 466, the question was whether a mortgage executed prior to the commencement of the building took precedence of mechanics' liens upon the building as well as the ground upon which it was situated, and the court held that the mechanics' liens were subordinate to the mortgage upon both the building and ground. In preparing the opinion it seems to have been assumed by the court that the liens attached as of the time of the commencement of the building, for the learned chief justice who wrote the opinion of the court, says: "If we are correct in these views, the design was to give the mechanic a lien from the commencement of the building," etc. But it was claimed, inasmuch as that point was not directly before the court, that it was not authoritatively decided. I have therefore examined the question as if not decided, and construed the act according to my understanding of it.

It is apparent to my mind that the legislature designed that the claims of mechanics and others, for work and materials, should have preference to all liens created by the party after the commencement of the building; that such liens should relate back to the commencement of the building without reference to the time when the work was done or material furnished, provided such liens were filed and prosecuted as prescribed by the act. The statute, by declaring that such liens should be before any liens originating subsequent to the commencement of the building, impliedly fixed that time as the date of the lien. The provision will not admit of any other construction. The lien is a creature of the statute and has the force and effect given to it by the law of its creation.

What effect a suspension of work for some considerable length of time might have in any given case, it is unnecessary to consider, as in this case there is no claim that the work was not prosecuted without intermission; nor do I wish to be understood as deciding whether or not a great change in the plans of the building after giving a mortgage would change the rule of priority, as there are no facts before me now requiring such a decision. In the construction I have given to the act I have assumed the ordinary case of continuing the work without material interruption or alteration of plans, and have not considered what modifications should be made in other cases, if any.

In some of the states the statutes give a lien "from the commencement of the work," while in others they are like the statutes here, and as they have received an interpretation by the courts of those states, I am not without aid in construing our own.

In the case of American Fire Ins. Co. v. Pringle, 2 Serg. & R. 138, the supreme court of Pennsylvania construed a like provision in the statutes of that state as giving to the mechanic a lien for work from the commencement of the building, and held such lien to be prior to the lien of a mortgage given after the commencement of a building, although the contracts for the work for which the liens were claimed were made after the giving of the mortgage. That doctrine was afterwards approved and followed in Pennock v. Hoover, 5 Rawle, 291; and in Hern v. Hopkins, 13 Serg. & R. 269, it was applied to a judgment lien obtained during the construction of a building, which was held to be overreached by the relation of the mechanics' lien back to the commencement of the building.

In Maryland, the statute is like ours, and the court of chancery of that state, in Wells v. Canton Co., 3 Md. 234, hold that mechanics' liens attach from the commencement of the building, and have preference over all liens attaching subsequently.

In the state of Missouri there is also a mechanics' lien law for the city of St. Louis, like ours in respect to the clause now under consideration, and in Dubois v. Wilson, 21 Mo. 213, it is held that a lien of a mechanic for work and materials furnished under a contract with the owner overreached a mortgage placed upon the building after its commencement, although the work was done and materials furnished after the mortgage was executed. That court approved of and followed the case of American Fire Ins. Co. v. Pringle, supra.

The counsel representing the mortgagees in those cases urged upon the attention of the court the same constitutional objections to the law as are presented here, but they failed to influence the judgment of those courts. Nor do I appreciate the force or pertinency of such objections. The mortgagee is chargeable with a knowledge of the law, and he must be presumed to have known the fact that a building was in process of construction when he took his mortgage. He should, therefore, have protected himself against liens of mechanics and others by the terms of his contract. His want of proper caution in not doing so cannot prejudice the plain statutory rights of mechanics, nor can he successfully maintain that the act impairs the obligation of his contract by postponing his lien to theirs, which he must have known might be the case when he took his mortgage. Presumptively, property is enhanced in value

equal to the amount of the work and materials used in building upon it. It is true, as a general rule, that all improvements by a mortgagor inure to the benefit of the mortgagee without liability or expense to him, by increasing the value of his security. But the legislature have by this act modified that rule in the interest of labor, and postponed or subordinated the lien of a mortgage, and all liens created intermediate to the commencement and completion of a building, to the claims of mechanics for work and materials used in the building. I cannot see any constitutional objections to such an act. With the policy or propriety of the act courts have nothing to do. Those questions are for the legislature. But if it were otherwise, I cannot see any valid objection to the principle or equity of the statute. This disposes of the question of priority between the mechanics and mortgagee, and subordinates the mortgage to their liens.

The counsel for the mechanics discussed the question as to whether there should be any priority as between them. It seems to me that the view I have taken of the first question disposes substantially of this, for it follows logically from it that there can be no preference as between them. I have held that the mechanics' liens by relation date from the commencement of the building, not one but all. The circumstance of one commencing work first does not give any priority. They all stand on the same footing and are to be paid in full or pro rata, as the funds may suffice. Such is the express provision of the statute of New Jersey. But without any statute, such construction is the most just and equitable. The building is the result of the labor of the mason, carpenter, bricklayer, plasterer, glazier and painter. It is the joint product of the skill of the artisan and the means of the material man. Each contributed and each should share alike without preference. Some one of the various kinds of mechanics must commence first, but the accident of commencing does not give that one any superior equity.

There is a like statute in the states of California and Oregon, and in both of these states it has been held that all liens arising under the act stand upon the same footing. All relate to the commencement of the building, and none have priority over the others. Moxley v. Shepard, 3 Cal. 64; Crowell v. Gilmore, 18 Cal. 370; Willamette Falls Co. v. Riley, 1 Or. 183.

Logically these cases support as well the first proposition hereinbefore discussed, for they each hold that such liens by relation take effect from the commencement of the building. If so, they must necessarily overreach all subsequent mortgages or transfers. I do not find, nor was I referred by the learned counsel to any case holding a different doctrine.

In the state of Ohio, where the law gives a lien only "from the commencement of the work or furnishing materials," the supreme court, in a remarkably well considered case (Choteau v. Thompson, 2 Ohio St. 114) hold that the act creates no priority as between the mechanics and material men; that, though they commenced work at different times, they were to be paid equally. The decision is based upon the manifest equity of the statute in view of the position in which each mechanic stands to the building.

The lien holders, or some of them, I understand, have taken judgment for the amount of their liens. I do not wish to be understood as expressing any opinion upon the validity of such judgments, or as sustaining the right of a party to proceed to judgment after bankruptcy proceedings are commenced. These matters are reserved until the debts or judgments are proved and properly before the court.

Case No. 6,806.

In re HOYT.

[3 N. B. R. (1870) 55 (Quarto, 13).] [1]

District Court, D. Massachusetts.

BANKRUPTCY—PAYMENT OF SURPLUS TO BANKRUPT —NO DEBTS PROVED—PROCEDURE.

The surplus funds in the hands of the assignee, after the settlement of the estate, where no debts have been proved, and there is reasonable cause to believe that none will be proved, are to be paid to the bankrupt upon the filing of a petition on oath by him, setting forth his reasons for believing that no creditors desire to prove their debts, and asking that the funds shall be paid to him.

[Cited in Re Smith, Case No. 12,989; Nicholas v. Murray, Id. 10,223.]

[Cited in Perry v. Lorillard Fire Ins. Co., 61 N. Y. 216; Page v. Waring, 76 N. Y. 473; King v. Remington, 36 Minn. 31, 29 N. W. 352.]

[In bankruptcy. In the matter of A. W. Hoyt.]

LOWELL, District Judge. The assignee in this case petitions for leave to transfer to the bankrupt the net assets in his hands, the case having been in court for a long time, and fully settled in the usual way, and no creditors having proved their debts, and there being good reason to believe that none intend to do so. The bankrupt was discharged more than a year ago. After the debts are paid, the assignee is a trustee for the bankrupt. Charman v. Charman, 14 Ves. 580. And the debts are those which have been duly proved to be such. The assignee is not an agent to pay the bankrupt's creditors against their will; and their will to be paid can be shown only by their acts in court. There are no creditors but such as prove their debts. The schedule may show that there are said to be

[1] [Reprinted by permission.]

possible creditors, but the schedule may be mistaken, or all the schedule creditors may have security, as is said to be the case here; or they may have other reasons, satisfactory to themselves, for not wishing to prove their debts. Until they do prove, the assignee has no concern with them, excepting to see that they are notified, and have full information of the proceedings, and an opportunity to come in if they wish to do so. When this or a similar petition was first presented in this case, I postponed its consideration in order to make sure that such opportunity had been afforded. In the meantime there has appeared a summary of two cases, in which it is said to have been decided that the assignee, after paying in full the debts which have been proved, must apply the surplus to the payment of such as have not been proved. In re James [Case No. 7,175]; In re Haynes [Id. 6,269]. I apprehend there must be some mistake in the brief reports of these cases. What the learned judge insisted on must have been, I suppose, that non-proving creditors should be carefully warned and notified. There is no warrant in the statute for paying a dividend to such persons; on the contrary, all the sections upon the subject, expressly, or by necessary intendment, refer to creditors who have verified their debts in the mode required by law. In England, this matter is regulated by St. 12 & 13 Vict. c. 106, § 117; but the law is the same here, because by force of the assignment there is a resulting trust, after the express trusts have been fulfilled; and it is not any part of an assignee's trust to seek out and satisfy supposed creditors, who do not choose themselves to come forward. The bankrupt should file his petition on oath, showing his reasons to believe that no creditors desire to prove, and asking to have the fund paid out to him, and it will be granted.

HOYT (ARMSTRONG v.). See Case No. 544a.

Case No. 6,807.

HOYT et al. v. BYRD et al.

[Hempst. 436.] [1]

Circuit Court, D. Arkansas. June, 1841.

BOND FOR COSTS—WHAT IS SUFFICIENT.

1. A bond conditioned for the payment of "all costs that may accrue in a suit, and be adjudged against the plaintiff," is a sufficient compliance with the rule requiring an indorser "for all costs for which the plaintiff may be liable in the suit."

2. Each party is supposed to pay his own costs as they arise in the course of proceedings; and the court will compel the performance of this duty by attachment if necessary.

[This was an action at law by William S. Hoyt, William Wade, Alfred H. P. Edwards, and Benjamin Hoyt against Richard C. Byrd, Sterling H. Tucker, and James Scull, Jr.]

S. H. Hempstead and R. W. Johnson, for plaintiffs.

F. W. Trapnall and John W. Cocke, for defendants.

JOHNSON, District Judge. The motion is to dismiss the suit, "because the plaintiffs have not filed, before the institution of this suit, a bond for costs as required by the rules and practice of the court." The rule of this court, upon this subject, is as follows: "The clerk shall require of all non-residents of this district an indorser for costs." The following form upon the declaration, petition, or bill of complaint may be substantially pursued: "I, A. B. acknowledge myself security for all costs for which the plaintiff may be liable in this suit." The bond or indorsement made in this case is in the following words: "I acknowledge myself held and firmly bound to the defendants for all costs that may accrue in this suit, and be adjudged against the plaintiff." The objection taken to the bond just recited is, that it does not in substance conform to the one required by the rule. The rule requires a bond for "all costs for which the plaintiff may be liable in the suit;" and this bond is "for all costs that may accrue in this suit, and be adjudged against the plaintiff." If all the costs for which the plaintiff may be liable, may be adjudged against him, then the obligation of this bond is coextensive with the obligation required by the rule. It can admit of no doubt, that the court may and is bound to adjudge against the plaintiffs all the costs for which they are liable in this suit, upon the motion of those entitled to receive them. Suppose the plaintiffs recover in this action their demand and costs of suit, and fail to collect the costs from the defendant, are they in that event exempted from the payment of the costs occasioned by them? I apprehend they are not, but that upon the application of those entitled, the court will order the plaintiffs to pay their costs, and will enforce the payment by a writ of attachment. 2 Tidd, 905; Bowne v. Arbuncle [Case No. 1,742]. This order is an adjudication and a judgment which may be enforced by the incarceration of the party against whom it is rendered. According to the English practice, each party pays his costs, as they arise in the course of the proceedings, and upon their failure to do so the court will compel them to pay by the process of attachment. 2 Tidd, Costs, 905. The same power is possessed by this court, and will be exercised whenever a party liable for costs shall fail to pay them. If, then, all the costs for which the plaintiffs are liable in this suit may be adjudged against them, and which cannot be doubted, it follows conclusively that the obligation of this bond is

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

coextensive with the obligation required by the rule, and the motion must be denied. Motion overruled.

Case No. 6,808.

HOYT v. CURTIS.

[3 Betts, C. C. MS. 71.]

Circuit Court, S. D. New York. June 26, 1844.

CUSTOMS DUTIES—COMPENSATION OF COLLECTOR—RESIGNATION—COMMISSIONS.

[1. Act March 2, 1799, § 2 (1 Stat. 706), provided that the compensation of collectors of customs at ports of entry should consist of certain commissions on all moneys received by them. Act May 7, 1822, § 9 (3 Stat. 695), provided that whenever the "emoluments" of the collector of a named port should exceed a certain sum the excess should be paid into the treasury. *Held*, that "emoluments" herein cover commissions on the collection of duties bonded by the collector; and he can therefore make title to, or claim interest in, commissions on duty bonds only so far as to mingle them with all his other emoluments in order to secure the maximum granted him by law.]

[2. Act Cong. May 8, 1792, § 4 (1 Stat. 274), relative to the compensation of customs officers, provides that, "whenever a collector shall die, the commissions to which he would have been entitled, on receipt of all duties bonded by him, shall be equally divided between his legal representatives and his successor in office, whose duty it shall be to collect the same." Act March 2, 1799 (1 Stat. 709), extends this provision in favor of a collector who resigns. *Held*, that the commissions so granted to a collector who has resigned is compensation for his acts in and about taking the bonds, and cannot be deemed compensation for his turning over his books and papers to his successor, and for his labor in making up his accounts after his resignation, both of which he is required to do by law as an essential part of his official duty.]

[3. It follows, therefore, that where a collector who has resigned sues his successor to recover the half of commissions on duties bonded by him before his resignation, the burden is upon him to show that the emoluments received by him while in office did not reach the maximum fixed by law as his compensation, failing which he is not entitled to recover.]

[This was an action at law by Jesse Hoyt against Edward Curtis.]

BETTS, District Judge. This cause comes up on motion for a new trial on a case made. It was assumpsit by the late collector against the collector now in office, to recover one-half the commissions received by the defendant on duty bonds given during the official period of the plaintiff, and falling due and collected since the defendant came into office. It appeared in proof that the half commissions amounted to $1,779.89, which had remained in defendant's hands, not paid over to the United States, and the total, with interest added, is $1,993.47, and that defendant's accounts, charging the United States and crediting himself these commissions, had been passed and allowed at the treasury. The action is founded upon the fourth section of the act of congress of March 2, 1799, which provides that, whenever a collector shall die or resign, the commissions to which he would have been entitled, on the receipt of all duties bonded by him, shall be equally divided between the collector resigning or the legal representative of such deceased collector, and his successor in office, whose duty it shall be to collect the same; and for this purpose all the public or official books, papers, and accounts of the collector resigning or deceased shall be delivered over to such successor. 3 [Bior. & D.] Laws, 241 [1 Stat. 709].

The plaintiff produced the letter of the secretary of the treasury of February 27, 1841, apprising him that the president had accepted his resignation of the office of collector to take effect agreeably to its tenor, on his being notified of the appointment of his successor. The resignation took effect on the 2d of March, 1841. He also produced a letter of the defendant in which he declined paying over these commissions to the plaintiff, because an intimation had been received from the treasury department that his resignation had not been accepted, and that it is therefore supposed that he has no just claim to the commissions. It was proved that instructions were given the defendant by the secretary of the treasury to retain these moneys, and not pay them to the plaintiff, and that similar instructions had been given his predecessor, the immediate successor of the plaintiff, in relation to other like commissions. It was admitted that the United States at the last term of the court recovered a verdict against the plaintiff on his accounts as collector to an amount much larger than the claim in this cause, the judgment upon which remains unsatisfied, and also that the United States withheld from the plaintiff any credit or account of those commissions.

The instructions of the court to the jury, now alleged to be contrary to law, were (1) that the directions of the secretary of the treasury to the defendant to withhold payment of these commissions to the plaintiff were of equal obligation upon him as if given by the comptroller; (2) that the plaintiff could not recover in this action without proving that his compensation as collector, limited by the acts of congress, had not been received by him; that he had no other right or title to these commissions than as part of his fees and emoluments necessary to make up such compensation. If the charge of the court in the last particular was correct, the verdict must stand, although it may have erred on the first point, and accordingly the objections to the instructions under the second head will first be considered.

The propositions laid down in the plaintiff's points, and maintained on the argument, are that the one-half commissions allowed by the act of congress to a collector after his resignation are not given him as officer and for services performed when collector, but are intended to compensate him for transferring books, vouchers, etc., and making up his accounts, after he ceases to be an officer; that the defendant is not the agent of the

government in allotting these commissions, but the agent or trustee of the plaintiff alone, and that the treasury, under the law, never had or could have any title or interest in these commissions. For the defendant it was insisted that, if the liability of the defendant is established, the charge of the court that the plaintiff was not entitled to recover these commissions, without showing affirmatively that they were necessary to make up the maximum compensation allowed him by the act of 1822, was correct. But it was insisted that the defendant being a public officer, and that duty bonds collected by him being public moneys received by him in his official capacity, he is not liable to an action in behalf of individuals to whom any part of such moneys may by law be appointed to be distributed or paid.

A review of the legislation of congress on the subject will determine with exactness in what character an outgoing collector is allowed half commissions upon certain classes of duty bonds; and a collation of the enactments will afford a clearer illustration of the intent of congress than any course of general reasoning could effect. At the first session of the first congress under the constitution, July 31, 1789, a revenue system from imports was devised providing for its administration substantially the same agencies, and with like powers and privileges attached to them, that have continued to be employed to this day. A collector, naval officer, and surveyor were to be appointed at all the principal ports of entry and delivery, their powers and duties were marked out, and they were to be compensated by fees (and a commission to the collector of 1 per cent. on all moneys received and paid into the treasury), and by a share of all fines, penalties, and forfeitures. Section 29 specified the fees and commissions to be received; and section 38, the proportion of fines and forfeitures. 2 [Bior. & D.] Laws, 26 [1 Stat. 44]. This act was repealed August 4, 1790, 2 [Bior. & D.] Laws, 131 [1 Stat. 145], but the new act embodied most of the features of the first, and in respect to the compensation of collectors, etc., deviated from it only by reducing the commissions for collections to three-fourths of 1 per cent. on the amount of moneys received, instead of 1 per cent. on the amount received and paid into the treasury, 2 [Bior. & D.] Laws, 166 [1 Stat. 172]. The act of May 8, 1792, relative to the compensation of certain officers employed in the collection of the duties of import and tonnage, added to the compensation of classes of those officers. Section 1. Section 2 directed the allowance of three-fourths of 1 per cent. to the collectors of Philadelphia and New York, to cease on the last day of June thereafter, and provided that "instead thereof they shall, after that time, be entitled to one-half of 1 per cent. on all such moneys by them respectively received." Section 4 introduced an original provision: "That whenever a collector shall die, the commissions to which he would have been entitled, on the receipt of all duties bonded by him, shall be equally divided between the legal representatives of such deceased collector and his successor in office, whose duty it shall be to collect the same; and for this purpose the said representatives shall deliver over to such successor, all the public or official books, papers, and accounts of the said deceased." 2 [Bior. & D.] Laws, 297–299 [1 Stat. 274].

The then existing duty acts were repealed and substituted by the act of March 2, 1799,—3 [Bior. & D.] Laws, 236–241 [1 Stat. 706],—which yet remains in force as the substitution of all subsequent laws of imports and on the same day congress passed "An act to establish the compensation of the officers employed in the collection of the duties on imports and tonnage and for other purposes,"—Id. Section 2 established the fees to be received in lieu of "the fees and emoluments heretofore established," but in substance essentially the same as before allowed. It is also allowed to the collector of New York one-quarter per cent. on all moneys received on duties and tonnage,—3 [Bior. & D.] Laws, 239, 240 [1 Stat. 706],—and then section 4 recreated section 4 of the act of May 8, 1792, with the addition only of applying the provision to collectors who shall die or resign,—3 [Bior. & D.] Laws, 241 [1 Stat. 709]. The concurrent act had also allotted to collectors, etc., the same share in fines, penalties, and forfeitures as were given by preceding statutes. 3 [Bior. & D.] Laws, 223, § 91 [1 Stat. 697].

This scheme of compensation allotted to the collectors the entire amount received by them from the sources indicated, and no doubt, in the districts of large importations,—this in particular,—the aggregate must have been very large. Congress interposed, first, by the act of April 30, 1802, and next by that of May 7, 1822, and finally by the act of March 3, 1841, to restrict and limit the actual compensation realized by collectors; but it is to be remarked, as perhaps peculiar to this legislation, first introduced in 1802, that the charges for fees, commissions, etc., are reduced so as to yield no more than the compensation granted, but, being left in substance as before, only the officer is required, when his receipts attain a certain amount, to pay the excess, if any, into the treasury. So far as fees, etc., are concerned, the government thus augments the revenue from duties by taking to itself a large sum beyond the imports, and now no longer deemed necessary to cover the expenses of collection, for which purpose alone such fees, etc., were originally appointed; and in respect to this officer all such extra or surplus fees are the same as if abolished. The purpose of congress to withdraw these sums from the allowances before received by collectors, etc., and constitute them a part of the general income and funds, affords a key to the mean-

ing of the enactments in that behalf, and is not to be lost sight of in giving a construction to the limitation clauses.

It is plain that the act of 1802 was designed to regulate the entire subject of compensation to collectors. It was in amendment of the existing laws. The first section added to the fees and emoluments of one collector a salary: the second took from another the salary assigned to the office; and the third declared whenever the annual emoluments of any collector of the customs, after deducting expenditures, shall amount to more than $5,000, the surplus shall be accounted for and paid into the treasury, excepting, however, his interest in fines, forfeitures, and penalties. 3 [Bior. & D.] Laws, 495 [2 Stat. 172]. Congress does not act upon the sources of the emoluments; those are left as before. But it seems to me no authorized construction of statutes could regard this act as allowing a collector in office to receive his commission on bonds, irrespective of the amount of emoluments already realized from other branches of income. So when the provisions are embodied in the act of May 7, 1822,—6 [Bior. & D.] Laws, 78–81 [3 Stat. 695],—the language employed by congress manifestly imports that the whole subject of compensation to collectors was definitely regulated. Section 7 established new rates of commissions in lieu of those then allowed by law. Section 8 provided salaries to various collectors, etc., in addition to their emoluments. Section 9 directed whenever the emoluments of the collector of New York, etc., shall exceed $4,000 in any one year, after deducting expenses, the excess shall be paid into the treasury. Section 12 requires the collector to account for all his emoluments, etc. This court, in April term last, decided that the word "emoluments" covered also all fees and perquisites allowed by law. U. S. v. Hoyt, [Case No. 15,409]. Sections 11 and 18 reserve the fines and forfeitures to the collector as heretofore, and sanction an allowance, not exceeding $400 annually, for services performed by a collector for the United States in another office or capacity.

This recapitulation of the legislation of congress on the subject seems to me to demonstrate that it was designed to fix with precision the amount of compensation a collector would receive out of moneys derived from imports and tonnage, and to interdict that amount being exceeded from any allowance of salary, fees, or commissions. The exception of fines and forfeitures from the limitation is strong evidence that congress intended the prohibition should embrace every other branch of income derived from the revenue. The limitation act being already adjudged in this court to withdraw every allowance, by way of fees or emoluments, that would elevate the compensation over the maximum fixed by congress, it could not be maintained, as already intimated, that the collector in office could make any title to the commission on duty bonds, other than to mingle or estimate them with all his other emoluments in order to secure the maximum granted him by law. So soon as that maximum is reached, the surplus in his hands becomes part of the funds to be accounted for and paid over to the government.

It would seem hardly to admit of argument, in view of the plain scope and object of the legislation referred to, that the grant of commissions on duty bonds might be construed as an independent provision, and not brought within the restrictions of the limitation acts in respect to collectors in office. What is there to discriminate the case of a retiring collector from that of an acting one? Will the provision justify the construction that the half commission is granted in reward of services in making up accounts, or for passing over books, accounts, etc., to his successor? It will be perceived that the first two acts (1789, 1790) only authorized collectors to take commissions from moneys received, and the compensation act of 1799 was designed to remedy a hardship that might befall the estate of a collector, where, after having performed the most critical and responsible portion of the services and secured the duties by bond, he dies before the money is received, thus leaving his representatives liable for his acts in taking the bonds, without any corresponding compensation or indemnity.

Congress considered such services whilst in office justly deserving one-half the commission given on their completion, by actual collection of the money, and that it was unjust to permit the new collector to take to himself the reward earned by his predecessor. It would be a strained reading of the law to understand this half commission to be bestowed in consideration of the surrender of books and vouchers, which it is to be remembered are not the private property of the collector, but belong to the public, as part of the appurtenances of the office, and, if not transferred under existing regulations, would be subject to the direction of the secretary of the treasury under other provisions of the law. It might be a politic proviso to stimulate the prompt and full surrender of all such documents by postponing the allowance of the commission till it was made, but the law in no way justifies the interpretation that such surrender was the consideration, in whole or in part, for the allowance.

This could not be so, because those books or vouchers would afford no aid to the government in enforcing the collection of the bonds. They might be serviceable in testing the correctness with which the collector had performed his duty, and would accordingly only be of importance to the treasury in adjusting the relations of the collector with the government, and determining

whether the per centum was due him or equitably belonged to the treasury. There would, then, be no reasonable ground to infer that a compensation so considerable in its character was conferred in consideration of a retiring collector fulfilling towards the government a duty necessarily incident to the office he relinquishes, that of "delivering over to his successor all the public or official books papers and accounts" in his hands. Nor is there anything in the law authorizing the inference that this allowance is intended to remunerate the labor and expense of preparing his accounts, by a collector, after he resigns.

The second section of the compensation act of 1799—3 [Bior. & D.] Laws, 241 [1 Stat. 706]—directs collectors, etc., to make up and transmit, within 40 days after the last day of December annually, accurate accounts of all fees and emoluments received by them. The eleventh section of the compensation act of 1822, if it does not supplant the former law, empowers the secretary of the treasury to demand such accounts at such times and in such forms as he may prescribe. 7 [Bior. & D.] Laws, 80 [3 Stat. 695].

It is, then, a part of the duty of an acting or retiring collector to make up his accounts with the treasury, no less imperative than to discharge any other duty appertaining to his office. Making up of his accounts after resigning, for the period he was in office, is no more a new and distinct service for which he can claim compensation, than is the paying over the funds remaining in his hands. He is only thus completing the duties, and a necessary and component part of his official services, assumed by and cast upon him, when he undertook the office.

The act of 1822 also answers the argument that these commissions cannot be regarded as part of the emoluments of collectors, because the periods fixed for accounting for fees and emoluments are limited to 40 days after the close of the year, and these commissions may not accrue to a resigning collector within several months subsequent, for the secretary of the treasury is required to prescribe regulations that are proper to meet every case of accounting and the defect, if any exists, is only in the omission to frame and publish such regulations. That omission cannot vary the construction of the laws in this behalf.

The opinion of the attorney general, referred to in Op. Attys. Gen. U. S., 1262 in the Case of Mr. Henshaw, does not militate against this view of the case. Indeed, it seems to have been the opinion of that officer that the fourth section of the act of 1799 is repealed by the compensation act of May 7, 1822; but yielding to the usage of the treasury department, as affording an authoritative construction adverse to his judgment, he advises the department to continue its former practice, and to consider both acts in force. There is nothing in his opinion indicating that Mr. Henshaw claimed the commissions under the act of 1799, the extra and beyond the limitation to his compensation fixed by the act of 1822, but the fair construction of it is that those commissions were claimed or retained in order to make up his maximum compensation.

If the facts of the case presented the question in the other point of view, I should feel constrained to adopt the conclusion of the attorney general as a better exposition of the meaning of congress than the practice of the treasury department, and should unhesitatingly decide that in respect to emoluments or compensation of any name (other than fines, etc.), derivable by collectors under antecedent acts, the gross amount could not be allowed to exceed the limitation fixed by the act of 1822.

The case of Bates v. Drury [Case No. 1,100] affords no aid in solving the question now presented, other than the recognition of the fourth section of the act of 1799, as still a subsisting part of the law. This is not the controverted point in the present case, and, if it was, I see no reason to question that the section is still in force, and supplies one of the sources from which collectors derive their compensation; but the moneys so obtained make up a portion of the entire emoluments, and are in their hands to be accounted for pursuant to the provisions of the act of 1822, the same as other fees and perquisites. Another objection to the instructions given by the court is that it imposed on the plaintiff the burden of providing that the money sued for was necessary to make up his maximum compensation, whereas it is matter of defense to be established by the other side, to show that he was already fully paid all he could legally demand.

The posture of this case is different from what it would be if the defendant was liable to the plaintiff for such compensation, in which case the burden of proof might be on him to show its satisfaction. But he is merely the depository of public moneys, and, if he has any personal relation to the parties, stands in the character of a trustee, or, rather, stakeholder, between the plaintiff and the government in respect to this fund. The plaintiff is accordingly bound to establish a valid title to this money before he can compel the defendant to pay it over to him. He can have no higher title to it against the defendant than he has against the government, and, if between himself and the treasury department the right to it is not clearly in him, he has no ground of action to reclaim it from the defendant.

It has been shown that, upon the laws as they stand, the plaintiff could not, in his accounts with the treasury, retain these commissions except only as a necessary part of his limited compensation. They belong to him in no other way. When, then, he proceeds against his successor to recover

public moneys out of his hands, he can clearly succeed only by proving that the public is indebted to him the amount he seeks, and that it is money which, if collected by him, he would have been entitled to retain. The case is no wise barred by the fact that the defendant charged these commissions against the government, and received credit for them at the treasury as due and payable by him to the plaintiff. The form of rendering and paying his accounts would determine nothing as to the point litigated; but, aside of that, the secretary of the treasury forbid the payment of the money to the plaintiff until his right to it should be decided at law.

This, then, compels the plaintiff to proceed upon his legal rights alone, and, as I understand the law, he has failed to show a title in himself to these moneys as against all other parties and the liability of the defendant to him therefor. His right upon the law, as I understand it, is no way enlarged by his resignation. The commission is appointed by law to the collector, in reward of services rendered as collector, and the consideration or object of the allowance is not affected by the payment being made after he ceases to hold office. Nor does the defendant become responsible upon any personal relationship between the parties. He was no agent of the plaintiff by his appointment or by designation of law, in opposition to or paramount to the authority of the treasury department. The whole face of the bond is due to the government. It is made subject, on being paid, to a certain commission which the law says "it shall be the duty of the collector in office to collect." This collecting, however, can be nothing more than subtracting the per centage from such public moneys while in his hands. The act does not direct the collector to pay such commissions to his predecessor, and he cannot accordingly be regarded as standing in relation of a private agent to such predecessor, or bound to account to him for the money.

Supposing the government refuses to credit these commissions to his account current, claiming the control of them as part of the public moneys, could he be allowed to set up the right of his predecessor in bar of such authority, and thus intercept the rights of the government as against his predecessor? Manifestly he would be bound to pay over the entire fund as being part of the revenue collected by him. So if his accounts are nominally approved, with the allowance of a credit of the commissions to the resigned collector, the secretary of the treasury would have the power to revoke such approval so far as to require that the money should not be paid out by the collector until a clear right to it at law was established by his predecessor. The defendant could not be regarded as holding it merely as money had and received, in the ordinary acceptation, for the plaintiff, but as a public officer, having it in deposit for the government or the plaintiff, whichever had the legal right to it. Upon these views of the case, I am of opinion that the law is against the right of the plaintiff to recover, and that the motion for a new trial must be denied.

HOYT (DORR v.). See Cases Nos. 4,007–4,009.

HOYT (HADDEN v.). See Cases Nos. 5,890 and 5,891.

HOYT (HALL v.). See Case No. 5,934.

Case No. 6,809.

HOYT v. The JOSHUA BARKER.

[See Case No. 7,547.]

Case No. 6,810.

HOYT v. SPRAGUE et al.

[12 Chi. Leg. News, 25; 8 Reporter, 616.] [1]

Circuit Court, D. Rhode Island. 1879.[2]

PARTNERSHIP—SETTLEMENT OF ESTATE.

An administrator of a deceased partner has power to settle with the surviving partners on such terms as in the exercise of good faith and reasonable diligence he may choose to accept. He is the personal representative of the deceased partner, and has all his powers of settlement, except that being trustee for the next of kin, he cannot give away anything.

[Cited in Nellis v. Pennock Manuf'g Co., 38 Fed. 380.]

[This was a bill in equity by William S. Hoyt against Amasa Sprague, William Sprague, Fannie Sprague, Mary Sprague, the A. & W. Sprague Manufacturing Company, and Zachariah Chaffee, assignee of said company.]

LOWELL, Circuit Judge. The hardships of the case, on the one side, that the complainants should have lost a large estate by bad investments, not originally made by them; and on the other, that the creditors of the manufacturing company should lose a large part of the property to which they gave credit, have been brought to our notice by counsel. As these considerations balance each other, there will be the less difficulty in considering the case in its purely legal aspects. The complainants seek to set aside or open the account taken by the referees and acted on by the parties in 1865, on the ground that it was false and fraudulent, and that its method was illegal; and whether the account is opened or not, they ask that the amount justly due to the complainants in 1865 may be declared not to have been lawfully invested in the stock of the A. & W. Sprague Manufacturing Compa-

[1] [8 Repcrter, 616, contains only a partial report.]

[2] [Affirmed in 103 U. S. 613.]

ny, but to have remained a charge upon the property transferred to the company, and by the company to the defendant Chaffee, as trustee for its creditors. They allege that the whole scheme for keeping the property together was fraudulent, and a sort of conspiracy intended to give and actually giving undue advantages to the surviving partners of William Sprague, the grandfather of the complainants. The defendants maintain that the account was properly taken, and was just and true, and that the transfers were valid; and that the complainants are barred by lapse of time from prosecuting their claim. They deny the frauds in general and in particular.

We do not find evidence to support the numerous charges of fraud, over-persuasion of the administratrix, etc., with which the bill abounds. On the contrary, it is quite clear that this is one of those not unfrequent family arrangements by which a property in trade or manufactures has been kept together, for the supposed benefit of all parties. The very purpose of the complainants' grandfather in forming the co-partnership, on his death-bed, probably was to have the business continued precisely as it was continued; but as he had not the knowledge requisite for carrying out his wishes in a legal method, the property of the complainants, while they were minors, could not lawfully be kept in the business. The defendants argued that the bill could not be supported if the charges of fraud were not maintained, under the rule laid down in the following cases: Price v. Berrington, 3 Macn. & G. 486; Ferraby v. Hobson, 2 Phil. Ch. 255; Glascott v. Lang, Id. 310; Fisher v. Boody [Case No. 4,814]; Eyre v. Potter, 15 How. [56 U. S.] 42; Mt. Vernon Bank v. Stone, 2 R. I. 129; Wilde v. Gibson, 1 H. L. Cas. 605; Tillinghast v. Champlin, 4 R. I. 173. We do not understand that there is an absolute rule in equity that the bill shall be dismissed if the charges of fraud are not sustained. If the court can fairly discover in the bill other distinct and substantive grounds of relief, which are alleged not merely as incidents or supports to the charges of fraud, it may proceed to the consideration of those allegations, if it is of opinion that the defendants will not be prejudiced by that mode of dealing with the case. Maguire v. O'Reilly, 3 Jones & L. 224; Archbold v. Commissioners of Bequests, 2 H. L. Cas. 440; Hickson v. Lombard, L. R. 1 H. L. 324; Baker v. Bradley, 7 De Gex, M. & G. 597.

We think it can be made out from this bill that much of the fraud therein charged is intended to be considered a legal result of admitted facts. These charges consist in a considerable part, of an imputation of motives and intentions, which, indeed, are all denied by the answers, and thereby disproved, so far as they are material; but we can, without great violence to the language of the complaint, ascertain that it relies on a continuing trust, arising out of the mode in which the affairs of the firm were conducted and settled, and the conveyances to the corporation were made, independently of the allegations of fraud. We therefore proceed to consider the questions of trust. The frame of the bill, and more especially the briefs and arguments in its support, seem to us to attribute to surviving partners a more onerous relation of trust than is supported by any authorities cited, or which we have been able to find. Partners are quasi trustees for each other, both before and after dissolution. When one partner has retired, or become bankrupt, or died, both partners or their representatives still remain quasi trustees, which means scarcely more than that they must account to each other in equity. Farnam v. Brooks, 9 Pick. 212; Knox v. Gye, L. R. 5 H. L. 656. Upon the death of William Sprague it was the duty of the surviving partners to pay to his administratrix the actual value of his share of the joint property, when and as it might be realized by due diligence, and without undue sacrifice. Moore v. Huntington, 17 Wall. [84 U. S.] 417. It was not their duty to see that an appraisement was made of this share in the probate court, nor would such an appraisement have bound them if it had been made. We believe jurisdiction is given in some states to the probate court to wind up partnership affairs; but it is not so in Rhode Island; and if it were, there is no obligation upon the surviving partners to settle through the courts, as we shall presently show. If the survivors failed to settle with the administratrix as promptly as was practicable, whether the delay was with her acquiescence or not, she would have the right, when the settlement should be made, to take her original share with interest, or with profits, as she might then elect. In other words, the survivors remained liable as partners so long as they treated the capital of the deceased partner as part of their capital; but the administratrix did not remain so liable in all respects; she could elect not to be subject to losses. On her part the administratrix had power to settle with the surviving partners on such terms as in the exercise of good faith and reasonable diligence she chose to accept. The argument that there is some specially legal mode of accounting cannot be sustained. There is none such. The administrator is the personal representative of the deceased partner, and has all his powers of settlement except that being a trustee for the next of kin, he cannot give away anything. No doubt the administrator may bring a suit and force a settlement in a mode which Mr. Justice Lindley says is "generally ruinous to the other partners." Lindl. Partn. 1044. But he is not bound to take this course. Settlements are made out of court "to a vast extent, every day," says Lord Langdale, M. R. (11 Beav. 13); and are always upheld, in the absence of negligence

or bad faith. Williams, Ex'rs, 939; Lindl. Partn. 1069; T. Pars. Partn. 442; Colly. Partn. § 638; Farnam v. Brooks, 9 Pick. 212; Codman v. Rogers, 10 Pick. 112; Chambers v. Howell, 11 Beav. 6; Smith v. Everett, 27 Beav. 446; Davies v. Davies, 2 Keen, 534; Wedderburn v. Wedderburn, 4 Mylne & C. 41, 45, per Lord Chelmsford. No case has been shown us which contradicts this somewhat elementary proposition. The decisions cited make two other propositions equally clear: 1st, that the surviving partners cannot force the administrator to sell to them at a valuation; and, 2d, that when the administrator is himself the surviving partner, or one of them, he cannot be both buyer and seller. Neither point is applicable to this case. Such being the situation of the parties, they came to an accounting in 1865, by means of the agreement C, and the action under it. Mary Sprague signed that paper, both as administratrix and as guardian. It seems there is a statute in Rhode Island which authorizes a guardian to submit disputes to arbitration. The defendants argue that the statute does not extend to such a case as this. It seems to us broad enough for that purpose. At all events the administratrix, could ascertain the value of her interest by a reference, or in any other mode that should be fair and reasonable. The share of the guardian was set off separately because the other parties represented by the administratrix, that is to say, she, herself, and her son Byron, were of age. He had received his share, and hers was settled in the course of the same proceedings. If the administratrix had authority to make the reference, we see no objection to the award being made in severalty to the parties interested. In making up the account, profits were allowed instead of interest; and we cannot see that the full share was not set off to the guardian. A settlement of profits in such a case, in a court of equity, is a difficult and complicated matter. The courts usually require the master to find what profits are to be attributed to the capital of the deceased partner as distinguished from other sources of profit, such as the skill of the survivors, or any other circumstances which may have increased the profits. Mr. Lindley says that special inquiries on this subject are almost always necessary, and that the simple rule of three is not the rule of the courts. Partn. p. 980. See Willett v. Blanford, 1 Hare, 253, approved by James, L. J.; Vyse v. Foster, 8 Ch. App. 309, 331, and by the lords justices in Simpson v. Chapman, 4 De Gex, M. & G. 154. It seems that this complicated account was ordered in Brown v. De Tastet, Jac. 284; and we learn from a statement made in argument at 2 Mylne & K. 658, that after the plaintiff in Brown v. De Tastet had obtained a decree of the house of lords he abandoned the case because the accounting was so difficult. When the surviving partner is not himself the executor he is usually granted an allowance for his services. Lindl. Partn. 982; Brown v. De Tastet, Jac. 284; Cook v. Collingridge, Id. 607.

The charges of fraud and concealment in respect to the account have not been sustained; nor is it true, as alleged, that both the referees were attorneys of A. & W. Sprague; they represented different interests. We think the share assigned the guardian was assigned with good faith, care and diligence, and with full opportunity for investigation; and was as large or larger than the amount which a court of equity would have given. It is to be observed that no complaint is made of the settlement of the Quidneck property by the same referees at the same time and as part of the same transaction. The defendants, however, insist that whatever may have been the good faith and the diligence of the parties, the result reached was illegal and void, because, under the law of nations, an appointment of a guardian for non-resident minors could not be lawfully authorized by a statute of Rhode Island; that such a power could not be entrusted to the probate court under the constitution of Rhode Island; that the legislature of that state could not constitutionally authorize the change of investment; that there was some real estate situated out of Rhode Island which could not be conveyed by virtue of the resolve.

1. All or nearly all the states have asserted and exercised the right of passing laws for the appointment of guardians of the property within the state of persons not residing therein; and the power to do so seems to result from that other admitted principle, that a guardian appointed without the state is permitted to act within it only by comity, and that to a somewhat limited extent.

2. The constitution of Rhode Island, adopted in 1843, declares, in article 10, § 2: "Chancery powers may be conferred on the supreme court, but on no other courts to any greater extent than is now provided by law." The defendants say that the power to appoint property guardians is a chancery power. No doubt it is one of the powers exercised by courts of chancery, and it may, at one time, have been exclusively exercised in chancery. So were the powers to grant new trials; to enable parties to interrogate each other; to permit set off; to make partition of lands, and a great many others which in 1843 belonged concurrently or exclusively to other courts. We understand that the constitution refers to those kinds and classes of powers which in 1843 would be commonly known as chancery powers; and certainly the appointment of guardians would not have been so described in Rhode Island, or any other state of the Union, at that time. But it is enough to say that this precise power had already been "provided by law" in Rhode Island, before the constitution was adopted, and is therefore within the express exception.

3. The right of a legislature to authorize a change of investments by trustees has been often exercised, and generally sustained. See Thurston v. Thurston, 6 R. I. 296, and the cases there cited; Florentine v. Barton, 2 Wall. [69 U. S.] 210; Williamson v. Berry, 8 How. [49 U. S.] 495; Watkins v. Holman, 16 Pet. [41 U. S.] 25; Wilkinson v. Leland, 2 Pet. [27 U. S.] 627; Ward v. New England Screw Co. [Case No. 17,157]; Leggett v. Hunter, 19 N. Y. 445; Sohier v. Massachusetts General Hospital, 3 Cush. 483. Many other cases are found in the briefs. Whatever might be our opinion upon the point if it were new, we do not feel at liberty to disregard the authorities. If the legislature had the power, the propriety of its exercise in a particular case is not a question for the courts. Up to some time in 1865, an investment in manufacturing stock by a guardian was both usual and lawful in Rhode Island, as it still is in Massachusetts and some other states. Sometime in that year, a date which the parties to the argument here did not deem important, a law was passed which, by implication, excludes such stocks from being the proper subjects of such investment. This resolve was passed in 1863. Had it been later than the general law above mentioned, we should strongly incline to the opinion that it would be void, as making a special exception to a general law. This is the distinction taken in Picquet's Case, 5 Pick. 65, and it seems entirely sound. But leave for the investment having been granted in 1863, we do not think the general law in question repealed it or was intended to do so, even if it was passed, as we understand it was, before the parties had signed agreement C.

4. With respect to real estate not in Rhode Island no specific issues are raised by the pleadings, nor does the record enable us to say what its legal situation was or is. If there were such lands standing in the name of William Sprague the elder at the time of his death, but bought with the joint funds and used in the joint business, and if they were not needed to pay joint debts, we may assume that under the rule of the American cases they would descend to William's heirs, subject to the equitable rights of the heirs of Amasa. If the title of the complainants to the undivided part of these lands was not lawfully divested by the settlement and conveyance of 1865, then they still hold it, though they have received payment for it; and, speaking for myself, I should doubt whether a court of equity ought, for this reason, to set aside the settlement at their request, unless the remedy at law was clearly shown to be inadequate.

We have considered the objections to the form of the petition to the legislature, and to the form of the bond given to the judge of probate, and do not consider them well taken, nor that they would vitiate the settlement in the absence of fraud, if they were sound. Our conclusion, therefore, is that the settlement of 1865 is both lawful and honest; that it gave a full share to the guardian and that the deed K conveyed to the corporation a title free from a trust to account further to the complainants. We have not found it necessary to examine thoroughly the defense of the statute of limitations or that of laches. We understand that after a settlement has been arrived at, or after the joint business is closed, six years is an absolute bar at law and in equity to a claim of this nature. Farnam v. Brooks, 9 Pick. 212; Tatam v. Williams, 3 Hare, 347; Knox v. Gye, L. R. 5 H. L. 656; Bank of U. S. v. Daniel, 12 Pet. [37 U. S.] 32. It is not within the exception of merchants' accounts. Codman v. Rogers, 10 Pick. 112. If there were fraud, concealed from the parties interested, the bar would not begin to operate until they had discovered the fraud. Bayley v. Glover, 21 Wall. [88 U. S.] 342. But it has been lately held by the supreme court that the concealment does not give the party a fresh start of six years, but only a reasonable time after the facts are known. Brown v. Buena Vista Co., 95 U. S. 157.

We do not understand that there is any evidence in this case of a concealed fraud. The allegations are somewhat vague and the testimony is not less so. All the parties who are living deny concealment as well as fraud. And we do not see that either is made out. The complainants say that they were ignorant of the mode and time of settlement, and of the particular proceedings which they now say were illegal. For the purpose of this inquiry, we must assume them to have been illegal; but they were not of a secret nature. The means of knowledge were at hand as well before as after the failure of the corporation. Nor are we advised that ignorance of facts is a good replication to a plea of the statute in the absence of fraud. If the question is of laches, in equity, which we hardly think it is, then the fact that the creditors of the corporation are the real parties adversely interested becomes important, and makes this case somewhat analogous to those cited by the defendants, in which stockholders seeking to relieve themselves of their liability on the ground of fraud or misrepresentation, have always been held to strict diligence. The fact is not without importance in this connection, and indeed it has some bearing on the whole case, that the losses and disasters which have brought the corporation to bankruptcy appear to have happened long after the settlement of 1865, and in all probability after the younger of the complainants came of age. The bill charges the fault to have been in the management of the corporation, in which each of the complainants was an owner for more than six years after becoming sui juris. The defendants attribute their misfortunes to the revulsion of business which occurred in the year 1873. Whichever party is right in respect to the causes of misfortune, we think it very

doubtful whether a court of equity could permit stockholders to exchange their position for that of secured creditors under such circumstances, if there were no statute of limitations in the case.

Prayers are found in the bill that Mary Sprague and William Sprague should account as guardians. We understood the parties to say that other suits are pending for this purpose, and we did not understand that such accounting was asked in this suit, except as ancillary to the relief against the property in the hands of Chaffee. We have not therefore considered whether Mary Sprague would be liable for her delay in calling the partners to an account, or for any other acts or omissions of hers, except as they affected the trust sought to be established in this case. Bill dismissed, with costs.

[NOTE. An appeal was then taken by the complainants to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Bradley, who held that the complainants' acquiescence precluded them from the relief sought. As the administratrix and guardian had allowed the assets of the deceased partner to remain in the firm, her lien on the property thereafter acquired was postponed to that of creditors, when a case arose for an equitable marshaling of assets. The beneficiaries of the deceased partner's estate had no greater claim than she had. 103 U. S. 613.]

HOYT (STEPHENSON v.). See Case No. 13,373.

HOYT (UNITED STATES v.). See Cases Nos. 15,409 and 15,410.

HOYT (WAKEMAN v.). See Case No. 17,051.

HOYT (WILLISON v.). See Case No. 17,772.

Case No. 6,811.

The H. P. BALDWIN.

[2 Abb. U. S. 257; 12 Int. Rev. Rec. 170; 3 Chi. Leg. News, 50; 5 Am. Law Rev. 564.] [1]

District Court, E. D. Michigan. Sept. 8, 1870.

COLLISION—REQUISITES OF LIBEL.

A libel for collision must state the facts constituting the fault in navigation on the ground of which damages are claimed against the vessel libeled. A mere general allegation that "she was so carelessly, negligently, unskillfully, and recklessly navigated that," &c., is not sufficient.

Exceptions to libel.

The libel in this case was filed by George W. Allen and Wells Burt, against the bark H. P. Baldwin, to recover damages for a collision. The claimants filed exceptions to the libel, for insufficiency in the statement of the cause of the collision.

Moore & Griffin, for libelant.

Newberry, Pond, & Brown, for claimants.

LONGYEAR, District Judge. The libelant's vessel, the schooner Marquette, was bound on a voyage from Oswego to Chicago, and when in the Straits of Mackinaw, was collided with by the bark H. P. Baldwin. The manner and cause of the collision are stated in the third article of the libel, in the following language: "Third. That when the said schooner had so far proceeded on her said voyage, as to have reached the Straits of Mackinaw, and were off and a little above 'Old Mackinaw,' so called, and while running on the wind upon the port tack, with her proper watch, officers, and crew properly placed and vigilantly attentive to the care and safe navigation of their said schooner, with the proper signal lights properly placed and brightly burning, the bark H. P. Baldwin, in passing up by the starboard side, was so carelessly, negligently, unskillfully, and recklessly navigated by those in charge of her that she was made to run into, upon, and collide with the said schooner, the said bark striking the said schooner on the starboard side," &c. There are no other allegations in the libel as to the manner and cause of the collision. Articles 4 and 6 were alluded to on the argument as throwing further light upon this subject. But article 4 is connnea to a statement of what efforts were made by the master and crew of the schooner to avoid the collision, and states, by way of fixing the period in the occurrences which resulted in the collision when such efforts were made, that they were made "as soon as the said bark headed towards and for the said schooner." And article 6 is the usual allegation that the bark was solely in fault. Is the allegation above quoted then, that the bark "was so carelessly, negligently, unskillfully, and recklessly navigated," as the cause of collision, a sufficient allegation?

There does not seem to be any well defined rule laid down in the books as to the degree of certainty requisite in stating the cause of collision. Mr. Parsons says: "How these things should be stated, we can better indicate by the forms we give in the appendix than in any other way; saying now only that the demand of the libelant should be so clearly stated that the respondent may know, without any doubt, what claims he must repel. The facts should be stated, also, that they may be understood by all interested in knowing them, and the judge be able to see judicially, that they bring the case within his jurisdiction, and within the law of his court." 2 Pars. Shipp. & Adm. 380. On an examination of the precedents to which we are referred by Mr. Parsons, and also of those laid down by other authors, we find that in every instance of a libel for collision resulting from carelessness, &c., it is stated wherein the carelessness, negligence, unskillfulness, or recklessness consisted. I believe this to be

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 564, contains only a partial report.]

the only correct, practicable, and safe rule. To state that the navigation of the colliding vessel was careless, negligent, unskillful, or reckless, without stating wherein the carelessness, &c., consisted, is stating a mere conclusion. The facts should be stated so that the court may be able to see judicially that carelessness, &c., existed, and contributed to, or was the cause of the collision. I cannot see, in the application of this rule, any of the hardships contemplated by counsel for libellant in this case. It is true, the libelant cannot be presumed always to know and be able to state in his libel just what orders were given on the colliding-vessel, or all that was done upon it that resulted in the manoeuvers which brought about the collision, but he can state what those manoeuvers were, for if he has the necessary lookout, they can be and are always seen and known on board his own vessel. If the manoeuvers of the colliding vessel were such as to bring about the result when it was within the power, or it was the duty, of the colliding vessel to avoid the other, then it is sufficient to state what such manoeuvers were, accompanying such statements, of course, with a statement of the position, course, &c., of the respective vessels at the time such manoeuvers occurred, by which the court may be able to see what was the necessary result of such manoeuvers. I say such statement would be sufficient, because, if such manoeuvers were in violation of the duty of the colliding vessel under the circumstances of the case, then they necessarily constitute, in and of themselves, careless, negligent, unskillful, and reckless navigation. For instance, in this case, if the colliding vessel, when in dangerous proximity to the libelant's vessel, suddenly changed her course, and the collision was thereby brought about, it would be sufficient to state that fact; or, if the two vessels were crossing, and so were within article 12 of the collision act (13 Stat. 60), or, if the colliding vessel was overtaking the other, and so was within article 17 of said act; and if in either of these cases the colliding vessel failed to observe the requirements of those articles, it would be sufficient to state these facts, for then the carelessness, &c., complained of would clearly appear from the facts stated.

I think the libel in this case falls far short of the necessary requisites as above indicated, in its statement of the cause of the collision. We might infer several things from the statements which are contained in the libel; but this is not sufficient in a matter of pleading. The facts must be clearly and positively stated, and not be left to inference, nor alleged by way of reference or recital merely. The exceptions are sustained, and the libelant will be granted leave to amend his libel. Order accordingly.

Case No. 6,812.

The H. P. BALDWIN.

[Brown, Adm. 300.] [1]

District Court, E. D. Michigan. April, 1871.

COLLISION—VESSELS CLOSE-HAULED ON OPPOSITE TACKS—LOOKOUT.

1. Where a bark, close-hauled upon the starboard tack, was approaching a schooner close-hauled upon her port tack, at an angle of about six points, *held*, that the bark had the right to keep steadily on her course, so long as there was any room for doubt as to the intentions of the schooner.

[Cited in The F. W. Gifford, Case No. 5,166.]

2. The fact that the entire crew of the bark, including the lookout, were engaged, shortly before the collision, in tacking the ship, though a fault, was *held* not to have contributed to the collision, as they had resumed their duties a sufficient time before it took place.

3. The fact that the schooner was disabled, and partially unmanageable, did not impose upon the bark the duty of avoiding her, unless the disability was manifest to those upon the bark.

4. The fact that the lookout of the schooner was engaged, with the remainder of the watch, just previous to the collision, in hauling down the flying jib, which had become disabled, was a fault directly contributing to the disaster.

[Cited in The Ancon, Case No. 348.]

Libel and cross-libel for collision between the schooner Marquette and the bark H. P. Baldwin. The collision occurred between two and three o'clock in the morning of the 10th day of July, 1870, in the Straits of Mackinaw, south of the center of the channel, and off from and a little west of "Old Fort Mackinaw," so called. Both vessels were bound up through the straits—the schooner on a voyage from Oswego to Chicago, and the bark on a voyage from Bay City to Chicago. The wind was west southwest, although somewhat variable, and the night was clear, with occasional scudding clouds. When the two vessels first made each other, they were both close-hauled and running by the wind, but upon opposite tacks—the schooner on the starboard tack, and the bark on the port tack. On nearing each other, the bark, as was her duty, kept off a point or so and passed the schooner under her stern. Each vessel, having subsequently come about, found herself again crossing the other's track, close-hauled and running by the wind as before, but on the opposite tacks, the bark now being on the starboard tack and the schooner on the port tack. It was while on these courses the collision occurred, the bark striking the schooner on her starboard side, just abaft the main rigging, and sinking her in about five minutes. Just before the collision, the flying jib pendant of the schooner was carried away by a squall, and the flying jib had in consequence been hauled down. This gave

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

the schooner a tendency to somewhat eat up into the wind, and made it more difficult to keep her away, but did not materially lessen her headway, which was still about three miles an hour. Each vessel kept her course without anything being done by either to avoid a collision, until a collision was imminent (and in view of the manoeuvres then made by each was, in fact, inevitable), when the wheel of the bark was ordered hard up (astarboard), and that of the schooner was ordered hard alee (also astarboard). This order on the part of the schooner brought her up into the wind and stopped her headway, or nearly so, and it was while she was in this position that the bark came into her, as before stated.

The faults charged in the libel against the bark were: (1) That she had not a proper lookout properly placed, and attentive to his duty. (2) That she had no competent officer on deck on watch attending to the safe navigation of the vessel. (3) That the proper measures were not taken and orders given in due and sufficient time to avoid the schooner as she lay helpless and disabled. (4) That she came too near the schooner before any efforts were made to avoid her as she lay helpless and disabled.

The faults charged in the libel against the schooner are: (1) That she had no proper and competent lookout. (2) That she did not keep out of the way of the bark. (3) That she was not properly equipped and manned, and her officers and crew were not at their proper posts and attentive to their duty.

W. A. Moore, for the Marquette.

H. B. Brown and G. V. N. Lothrop, for the Baldwin.

LONGYEAR, District Judge. The evidence showed that each vessel, after she had come about the last time before the collision, laid her course by the wind, and was sailing close-hauled, the schooner on the port tack and the bark on the starboard tack, up to just before the collision, and that the schooner would sail within about six points and the bark within about five and a half points of the wind. The wind being west southwest, the course of the schooner must have been about northwest, and that of the bark about south half west. The two vessels were, therefore, crossing so as to involve risk of collision, and article 12 of the collision act of April 29, 1864 (13 Stat. 60), applies. By article 12 it was the duty of the schooner to keep out of the way of the bark, and not having done so, the onus is upon her to show some fault on the part of the bark which caused, or at least contributed to, the collision, in order to a recovery against the bark. The Western Metropolis [Case No. 17,440]; The Black Prince [1 Lush. 568].

I will therefore proceed first to examine the allegations of fault on the part of the bark: (1) That the bark had not a proper lookout properly placed and attentive to his duty. (2) That she had no competent officer on deck or watch attending to the safe navigation of the vessel.

These two allegations will be considered together. I do not think these allegations are sustained by the proofs. It is true that, on coming about, the entire watch, including the lookout and the officers of the deck, were engaged in that manoeuvre. While this was in and of itself a fault, it is not such a fault as will make the bark responsible, unless it was the cause of or in some manner contributed to the collision. I think there is a clear preponderance of evidence that the entire watch had resumed their respective duties, and were properly attending to them a sufficient length of time before the collision, to take away all probability that their previous digression from their proper duties contributed in any manner to the accident. The remaining allegations of fault on the part of the bark will also be considered together. They are as follows: (3) That the proper measures were not taken and orders given in due and sufficient time to avoid the schooner as she lay helpless and disabled. (4) That she came too near the schooner before any efforts were made to avoid her as she lay helpless and disabled.

These allegations of fault on the part of the bark necessarily assume: (1) That the schooner had become so disabled and helpless as to prevent her keeping out of the way of the bark, as was her duty. (2) That such disability occurred a sufficient length of time before the collision for the bark to have taken measures to avoid the schooner. (3) That the disability and helplessness of the schooner were known to those in charge of the navigation of the bark, or that the disability was of such a character that, by the exercise of ordinary care and watchfulness on board the bark, it could have been readily seen and its effect understood by them in season for the necessary measures to be taken on board the bark to avoid a collision.

The fact that measures might have been taken, orders given, or efforts made, on the part of the bark, which would have prevented the catastrophe, is not enough. Circumstances must be shown that would make it the duty of those in charge of the navigation of the bark to take the measures, give the orders, or make the efforts. Williamson v. Barret, 13 How. [54 U. S.] 109. It will be readily seen that, under this rule, all the conditions assumed must have existed, in order to make out the allegations of fault last above recited.

First, then, as to the character and effect of the disability: In consequence of the flying jib pendant being carried away by a squall, it became necessary to haul down the flying jib, and it was done accordingly,

and this was the full extent of the disability. The effect of it upon the navigation of the vessel was to make her less manageable, not to make her unmanageable. It gave her a tendency to eat up into the wind, and she would not keep away as quickly as she would with the flying jib up; it checked her headway, but did not stop it entirely, or even very nearly. In fact, the wheelsman had not noticed that it had any effect upon the steering of the vessel. It was then but a partial disability at most—such an one as, while it did not render the schooner helpless, made it necessary for her to have more time to get out of the way of another vessel than she would have needed but for the accident.

Secondly, as to the length of time between the accident and the collision: The evidence shows that the flying jib was hauled down immediately after the pendant was carried away, but how long the downhaul occupied does not clearly appear, but, from all the circumstances, it could have been only a very few minutes; one of the witnesses who assisted thinks it was five minutes. I think it could not have exceeded that, at most. The evidence does, however, clearly show that the completion of the downhaul, the order of the master of the schooner, "ready about" and "hard alee," the coming up of the schooner into the wind and the collision followed each other in quick and rapid succession—so quick and rapid as to leave but little room for doubt that the collision was inevitable at the completion of the downhaul. There may have been sufficient time after the flying jib pendant was carried away, if that accident had been detected by those in charge on board the bark the moment it occurred, for such measures to be taken on board the bark as would have avoided a collision.

We will therefore pass to the consideration of the third condition named, viz., the knowledge of the disability of the schooner, or responsibility for want of knowledge of it, on board the bark, in season to adopt the necessary measures to avoid a collision: That those in charge of the navigation of the bark did not, in fact, know of the accident to the schooner's flying jib, the evidence is clear and uncontradicted. Was the accident, then, of such a character that, by the exercise of ordinary care and attention on board the bark, it could have been readily seen, and its effect understood by them? It must be borne in mind that it was in the night, and although it was light enough so that outlines of a vessel could be seen at a considerable distance, yet it was not so light that it could be readily distinguished how a vessel carried her sails; and although perhaps unusual, yet it is not so unprecedented for a schooner of the size of the Marquette to be under way without her flying jib up, as to warrant the court in holding, as matter of law, that an approaching vessel must take notice of a want of it, and that such want of it is evidence of such disability as to excuse the vessel from obeying the ordinary rules of navigation. But so it must be held, in order to hold the bark responsible for not taking notice of the accident to the schooner.

But it is claimed that, laying aside the accident to the schooner, the bark had no right unnecessarily to run her down, even though the schooner may have been in fault in the first instance for not keeping out of the bark's way. This is no doubt correct. The evidence shows that the schooner's green light was made from the bark when from one and a half to two miles distant, and that the mate, on being interrogated by the master on two or three occasions whether the schooner was doing anything to keep out of the way, replied that he could not see as she was. Upon this it is claimed it became the duty of the master of the bark himself to take measures to keep out of the way of the schooner. But when did this duty begin? It will not do to say that it began when it became probable that the schooner did not intend to get out of the way, because by article 18 it was the duty of the bark to keep her course, and it would not do for her to change it so long as there was any room for doubt as to the intentions of the schooner. So long as there was sufficient space left for the schooner to keep away and pass the bark on the port side, as it was fair to presume she would do, it was not safe for the bark herself to keep away and attempt to pass under the stern of the schooner. And so long as the schooner kept her course, as she seemed disposed to do, it was not safe for the bark to come up into the wind, because by so doing she would necessarily throw herself across the bows of the schooner, and at the same time become unmanageable, thus placing herself in peril, a thing which the law never requires of one vessel in order to avoid danger to another.

We see, then, that up to the very point where the space between the two vessels ceased to be sufficient for the schooner to keep away, and thus avoid the bark, all was in doubt and gross uncertainty to those in charge of the bark, as to what the schooner would do. Certainly, up to this point it cannot be said that any duty had devolved upon the bark to take measures to avoid a collision. And who shall say just when that point was passed? This court cannot, and will not assume to say. The master of the bark stood there with all the circumstances before him, and no doubt used his best judgment, and acted accordingly. And although it is now quite apparent that if he had given the order he did give a little sooner, a collision would have been avoided, yet in view of the doubts with which the matter was surrounded at the time, I cannot say it was his duty so to have given the order, and that the bark is liable because the or-

der was not so given. It is contended also that the order which was given on board the bark was the wrong order; that it should have been "hard down," and the bark thereby brought up into the wind, alongside the schooner, and a collision avoided. I think it is quite clear from the evidence that the order "hard up" was given on board the bark before the order "hard-a-lee," which brought the schooner into the wind, was given. Hence, when the order was given by those in charge of the bark, it was still all in uncertainty with them what order would be given on the schooner, or whether any would be given at all. It is quite apparent now, that if no order whatever had been given on board the schooner, a collision would probably have been avoided, or if not, the blow would have been a glancing one, and probably light; and that if the opposite order had been given on the schooner to the one which was given, and her stern thereby thrown away from the bark, a collision would, quite probably, have been entirely avoided. I think that the order given on board the bark, under the circumstances in which it was given, was the right order, and even if it was not, the circumstances of doubt under which it was given—circumstances for the existence of which the bark was not responsible—were such as to make it no fault.

As we have already seen, the schooner was under headway up to the time she was thrown head to the wind, and that this occurred but a moment before the collision, and after the order "hard up" had been given on board the bark. Hence, up to that moment, the schooner must be considered as a vessel in motion, whose duty it was to keep out of the way of the bark, and the case comes clearly within the principle of those decisions cited by the bark's advocate, holding that where a vessel commits an error under impending danger, or in extremis produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel. See Bentley v. Coyne, 4 Wall. [71 U. S.] 509, 512; The Nichols, 7 Wall. [74 U. S.] 656, 666; The Fairbanks, 9 Wall. [76 U. S.] 420, 424; The City of Paris, Id. 634, 638; The Scranton [Case No. 12,558]; The Western Metropolis [Id. 17,440]. I hold, therefore, that none of the allegations of fault against the bark are sustained.

The remaining questions for consideration are those arising upon the libel of the owners of the bark against the schooner for damages sustained by the bark by the same collision. The allegations of fault on the part of the schooner, are: (1) That the schooner had no proper and competent lookout. (2) That the schooner did not keep out of the way of the bark. (3) That the schooner was not properly equipped and manned, and that her officers and crew were not at their proper posts attentive to their duty.

As to the first allegation, the only evidence there is upon the subject tends to prove that the schooner had on board a proper and competent lookout. Whether he was at his proper post and attentive to his duty or not is another question, and will be considered under the second clause of the third allegation of fault. The first allegation, therefore, is not sustained.

As to the second allegation, there is no dispute as to the fact that the schooner did not keep out of the way of the bark, but it is sought to be excused on account of the accident to the flying jib pendant of the schooner, in consequence of which, it is claimed, she could not get out of the way. This excuse will now be considered in connection with the third and last allegation. As has already been seen in considering another branch of the case, the accident to the flying jib pendant of the schooner caused only a partial disability, and I think the evidence clearly shows that, notwithstanding the accident, the schooner could have kept away and avoided the bark if she had seen the bark in time to have effected the necessary manoeuvres for that purpose, and that the only reason she did not do so was, the close proximity of the bark when she was first seen from the schooner. I think it quite clear from the proofs that the schooner had not time, even if she had been in full trim, to make the necessary manoeuvres to avoid the bark after she first saw her. The closeness of the proximity, and the shortness of the time, are best determined by what occurred on board the schooner between the time the bark was first seen and the collision. Immediately upon seeing the bark the master of the schooner gave his order "ready about," and then, as soon as that order could be executed, which, of course, was almost instantly, came the order "hard-a-lee," repeated three times in a loud voice, and then almost immediately came the collision. The extreme shortness of time between the last order and the collision is shown by the men who had turned in and were awakened by hearing the order. They had barely time to spring out of their berths and run upon deck when the collision came—in fact, one of them tells us that he was helped out of his berth by the force of the blow.

The proof is satisfactory to my mind that the bark was in sight, and with ordinary care and attention on board the schooner might and would have been seen much sooner than she was, and in ample time for the schooner, slightly disabled as she was, to have kept out of the bark's way. Why, then, was she not seen sooner than she was? I think this question is fully answered by two facts in the case. Captain Allen, master of the schooner, who was in charge of her navigation at the time, tells us that after the bark had passed him on her port tack, he "did not pay any attention to her, as I

thought she was clear of us for the night." The other fact is that the entire watch on board the schooner, except the wheelsman, including the lookout, were engaged, just at the critical moment, in hauling down the flying jib. It was during this time, and while the lookout was thus away from his post and attending to other duties, that the bark was allowed to approach to such fatal nearness to the schooner, and I think that to this fact the collision is justly attributed.

The supreme court, in the case of The Catharine, 17 How. [58 U. S.] 177, makes use of the following language: "As to the Catharine, we are not satisfied that she had a proper lookout on the vessel at the time of the collision. The excuse given is, that all hands, a short time previously, had been called to reef the sails, and some evidence is given to prove that this is customary in vessels of this description. However this may be in the day time, we think that such a custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels;" and in this case it may be added, especially with the knowledge of the fact that the bark was somewhere in the vicinity, and might, at any time, come about, and be again crossing the schooner's course.

I think, therefore, that the lookout leaving his post to aid in the flying jib downhaul was a fault, which directly contributed to, if it was not the sole cause of the collision. What the schooner might or might not have been able to do to keep out of the way, if her lookout had been at his proper post, and the bark had been seen when still at a safe distance, is mere matter of conjecture, and something with which we have no concern. The fault consists in the lookout not being at his post, and the bark not being seen. I suggest, however, that if the lookout had been at his post, and the bark had been seen in time, as she might, and no doubt would have been, for the schooner to have made an effort to keep out of the way of the bark, and she had found such effort unavailing, or, knowing that she could not keep out of the way, have notified the bark by some signal of her disabled condition, as she in such case would have had time to do, she then would have done her whole duty, and would have been excused. As it is, her excuse for not keeping out of the way is unavailing, and she must be held to respond for the damages done to the bark. A decree must be entered dismissing the libel of Allen and Burt against the bark H. P. Baldwin, with costs, and in favor of the libellant Hudson, against the schooner Marquette, for the damages sustained by the bark H. P. Baldwin, and for costs, and referring it to a commissioner to ascertain and compute such damages. Decree for cross-libellant.

Case No. 6,813.

In re HUBBARD.

[1 Lowell, 190;[1] 1 N. B. R. 679.]

District Court, D. Massachusetts. Dec., 1867.

BANKRUPTCY—PROOF OF DEBT—MISTAKE—LEAVE TO WITHDRAW.

1. A creditor who has proved his debt in bankruptcy may be permitted to withdraw his proof if it was made under a mistake of fact or law.

[Cited in Re Parkes, Case No. 10,754; Re Baxter, 12 Fed. 75.]

[Cited in Re Burgess, 83 Me. 343, 22 Atl. 222; Nichols v. Smith, 143 Mass. 462, 9 N. E. 810.]

2. Leave to withdraw will usually be granted where the withdrawal will restore all parties to the position they were in before the proof was made; but not if intervening rights will be affected.

[Cited in Re Phillips, Case No. 11,098.]

In bankruptcy. [In the matter of Edward Hubbard, Jr.] In this case certain creditors proved their debts at the first meeting, on the twenty-fifth of November, and on the twenty-first of December they filed a petition before the register to be allowed to withdraw their proofs of debt from the files, for the reason that, since proof had been made, they had discovered that a certain person named was a dormant partner with the bankrupt, and was solvent; that they could not by due diligence have discovered this fact earlier; and alleging that they had discontinued all suits against the bankrupt himself. The register certified to the judge the question whether the petition ought to be granted.

LOWELL, District Judge. Where proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. And even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal if there had been a mistake, and no want of diligence. In the only case in which I have refused such a petition, the creditor, by proving his debt, had relieved an attachment by trustee process, and the garnishee had in good faith paid over the funds to the assignee. Although I did not believe that any court would hold the lien to be revived by the creditor's withdrawing his proof, yet it was not right to permit such a question to be even mooted.

Under our practice an order of this kind may be passed by the register, if after due notice, no opposition is made; otherwise by the court. The decisions on the question are Morse v. Lowell, 7 Metc. [Mass.] 152;

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

Ex parte Harwood [Case No. 6,185]; Bemis v. Smith, 10 Metc. [Mass.] 194; Safford v. Slade, 11 Cush. 29; Beverly Bank v. Wilkinson, 2 Gray, 519. Leave to withdraw proof granted.

Case No. 6,814.

HUBBARD et al. v. ALLAIRE WORKS.

[7 Blatchf. 284;[1] 4 N. B. R. 623.]

Circuit Court, S. D. New York. June 8, 1870.

BANKRUPTCY—ASSIGNEE—RECOVERING BACK MONEY—PREFERENCE.

1. Sections 35 and 39 of the bankrupt act of March 2, 1867 [14 Stat. 534, 536], must be construed together, and an assignee is not entitled to any greater rights in respect to recovering back money or other property under the 39th section than he is entitled to under the 35th section.

[Cited in Collins v. Gray, Case No. 3,013; Re Pitts, 8 Fed. 265.]

[Cited in Tyler v. Brock, 68 N. Y. 423.]

2. Where he seeks to recover back money paid with a view to give a preference to a creditor, he must show, in order to entitle himself to recover, that the preference was given within four months before the filing of the petition in bankruptcy.

[Cited in Re Bousfield & Poole Manuf'g Co., Case No. 1,703.]

This was a bill in equity, praying that a judgment rendered in favor of the defendants against the bankrupts [Robert J. Hubbard and Andrew J. Hennion], and all proceedings thereunder, including an execution issued thereon, and a sale of property of the bankrupts on such execution, might be decreed to be null and void, and that the defendants might be required to account for and pay over to the plaintiffs, as assignees of the bankrupts, such sums of money as they had received by virtue of the judgment and the proceedings thereunder. The defendants had a claim against the bankrupts amounting to four thousand six hundred and fifty-four dollars and forty-four cents, with interest from October 18th, 1867. On the 28th of October, 1867, the defendants commenced an action against the bankrupts in the superior court of the city of New York, to recover the said claim. The bankrupts, in pursuance of an agreement to that effect made by them with the defendants, appeared in the suit by attorney, and, without availing themselves of the twenty days delay allowed by law, consented in writing to the entry of a judgment in the suit in favor of the defendants, by serving on the defendants, on the 31st of October, 1867, an offer in writing to allow judgment to be taken for said sum. On the 1st of November, 1867, the offer was accepted by the defendants, and, on the 2d of November, 1867, a judgment was entered and docketed in said court, in favor of the defendants against the bankrupts, for four thousand six hundred and eighty-six dollars and sixty cents, being the amount of said claim and interest and costs of suit. On the same day an execution was issued on the judgment to the sheriff of the city and county of New York. Under that execution and other executions, the sheriff seized certain personal property of the bankrupts, and, on the 14th of March, 1868, sold it and realized for it a sum, out of which the amount of the judgment, with interest from Nov. 2d, 1867, namely, four thousand eight hundred and six dollars and ninety-four cents, was paid to the defendants. The claim on which the judgment was recovered, was one which existed on the 18th of October, 1867. On the allegations in the bill, the bankrupts, at the time of the confession of judgment and of the entry thereof, were insolvent, and the officers of the defendants, they being a corporation, had reasonable cause to believe that the bankrupts were so insolvent, and that the transaction was one in fraud of the provisions of the bankruptcy act. On the 27th of March, 1868, a petition in involuntary bankruptcy was filed, in the district court of the United States for this district, against the bankrupts. On the 17th of April, 1868, they were adjudged bankrupts, and the plaintiffs were afterwards duly chosen to be their assignees. The case now came before the court on a plea put in by the defendants to the bill. The plea did not aver when the property of the bankrupts was seized on the execution, nor did the bill aver when it was so seized. But the plea averred that the execution was levied on the property more than four months before the filing of the petition in bankruptcy. The plea pleaded in bar of the bill the fact that the judgment was entered and execution thereon was issued, and the levy thereunder complained of in the bill was made more than four months before the filing of said petition, and that no part of the property of the bankrupts mentioned in the bill was attached, sequestered, or seized on execution under or by virtue of the judgment, within four months before the filing of the said petition. The plaintiffs did not take issue on the plea, but demurred to it, and the question whether the plea should be held good and allowed, was argued.

James Emott and John McDonald, for plaintiffs.

Charles A. Rapallo, for defendants.

BLATCHFORD, District Judge (after stating the facts as above). The question involved in this case is, whether the plaintiffs can recover, in view of the fact that the property in question was not seized on execution within four months before the filing of the petition in bankruptcy against

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

the bankrupts, although it was so seized within six months before such filing. My attention has not been called to any adjudication in which the point appears to have challenged attention. The case of Graham v. Stark [Case No. 5,676], is, in its facts, an authority in favor of the plaintiffs. The preference to the creditor, in that case, was given within six months before the filing of the petition in bankruptcy, although not within four months, and the preference was set aside on proceedings taken by the assignee in bankruptcy. But the point as to the four months' limitation is not adverted to by the court in its decision, nor does it appear that it was taken by counsel.

I have always regarded it as clear that sections 35 and 39 of the bankruptcy act must be construed together and made to harmonize, and effect be given to every provision in each of them. In this view, and on a consideration of the entire statute, I do not think that an assignee is entitled to any greater rights in respect to recovering back money or other property under the 39th section than he is entitled to under the 35th. Under the 35th section, some effect must be given to the four months' limitation therein prescribed. The second branch of that section, which concerns the six months' limitation, does, in terms, include the transaction in question in this case; and, if there were no such provision in the statute as that found in the first branch of the 35th section, the plaintiffs' right to judgment on the plea, would be clear. But the two branches of the 35th section must be construed together, and a scope of operation given to each of them, if possible. If the second branch, with its six months' limitation, is to be held to cover every case, as well that of a preference to a creditor, as all other cases, the first branch is useless, and might as well have been omitted. But the first branch, which is the partial clause, precedes the second branch, which is the general clause. The first branch provides for the case of a transaction done with a view to give a preference to a creditor or person having a claim against a debtor, or who is under any liability for him. In such case, if the transaction takes place within four months before the filing of the petition in bankruptcy, and the other circumstances specified exist, the transaction is made void. The second branch must be held to be intended to provide for any disposition of property that is not provided for by the first branch, that is, for any disposition that does not give such a preference as the first branch provides for. But, whenever a case falls within the first branch, it must, although it may also be in terms within the second branch, be tested as to its validity and as to the limitation of time prescribed, exclusively by the provisions of the first branch.

It results, from these views, that the plea must be allowed, and the bill be dismissed, with costs.

HUBBARD (ATKINSON v.). See Case No. 612.

Case No. 6,815.

HUBBARD v. BANK OF UNITED STATES et al.

[5 Hunt, Mer. Mag. 75.]

Circuit Court, S. D. New York. June, 1840.

CORPORATIONS—STOCK—TRANSFER—PURCHASER AS LEGAL OWNER BEFORE TRANSFER—ATTACHMENT.

[1. The court will compel a bank to permit a transfer of shares of its stock to be made upon the proper books to the rightful owner, regardless of the by-laws on that subject.]

[2. A purchaser of bank stock becomes its legal owner on its full sale to him, without waiting the formal transfer on the books of the bank.]

[3. Trustees in an attachment suit, who unsuccessfully contest a transfer of bank stock on the books of the bank on the ground that the sale by the debtor was fraudulent as to the attachment creditor, are liable for costs.]

[This was a bill in equity by Amos H. Hubbard against the Bank of the United States and others, to compel a transfer of bank stocks on the bank's books.] The points presented by the pleadings and proofs are, in substance, that James Lanman, of Norwich, Connecticut, had invested funds belonging to the separate estate of his wife in the stock of the Bank of the United States, intended to be reserved for her separate use, but, for convenience of transfer and drawing dividends, the shares and scrip were taken in the name of James Lanman and his wife jointly. That on the 1st of September, 1834, the complainant purchased of Lanman and wife one hundred and fifty shares of said stock, at Norwich, paying $119 per share therefor, and received the necessary power of attorney and authority for having a transfer made to him on the books of the bank. Application was made the next day at the agency of the bank in New York, to have the transfer perfected; but some slight informality in the papers required their being sent back to Norwich and rectified, before the bank would act upon them, and they were not presented in due form until the 6th of September, on which day 125 shares were transferred to the complainant; but the scrip for the remaining 25 shares not being found in the agency where it was supposed by the complainant to have been deposited with the 125 shares, the bank deferred the transfer of those shares until the scrip should be produced. It was subsequently found, on search, in possession of Lanman, at Norwich, and was immediately transmitted to New York, with intent to complete the transfer. On the 6th of September, 1836, an attachment was sued out conformably to the laws of the state,

against the property of James Lanman, as a non-resident debtor; and, at two o'clock in the afternoon of that day, notice thereof was served on the bank, and the said twenty-five shares of stock were claimed under the attachment. The trustees, when appointed, demanded the assignment of the stock to them; but the bank declined making it, because it was claimed by the complainant under his purchase; and on the presentation of the scrip, subsequent to the attachment, the bank declined making the transfer on the books to the complainant, because of the pendency of such attachment.

Goddard & Staples, for complainant, insisted that the sale of the stock was complete; and vested the property in the complainant before the attachment issued. That if the sale was insufficient to pass the property, without being accompanied by a transfer of the shares on the books of the bank, yet that it was not subject to attachment for the debts of Lanman, having been purchased with the separate funds of the wife, and held for her use under her marriage settlement.

Mr. Bonney, for trustees, contended that the stock was the property of James Lanman, and subject to the claims of his creditors prior to the first of September, and that the alleged sale to the complainant on that day did not pass the property so as to prevent the attachment arresting it for the benefit of all his creditors,—a transfer on the books of the bank being an indispensable requisite to the completion of a sale. That the sale was palpably a family arrangement (the complainant being Lanman's son-in-law), with a view to rescue this fund for the use of Lanman and wife, and was therefore fraudulent, as against his creditors.

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

THE COURT remarked that there was no proof to support the allegation that the purchase by the complainant was collusive or fraudulent with respect to the creditors of Lanman. The controversy, then, was between a bona fide purchaser and the attachment creditors, and it turned exclusively upon questions of law. The rights and interests of proprietors or stockholders in banking companies pass by assignment, and no other formality is requisite to vest the full property therein, in a purchaser. 2 Cow. 770; 11 Wend. 627; 6 Pick. 324; 8 Pick. 90; 9 Pick. 202; 10 Pick. 422. The existence of by-laws of the bank prohibiting any transfer of stock, except upon the books of the bank, affects only the corporation or individual corporators, and cannot control the rights of third parties. An assignee becomes absolute owner of the stock without observing that method of transfer, and notwithstanding any prohibitory by-law. The by-law will be allowed to operate no further, as against third parties, than to protect liens of the corporation upon the stock existing previous to its sale or assignment. Although the purchaser acquires the full property of the stock by sale and assignment, yet, to give him every beneficial enjoyment of it (the right of a corporator, for instance), it may be necessary that it should be transferred to his name at the bank; and, if the bank refuses to give him that benefit of his purchase, a court of chancery will compel it to open its transfer books and register the assignment in his behalf. [Mechanics' Bank of Alexandria v. Seton] 1 Pet. [26 U. S.] 299; 16 Mass. 101. These two considerations determine the case in favor of the complainant, and entitle him to the decree he prays for. And the court observed it was not therefore called upon to decide whether the stock is protected from attachment as the sole property of Mrs. Lanman, but that it saw no reason to doubt, upon the proofs, that Mrs. Lanman had a right to hold this property exempt from the debts of her husband, or that a court of chancery might, in the form of proceeding, interpose its guardianship over her interests, and preserve them from the attachment of his creditors. 5 Johns. Ch. 464; 6 Johns. Ch. 25; Id. 178; Id. 222.

On the question of costs, the court observed that the defendants did not stand in the relation of naked trustees, seeking the direction of the court or submitting themselves to it, but were litigant parties contesting the complainant's right, and maintaining the permanent right of creditors. Whether they are personally interested in these debts would not vary the case, because they must be regarded as acting under a guaranty, or as assuming this adversary attitude at their own hazard; and it is no less meet in equity than at law that they should bear the expenses created by a resistance to the rights of the complainant, found on examination not to be well founded. Decreed accordingly that the Bank of the United States transfer to the complainant the twenty-five shares of stock mentioned in the pleadings, and that the trustees of the attaching creditors pay the complainant's costs.

HUBBARD (BLACK v.). See Case No. 1,460.

Case No. 6,816.

HUBBARD et al. v. COOLIDGE et al.

[2 Gall. 353.] [1]

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

MARINE INSURANCE—MISREPRESENTATION.

1. If a policy of insurance authorise the ship to stop at a particular port, it is not necessary for the assured to disclose that the ship will call there, although he has information of the fact.

2. The plaintiffs having stated to the underwriters, in answer to some general inquiries, "that they had no knowledge that the ship would call at the Cape, and knew of no motive for calling there," &c.; and no further inquiries being made by the underwriters, this was not a misrepresentation, to avoid the policy.

3. A representation, as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed.

Assumpsit on a special policy of insurance. The policy, reciting that the plaintiffs were jointly interested in the cargo of the ship Monticello, and the defendants in the cargo of the brig Reaper, on a voyage from Calcutta to the United States, and that the parties were of opinion, that the premium required by underwriters was greater that the risk, for the purpose of dividing the risk, stated the agreement as follows: That the plaintiffs should pay to the defendants $1000, if the Reaper should be lost in the said voyage by any of the perils usually expressed in policies of insurance, provided the Monticello should arrive at a port of discharge in the United States; and that the defendants should pay to the plaintiffs the like sum, if the Monticello should be lost in the voyage, by any of the like perils, provided the Reaper should arrive at a port of discharge in the United States. The parties further agreed, that the vessels' stopping at the usual places of refreshment should not be deemed a deviation; nor should either party be liable, if the vessel of the other party should be seized before leaving the anchorage in Calcutta; nor for any partial loss or damage, but only for a total loss, actual or constructive, according to the law of insurance. The declaration alleged a loss by capture, and by perils of the seas. Upon the trial it appeared in evidence, that the plaintiffs, who reside in New York, employed their agent to effect the policy with the defendants and other shippers in Boston, and that policies were finally effected, on the 19th of January, 1813, in the same form, to the aggregate amount of $10,000. During the negotiation, various propositions passed between the parties, and various letters between the plaintiffs and their agent. In the first letter of the plaintiffs (29th December, 1812) to their agent, proposing the insurance, it is stated, that the ship Monticello was to sail from Calcutta in all August, agreeably to a letter of the captain, of the 14th of July; that by information the Reaper was to sail in September or October; that they wished the insurance to be effected with a warranty against a knowledge of war in Calcutta, and permission given for the vessels to stop at the Cape and St. Helena. These instructions and statements were shown to the underwriters. The letter from the captain, of the 14th of July, 1812, after stating the proceedings of the voyage, and the general expectation at Calcutta, that a war had taken place, or would take place, between Great Britain and the United States, and that no insurance, owing to that expectation, could be effected there, proceeds, "Let the insurance be at and from Calcutta to New York, with the privilege of stopping at the Cape and at St. Helena;" and again, "I shall proceed from this directly to New York, the stoppages before alluded to excepted;" and afterwards he adds, "I may not stop at either of the above places, of course there will be a return premium. I shall sail in all August." In another letter of the plaintiffs to their agent (13th of January, 1813) the purport of this letter was stated in answer to some general inquiries made by the request of the underwriters. There was contradictory testimony as to the fact, whether this letter was communicated to the underwriters or not. The Monticello sailed in August from Calcutta, went into the Cape of Good Hope, as it was alleged, in distress, and was there seized as prize of war, and finally, on the 7th of July, 1813, was condemned. Due notice of the loss was given to the underwriters. It was admitted, that the Cape and St. Helena were usual places of refreshment in the voyage. The defence, at the trial, turned on two points: (1) That there was a concealment of the purport of the letter of the 14th of July, material to the risk, inasmuch as it disclosed an intention of stopping at the Cape, by which condemnation would have become almost inevitable. (2) That there was a misrepresentation of material facts and information in the possession of the plaintiffs, which had been called for by the underwriters.

W. Sullivan and Mr. Hubbard, for plaintiffs.

Prescott & Gorham, for defendants.

STORY, Circuit Justice (after summing up the facts, and advising the jury to find a verdict for the plaintiffs on the facts, if they were satisfied that there had been no concealment or misrepresentation), proceeded: If, on the point of concealment, the jury are satisfied, that the substance of the letter of the 14th of July was not communicated to the underwriters, and that it would have materially enhanced the premium, it becomes my duty to declare the law applicable to this point. It is incumbent on

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

the assured to disclose all facts in his possession material to the risk, which are not contained or implied in the policy itself. But he may be innocently silent as to facts, which the policy necessarily imports. If the policy authorized the ship to stop at a particular port, it is not necessary for the assured to disclose, that the ship will call there, although he has information of the fact. The underwriter, in such a case, takes upon himself the chance of her stopping; and he cannot but know, that the permission to stop implies a chance or probability of its being done, and he estimates his risk accordingly. If he want further information, he is bound to ask for it: and if he waive any inquiry, he cannot reasonably complain, that the calling at such port was not estimated in his risk. Suppose, at the present time, a policy from Boston to any port in France; the assured need not disclose to what port he intends sending his ship, although in consequence of the Algerine war, the risk to a port in the Mediterranean might materially enhance the premium, beyond that to a port in the Atlantic Ocean. If the underwriter sign the policy without inquiry, he agrees that the ship may go to any port, which the assured may elect. It would be a different thing, if the assured fraudulently misrepresented the port of destination. Seton v. Low, 1 Johns. Cas. 1.

The present case, however, does not require so strong a principle. The concealment is stated to consist in the non-disclosure of the contents of the letter of the 14th of July. That letter does not disclose a decided intention to call at the Cape or at St. Helena. It merely requires, that the insurance should include a permission to stop at these ports without any absolute determination, one way or the other. It seems to have been a measure of extreme caution, to guard against possible events. As the defendants allowed the permission to stop at these ports, I am entirely satisfied, that the non-disclosure of the letter of the 14th of July was not such a concealment, as could, in point of law, avoid the policy. If, therefore, the concealment be made out, the plaintiffs are, notwithstanding, by law entitled to a verdict on this point.

But it is argued, that the underwriters did call for information, and it was not truly given. The call was very general; and when the answer was given, it was not complained of, as not sufficiently precise and special. If dissatisfied, the underwriters were bound to make further inquiries, and to point out the deficiencies, and not lie by until after a loss, when the assured is no longer able to save himself. General answers are sufficient to general inquiries; and if the underwriters do not insist upon more exact information, they waive the benefit of it; and this applies more strongly in cases, where the questions are not so explicit, as to point to any definite facts. Where the underwriters call for information on a particular point, the assured is bound to answer truly. If he misrepresent a material fact, or give it a false coloring, by design or by accident, it is fatal to the policy. Representations as to the destination of the ship, however, have been thought susceptible of a distinction. It has been held, that such a representation, if not fraudulently made, does not avoid the policy. If true at the time, it is sufficient, although another destination should ultimately be given; for the assured in effect says, this is my present intention or expectation, but I reserve a right by the policy to go to other ports. Bize v. Fletcher, Doug. 271, Park, Ins. 270; Marsh. Ins. bk. 1, p. 459, c. 10, § 2; Vandervoort v. Smith, 2 Caines, 155.

In the present case, there is not the slightest pretence, that the plaintiffs fraudulently misrepresented the destination of the ship. The supposed misrepresentation consists in the plaintiffs' having affirmed, that they had no knowledge, that the ship would call at the Cape, and knew of no motive for calling there, and thought, as rumors of war existed at Calcutta, it would be madness in the captain to call at the Cape; whereas the defendants contend, that the letter of the 14th of July clearly showed an intention to call there. I have already stated what is my construction of that letter. The jury will consider, whether it is possible to give it any other reasonable construction. If that letter was disclosed, there is an end to the defence. If it was not, it seems to me very difficult to maintain, that the plaintiffs have falsely interpreted it.

The jury gave a verdict for the plaintiffs, and found specially, that the letter of the 13th of January, 1813, (which substantially stated the contents of the letter of the 14th of July) was shown to the underwriters.

HUBBARD (MILLER v.). See Case No. 9,574.

Case No. 6,817.

HUBBARD et al. v. MORGAN et al.

[1 Betts, C. C. MS. 6.]

Circuit Court, S. D. New York.[1]

CERTIFICATE OF SPECIAL PARTNERSHIP—ACKNOWLEDGMENT—WHEN SPECIAL PARTNER LIABLE AS A GENERAL ONE.

[1. The recorder of the city of New York is a judge of the county court within the contemplation of the New York statute respecting special partnerships, and the certificate is properly acknowledged before him.]

[2. Where the names of all the partners are correctly given in a certificate of special partnership, the use of the words "and Company" in the firm name, as a collective appellation to designate the persons specifically named, does not render a special partner liable as a general partner.]

[1] [The report of the case in the district court, as contained in Hunt, Mer. Mag. 246, is embodied in the statement of facts herein.]

[At law. Assumpsit by Elijah T. Hubbard and Henry T. Carrington against Edward M. Morgan, William H. Jessup, Henry T. Morgan, and Knowles Taylor to recover a balance of account of $10,179.75. Heard on motion for a new trial on case. Plaintiffs resided and did business in the state of Illinois, and the transaction out of which the alleged liability arose was had with the firm of Edward M. Morgan & Co. Defendant Taylor had put $75,000 into the firm of Edward M. Morgan & Co. as a special partner, and set up such fact in defense of the action. The court below (BETTS, District Judge) decided that the recorder of New York was not a judge of the county court, within the contemplation of the state act, respecting special partnerships, and accordingly the certificate of special partnership acknowledged before him was not executed conformably to the act; and also that the use of the term "and Company," in the name of the firm, rendered Taylor a general partner, and a verdict was accordingly rendered. Taylor appealed.]

PER CURIAM. It being understood that the highest court of the state has recently decided in effect that the recorder is a judge of the county court, we shall follow that decision, and accordingly hold the certificate to have been properly acknowledged.

On the second point, we think that as the names of all the partners were correctly given, and the "and Company" was not intended to and did not import that any other person was a member of the firm, but was only a collective appellation for those specifically named, that the use of those terms does not render Mr. Taylor a general partner. A new trial ordered.

Case No. 6,818.

HUBBARD et al. v. NORTHERN R. CO. et al.

[3 Blatchf. 84; [1] 25 Vt. 715; 17 Law Rep. 316.]

Circuit Court, D. Vermont. Oct., 1853.

CIRCUIT COURTS—JURISDICTION—REMOVAL OF CAUSES.

1. The circuit courts of the United States have no jurisdiction, and, of course, cannot exercise any, but such as congress, by legislative acts warranted by the constitution, has conferred upon them.

[Cited in Harrison v. Hadley, Case No. 6,137.]

[Cited in Beery v. Irick, 22 Grat. 488.]

[See Baker v. Biddle, Case No. 764.]

2. Where one of the two plaintiffs in a suit originally commenced in a state court, and removed by the defendant into this court, under the 12th section of the act of September 24, 1789 (1 Stat. 79), was a citizen of New Hampshire, and the other was a citizen of Vermont, and the defendant was a citizen of New York: *Held*, that this court had no jurisdiction of the case; that it could not be removed into this court; and that it must be remanded to the state court.

[Cited in Fisk v. Henarie, 32 Fed. 422.]

3. To authorize the removal, all the plaintiffs must be citizens of the state in which the suit is brought, and all the defendants must be citizens of some other state or states.

[Cited in Sands v. Smith, Case No. 12,305; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., Id. 4,883.]

4. The erection of the supreme and inferior courts of the United States, under the constitution of the United States, considered.

These were actions at law, originally instituted in a state court, and were removed into this court by the defendants [the Northern Railroad Company and trustees], under the 12th section of the act of September 24, 1789 (1 Stat. 79). The plaintiffs [Henry Hubbard and Solomon Downer, administrators of S. F. Belknap] now moved to dismiss the actions, and remand them to the state court, for want of jurisdiction in this court.

Julius Converse, for plaintiffs.

Samuel S. Phelps and Lucius B. Peck, for defendants.

PRENTISS, District Judge. The judicial power of the United States is, by the constitution, vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. And here I cannot forbear saying, what is naturally suggested to the mind by this reference to the constitution, though it may have no direct or immediate bearing upon the particular matter in question, that the more closely any one studies the constitution of the United States, and the greater his experience and opportunities of observation in civil life, the more he will be brought to admire the wisdom, the sagacity, and the enlightened patriotism of the authors of that instrument. None of its provisions present higher evidence of intelligence, judgment, and inflexible devotion to principle, than those concerning the judiciary—giving it, as they do, a limited, yet adequate, jurisdiction, extending to, but not going a jot beyond, what the wants, necessities, and exigencies of the government of a nation, formed by a union of states, retaining in severalty a distinct but qualified sovereignty, require, with a tenure of office during good behavior, determinable only by misconduct—thus securing, as far as any organic law can do, consistently with subjection to just responsibility, that independence of opinion and action which is indispensably requisite to preserve rectitude, impartiality, and firmness in the administration of justice.

Under and pursuant to the constitution, congress, besides a supreme court, has established certain courts inferior to that court, called and known as the circuit and district courts. In erecting these courts, congress might have given them such jurisdiction as it thought proper, keeping within the limits prescribed in the constitution. It might

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

have vested in the circuit court, for instance, more or less of the judicial power of the United States, not by the constitution vested originally or exclusively in the supreme court. It has given it not all it might have given it under the constitution, but a limited and restricted jurisdiction. By the constitution, the judicial power of the United States extends, for example, in general terms, to "controversies between citizens of different states;" but, by the act of congress, the circuit court cannot take jurisdiction of all such controversies, but only of those where the matter in dispute exceeds the sum or value of five hundred dollars. So, also, the jurisdiction is subject to restrictions in other respects; such, for instance, as the residence of one of the parties in the district where the suit is brought. The result, therefore, is that this court has no jurisdiction, and, of course, cannot exercise any, but such as congress, by legislative acts warranted by the constitution, has conferred upon it.

The plaintiffs are joint administrators, under letters of administration granted by a court of probate in this state, the intestate having had his domicil here. One of the plaintiffs, Hubbard, is a citizen of New Hampshire; and the other, Downer, a citizen of this state. The defendant is a corporation, created, established, and performing its corporate functions in New York. The suits were regularly commenced in the state court, according to the laws of the state, service being made upon the defendant, in one case, by attaching a large amount of personal property; and, in the other, by attaching personal property and also certain debts owing the defendant by certain persons summoned in as trustees.

The language used by congress, in providing for and regulating the removal of causes, at the instance of the defendant, from a state court to the circuit court, is not the same, in reference to the character or residence of the parties, as that employed in suits originally brought in the circuit court. There is a marked difference, in the particular mentioned, in the phraseology of the two provisions—one being much more restrictive than the other. In that giving original jurisdiction, the words are, "where the suit is between a citizen of the state where the suit is brought, and a citizen of another state." In that giving jurisdiction of suits originally commenced in a state court and regulating their removal, the words are, "commenced by a citizen of the state in which the suit is brought, against a citizen of another state." Of course, jurisdiction, which is excluded, in both classes of cases, where neither party is a citizen of the state in which the suit is brought, is not coextensive, in the latter class, with that in the former; for, no suit, for instance, commenced in a state court by a citizen of another state, against a citizen of the state where the suit is brought, can be removed to the circuit court, although it might have been originally brought there. But the difference between the two provisions, so far as concerns the single isolated question here presented, is not material, the construction, in that particular, being alike as to both.

If Downer were the sole plaintiff in these actions, he being a citizen of this state, and the defendant resident in New York, the cases, it is obvious, would be within the very terms of the act of congress; but, if Hubbard were the sole plaintiff, he not being a citizen of this state, the cases, it is equally obvious, would not be within the act. The question, therefore, simply is, whether, there being two plaintiffs, it is sufficient, to bring the cases within the provisions of the act of congress, and give jurisdiction, that one of the plaintiffs is a citizen of this state, or whether it is necessary that both should be.

Though there may be no adjudged case exactly in point, upon this particular provision of the act, there are several cases upon the provision relating to original jurisdiction, which, from just analogy, would seem to decide the present question. In the case of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, where the plaintiffs below brought their suit in the circuit court for Louisiana, one of them being a citizen of the state of Kentucky, and the other a citizen of the Mississippi territory, it was held, that a citizen of a territory cannot sue a citizen of a state in the courts of the United States, nor can those courts take jurisdiction by other parties being joined who are capable of suing. Marshall, C. J., after stating that Winter, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the circuit court of Louisiana, asks: "Is this case mended, by being associated with others who are capable of suing in that court?" And he decides the question, by saying: "In the case of Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, it was decided, that, where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction." The sum of the matter seems to be, that in every case brought before a circuit court by original process, each of the persons prosecuting must be competent to sue, and each of the persons defending must be liable to be sued, in such court. Here, one of the plaintiffs as well as the defendant, residing out of this district, it is quite evident that the cases between these parties, though between citizens of different states, are not of a character to be within the original cognizance of this court, and, of course, could not have been instituted therein.

From the rule so laid down at an early day, and thus reconsidered and re-affirmed at an after period, in respect to the jurisdiction of suits originally brought in the circuit court, it must follow, unless a distinction be made where there is no perceptible ground

of difference, that the jurisdiction cannot be sustained in the case of a suit originally commenced in and removed from a state court, unless the citizenship of each individual be such as to make the suit removable, and thus subject him to such jurisdiction. According to the rule, the local residence of all the parties on each side must be such as to bring the case within the provision of the act of congress regulating the removal; that is, all the parties plaintiffs must be citizens of the state in which the suit is brought, and all the parties defendants citizens of some other state or states.

Such appearing to be the construction, not only authorized but called for, by determinations of the highest judicial authority, it forms the law for the decision of the question here pending; and, according to it, one of the plaintiffs not being a citizen of this state, this court has not jurisdiction. The consequence is, that the motion to dismiss must be allowed, and the causes be remanded to the state court.

NOTE [from 17 Law Rep. 316]. It was clearly seen, by the great men who conceived and framed the constitution of the United States, that without a national judiciary, existing under and deriving its authority solely from the national government, with powers commensurate with, but not exceeding, the great purposes and objects of the Union, the government would have neither efficiency nor stability, and would soon perish for want of power in itself to enforce obedience to its laws, and hold the people, and through them the states, in just subordination to the paramount national authority. It was considered indispensable to have a judiciary, to take cognizance not only of all suits and prosecutions in behalf of the general government, or arising under its laws, but of controversies between citizens of different states, and especially of all controversies between states arising out of adverse or interfering state claims, thereby securing a peaceful determination of what might otherwise grow into forcible collisions and conflicts; and also for protection to every citizen of the Union against all unconstitutional invasions of his rights, either by acts of legislation prohibited to the states, or by unauthorized legislative action of the general government.

It was also held, and acted upon as an undeniable proposition, that, to maintain the constitution itself in its true spirit and meaning, and secure a just and faithful performance of judicial duty, in all questions arising under the constitution and laws, or affecting individual private rights, it was not only expedient and judicious, but essentially necessary, to make the judiciary independent,—independent as provided in the constitution,—by elevating the judges, as far as practicable, above and beyond the reach of governmental, popular, or sinister influences. It was seen that if you make the continuance in office of a judge dependent on reappointment or re-election, at short stated periods, you so much lessen or impair his independence; and that just in proportion as you do that, you diminish your security for his good behavior. At the same time it was seen, what more than 60 years' experience has proved to be true, that, as the judges neither would have nor could exercise any power otherwise than through the decision of controversies brought judicially before them, between party and party, there could be no danger whatever, either to the state or the people, from such independence of position, and consequent independence of opinion and action.

The principle of judicial independence, and the reasons on which it is founded, apply, in their utmost force, to all free representative governments. If in favorable times, and under peculiarly favorable circumstances, a dependent judiciary may be both able and upright, as in Vermont, for instance, for many years, much to her credit, as well as advantage, it raises no doubt as to the superior wisdom and safety of a more permanent tenure of office. The instance mentioned is, at the most, but an exception, and is owing chiefly to the steady, uniform political character of the state, to the habit prevailing in it of never allowing the judicial appointments to be controlled by party politics, and to the commercial pursuits and interests of the people being of such limited extent as to make the suits in its courts in general of comparatively small magnitude. But there, as everywhere else, it would be both wiser and safer to have the independence of the judiciary such as to place it, not only beyond the reach, so long as its ministers conduct themselves with integrity, of either of the other powers of government, but also beyond the possible reach of popular and personal influence.

In general, notwithstanding all the formal guaranties of a written constitution, if the judge be not thus independent, what assurance or confidence can the citizen have of impartial justice, or of certain and effectual protection from unjust and unconstitutional violation of his rights? If the liberty of speech, or of the press, be assailed; if the writ of habeas corpus be suspended in time of peace; if the trial by jury be invaded; if the obligation of contracts be impaired, or vested rights infringed; if the citizen be deprived of his liberty, or of his property, or if his life be unconstitutionally put in jeopardy,—where is the remedy, or who is to stay the hand of oppression? The only remedy is in the courts of justice; and without an independent judiciary—independent in the proper sense—it would be hopeless to think of maintaining the provisions of the constitution for the security of these and other private rights, in their full vigor and efficacy, according to their true legitimate meaning, or of their having any settled, fixed, and uniform operation. Indeed, with a dependent, or, in other words, a time-serving and temporizing, judiciary, the constitution would either cease to be the supreme paramount law, or, what would be same in effect, would be made to mean, in all parts most essential to the security of the citizen, just what the legislative power, or popular opinion for the time being, might be disposed to have it.

HUBBARD (PAGE v.). See Case No. 10,663.

HUBBARD v. PROCEEDS OF THE KATE HINCHMAN. See Cases Nos. 7,620 and 7,621.

Case No. 6,819.

HUBBARD v. TURNER et al.

[2 McLean, 519.] [1]

Circuit Court, D. Illinois. June Term, 1841.

EQUITY—PRACTICE—ANSWER—CROSSBILL—FRAUD—ASSIGNMENT OF MORTGAGE—RIGHTS OF ASSIGNOR AND ASSIGNEE—NOTICE—SETOFF.

1. Fraud must be clearly proved.

2. A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor.

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

3. Although there may be an equitable lien on the mortgaged premises, yet the assignee having no notice of it is not affected by it.

4. Generally the mortgagor may claim the same rights against the assignee of a mortgage as against the mortgagee.

5. If the mortgagor have a setoff or mutual credit against the mortgagee it is not affected by the assignment.

6. A payment made to the mortgagee, after the assignment but before the mortgagor has notice of it, is good against the assignee.

7. The statute of Illinois, however, places bonds and mortgages and every description of instrument, for the payment of money, or property on the same footing as bills of exchange.

8. Under the statute of Illinois a declaration of trust not recorded is inoperative.

[Cited in Oregon Trust Co. v. Shaw, Case No. 10,556.]

9. A mortgage on a large amount of property, for the payment of ninety thousand dollars, where but four thousand dollars were due to the mortgagees, is fraudulent, as against creditors. And these facts are sufficient for the exercise of an equitable jurisdiction.

10. It is not the English practice to set up a matter in the answer, which shall have the effect of a crossbill. And our practice is derived from that of the high court of chancery in England.

In equity.

Morris & Thomas, for complainant.

Mr. Butterfield, for defendants.

OPINION OF THE COURT. On the 19th April, 1836, the complainant for himself and others entered into two contracts with the defendant, Turner, for the sale of certain property in and near the city of Chicago, in this state. In one of the contracts the complainant, for himself and as attorney in fact for Samuel Russell, entered into a penal bond for the conveyance of certain lots in Chicago, to wit—for the consideration of eight thousand seven hundred and fifty dollars, the complainant in his own right sold to Turner lots seven and twelve, on the north side of the Chicago river, in Kinzie's addition to the original town plat. And as agent for Samuel Russell, for the consideration of twenty six thousand two hundred and fifty dollars, the complainant sold to Turner lots one, eleven and twelve, in block seventeen, and eleven and twelve, in block sixteen, ten and eleven, in block two, seven in block five, lying north of the river and within Kinzie's addition to the original town plat. Deeds with general warranty were to be made for the above lots on the payment to the complainant in his own right, and as attorney in fact for Russell, as follows: "Five thousand dollars down; the same amount by a draft on the Otsego Bank of New York, payable the first of June ensuing; and the residue of the purchase money, being twenty five thousand dollars, was to be paid in three equal instalments—in six, twelve, and eighteen months—for which three promissory notes were executed by Turner, payable to the order of the complainant." In the other contract a like penal bond was entered into by the complainant in his own right, and as attorney in fact for William H. Brown and William W. Saltonstall. The bond recited that the complainant had sold to the defendant, Turner, for the sum of seventeen thousand dollars, lots six, in block twenty nine, near the junction of the north and south branches of the Chicago river, within the original plat of the town; two, four, eight, twelve and sixteen, in the subdivision of block fourteen by Arthur Bronson. And, as agent for William H. Brown, for the consideration of thirty thousand dollars, the complainant sold to the defendant, Turner, one half of eighty acres, being the east half of the northeast quarter of section seventeen in said town, known as Duncan's addition to Chicago. And, as agent for Saltonstall, for the sum of seven thousand dollars, lot eight, in block forty four, within the original town plat.

Deeds of general warranty were to be made for the above on the payment to the complainant in his own right, and as agent for Brown and Saltonstall, ten thousand dollars down, seven thousand dollars on or before the twentieth of June next ensuing, fifteen thousand dollars on the twentieth of October ensuing, twelve thousand on the first of April ensuing, and the remaining ten thousand dollars, making in all the sum of fifty four thousand dollars, the nineteenth of October eighteen hundred and thirty seven. Four promissory notes were executed by Turner in accordance with the above agreement. On the same 19th April, 1836, the complainant entered into an agreement with the defendant, Turner, in which the lots purchased, amounting to fifty four thousand dollars, were recited in consideration of which, the sum of fifty dollars, and the per cent. commission and profit stated, did covenant with the defendant, his heirs and assigns, "to guaranty, warrant and insure to him, his heirs and assigns, that he and they shall realize and receive one hundred per cent. advance in eighteen months from that date from, and upon, said purchase money for all the property above mentioned, viz—upon the sum of fifty four thousand dollars." For this guaranty and insurance the defendant, Turner, his heirs, &c., agreed to pay to the complainant ten per cent. upon the amount which he or they should realize for the sale of the seven lots above stated, purchased for the sum of twenty four thousand dollars. And twenty per cent. upon the amount realized on the sale of the individual moiety of Duncan's addition, purchased at thirty thousand dollars. Turner, also, agreed to pay the complainant three thousand five hundred dollars; and, also, one half of all he should realize for the sale of the above lots, over one hundred and eight thousand dollars. And the defendant became bound not to sell any part of the above property for less than one hundred per cent. advance on the purchase money.

On the 6th July, 1837, the complainant,

and the defendant, Turner, entered into a new agreement which materially changed their former contracts. At this time the defendant had paid, including interest, the sum of forty five thousand two hundred and twenty six dollars on the fifty four thousand dollar contract, leaving the sum of ten thousand dollars only, with interest, unpaid; and which was not due until the nineteenth of October, ensuing. On the other purchase, of thirty five thousand dollars, there had been paid the sum of eighteen thousand six hundred and sixty two dollars, which included interest, leaving a note unpaid for eight thousand nine hundred and seventeen dollars fifteen cents, which was due the 19th of April preceding; and a note for nine thousand two hundred seven dollars and ninety five cents, which would fall due the 19th of October, ensuing. On both contracts the sum of sixty four thousand and eighty eight dollars seems to have been paid by Turner. And he was in default only for the payment due the 19th April, as above stated. Up to the time of the new arrangement, the principal matter in controversy between the parties, seems to be as to the effect of the contract of guaranty.

On the part of the complainant it is contended that under the guaranty, the defendant was bound to make the payments as they became due on both contracts; and having failed to do so, he can claim nothing under the guaranty. That the contract of guaranty was usurious and fraudulent, and consequently void. Whether the guaranty was usurious or fraudulent will hereafter be considered; but it is clear that it referred only to the fifty four thousand dollar contract. The property sold by that contract is named in the guaranty, and, also, the sum agreed to be paid; and in consideration of that purchase and the commissions allowed, on double the amount of the purchase money, the contract of guaranty was entered into. It had no reference to the other contract or to any payments to be made under it. So far then as regards the conditions of the guaranty, the defendant was in no default on the 6th July, 1837, when the new contract was made. The allegation in the bill that the payment of twelve thousand dollars was not made on the 1st April, 1837, when it became due, is denied by the answer, and is not sustained by the evidence. As to the terms of the new contract the bill and answer are at issue. Prior to this time it is admitted that no part of the property, specified in the fifty four thousand dollar contract, had been conveyed to Turner. The conditions of the guaranty contract were assumed, in part, as the basis of the compromise. Hubbard agreed to account to Turner for the sum of one hundred and eight thousand dollars, that being the amount of the fifty four thousand dollar purchase, and one hundred per cent. added thereto. To make up this sum, commissions were allowed and the premium of three thousand five hundred dollars, agreeably to the guaranty contract, which amounted to the sum of twenty thousand three hundred dollars. And conveyances were made to Turner of the Hubbard square and the Lake House property, in Chicago, for the consideration of fifty thousand dollars. A bond and mortgage were, also, executed by Hubbard for the payment of twenty six thousand seven hundred dollars, in five years, with interest. The aggregate of these amounts is the sum of ninety seven thousand dollars, leaving a balance of eleven thousand dollars due. And the parties differ as to the manner in which this balance was paid.

On the part of the complainant it is contended, that it was paid by an allowance of three thousand dollars for settling the guaranty before it was due, and the consideration of eight thousand dollars for fifteen acres of land near Peru. By Turner it is insisted the balance was paid by deducting the ten thousand dollar note and interest, due in October, 1837, on the fifty four thousand dollar contract. The defendant admits that by the compromise he agreed to pay the two notes unpaid, under the thirty five thousand dollar contract. As above stated, one of these notes was for the sum of eight thousand nine hundred seventeen dollars and thirty eight cents, which was due 19th April, 1837. The other was for the sum of nine thousand two hundred seven dollars and ninety five cents, payable the 19th October, 1837, making the aggregate sum of eighteen thousand one hundred twenty six dollars and thirty cents. From this sum the defendant states several sums were deducted, which, upon balances of accounts, &c., the complainant owed him, which reduced the amount due to the complainant under the compromise, to the sum of sixteen thousand three hundred eighty two dollars and twenty nine cents. And four drafts were drawn by Turner in favor of complainant on Huntington & Campbell and J. P. Huntington, of New York, amounting to this sum. But the complainant insists that, in addition to the two notes above specified, the defendant agreed to pay the ten thousand dollar note, which would fall due in October, under the fifty four thousand dollar contract. And it appears, at the time of the compromise, the defendant drew in favor of the complainant, on the Hon. Daniel Webster, for ten thousand dollars, payable in ninety days, at the Merchants' Bank in New York. But this draft the defendant insists was a loan to the plaintiff, and not a payment under the compromise. The complainant, also, alledges that, as a part of the consideration of the compromise, the defendant loaned him twenty thousand dollars, to be obtained from Mrs. Coultis, which were never obtained; and that in this, as also in his representations respecting the solvency of Huntington and Campbell, and the certainty of the drafts which he drew

on them, and on J. P. Huntington's being punctually paid, the defendant was guilty of fraud.

In this part of the case three inquiries seem to arise: First: Was the draft on Mr. Webster a loan? Second: In what manner was the sum of eleven thousand dollars paid, by the complainant, under the compromise? Third: Was Turner guilty of fraud as above charged?

The defendant, at the time he drew the draft on Mr. Webster, assigned to the complainant, as security for the payment of it, a mortgage given by Hugunin and Pearce for the payment of ten thousand dollars, in ten years from the 27th April, 1837. And Greenwood, a witness, who was the clerk of the complainant, at the time of the compromise, and who kept his books, swears that this draft was given in payment, under the compromise, and not as a loan. Without explanation the fact of security having been given for the payment of the draft would seem to imply, very strongly, that it was a payment and not a loan. But even in this view it would be somewhat singular that security for the payment of this draft only should be required. The explanation, however, is found by a reference to the conditions on which the assignment of the above mortgage was made. The instrument declares that the assignment of the mortgage was "to secure the following payment, and upon the following condition, viz: To secure the payment of a draft upon the Hon. Daniel Webster, &c., and upon this condition, that the said Hubbard shall execute, with his wife, at or before the maturity of said draft, either a warranty deed of fifteen undivided acres of land in eighty acres, being in section ten, near the termination of the canal from Chicago to Peru, Illinois; being the same fifteen acres of land he now owns; or shall, within said time last mentioned, execute, as aforesaid, a bond and mortgage to said Turner, for the payment of ten thousand dollars in eight years from the maturity of said draft, with annual interest, at seven per cent. Said mortgage to be upon unincumbered real estate to the satisfaction of said Turner." And Turner was to make his election within thirty days, whether he would take the fifteen acres or the mortgage. Now, if this draft had been given in payment as alledged by the complainant, and sworn to by his witness, would security have been given for the repayment of it? We may imagine why security should be required for the punctual payment of a draft, but if drawn in payment of a debt justly due, there is no possible combination of facts or circumstances which could render necessary a security for its repayment. This would be utterly inconsistent with the fact of payment. If paid in discharge of a just debt, of course it would not be required to be repaid.

On the face of the draft Turner declared that he held himself individually responsible to the said Hubbard or his order, for the payment of it, agreeably to his covenant of that date executed to the said Hubbard. And it appears that Turner wrote to Mr. Webster, the same day the draft was drawn, requesting him not to pay it unless advised by him; as Hubbard was bound to give security for the repayment of the amount before the draft was due. And such is the condition recited above. From the condition it would seem that Turner had his option, whether to receive the Peru land in full for the draft on Mr. Webster, or, a mortgage on unincumbered property, for the payment of ten thousand dollars, and interest, at seven per cent., in eight years from the maturity of the draft. To avoid the condition of this assignment the complainant alledges that it was made on a paper disconnected with the mortgage of Hugunin and Pearce, and when drawn and executed it contained no such condition as it now contains, in regard to the Peru land, and the mortgage for ten thousand dollars in lieu of it, at the option of Turner. And it is alledged that the assignment, being in the hand-writing of Turner, he must have withdrawn it and substituted another with the above condition. This allegation charges on Turner a fraud of a most serious character, and which requires clear evidence to establish it. The answer denies this allegation of the bill. Greenwood, the plaintiff's witness, swears that there was no such condition as the above in the first assignment of the mortgage; but he admits that he was not present when the papers were executed. And Grant, another witness, the attorney of complainant, to whom the papers were submitted, also, states the assignment was without condition. This paper, with others, was acknowledged before Henry Brown, a justice of the peace, on the evening of the 10th of July, and the next morning Turner left the city. All the papers signed by Turner were left in possession of the complainant, this assignment among others, and he shortly afterwards handed them over to the recorder of deeds for the county, who recorded them.

The original assignment, as executed, is in evidence, and is identified and confirmed by the deposition of the justice of the peace before whom it was acknowledged. He took no acknowledgment of papers between Hubbard and Turner except at that time. There is no erasure or alteration on the face of this paper, and it contains the condition as above stated. The inference is, therefore, irresistible, that the witnesses, Greenwood and Grant, are mistaken. And if this paper be genuine, of which there would seem to be no doubt, the draft drawn on Webster was a loan to the complainant and not a payment. The transaction, it must be admitted, is out of the ordinary course

of business, but it is not more so than some other parts of the dealings between the same parties. The draft on Mr. Webster was not paid, nor was the mortgage executed by the complainant to secure its repayment. The answer of this inquiry makes the answer to the second easy, as to the manner in which the sum of eleven thousand dollars was paid by the complainant under the compromise. If the Peru land, at the option of Turner, was to be received for the draft on Mr. Webster, it could not have been applied as stated by Mr. Greenwood, the witness, as a credit of eight thousand dollars against the guaranty contract. The assignment of the Hugunin and Pearce mortgage shows that the draft was a distinct transaction, and was, in fact, a loan; and, if a loan, the Peru land could not have been offered as a discharge of it, if that land had been applied as contended for by the complainant. It must have been as free from the compromise as the unincumbered property on which the mortgage was to be executed, which Turner could demand in lieu of the Peru land. To make up the eleven thousand dollars the complainant charges three thousand dollars in addition to the sum of eight thousand for this land, on the ground that he settled the guaranty contract before it was due. That contract was entered into the 19th April, 1836, and it insured an advance of one hundred per cent. on the fifty four thousand dollar purchase in eighteen months. The compromise was made the 6th July, 1837, so that there was little more than three months of that contract to run. A charge of three thousand dollars for the payment, as settlement of this contract, in the manner in which it was settled, would have been a very extravagant and unjust charge. But the answer denies that any such charge was made by the complainant, or allowed in the compromise. And there is nothing in the evidence, or the circumstances of the case, which can overcome the answer. We are satisfied, therefore, that the payment of eleven thousand dollars was not made as insisted on by the complainant, but was, in fact, made by the application of the ten thousand dollar note, due 19th October, 1837, as set up in the answer of Turner. The interest on that note, up to the time it became due, being added to the principal, made the sum of eleven hundred and fifty dollars. This exceeded, by the sum of fifty dollars, the amount necessary to close the compromise; but this small sum was, probably, disregarded as the note was not due. The calculations seem not to have been made with much accuracy.

We come now to the third inquiry proposed, whether Turner was guilty of fraud. Were his representations in regard to the loan of twenty thousand dollars from Mrs. Ann Coultis fraudulent? The bill so charges. Now, from the evidence this loan seems to have been a transaction subsequent to the compromise. It was then not a part of it. On the 10th of July, 1837, Turner wrote to his father-in-law, Robert Campbell, that Hubbard was anxious to make a loan of twenty thousand dollars, for ten years, at seven per cent.; and, as the security was good, he thought it advisable to loan him, for Mrs. Coultis, the above sum, in case she had got returns, and had not made other disposition of her money. This lady, Turner represented, expected a large sum from England, and would, probably, receive it through Prime, Ward and King, of New York. On the above date Hubbard wrote to Mr. Campbell, saying, that Turner had made a conditional negotiation with him for a loan through Mrs. Coultis. And that if she should determine to loan him the amount, Hubbard requested Mr. Campbell to advise him of the fact. From these letters it appears that Turner did not make the loan, but pledged his influence and agency, so far as he could exercise them, to obtain the money. He did not know that the money had been received from England; and, if received, that it had not been loaned. And Hubbard's own letter shows that he expected to obtain the money only by the determination of Mrs. Coultis, as he requests Mr. Campbell to advise him, should she determine to loan the amount. It seems that Mrs. Ann Coultis received no money from England, and that Prime, Ward and King had not been advised on the subject. Mrs. Coultis had either been deceived herself, or was willing to practice an imposition on others, in regard to the money. But there is no evidence to sustain the allegation in the bill, that the representations, in regard to this loan, were made by Turner with the intent to defraud the complainant. His agency in the matter seems to have arisen from motives of friendship to Hubbard, and not with a view to defraud him. Turner was, no doubt, himself deceived as to the expectations of Mrs. Coultis. Had the loan been negotiated on the security designated, from the depreciation in the price of property, as proved in this case, Turner, with more propriety, might have been charged with a fraud against Mrs. Coultis. This part of the bill is not sustained. Strong representations were made by the defendant as to the solvency of Huntington and Campbell, and of J. P. Huntington, and that the four drafts drawn on them would be punctually paid; and he exhibited an authority to draw on them. The answer avers that these representations were true. It seems that the defendant had drawn drafts on the same persons to a large amount previously, all of which had been paid; and there is nothing in the evidence which shows that he had not reason to believe, when the above drafts were drawn, they would not be paid. His calculations, like the calculations of all speculators, made at the time, were not realized;

but the revulsion which took place in the price of property, and the general business of the country, seems not to have been foreseen by any one, much less by those who had yielded to the mania of the times. Under such circumstances a confident assurance of acceptance and payment of the drafts, by the drawer, followed by a failure to pay should not convict the drawer of fraud. That he was too confident in his expectation and assurances is shown by the result; but if this should make the transaction fraudulent, how can the complainant be sheltered from fraud in his confident representations of the great increase of the value of property sold by him to the defendant? In fact both parties partook, in a high degree, of the excitement of the times, and cherished the most visionary expectations of the future. But if the defendant had made fraudulent representations in regard to the payment of these drafts, how could that affect this case? It might waive the necessity of a demand and notice, but that only goes to the personal liability of the drawer.

The complainant prays that the deed from Russell and C. L. Hubbard may stand, and that so much of the property thereof may be sold as shall satisfy the balance due of the purchase money. Was the guaranty contract in the first instance, or as acted upon by the compromise, usurious or fraudulent? That the vendor should insure an advance of one hundred per cent. upon property sold in eighteen months seems to be extraordinary. And in ordinary times it would be. But when that contract was made a greater advance in less time was often realized by the purchaser. And when we look into the contract, and deduct the commissions allowed, the guaranty does not exceed much, if any, fifty per cent. These commissions amounted to the sum of twenty thousand three hundred dollars. And this sum, had the property advanced, as anticipated by the complainant, would have been to him a clear profit. That there was no usury in the transaction is manifest. There was no loan, either by the intention of the parties, or by the words of the contract. The sale was a bona fide one, and the guaranty contract was entered into by the complainant, as an inducement to the defendant to purchase; and, also, with the hope that it would yield a handsome profit. It seems that was not the first contract of the kind made by the complainant. And from his past experience he considered himself, no doubt, more likely to gain than lose by that one. But if there was any hardship in the contract, as at first made, there was none, to the complainant, as it was settled by the compromise. At the time of the compromise the defendant had paid to the complainant more than sixty four thousand dollars; and, in addition to this sum, he agreed to pay sixteen thousand three hundred eighty two dollars and ninety nine cents, for which sum drafts were drawn. The defendant received by the compromise a conveyance of lots, estimated to be worth fifty thousand dollars, and a bond and mortgage for the payment of twenty six thousand seven hundred dollars, making the sum of seventy six thousand seven hundred dollars. By the compromise he paid, and agreed to pay, a sum exceeding eighty thousand dollars. From this sum should be deducted any amount of moneys received by Hubbard, on sales of property covered by the thirty five thousand dollar contract, as agent of Turner; and for which he accounted in the compromise. But this deduction being made, would still leave the hardship of the compromise on the side of the defendant. A most extravagant estimate of value was placed upon the property conveyed to the defendant, and, also, on that which was mortgaged to him. The whole of this property is now believed to be worth less than one fourth of the sum at which it was valued. On the 30th of October, 1837, Turner assigned the above bond and mortgage to the Hon. Daniel Webster. This assignment is charged to have been fraudulent, but the answers and the evidence show that it was made for a good and valuable consideration. And Mr. Webster assigned the bond and mortgage the 12th January, 1838, to the bank of the United States. This assignment is, also, shown to have been bona fide, and for a valuable consideration.

And the question is raised by the complainant, whether the lots covered by this mortgage are not in the hands of the Bank of the United States, liable to the creditors of Turner, and to the payment of any amount that may be unpaid of the purchase money to the grantor. As there was no fraud in the assignments they must be held valid; and, of course, the general creditors of Turner can have no claim on the property. If a lien had been given on it, subsequently to the above mortgage, the asserter of such a lien might claim the right to pay off the first mortgage, and hold the land subject to his own lien. To this, it is presumed, the Bank of the United States, or its assignees, could have no objection, as the property is not now worth, probably, one fourth of the amount paid for it by the bank. Neither the bank nor Mr. Webster had any notice, at the time of the assignments, of any equitable lien upon the mortgaged premises. But, on general principles, the mortgagor may claim the same rights against the assignee of the mortgage as he could against the mortgagee. If he made a payment to the mortgagee, subsequently to the assignment, of which he has no notice, the payment shall be allowed against the assignee. And so if the mortgagor have any setoff or mutual credit against the mortgagee, it is not affected by the assignment. 2 Hov. Frauds, 133; Norrish v. Marshall, 5 Madd. 481; 2 Johns. Ch. 441, 479, 512.

But it is insisted that this general principle is controlled by an act of Illinois, passed the 3d January, 1827 [Rev. St. Ill. 124], "making promissory notes and other writings assignable." The first section provides that promissory notes, bonds, due-bills, and other instruments of writing, for the payment of money or property, shall be assignable by indorsement thereon, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in the assignee, who is authorized to sue in his own name. By the fourth section, if the assignment be made before the instrument become due, the defendant is prohibited from giving in evidence the payment of any property or money before the assignment, unless he prove the assignee had notice of such payment at the time of the assignment. Nor, by the same statute, can the defendant set up a want of consideration, where the instrument was signed before it was due. The provisions of this statute are peculiar. They place every description of instrument, for the payment of money or property, in regard to its negotiability, on the same footing as a bill of exchange or promissory note. The language of the act is broad enough to include bonds and mortgages; and, if it embrace them, the mortgage under consideration having been assigned to Mr. Webster before the money secured by it was due, it must be held by him, and by the bank, as his assignee, free from the equity of the vendor. The drafts drawn on Huntington and Campbell, and J. P. Huntington, amounting to the sum of sixteen thousand three hundred eighty two dollars and ninety nine cents, remain unpaid; and the inquiry is now to be made, whether the lots, conveyed absolutely to Turner, amounting to fifty thousand dollars, on the compromise, shall be made subject to the payment of these drafts. That the property mortgaged, and now in the hands of the Bank of the United States, or its assignees, is not liable to this demand, has been shown. The property above conveyed, the 18th July, 1837, was mortgaged by Turner to Robert Campbell and Henry Scott, of the state of New York, in consideration of ninety thousand dollars. The condition expressed was, that the said Turner, his heirs, &c., shall pay to the said Campbell and Scott, their executors, &c., the above sum of ninety thousand dollars, with interest. A bond, corresponding with the mortgage, was executed at the same time, and, also, what purports to be a declaration of trust. This paper, after referring to the mortgage, declares that it was executed to the said Campbell and Scott in trust for the following purposes, and they are declared to be trustees. And they are directed to pay certain debts to individuals specified, amounting to thirty thousand four hundred and twenty dollars, out of the moneys first realized upon said mortgage. After making these payments, the trustees are to hold the mortgaged premises, in trust, to pay unto the Bank of Michigan the residue of the money realized from the premises, should the mortgagor owe that amount to the bank. Any balance over that indebtment was directed to be paid to the Bank of the United States on Beardsley's acceptances. The mortgage was acknowledged the 19th of July, left for record the 25th, and recorded the 10th August, 1837. To the execution of the declaration of trust there was no witness, and it has not been recorded. And here a question arises, whether a declaration of trust is valid, under the statutes of Illinois, it never having been recorded.

By the 8th section of the act concerning conveyances of real property, passed 31st January, 1827 [Rev. St. Ill. 129], it is provided that every deed conveying real estate, which by any other instrument shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; but no benefit can be claimed under such defeasance, or other writing, unless it be recorded within thirty days after the deed shall have been recorded. By the 15th section of the same act, all grants, bargains, sales, leases, releases, mortgages, defeasances, conveyances, bonds, contracts and agreements of, and concerning, lands, or whereby the same may be affected in law or equity, shall be recorded; and if not proved and recorded in twelve months, it shall be adjudged fraudulent and void against any subsequent bona fide purchaser. And, afterwards, in the act abolishing the office of state recorder, approved January 18, 1833 [Rev. St. Ill. 587], it was provided, in the 5th section, that, after the first day of August next, all deeds and other title papers, which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void, as to all such creditors, &c., until the same shall be filed for record in the county where the lands lie. The 7th section of the same act repeals all former laws on the same subject.

The defendant insists that the 8th section, above cited, can only apply where the deed is absolute upon its face, which is not the case under consideration. That the deed to Campbell and Scott is conditional, requiring the payment of ninety thousand dollars by Turner. Scott, it seems, was a creditor to the amount of about four thousand dollars, and this, aside from the declaration of trust, was the only consideration on which the mortgage was given. This sum, however, is not stated in the mortgage, nor is there any reference to it. The consideration named is ninety thousand dollars, and that is the amount which Turner bound himself to pay

to the mortgagees. Now, such a transaction by an individual embarrassed, having no other foundation than the sum of four thousand dollars, would be held fraudulent against creditors. It would have the appearance of an attempt to place a large amount of property, under the pretence of paying a small sum, beyond the reach of creditors. The 15th section, it is contended, applies only to subsequent purchasers. This must be admitted, looking only to the provisions of that section. But the fifth section of the act of 1833 declares, that all deeds and other title papers, required to be recorded, shall take effect only from the time of filing such papers for record. And such papers are declared to be void against creditors, until they shall be recorded. Now, is this declaration of trust, a paper, which the law required to be recorded? The 8th and 15th sections of the act of 1827, above cited, would seem to leave no doubt upon this point. The inquiry is not what is the effect, under either of these sections, if the paper be not recorded, but does either of them require it to be recorded? In this respect the provision of the 15th section is as broad as words can make it. All grants, bargains, sales, leases, releases, mortgages, defeasances, conveyances, bonds, contracts, and agreements of, and concerning lands, are required to be placed upon the record. The 8th section is equally comprehensive, though less explicit. And if these sections, or either of them, embrace this declaration of trust, the 5th section of the act of 1833, declares, that it shall have no effect against creditors until recorded. Is not the complainant a creditor? As vendor he stands in the most favored relation of a creditor. He has a lien upon the land sold for the whole or any part of the purchase money that remains due. And this lien may be enforced against any purchaser of the land with notice.

The argument that because one condition is expressed in the mortgage deed, the other conditions expressed on a separate paper, and on which, only, the deed could be held bona fide, need not be recorded, can not be sustained. It can not be sustained under the 8th section. The mortgage deed does not show the trust. It purports to secure a debt of ninety thousand dollars due to the mortgagees. There is no intimation that this large sum of money is to be held or applied for the benefit of others. There is no such trust apparent or implied from the deed. Now, what is the object of a defeasance? Is it not to show the nature of the contract? If a trust be created it shows the character and extent of it. And this is shown by the declaration of trust under consideration. Does not the 8th section require such a paper to be recorded? Does it not essentially affect the deed of mortgage. By the deed the money would seem to belong to the mortgagees. But the declaration shows they hold it in trust for certain creditors. The eighth section should not be so construed as to require a declaration of trust to be recorded, only, when it is connected with an absolute deed. The spirit and policy of the provision equally applies to a declaration of trust which materially affects the deed; which, in fact, gives a different effect to the deed from what its words import. Such a paper is as much within the law as if it were connected with an absolute deed. In both instances it modifies the deed. It creates rights which are not found in the deed. How then can the same paper, producing the like effect in both cases, be held to be within the law in the one case and not in the other? Notice, which the law intended, is necessary in both cases. But without relying upon the eighth section the paper comes clearly within the provisions of the fifteenth section. This is sufficient. It takes no effect until filed for record, as against creditors.

The defendant insists that the complainant has an adequate remedy at law. And that suits of attachment are now pending which will give him full relief. The ninety thousand dollar mortgage is a sufficient ground for an equitable jurisdiction. Until the apparent lien under that instrument shall be set aside, or postponed, no part of the property covered by it could be safely purchased. There are other considerations arising out of the case which go to sustain the jurisdiction of the court. But little attention seems to have been paid to the mode of proceeding in this case, or to the citizenship of the parties. New matters are set up in the answer to operate as a cross-bill, and to these, answers are filed by new parties. This is the course of practice in Kentucky, and in some of the other states, but it is not the established English practice. And this court and the supreme court are governed, in chancery, by the English practice. A crossbill is filed to bring more fully before the court a subject matter connected with the case made in the bill, and which is necessary to a determination of the controversy. The necessity of a crossbill may arise as well between two defendants as between one or more defendants and the complainant. Mitf. Pl. 81. There is an instance in the case of Fife v. Clayton, 13 Ves. 546, 15 Ves. 525, where a court of chancery, contrary to the old practice, gave the benefit of a crossbill to a defendant upon his answer. But this seems to be a departure from the general rule. Hind, Pr. 54; 1 Atk. 21. In this case there are no matters set up in the answers referred to, perhaps, that would not be appropriate to the matter of the bill, or might be used as depositions on the hearing. In a case which interests so many parties as this one, and embraces so many, and complicated facts and circumstances, mere form should, as far as possible, be dispensed with.

The pleadings should always state the citizenship of the parties to show the jurisdic-

tion of the court. As between citizens of the same state the court can exercise no jurisdiction. The complainant is a citizen of Illinois, and Turner, the defendant, is a citizen of New York. But where several of the other defendants reside is no where stated. If any of them are citizens of Illinois the court can have no jurisdiction between them and the complainant. By the act of the 28th February, 1839 [5 Stat. 321], the jurisdiction of the court is extended in certain cases, but that act has no application to the parties in this case. As between the plaintiff and citizens of states, other than Illinois, the court may exercise jurisdiction, where the defendants voluntarily file their answers, as has been done in this suit. The money sought to be recovered by the complainant is due to him and others for whom he is agent. He acted under a power of attorney which authorized him to sell and convey the property, and in all other respects to act in the premises. The unpaid drafts were drawn in his favor, and his interests are mixed up with the others. Under the circumstances, we think, the suit may be well sustained in the name of the complainant, in the form which he has brought it. The history of the present case affords a striking exemplification of the ruin which generally follows a most extravagant and visionary estimate as to the value of property. Under such circumstances the judgment seems to be overthrown, and dreams of imaginary wealth take possession of the mind. It is, indeed, a species of madness, from the influence of which but few are exempt.

The property purchased by the defendant is not now worth, perhaps, one fourth the amount which he either paid or agreed to pay for it. But this is a hardship for which the law can give no relief. Whether the value of property shall advance or decline is a matter of calculation and risk by the vendor and purchaser. The law can only look at the contract. If it has been fairly entered into, it fixes the rights of the parties, and the rule for the action of the court. As against the claim of the vendor for the residue of the purchase money, on the property conveyed to Turner, the mortgage executed by him can afford no protection beyond the demand of Scott the mortgagee. The declaration of trust not having been recorded, under the statutes of Illinois, is inoperative against creditors. And the complainant must be viewed in the light of a favored creditor.

The court will decree the sale of so much of the property conveyed to Turner, by the complainant, for himself, and as agent, in July, 1837, as shall pay the residue of the purchase money. The property to be sold in lots, after giving —— days notice, as the rule requires, and agreeably to the requisites, and subject to the conditions, of the laws of the state. The sale to be subject to the lien of Scott, under the mortgage, for the amount due him, which amount shall be first paid from moneys realized by the sales. And a reference is made to the master to ascertain that amount, and the amount of the four drafts drawn on Huntington and Campbell, and J. P. Huntington, including interest, damages, and costs of protest. From this amount he will deduct the amount of the mortgage of Hugunin and Pearce, unless the same shall have been reassigned to Turner. This mortgage was assigned to secure the payment of the draft on Mr. Webster, but the complainant failed to give the security which he was bound to do before the maturity of the draft for its repayment, and he was, consequently, not entitled to the proceeds of the draft. The amount of the above mortgage must, therefore, be accounted for by the complainant, by deducting it from the balance of the purchase money due.

HUBBARD (WELLS v.). See Case No. 17,397.

Case No. 6,820.

In re HUBBEL et al.

[9 N. B. R. 523;[1] 19 Int. Rev. Rec. 150; 6 Leg. Gaz. 148.]

District Court, S. D. New York. May 5, 1874.

BANKRUPTCY — ASSIGNEE'S ACCOUNT — AMOUNT PAID TO HIS COUNSEL—SUBMISSION TO MEETING OF CREDITORS.

1. Sums paid by an assignee to his counsel should be included in his account and submitted to the meeting of the creditors, and audited as a part of the assignee's accounts.

2. Under special circumstances, on notice to all creditors who have proved their claims, the court may order an inquiry as to an assignee's or an attorney's account, before a meeting of creditors, but the practice is not to be encouraged.

3. In this case, where all of the assignee's attorney's bill, except four items amounting to about one-fifth the bill, had been presented to a third meeting of the creditors, and no objection made thereto, and as to these four items the court had ordered a reference, and the register reported in favor of their payment if the assignee made no objection, still the court refused to pass upon them, but ordered a general meeting of the creditors to be called for them to act thereon.

[In bankruptcy. In the matter of C. C. Hubbel and E. A. Chapel.]

BLATCHFORD, District Judge. On the 18th of November, 1873, the attorney for the assignee presented to this court a petition setting forth that he had rendered various services in this matter, as attorney, for the assignee, as such, in reference to the estate of the bankrupts, and that the value of such services was the sum of four hundred and forty-one dollars and fifty-seven cents, and praying for an order referring it to the regis-

[1] [Reprinted from 9 N. B. R. 523, by permission.]

ter in charge of the case to tax the amount of the costs, counsel fees and disbursements of the said petitioner in and about his said services, on notice to the assignee. The court refused to make the order on the ground then stated in a memorandum endorsed on the petition, that the bill "should be made a part of the assignee's accounts, and be presented at a meeting of creditors and be audited as part of the assignee's accounts." If an assignee employs an attorney, who renders legal services for him, the bill of the attorney therefor should be presented by the assignee, as a part of his accounts, at a meeting of creditors, where the assignee's accounts are required to be presented, as provided by section twenty-seven of the act. The intention is, that the disbursements of the assignee, in administering the estate, whether only incurred and not yet paid, or whether incurred and paid, shall be submitted to the creditors at a general meeting and be audited by the register as a part of the business of auditing the accounts of the assignee, with a view to passing the same under the power given to the register by section four of the act, and general order number five, to audit and pass the accounts of assignees. Under special circumstances the court may properly, on due notice to all creditors who have proved their debts, institute an inquiry into the services rendered to an assignee by an attorney or counsellor, with a view to payment of them, prior to the holding of any second general meeting of creditors; but the practice is one not to be encouraged.

On the 28th January, 1874, the attorney for the assignee presented to the court a petition setting forth, with particularity, the services he had rendered for the assignee, in reference to the estate, and annexing a bill thereof stated in items, and amounting, for services and disbursements, to five hundred and fifty-six dollars and fifty-seven cents. The petition states that at the third meeting of creditors (but when that was held is not stated) the petitioner presented his bill containing all the items except the last four, to the register, for taxation and allowance, in open meeting; that the bill was brought to the knowledge of the assignee and all the creditors present, and neither the assignee nor any creditor took objection to the bill; that subsequently the register, without passing on the bill, passed the accounts of the assignee and discharged him, but no order of distribution had been made, and he still had in his hands funds of the estate to the amount of about three thousand dollars; that subsequently, the register having doubts as to his power to pass upon the bill, declined to do so; that thereafter the said petition of November 18th, 1873, was presented to the court, and that the bill was fully presented for allowance at the third meeting of creditors, and all the creditors and the assignee had notice thereof and opportunity to object, and no objection was made. The petition prayed for an order directing the register to pass upon, tax and adjust the bill. The assignee consented in writing that the petition be presented. Thereupon the court made an order that the register "pass upon, tax, audit and adjust the bill," upon notice to the assignee, "and ascertain and report, on like notice, whether anything, and, if so, how much ought to be paid thereon by said assignee out of the assets of the estate, and report his opinion, with the evidence taken, to this court."

By the proceedings before the register, under this order, now returned to the court, it appears that the assignee attended before the register, and that the attorney made proof of the services he had rendered and of their value, and that the assignee introduced no evidence. The bill, as so proved, amounts to five hundred and fifty-six dollars and fifty-seven cents. The register reports that in his opinion the bill so proved should be taxed, audited and adjusted, and paid out of the assets of the estate.

The difficulty I have in this matter is, that even assuming that the presentation of the bill that was presented at the third meeting of creditors, in the manner in which it was presented, was a proper presentation of it and a substantial compliance with the proper practice, as hereinbefore stated, yet the bill now presented has four items added to it, the last four, (which seem to amount to one hundred and seventy-eight dollars and twenty cents) which have never been submitted to the creditors. Moreover, in the petition of November 18th, 1873, the bill is stated to amount to four hundred and forty-one dollars and fifty-seven cents. It is now claimed to be five hundred and fifty-six dollars and fifty-seven cents.

The only course open is for a meeting of creditors to be ordered by the court, the assignee to give, under section seventeen [of the act of 1867 (14 Stat. 524)], such notice thereof to all known creditors, by publication and otherwise, as is required to be given by the marshal of the first meeting of creditors, the notice to state that the special business of the meeting is to audit and pass upon the said bill, stating its general nature and amount as claimed, and the proceedings at the meeting to be reported to the court. Let a proper order in the premises be prepared by the register and submitted to the court.

HUBBY (HUGGINS v.). See Case No. 6,839.

HUBER (MILNE v.). See Case No. 9,617.

HUBER v. SEVEN COAL BARGES. See Case No. 12,677.

HUBER (SHIMER v.). See Case No. 12,787.

Case No. 6,821.

HUCHBERGER et al. v. HOME FIRE INS. CO.

[5 Biss. 106.] [1]

Circuit Court, N. D. Illinois. Feb., 1870.

FIRE INSURANCE—RIGHTS UNDER POLICY—FRAUD OF INSURED—BURDEN OF PROOF—INTEREST ON POLICY.

1. The sixty days for an insurance policy, before right of action accrues, begin to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company.

2. If the insured, with intent to defraud, makes claim for a larger loss than he actually sustained, he forfeits his rights.

[Cited in Shaw v. Scottish Com. Ins. Co., 1 Fed. 765.]

3. Burden of proof, in establishing this defense, is on the defendant, and the evidence must be either direct and positive, or the circumstances must be convincing, and admitting no other natural conclusion.

4. On verdict for insured, the jury should allow interest from the commencement of the action.

[This was an action at law by Lehman Huchberger and others against the Home Fire Insurance Company of New York.]

Emery A. Storrs, for plaintiffs.

John Van Arman and J. H. Knowlton, for defendant.

BLODGETT, District Judge (charging jury). This suit is brought upon one of several policies of insurance amounting in the whole to $46,000, one of which was issued by defendant on the stock of dry goods in plaintiffs' store, at No. 173 Lake street, in this city. There is no question as to the issue and validity of the policy, nor is there any question as to the fact that, on the evening of March 2d, 1867, a fire occurred in that store, which subsequently destroyed the stock of goods then in the store, the portion saved being only worth a little over $6,000; nor is it denied that the plaintiffs furnished the proper agent of the defendant, in due time, the proofs of loss required by the policy; but it is insisted that the plaintiffs did not comply with the conditions of the policy, which are precedent to the right of action. The policy requires the insured forthwith to give notice in writing, to the company, of the loss sustained, and as soon as convenient thereafter, furnish proof of loss, etc., and that the insured, if required, shall submit to a further examination on oath, etc. It is claimed that no notice of the loss was given within the meaning of this clause of the policy. It is also claimed, that the loss, by the terms of the policy, does not become payable until sixty days after due notice and proof of loss, and that, inasmuch as the plaintiffs furnished to the agent of the defendant their formal proof of loss on the 13th of March, and afterward submitted to a further examination on oath, at the request of the adjuster of the defendant, in regard to the details of their business, the proofs of loss within the meaning of the policy were not completed until this examination was reduced to writing and sworn to, which was on the 22d of March; and as this suit was brought on the 16th of May, the sixty days had not elapsed, and that this suit was therefore prematurely brought. It is true, that the notice of loss, as required by the policy, should have been given and approved, unless you are satisfied from the evidence that it has been waived.

As to the time when the right of action accrued, I am of opinion that the sixty days began to run from the furnishing of the proofs of loss, and not from the further affidavit; that the further examination is an act on the part of the insurer, and has no reference to the period when the time begins to run, for if their position is correct, the insurance company could extend indefinitely the time of payment. They might keep calling for further proof from time to time, and insist as long as they chose that they were not satisfied in regard to the facts of the loss.

But the chief defense set up to avoid the liability arising upon the admitted facts, to which I have referred, is, that plaintiffs fraudulently presented and insisted upon a claim against the defendant for a much greater loss than they actually had sustained; and the real question in this case is whether the claim of loss made out by the plaintiffs and demanded from the defendant, was for an amount which plaintiffs knew was greater than the loss actually sustained. If plaintiffs, knowingly and with intent to defraud the defendant and other insurance companies who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in the store at the time of the fire, and destroyed or damaged, they thereby forfeit all claim against the insurers. In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims unless honestly made, is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm.

I do not mean by this, that a person who has sustained a loss for which an insurance company is liable, is obliged to state the exact amount of his loss in dollars and cents, with arithmetical accuracy, for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole

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

truth, and nothing but the truth, as nearly as he can come at it at the time by reasonable effort on his part. If the evidence in this case, taken altogether, satisfies your minds that the plaintiffs did, knowingly and fraudulently, present a claim for a loss greater than they had sustained by the fire in question, then they cannot recover in this action. This is really the only law directly involved in this case, but there are some rules of evidence applicable to the case, to which it is proper I should call your attention.

The burden of proof to make out the defense insisted upon is upon the defendant. The law does not allow you to presume fraud without proof, and it must be such proof as admits of no other fair construction. I do not mean by this, that the defendant is bound to establish fraud by positive and direct evidence, because that is frequently impossible; but the evidence of fraud must be either direct and positive, or the circumstances must be so strong, convincing and preponderating as to admit of no other rational conclusion. The defense interposed, if sustained, stamps the defendants as swindlers and dishonest men. You should, therefore, be cautious in your consideration of evidence tending to lead you to so serious a conclusion. Yet, if the evidence adduced is so convincing in its character as to satisfy your minds that the plaintiffs intended to perpetrate a fraud on the insurers, you then need not hesitate to pronounce that conclusion by your verdict. It is as essential to the ends of justice that the guilty should be punished as that the innocent should be acquitted.

If you should conclude that in making up their accounts of their loss, plaintiffs acted in good faith, and made, as nearly as they could under the circumstances, a truthful statement, without any intent to defraud defendant, you will find for the plaintiffs, and ascertain their damages by adding interest from May 16, to the amount of the policy.

Verdict and judgment for plaintiff.

Consult Huchberger v. Merchants' Fire Ins. Co. [Case No. 6,822], and notes thereto.

Case No. 6,822.

HUCHBERGER et al. v. MERCHANTS' FIRE INS. CO.

[4 Biss. 265.] [1]

Circuit Court, N. D. Illinois. Oct., 1868.[2]

FIRE INSURANCE—FRAUD—BURDEN OF PROOF.

1. If the insured has intentionally endeavored to make out his loss larger than it was, he cannot recover his actual loss; otherwise, if he make out the loss from his best recollection, without intention to deceive.

2. The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. Such proof may, however, be circumstantial, if sufficient and convincing.

[Cited in Hawloetz v. Kass, 25 Fed. 767.]

[Cited in Hills v. Goodyear, 4 Lea, 244; Kane v. Hibernia Ins. Co., 39 N. J. Law, 705.]

3. Credibility of witnesses is the province of the jury alone—tests of evidence stated.

[Cited in Sibley v. St. Paul, F. & M. Ins. Co., Case No. 12,830.]

[Cited in Clevenger v. Curry, 81 Ill. 434.]

This was a suit to recover on one of several policies of insurance to the amount of four thousand six hundred dollars on a stock of goods owned by the plaintiffs [Lehman Huchberger and others] in the store No. 173 Lake street, Chicago, which was destroyed by fire on the 2d of March, 1867. No question was made that the fire occurred, and that the plaintiffs complied with the stipulations of the policy, and furnished in proper season proof of loss. Two defenses were interposed to the action: First, that the plaintiffs set fire to their own store, or acted with such gross negligence as to vacate the policy; and, secondly, that they furnished a false and fraudulent account of the kind and value of the goods destroyed.

F. A. Hoffman and E. A. Storrs, for plaintiffs.

O. B. Sansum, Robert Hervey, and Thomas Hoyne, for defendant.

DAVIS, Circuit Justice, after stating the facts, charged the jury as follows:

If either of these defenses are true, of course the plaintiffs cannot recover. Whether they are true or not, it is your province to decide. The solution of these questions depends solely on the conviction produced in your mind by the facts given in evidence. The law applicable to the case is very simple, and will give you no trouble. It suggests itself to the common mind. The insurance company did not agree to pay if the parties purposely destroyed their own property, or if by their own negligence it was burned up; nor can the plaintiffs recover if they intentionally endeavored to make out their loss larger than it was, although the jury may believe they did suffer a serious damage. If they come into court with unclean hands, the law will not help them to get the value of the goods really destroyed. But if the plaintiffs made the estimate from their best recollection, not having their books before them, and not having an intention to deceive, they can recover. While the law allows indulgence for mistakes honestly committed, it does not relieve if there be a purpose to commit a fraud.

The first thing to be observed is that the nature of the defense is such as to throw the burden of proof onto the defendant. There is no question that the plaintiffs are entitled to recover unless one or the other of the defenses is proved, and of this the jury must

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[2] [Affirmed in 12 Wall. (79 U. S.) 164.]

be satisfied by a preponderance of evidence. If the evidence is evenly balanced in their minds, or, in other words, if they are in doubt as to what is the truth of the case, they will find for the plaintiffs. There is no positive proof that either of the defenses is true. The proof is circumstantial. If there is enough of this kind of evidence, it is often times as convincing to the mind as positive proof; and, notwithstanding the character of the defenses, if you are convinced from the evidence that one or both are established, there should be no hesitation in finding for the defendant. But as this finding necessarily stamps the plaintiffs as dishonest men, you should not be swift to come to such a conclusion. The case itself requires the application of your best judgments and the highest power of discrimination.

The credibility of witnesses is for the jury. The court cannot instruct you who to believe and who to disbelieve. There is no artificial rule of belief to control the minds of a jury. Some witnesses by their appearance on the stand impress the jury that they are impartial between the parties and tell the truth. Other witnesses who testify show such bias and tell their story in such a way that the mind hesitates to place implicit reliance on what they say. To such witnesses you should apply the best of your common sense:—how did they bear themselves on the stand? Was the evidence favorable? Was it consistent with ordinary human conduct? Did they stand the test of cross-examination? Have they been succesfully contradicted or impeached? Have they shown malice? These are matters proper to be considered in examining the value of the testimony on which the case turns. The respective counsel have given you their views elaborately, and it is your province to settle the controversy.

I do not think it necessary to examine the evidence at length. The issues are definitely made, and easily understood. It is your duty to apply the evidence to them, in order to their correct determination. You had better take up one of these issues at a time. Was the fire the result of accident or design? The defendant's counsel urged that if the plaintiffs did not set fire to the store, there was gross negligence on their part which contributed to the accident; even the witness who seeks to prove this part of the case, by his testimony seems to so place it that the question of negligence disappears in the crime of arson. Therefore the point to consider is, Was this fire caused by the plaintiffs or their agents? The main witness on this subject is one Stark. Apply the tests I have given you to this witness in order to determine whether he is worthy of credit. Is his story probable? Is it consistent with the conduct of men of ordinary intelligence? Did he come out of the cross-examination as a man that impresses you with the conviction that he was telling the truth? Has he been successfully contradicted? Test his credibility by these rules. If you believe him, there is an end of the case, for he swears to enough to convict Huchberger of arson. But if he does not convince you, then the second defense made in the action is to be considered, that is, that the plaintiffs rendered a false account of the loss they sustained by the fire. The consideration of this question involves a review of the main part of the evidence which has occupied for so long a time the attention of the court and jury. If, after carefully viewing all the evidence on this subject, you are satisfied that the plaintiffs intended to commit a fraud on the insurance company, you will find for the defendant. If, on the contrary, the evidence satisfies you the account was true, you will find for the plaintiffs; or, if the evidence satisfies you that the account of loss was not true, but mistakenly rendered; without fraud or the intent to defraud, you will find for the loss actually sustained. If you come to the latter conclusion, that there was no intentional wrong, but that the loss was actually less than the plaintiffs say, you will find accordingly. The risk in this case is two thousand five hundred dollars.

NOTE. Willful or negligent conduct on the part of the insured, by which salvage is lost, might discharge the underwriter, as fraud certainly would. Dunham v. New England, &c. Ins. Co. [Case No. 4,152]. In an action on an open policy of insurance, a discrepancy between the value of the goods destroyed, as sworn to by the insured, and the value as proved on the trial, is not necessarily evidence of fraud against the company on the part of the insured. Beck v. Germania Ins. Co., 23 La. Ann. 510.

[This case was affirmed by the supreme court, with 10 per cent. damages in addition, in an opinion by Mr. Chief Justice Chase, who said the writ of error taken by the defendant was manifestly for delay. 12 Wall. (79 U. S.) 164.

[See, also, Cases Nos. 6,821 and 6,823.]

Case No. 6,823.

HUCHBERGER et al. v. PROVIDENCE WASHINGTON INS. CO.

[1 Chi. Leg. News, 353.]

Circuit Court, N. D. Illinois. June 28, 1869.[1]

FIRE INSURANCE — DEFECTIVE PROOFS OF LOSS—WHEN SUIT MAY BE BROUGHT—FRAUDULENT PROOFS.

[1. Plaintiffs were unable to verify their proofs of loss by their books of account, as provided in the policy, because they supposed the books to be lost. They therefore furnished them without such verification, and afterwards, on demand of the company, furnished additional affidavits of their loss. The books were in fact in the possession of the insurance company. *Held*, that the company could not complain that the proofs were not verified from the books in the first instance, and therefore the right given by the policy to sue within 60 days after proofs of loss accrued 60 days after the first proofs were furnished, and was not postponed to 60 days from the date of furnishing the additional affidavits.]

[1] [Affirmed in 12 Wall. (79 U. S.) 164.]

[2. Knowingly claiming, in the proofs of loss, a much larger amount than the actual loss, with intent to defraud the insurer, will prevent a recovery of any sum whatever, although the loss may have been considerable in amount. But, if the loss was honestly overestimated, the actual loss proved may be recovered.]

[This was an action at law by Huchberger Bros. against the Providence Washington Insurance Company.]

DAVIS, Circuit Justice (charging jury). This case is brought on one of the several policies of insurance to the amount of $46,000 on the stock of goods owned by the plaintiffs, in the store No. 173 Lake street, which was destroyed by fire on the second day of March, 1867. There is no question that the fire occurred, but the defendant raises the objection that the suit, being instituted on the 16th day of May, was begun too soon, as the policy allows the insurance company sixty days in which to pay, after notice and proof of loss; and the defendant insists that this time of sixty days began to run from the 23d day of March, when the affidavits in evidence were made by the plaintiffs and delivered to Miller, the agent of the defendant. This is a mistaken view of the terms of the policy. The plaintiffs, as they were required, did furnish, on the 23d of March, to the agent of the defendant (having given immediate notice of the fire), a particular account of their loss, verified by their own oath, with the proper certificate of the notary. The insurance company, by the policy, had the right to require that their loss should be also verified by their books of account, or other proper vouchers; but as the books of account were in the possession of the defendant, and this, too, without the knowledge of the plaintiffs, they, the plaintiffs, could not comply with this portion of the policy, and the defendant cannot complain of the plaintiffs' inability to verify their loss by their books. The plaintiffs, supposing their books and vouchers were destroyed, on request of the insurance company made the additional affidavits of the 22d and 23d of March. These affidavits were voluntary statements, and are proper evidence to be considered by the jury in deciding the merits of the case; but the making of them was not a condition precedent to the plaintiff's right to recover. When the plaintiffs made the proof of loss, on the 13th of March, verified by their own oath, with the proper notarial certificate, and could not verify this loss by the books of account and vouchers, because not in their possession, then they had a right to sue after sixty days from the 13th of March, unless the company in the interval paid them.

The main defense presented to this action is this: That the plaintiffs furnished a false and fraudulent account of the quantity and value of the goods which were destroyed. If this defense is true, the plaintiffs cannot recover anything; and whether true or not, it is your province to decide. The solution of the question depends on the conviction produced on your minds by the testimony. The law applicable to the case is very simple, will give you no trouble, and suggests itself naturally to the common mind. The plaintiffs cannot recover if they intentionally endeavored to make out their loss larger that it was; although the jury may believe they did suffer a very considerable loss. In such a case, coming into the court with unclean hands, the law will not help them to get even the value of the property destroyed. But if the plaintiffs made out their loss from their best recollection, not having their books before them, and had no intention to deceive, they can recover their pro rata loss, although the jury may be satisfied their claim is larger than the evidence warrants. The law allows indulgence for the mistakes of men honestly committed, but it never relieves when there is a purpose to commit a fraud. Of course, if the jury are satisfied the plaintiffs lost what they said they did, they should find for them the full amount of the policy. The nature of this defense is such that the burden of proving it is on the defendant. There is no positive proof that it is true, but it is sought to establish it by a species of proof from which you are led to infer its truth. If there is enough of this kind of evidence, it is oftentimes as convincing as positive proof. But to consider this kind of evidence in the character of the case you are trying devolves a high degree of responsibility on the jury. If the plaintiffs have sustained an honest loss, there should be no hesitation to give them a verdict. On the contrary, if you are convinced from the evidence that the case is fictitious, there should be no less hesitation on your part to find for the defendant. But as this latter finding necessarily stamps the plaintiffs as dishonest men, you should not be swift to come to such a conclusion, though it is your duty to do it if the evidence convinces you of its correctness. The case itself requires the application of your best judgment and highest powers of discrimination. The credibility of witnesses is for the jury. The court cannot instruct you who to believe and who to disbelieve, and there is no rule of law on the subject to control the minds of the jury. Some witnesses impress the jury that they are impartial between the parties and are telling the truth, while others produce the contrary impression. To all the witnesses you should apply the test of your common sense. Did they appear before you as honest men, telling what they knew? Had they the means of knowledge? Did they show bias, or were they fair and impartial? Were they intelligent? Did they show the test of a cross-examination, one of the surest means of ascertaining the truth? Have they been successfully contradicted on any ma-

terial point? I do not consider it necessary to examine the evidence at length. It all bears on a single issue, and it is your duty to apply it, in order to determine that issue. I will state the issue again:

Did the plaintiffs, purposely, render a false account of the loss which they sustained by the fire? If, on a consideration of the whole evidence, you are satisfied that the plaintiffs intended to commit a fraud on the insurance companies in making the loss larger than it actually was, you will find for the defendant. If, on the contrary, the evidence satisfies you that the account which the plaintiffs rendered of their loss was true, you will find for the plaintiffs; or if the evidence satisfies you that this account of loss was not true, but was mistakenly rendered by the plaintiffs, and that they did not intend to perpetrate a fraud on the insurance companies, then you will find a verdict for the loss actually sustained. If you come to the last conclusion, that there is no intentional wrong on the part of the plaintiffs, but that their loss was less than they say it was, you will have no difficulty in reaching the right verdict, as all the risks were $46,000 and the risk of this defendant was $4,000.

[See note to Case No. 6,822.]

HUCKINS (JOHNSON v.). See Case No. 7,390.

Case No. 6,824.

The HUD AND FRANK.

[1 Hask. 192.] [1]

District Court, D. Maine. Feb., 1869.

ENROLMENT OF VESSEL—FRAUD—FORFEITURE.

1. A vessel of foreign build, after being wrecked, and purchased, and re-built by a citizen of the United States, and so disguised that an enrolment was obtained for her as a new domestic vessel, is liable to forfeiture under section 24 of the act of 1866 [14 Stat. 184], for being fraudulently enrolled.

2. The forfeiture is not saved by the fact, that she might have been enrolled by the secretary of the treasury under the act of Dec. 23, 1852 [10 Stat. 149], as a foreign vessel, wrecked in the United States, and purchased and repaired by a citizen.

In admiralty. Libel in rem by the United States against schooner Hud and Frank, claiming her forfeiture for being fraudulently enrolled. The owners made claim, and answered, that the schooner, under the law, was substantially a new vessel; and that if she could not be so treated, then she was entitled to be enrolled as a foreign vessel, wrecked in the United States, and purchased and repaired by a citizen, and for that reason not liable to forfeiture.

George F. Talbot, Dist. Atty., for the United States.

Albert W. Bradbury and Bion Bradbury, for claimants.

FOX, District Judge. It is shown that this vessel was formerly the British brig Emma, built in Nova Scotia, and wrecked off Delaware Breakwater light in the fall of 1866, taken to New York and there condemned. H. J. Hewitt of Rockland advanced for her owners money to pay off certain lien claims, and he afterwards carried her to Rockland in this state, where she was sold at auction, and bought in by Hewitt, as he says, as agent for his brother-in-law, one Simons. The vessel was repaired under the direction of Hewitt at an expense of six or seven thousand dollars, but her form or dimensions were not changed by the repairs. Hewitt applied to the customs officers at Rockland to have her measured, but they refused. She was soon afterwards taken across the bay to Castine by Hewitt, Simons, and the master carpenter, and application was made to the customs officers at that port for her measurement and enrolment, she being represented as a new vessel, built at Rockland that season. One T. S. Fuller represented himself as owner of one-fourth, and Simons claimed to be owner of the remainder. The evidence wholly fails to satisfy the court that Fuller's interests were any other than nominal. In order to have the vessel enrolled at that port where he belonged, he claimed to be the "ship's-husband," and that Simons belonged in New York. The interior of the vessel was painted and so disguised as to deceive the officer who measured her, and when the certificate of the master builder, that she was built in Rockland that season, supported by the oath of Simons to the same effect, was produced, she was enrolled at Castine, as the schooner "Hud and Frank," built in Rockland in 1867. Under this enrolment she was sailing at the time of the seizure.

The 24th section of the act of 1866 (chapter 201) enacts that if any certificate of enrolment shall be knowingly and fraudulently obtained, or used for any vessel not entitled to the benefit thereof, such vessel shall be held to forfeiture. This vessel was not entitled to be enrolled as a new vessel. By fraud and perjury she obtained her enrolment as a new vessel, when she was not thus entitled to such enrolment. But it was claimed that she could have procured an enrolment under the act of Dec. 23, 1852, which authorizes the secretary of the treasury to issue an enrolment to a foreign built vessel, when she shall have been wrecked in the United States, and purchased and repaired by a citizen, if it appears to the satisfaction of the secretary, that the repairs equal three-fourths of the cost of the vessel when so repaired.

This vessel might have claimed an enrolment under this act; but it could only be

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

obtained from the secretary of the treasury, on his being satisfied as to the extent of the repairs; and she could not have been enrolled by the secretary as a new vessel, built at Rockland in 1866, but as the old brig Emma, built at Sidney, wrecked and repaired at a cost exceeding three-fourths of the value, so that the enrolment she could have procured would have been entirely different from the one in truth obtained. The object was quite apparent, to have her documented as a new vessel, instead of an old one, wrecked and repaired. The case, therefore, is directly within the provision of the act of 1866. She was not entitled to the benefit of the enrolment, which had been fraudulently obtained for her, and she is forfeited.

Decree accordingly.

Case No. 6,825.

In re HUDDELL et al.

[8 Wkly. Notes Cas. 407.]

Circuit Court, E. D. Pennsylvania. April 30, 1880.

BILLS AND NOTES — CONFLICT OF JURISDICTION — PRE-EXISTING DEBT, HOLDER OF NOTE AS COLLATERAL FOR — LOCAL LAW — GENERAL COMMERCIAL JURISPRUDENCE — STATE AND FEDERAL COURTS.

The holder of a negotiable note, taken as security for a pre-existing debt, is a holder for value, and as such is protected against any equities subsisting between the original parties to it.

[Error to the district court of the United States for the Eastern district of Pennsylvania.]

McKENNAN, Circuit Judge. The question in this case being one, not of local law, but of general commercial jurisprudence, the decisions of the state courts are persuasive only, and this court will follow the guidance of general judicial opinion concerning it. Mack v. Baker [Case No. 8,834] not followed.

In the settlement of the estate of Huddell & Seitzinger, bankrupts, R. D. Wood & Co. made a claim upon certain notes held by them. The parties agreed to a case stated, showing the following facts: R. D. Wood & Co. received from one Boyer two promissory notes, made by Seitzinger to the order of the firm of Huddell & Seitzinger, and indorsed by them. R. D. Wood & Co. had delivered to Boyer two of their own notes to be used for specified purposes. Boyer converted to his own use one of these notes, whereupon R. D. Wood & Co. called upon him to return the other. The matter was settled by Boyer's retaining the note he still held, and by his delivering to R. D. Wood & Co., inter alia, the two notes forming the present claim. These notes were procured by Boyer to be made by Seitzinger, and indorsed by Huddell & Seitzinger, and delivered to him by false representations, to the effect that R. D. Wood & Co. needed accommodation, and desired the use of this security. Neither Seitzinger nor Huddell received any consideration therefor. R. D. Wood & Co. had no notice of this transaction, and supposed that the notes represented a debt due by the maker to Boyer. The notes were duly protested.

The district court (Cadwalader, J.), following the register's report, entered judgment in the case stated for the assignee of the bankrupts, whereupon R. D. Wood & Co. took this writ of error to the district court.

Thomas Hart, Jr., for R. D. Wood & Co.

It is admitted that Judge Story's remark, in Swift v. Tyson, 16 Pet. [41 U. S.] 1, that the receipt of a note as collateral for a pre-existing debt is a holding for value, is obiter dictum. But since that case it has been regarded as fixing the law in the United States. 3 Kent, Comm. 81; Story, Prom. Notes (7th Ed., 1878) § 195. The author repeats the doctrine laid down in Swift v. Tyson [supra], and sustains it. Pars. Prom. Notes, 218, and notes; Byles, Bills (Sharswood's Notes) 28; McCarty v. Root, 21 How. [62 U. S.] 432. The Pennsylvania cases are otherwise, but this is the effect of early error, and the late cases, while recognizing these cases to be the law of the state, have regretted it. Depeau v. Waddington, 6 Whart. 220. In other states the doctrine of Swift v. Tyson is followed. Roberts v. Hall, 37 Conn. 205; Naglee v. Lyman, 14 Cal. 450; Fisher v. Fisher, 98 Mass. 303; Allaire v. Hartshorne, 1 Zab. (21 N. J. Law) 665; Cobb v. Doyle, 7 R. I. 550; Atkinson v. Brooks, 26 Vt. 574; Manning v. McClure, 36 Ill. 490; Valette v. Mason, 1 Smith (Ind.) 89; Bank of Charleston v. Chambers, 11 Rich. Law, 657; Boatman's Sav. Inst. v. Holland, 38 Mo. 49; Outhwite v. Porter, 13 Mich. 533. More benefit is obtained by enlarging the circulation and negotiation of promissory notes than can be obtained by attempts to get at the merits of individual cases, by restricting the same.

S. Dickson, contra, relied on Mack v. Baker [Case No. 8,834].

McKENNAN, Circuit Judge. Is the holder of a negotiable note, who has taken it as a security for a pre-existing debt, a holder for value, and so protected against any equities subsisting between the original parties to it? This is the only question presented by this case. If the rule established in Pennsylvania by the decisions of her highest court is to be followed, it must be answered in the negative. But these decisions are only persuasive, as may be said also of a recent decision in this court by a late eminent judge conformably to the state rule. The question involved is not one of local law, but of general commercial jurisprudence, hence the duty of the court is imperative to follow the guidance of general judicial opinion concern-

ing it. As to the preponderating weight of this opinion there is scarcely ground for doubt. In perhaps a majority of the United States, the law is settled that the taking of a note as collateral security for a pre-existing debt is a holding for value. So it is held in England. See Percival v. Frampton, 2 Cromp., M. & R. 180, and Poirier v. Morris, 2 El. & Bl. 89. It is stated to be the better doctrine in 3 Kent, Comm. 81; in Story, Prom. Notes, § 195; in Pars. Prom. Notes, 218; and in Byles, Bills (By Sharswood) 28. It has the judicial sanction of Judge Story, in Swift v. Tyson, 16 Pet. [41 U. S.] 1, where the adoption of it is distinctly approved by the supreme court, in McCarty v. Root, 21 How. [62 U. S.] 439. Such weight of authority must be regarded in this court as decisive, and judgment is, therefore, entered for plaintiffs on the case stated.

HUDDLESTONE (UNDERWOOD v.). See Cases Nos. 14,339 and 14,340.

Case No. 6,826.

HUDDY v. HAVENS.

[4 Wkly. Notes Cas. 20; 5 Cent. Law J. 66;[1] 1 Month. Jur. 167.]

Circuit Court, E. D. Pennsylvania. April 21, 1877.

REMOVAL OF CAUSE—TIME OF REMOVAL.

[Under the judiciary act of 1875 (18 Stat. 470), a cause must be removed before or at the first term at which it is at issue and legally triable, and the fact that it is not then actually tried, because the parties fail to put it upon the trial list, does not preserve the right of removal until a subsequent term.]

Petition by the plaintiff to remand a suit of covenant brought in common pleas court No. 2 to the June term, 1875. The cause was at issue in June, 1876, but was not ordered upon the trial list until some time in December, 1876, when it was ordered upon that list by the defendant. The cause appeared on the trial list of common pleas court No. 2, published in February, 1877. After the publication of this list, a rule for removal was taken by the defendant, and refused by the court. 3 Wkly. Notes Cas. 432. The defendant then filed a certified copy of the record in this court, whereupon the above petition to remand was filed.

Mr. Sutton, for the petition, was not called upon.

Mr. Harrington and S. C. Perkins, contra.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

McKENNAN, Circuit Judge, said that the cause must be remanded at the cost of the defendant. This subject was not a new one to the court, but careful consideration had been given to this act of congress of March 3, 1875, and the conclusion arrived at was well expressed by the language of Judge Dillon (Removal of Causes, 2 South. Law Rev. N. S. 311): "The act of 1875 requires the petition in the state court to be made and filed therein before or at the term at which such cause could be first tried, and before the trial thereof. The word term, as here used means according to the construction which it has received in the 8th judicial circuit, the term at which, under the legislation of the state and the rules of practice pursuant thereto, the cause is first triable, i. e., subject to be tried on its merits, not necessarily the term when owing to press of business or arrearages it may be first reached, in its order for actual trial. * * * It was the obvious purpose of congress, by the use of the words 'before or at, etc., the term at which the cause could be first tried,' to require the election to be taken at the first term, at which, under the law, the cause was triable on its merits."

The view expressed by Dillon, Circuit Judge, is concurred in by this court, as most reasonably carrying out the legislation of congress. Now the present cause was at issue in the June term of the common pleas court (not to consider the question whether or not the cause could not legally have been tried in 1875, by the defendant ruling the plaintiff to plead). There are no jury trials in that term, but there are in the September term following. It is argued by the defendant that, as the case was not ordered down upon the trial list till the December term, the cause could not have been tried till that term. In the opinion of this court, however, the cause could have been tried (in the sense in which the words are used in the act of congress) at latest in the September term. Either party could have expedited the cause by ordering it on the trial list. A case of this kind arose at Pittsburgh, in the Western district of Pennsylvania, and was decided in the same way.

It is urged further that by the practice and rules of the court the cause could not possibly have been even put on the trial list in September. It does not appear, however, that the cause was legally incapable of having been tried at that term. The president judge of that court (Hare, P. J.) disposes of the question in concise and emphatic language: "The next term under the act of March 3, 1875, c. 137, § 3 (18 Stat. 471), means the next term at which the case could legally be tried, not actually. If, owing to the crowded state of the docket, a case could not be reached till the third term after it was at issue, a petition to remove it then is too late." Huddy v. Havens, 3 Wkly. Notes Cas. 432. Apart from the fact that the common pleas has impliedly stated that the cause could legally have been tried before the term in which it was removed, it is a much wiser rule to proceed by the record, which shows that this cause was at issue, and therefore

[1] [5 Cent. Law. J. 66, contains only a partial report.]

legally triable, in the June term, 1876, than to adopt a rule which would require the court to take testimony in every case to ascertain whether the cause was removable or not.

Cause remanded, the costs to be paid by the defendants.

See Dunham v. Baird [Case No. 4,147].

Case No. 6,827.

HUDGINS v. LANE et al.

[2 Hughes, 361;[1] 11 N. B. R. 462.]

District Court, E. D. North Carolina. 1874.

DISCHARGE IN BANKRUPTCY—PARTNERS—DISSOLUTION OF FIRM—ASSIGNEE.

1. The discharge of a member of a firm, upon his individual petition in bankruptcy, and without any proceedings by or against the firm, does not discharge such member from the firm or partnership debts.

[Cited in Re Jewett, Case No. 7,306; Re Webb, Id. 17,317; Re Brick, 4 Fed. 806; Re Johnston, 17 Fed. 72.]

[Cited in Corey v. Perry, 67 Me. 144; Poillon v. Lawrence, 77 N. Y. 218.]

2. The dissolution of a firm by agreement between the members thereof will not affect the rights of its creditors, though the terms of such dissolution will frequently be enforced by the courts, as between the parties to such agreement.

[Cited in Wilkins v. Davis, Case No. 17,664; Crompton v. Conkling, Id. 3,407.]

3. An assignee appointed upon the adjudication of an individual member of a firm upon his own petition alone, whether the firm be existing or dissolved, acquires no title to the property of the firm.

4. In re Little [Case No. 8,390], and In re Noonan [Id. 10,292], cited and approved. The Cases of Frear [Id. 5,074], and Grady [Id. 5,654], examined and commented on.

[This was a suit by W. R. Hudgins against Henry J. Lane and Richard Smithson, trading as Lane & Smithson.]

J. P. Whedbee, for creditor.

C. C. & W. F. Pool, for Lane.

BROOKS, District Judge. This was a civil action tried before a justice of the peace for Pasquotank county, on the 28th of September, 1874. The justice rendered judgment against the defendant for the sum of $105.30, the said sum to bear interest from the 4th day of June, 1868, until paid, and for costs, from which judgment the defendant, Henry J. Lane, appealed to the superior court for Pasquotank. The Honorable Jonathan W. Albertson, judge of the said court, having been of counsel in the cause, declined to hear the appeal, when by agreement of the parties the case was referred to me, to be decided upon the following case agreed.

In the early part of the year 1868 the defendants, Lane and Richard Smithson, who were then trading as copartners, contracted the debts for which the judgment was rendered, by the purchase of merchandise from the plaintiff. By agreement between Lane and Smithson, some time in the years 1869 or 1870, the partnership between them was dissolved, and they ceased to carry on the business. No notice of the dissolution was published, and it was made without consultation with or agreement of their creditors.

On the 20th day of February, 1871, the defendant, Lane, filed his individual petition in bankruptcy, and on the 18th day of October of the same year received his discharge in due form. There was no proceeding by or against the firm of Lane & Smithson or by either partner against the other, nor was the firm adjudicated bankrupt. The defendant Lane pleads his discharge in defence in this action. The plaintiff in this action filed proof of the claim for which judgment is demanded, in due form, in the bankruptcy proceedings had at the instance of the defendant Lane.

The question presented for decision is, does the discharge pleaded by Lane and granted upon his individual petition, and to which the firm of Lane & Smithson were in no way parties, discharge Lane from his liability to the plaintiff? If this question was now for the first time presented for decision, I would find less embarrassment than I now feel. There is, I think, not so much difficulty in this case for the want of authority, but on account of the conflict in the opinion of the judges who have considered it.

In examining the cases decided, I find that as early as February, 1868, this question was considered by Judge Blatchford. In re Little [Case No. 8,390]. Though the question in that case was as to the propriety of an amendment which had been asked for by the petitioner, and refused by the register, yet the amendment desired was of such a character as necessarily presented for consideration the very question now to be determined. Little had been a partner in trade with one Dana, and had commenced voluntary proceedings in bankruptcy in his own name alone. In the schedules filed both debts and assets of the firm of Little & Dana were mentioned, and the petitioner prayed to be discharged from all his debts; and fearing a discharge in such a proceeding would not be effectual in discharging him from the debts due from Little & Dana, even after he had himself been adjudicated a bankrupt, asked that his proceedings be so amended as that Dana might be made a party, and cited to show cause why the firm of Little & Dana should not be declared bankrupt. It was proper then to inquire—First, what was the purpose of the amendment asked for? The answer must be that the petitioner may be discharged, as he prays in his petition to be discharged, that is, from all his debts and liabilities provable

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

in bankruptcy. Then the next inquiry which necessarily arose in that proceeding was: Is it necessary to accomplish that end that the firm of Little & Dana should be adjudicated bankrupts? If that be necessary for the accomplishment of that object, then it is a motion proper to be considered and granted, if, upon consideration, it be brought within the other rules applicable to amendments. But most clearly, if the amendment asked for, in the opinion of the court, shall be of no importance, shall be in no way necessary in the attainment of the object, or some one purpose desired as a result of the proceedings, then the motion to amend should be refused, for, as a rule, it is as clear as it is correct, that no allegation or matter should be allowed in legal proceedings by way of amendment, unless the allegation or averment sought to be added shall appear to be essential to entitle the pleader to the benefits to which the establishing of such allegation or averment will entitle him.

The original petition of Little was in his own name alone, as in this case it is in the name of Lane. There were firm debts due by Little & Dana, as in this case there were debts due by Lane & Smithson, and from which Lane, as did Little, prayed in his petition to be discharged. Then, if such a discharge as was asked for could be granted, he showing himself in all other respects entitled to it under the original petition, there was no need for any such object as the law regards of the amendment asked for, and there being no necessity, the impropriety of granting it necessarily follows.

If the firm assets could be distributed or properly investigated upon the individual petition and adjudication of one or any less number than all the members of the firm, and for such as are adjudicated as full relief from debts could be granted as if the firm was declared bankrupt, then there was no necessity or propriety in the provision of the 36th section [of the act of 1867 (14 Stat. 534)], authorizing proceedings against such members of a firm as may refuse to join.

Though the case referred to was decided at a time when most of the questions arising under the bankrupt law of 1867 were new, and the judges to whom they were presented were required to set for themselves precedents, yet the learned judge who decided it was clear, both in his illustrations and his conclusion, and gave great promise then of the great benefits which have since resulted to his brethren and the bar from his labor. His honor uses this language:

"Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, and as this petition is one to have the firm declared bankrupt on the petition of one of its partners, within the provision of section 36 of the act, and of general orders No. 18, as Dana did not join with Little in his (original) petition, he ought to have been brought in by proper proceedings under general orders No. 18, before an adjudication of bankruptcy was made on the petition of Little. The defect is now sought to be remedied by Little. His petition requires to be amended. When he is so brought in, he (meaning Little) can be discharged from his debts, including the debts of the firm; and until Dana is so brought in, Little cannot be discharged from the debts of the firm, because the theory and intent of section 36 of the act, and general orders Nos. 16 and 18, are, that the creditors of a firm shall be required to meet but once, and in one bankruptcy form all questions in regard to the bankruptcy of the firm, and in regard to their debts against the firm."

If we examine only slightly the opinion of the same judge in the Case of Frear [Case No. 5,074], there may appear to be a contrary opinion expressed. But there is no real conflict in the opinions. The only question in the latter case was, whether, under an adjudication of any one or more members of a firm (less than all), firm creditors could prove their debts, and it was decided that they could so prove. It would have appeared strange, indeed, had the court held otherwise. And yet there was involved no opinion as to the effect of such proof by a firm creditor in the event the individual estates of the bankrupt partners should prove to be insufficient to pay all his individual debts proved, for it was within the range of possibility that the individual estate of the bankrupt might be sufficient to pay principal and interest in full of all the individual debts proved, and the firm debts proved also, and while such a result may not usually be hoped for, yet, in the event supposed, who will say that such a firm creditor would not be entitled to be paid?

I do not believe that the learned judge intended to affirm the opinion expressed by the register as to the effect of a discharge under such a proceeding; that was simply a matter with which the register had nothing to do. And the suggestion, to say the least, was voluntary on his part. It has been brought to my attention more than once that upon a settlement of the assignee's account, and after the case had been pending for some years, and payment in full of all debts proved, there was yet a surplus in the depository, and I have been asked for orders directing such surplus to be paid to the bankrupt. If such a result should be hereafter shown in Lane's case (and I have no information as to the good or bad fortune of his individual creditors), my present impression is that I would not hesitate to direct, as I think the law provides, that such surplus be paid on such partnership debts as might be proved and filed.

While I do not concur fully in opinion with the learned judge, as expressed in the Case of

Grady [Case No. 5,654], especially that wherein he states so broadly that a party cannot "be discharged of a part of his liabilities merely, but if of any it must be of all of them;" and while there may be several clear illustrations given of the error in the opinion in this respect, yet his opinion in this case may be cited as explicit upon the only question upon which the case now under consideration depends, that there can be no discharge from firm debts upon an application of an individual member, unless the firm be adjudicated a bankrupt.

This question was discussed more recently and very fully before Judge Drummond, in the circuit court for the Eastern district of Wisconsin, in Re Noonan [Case No. 10,292], and in the well-considered opinion of the learned judge we find the opinion of Judge Blatchford, before referred to, sustained, and even strengthened. "And it is difficult to see," says Judge Drummond, "how any member of a firm can be released from his personal liability as such, without the court looking substantially into all the transactions of the firm, and settling up its affairs." Again, "A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court."

In this opinion, after a patient and full examination of the authorities, and the sections of the act bearing upon this question, I am induced to concur. The opinion of Judge Field in Re Abbe [Case No. 4], is relied upon for the defendant. While it may be inferred from the language used that the decision in that case would have been more favorable to the defendant than that now expressed, had the same question been directly presented, yet it will be found that the proceedings in that case were essentially different in more respects than one from the petition and proceedings in behalf of the defendant in this case. No discharge was then applied for by Abbe, or had been previously granted, and the judge seems to attach much importance to the fact that it appeared by the schedules filed by Abbe that there were no partnership assets to be administered, a fact which, as it seems to me, should have no effect upon a creditor's rights, if they were able to prove (as they sometimes do prove) that such statement was false.

But suppose that there were partnership assets, as in this case, to be administered. Lane states in his schedules that there were not only partnership debts due, but partnership assets, in the form of accounts, due Lane & Smithson, which he proposes to surrender to his assignee when one shall be appointed. The inquiry is very naturally suggested, why surrender these accounts or any other evidences of debt or any property which might be in his hands, belonging to the firm of Lane & Smithson, to his (Lane's) assignee? It is very clear, I think, that such assignee could not use any process of law which would enable him to collect a single dollar of such assets, though there might be many thousands due. Nor could such assignee sell and convey a title to any property belonging to the firm which might so come into his possession; and though it might be money belonging to the firm, and Lane's assignee should apply any part of it to the payment of Lane's individual debts, he could surely be held responsible by the solvent partners, or such assignee as might be appointed for the firm in the event of its bankruptcy. The assignee of Lane acquired no title to the choses in action or property of the firm, and consequently could not discharge for the one or sell the other. This view, as to the rights of assignees, accounts very reasonably for the expressed provisions of the law, that in all cases of the bankruptcy of a firm, the firm, and not the individual creditors, have the right to choose the assignee, and when so elected, such assignee becomes, by virtue of such election, the assignee of each of the individual members of the firm, which, in my opinion, suggests a stronger reason for the opinion expressed by Judge Drummond, that there can be no discharge from partnership debts but by the bankruptcy of the firm, and the looking into the firm business by the bankruptcy court. And in this view, too, the propriety of this provision is most clearly seen, for if, upon the bankruptcy of a single member of a firm composed of many individuals, the assets of the firm would become the property of the assignee, then the same result would follow if each member should be so adjudged, and separate assignees appointed, and then, instead of a speedy settlement and distribution, as is clearly contemplated by the whole scope of the law, would often be rendered very difficult, if not impossible.

It is objected further by defendants' counsel, that the firm of Lane & Smithson had been dissolved previous to the commencement of proceedings in bankruptcy by Lane. That might well be, and the arrangement, as between themselves, might be of the most satisfactory character or otherwise, but would such dissolution or arrangement affect in any way the rights of their firm creditors? Clearly they would not; each member would remain bound to their firm creditors as a firm and as individuals, in the same manner and in every way as before the dissolution.

Partnerships are often dissolved upon terms agreed upon by the members, and the terms enforced by the courts, as between themselves. But it would be new indeed if it should be declared that the rights of creditors were in any way affected by any such arrangement. Certainly, by no such arrangement can the objects provided for by the bankrupt law be defeated. In Re Independent Ins. Co. [Case No. 7,017], in the circuit court of Massachusetts, Judge Shepley declares that "no power exists to wrest from the jurisdiction of the court in bankruptcy

the assets of bankrupts, either corporations or of individuals, as are within the scope of the provisions of the United States bankrupt act." Then any member of a firm existing or dissolved may proceed against such of the members as will not join in a proceeding to have the firm declared bankrupt. In re Noonan [supra]. And if he will not so proceed, then the advantage of a discharge from his partnership debts will not be allowed him.

Lastly, it is insisted for the defendant that the plaintiff proved and filed his debt in his bankruptcy proceedings; that this was the voluntary act of the plaintiff, and by this he waived his rights against the firm.

It has been already shown that the plaintiff had the right so to prove his debt, in view of a distribution of Lane's individual estate alone, so that he might be prepared to enjoy his share of any surplus (should there be such), after the payment in full of his individual debts, and in availing himself of this privilege, I think, he lost no right as a creditor against the firm or assets of the firm, allowed him by the law.

According to the case agreed, I am for these reasons of opinion that the plaintiff is entitled to have the judgment of the justice affirmed.

HUDLAND (UNITED STATES v.). See Case No. 15,411.

Case No. 6,828.

The HUDSON.

[Cited in The Henry Ewbank, Case No. 6,376. Nowhere reported; opinion not now accessible.]

Case No. 6,829.

The HUDSON.

[5 Ben. 206; [1] 14 Int. Rev. Rec. 36.]

District Court, S. D. New York. June, 1871.

COLLISION ON HUDSON RIVER—VESSEL AT ANCHOR IN FOG—FERRY TRACK.

1. A United States revenue steamer came to anchor so near the track of a ferry, that, when the tide was ebb, if the ferry-boats kept far enough down to avoid her, they risked falling below the ferry slip. The steamer was requested to move further up stream, but failed to do so. The next morning was foggy, and, shortly before daylight, ferry-boat, although carefully navigated, collided with the steamer, which had failed to ring a bell, or otherwise announce her position: *Held*, that the steamer was improperly anchored too near the ferry track.

2. The ferry-boats were not bound to cease their trips in the fog.

3. The steamer was also in fault in failing to give some audible signal of her position.

In admiralty.

Henry E. Davies, Jr., and George S. Sedgwick, Asst. Dist. Attys., for the United States.

W. R. Beebe and Jos. C. Jackson, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the United States to recover for the damages sustained by the revenue steamer Cuyahoga, owned by the United States, through two collisions which took place, on the morning of the 29th of September, 1863, shortly before daylight, between the Cuyahoga and the steam ferry-boat Hudson, in the Hudson river, near the Jersey City slip of the ferry from the foot of Montgomery street, Jersey City, to the foot of Desbrosses street, New York. The first collision took place while the ferry-boat was on a trip from New York to Jersey City. The Cuyahoga was lying anchored with her head to the north, the tide being ebb, and was struck on her starboard side, near her bow, and considerably damaged. On her next trip from Jersey City to New York, the ferry-boat struck a launch on the port side of the Cuyahoga, hanging at davits, and stove it in. There was a fog at the time.

It is claimed, on the part of the ferry-boat, that the Cuyahoga was lying in too close proximity to what was, on an ebb tide, the usual track or route of the ferry-boats from the Desbrosses street slip on the New York side to their slip at Jersey City, which is the most northerly one of the slips at the foot of Montgomery street, Jersey City. The evidence shows this to have been the fact. On an ebb tide, the boat which leaves Desbrosses street heads up against the tide and runs over pretty well to the New Jersey shore, and then drops down sideways with the tide and heads in to her slip. This makes her usual track on an ebb tide a much wider one than the width of a straight course between the two slips. If she does not pursue such course and have the free use of such track, she is carried below her slip at Jersey City, and fails to make it on the first attempt, and loses time. On the same morning on which these collisions took place, and in the same fog, and before these collisions, another ferry-boat, the Aresseoh, which was running from New York to Jersey City, on the Desbrosses street ferry, knowing that the Cuyahoga was at anchor where she was, kept so far down, in order to avoid her, as, with the ebb tide, to miss the slip at Jersey City and go below it; and the Aresseoh, on a trip to Jersey City after these collisions, on the same morning, and in the same fog, came very near colliding with the Cuyahoga, running within a few feet of her, and, in her course after that, on the same trip, the tide being ebb, dropped by her and then headed up for her slip, but missed it and went below it. These boats were entitled

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

to their usual track in the ebb tide, as much in the fog as when there was no fog. Those in charge of the Cuyahoga were bound to know what such usual track in the ebb tide was, and what the effect of the ebb tide was on the manoeuvres of the boats in reaching their slip at Jersey City. The Cuyahoga had anchored where she was the afternoon before, and had seen the boats passing to and fro. There were two boats, each of which passed her once in every twenty minutes. Not that these facts would justify the ferry-boats in reckless navigation in the fog, merely because such was their track in an ebb tide; for, they knew that the Cuyahoga was at anchor where she was. But, the existence of the facts referred to made it incumbent on the Cuyahoga to take all prudent measures to indicate where she was in the fog. Her general presence and her general position were known; but the fog prevented her being seen at any but a very short distance, and equally prevented a light on her being seen. Any sound from her could, however, be heard through the fog. There is some dispute as to the density of the fog; but it is clear it was so dense as to demand that the Cuyahoga should announce herself by audible sounds. The ferry-boat was blowing her steam-whistle, and her paddles, she being a side-wheel boat, made a loud noise. The morning was still and calm. A sound on the water could be heard a considerable distance—much further than vision could penetrate through the fog. The approach of the ferry-boat to the Cuyahoga was, therefore, indicated to the latter, and she should have responded by sounding a bell, or blowing a horn, or striking on an anchor-stock, or shouting with the voice, or making some other audible noise. She did nothing of the kind. So far from that, the conduct of those on board of her was, in this respect, very reckless and culpable. On the afternoon before the collisions, the Hudson communicated with her in passing, and requested her people to take her further up stream, as she was in the course of the Hudson. This was done by the direction of Mr. Woolsey, the superintendent of the ferry, after he had seen where the Cuyahoga was anchored. After the first collision, and before the Hudson moved away, her pilot asked the people on the Cuyahoga if they would not ring a bell or blow a whistle or a horn, so it could be told where she lay. In reply, he was requested to go to hell. After the second collision, and before the Hudson moved away, her pilot again asked the people on the Cuyahoga if they would not ring a bell or make some noise, so that he could tell where she lay. On the trip, before referred to, of the Aresseoh, to Jersey City, her pilot, in dropping his boat down with the ebb tide close by the starboard side of the Cuyahoga, hailed a man whom he saw about amidships on her deck, and told him that the vessel lay in the course of the ferry-boat, and asked if he would not ring a bell, or make some noise, or drop down below the ferry slips. This was after the collisions with the Hudson, and while the fog continued. The reply was: "Bang away, damn you; I am as hard as you are; you have hit me twice now."

These facts show great fault on the part of the Cuyahoga, and fault which accounts largely for the collisions. If the Cuyahoga had indicated her position by making a proper noise, there can be no doubt that she would not have been hit. The ferry-boats were guided, during the fog, in reaching their slip at Jersey City, by a fog-bell, weighing nearly six hundred pounds, and having a peculiar sound, distinguishable from that of other bells, and which was constantly sounding on the pier adjoining such slip. This fault of the Cuyahoga modifies and regulates the responsibility of the ferry-boat. The latter was not bound to omit her trips altogether in the fog. She was bound to use proper precautions, by using less speed, and keeping a proper lookout, and feeling her way, and otherwise, in the fog, so as not to come into collision with another vessel using like proper precautions. The ferry-boat did use such precautions, and the evidence discloses no fault on her part. She was running under a slow bell, before sighting the Cuyahoga, at both collisions, employing no greater speed than was necessary to give her pilot proper control of her in the tide that was running. She had two lookouts, one stationed alongside of the pilot-house, on the promenade deck, as near the forward edge of that deck as possible, and the other at the extreme bow of the boat on the main deck. Her engineer was at his post, and stopped and reversed his engine promptly on getting the bells for that purpose. Those bells were rung by the pilot in the pilot-house the moment the Cuyahoga was reported. The lookout Coe, who was on the main-deck forward, reported her. He is not produced as a witness, but proof is made that an unsuccessful effort was made to find him. He had, at the time of the collisions, been on the ferries for two years. The fact that he was at the post mentioned is shown by the pilot and by the other lookout, and he reported to them that there was a vessel ahead, before they could see her from their position.

The position of the ferry-boat at the second collision, when she came in contact with the boat on the port side of the Cuyahoga, as that vessel lay tailing down the river, is sufficiently accounted for by the fact that, as the ferry-boat left her slip at Jersey City, she saw the lights of a Courtlandt street ferry-boat which was bound into the slip next adjoining below at Jersey City, and sheered up stream, against the ebb tide, by starboarding, so as to avoid being

borne down by the tide against the incoming boat. That sheer carried her, in the fog, to the port hand of the Cuyahoga.

The libel is dismissed.

Case No. 6,830.

The HUDSON.

[The case reported under above title in 14 Int. Rev. Rec. 36, is the same as Case No. 6,829.]

Case No. 6,831.

The HUDSON.

[Olc. 396.] [1]

District Court, S. D. New York. Oct., 1846.

SEAMEN—CONTRACT OF HIRING—MASTER AS WITNESS—DISCHARGE OF CREW—SET-OFF IN ADMIRALTY.

1. A master of a vessel is a competent witness for the owners in a suit in rem for wages by one of the ship's company.

[Cited in Patten v. Darling, Case No. 10,812; The Wanderer, 20 Fed. 656.]

2. A hiring at monthly wages imports that the engagement is by the month, terminable with each month, at the option of either party. If the party hired leaves before the expiration of the month, he loses the whole wages; if he is discharged before its termination, he recovers for the whole time.

[Cited in Truesdale v. Young, Case No. 14,204.]

3. The discharge of the crew by sale of the vessel on execution, is of the same effect as to their rights as the breaking up of the voyage or discharge of the crew by act of the master.

4. Debts or liabilities of seamen to the master or owner of a vessel for other cause than for misfeasance or nonperformance in the duties of their position, cannot be set up against their demand of wages.

5. Admiralty does not take cognizance of set-off; but allowances may be made to the master or owner by rebatement of wages in compensation of losses or injuries incurred by them in consequence of negligence or fault of the mariner in the performance of his duties.

[Cited in The Henry Ewbank, Case No. 6,376; Dexter v. Munroe, Id. 3,863; Gillingham v. Charleston Tow-Boat & Transp. Co., 40 Fed. 651.]

6. Quere. Whether the civil law action of reconvention, or the remedy of compensatio or stoppage may be had in admiralty?

The libellant brought this suit for the recovery of wages as steward on the steamboat Hudson. He avers that he entered on board in that capacity on the 17th of February, 1846; that no contract was made as to the rate of wages, but that his services were worth forty dollars per month, and that the usage in that line of business is to pay stewards at such monthly rate for the entire season of ten months. He avers that he was discharged the 24th of July thereafter, and claims a decree for ten months' wages at forty dollars per month. The answer controverts these allegations, and asserts that the libellant was hired by the month and not by the season, served only from March 2d to July 24th, and that his services were not worth forty dollars per month; and that he earned, whilst on board, over and above all payments, fifty-one dollars and seventy-five cents, and no more; that the boat was sold under execution July 21st, and that the libellant was afterwards discharged by the purchaser and now owner. He further avers that libellant was at the time indebted to the boat for liquors sold on board, &c., during the previous year, when bar-keeper, in the sum of forty-one dollars and eighty-three cents, and that claimant tendered him fifty-three dollars before suit brought, and deposited the same in court.

Mr. Haskett, for libellant, contended that the contract was for the season. That a judicial sale of the boat did not discharge the lien for wages, and that Charles J. Hodges, called by the claimant as a witness, was incompetent to testify, on the ground of interest.

Mr. Underhill, for claimant. Hodges was competent; his testimony was adverse to his own interest. 15 Johns. 270; 16 Johns. 70. He also cited 7 Adol. & E. 544; 2 East, 145.

BETTS, District Judge. A preliminary objection was taken to the testimony of Charles J. Hodges, former part owner and manager of the boat, as a witness in this case, based upon his interest in the event of the suit. It was urged that he, as such owner, was personally liable on the contract, and would be obliged to pay the claim of the libellant, if not recovered of the boat. He may have such contingent interest, but it would be one against the party calling him, because he would be most benefited by casting the debt upon the boat. Interests of a remote and uncertain character are not now regarded as disqualifying a witness; they go to his credibility alone. 5 Hill, 476; 1 Phil. Ev. 32; Cowen & Hill's Notes, 131. The libellant has not, in my judgment, produced sufficient evidence to sustain the averments of the libel that his hiring was for the entire season, at $40 per month; on the contrary, in the absence of direct evidence, the implication is, that his engagement was by the month, at monthly wages; and upon all the proofs I do not consider he ought to receive more than twenty-five dollars per month. This was the most the owner ever told him he would pay. The statement was made after the libellant had entered upon his duties on board, and was not controverted by him at the time. The owner had said, if he discharged the libellant, and made another appointment in his place, he meant to allow him wages for the season, and supposed he should pay three hundred dollars. This was a gratuitous statement, not made at the time of any contract between the parties, nor in reference to any

[1] [Reported by Edward R. Olcott, Esq.]

new action or engagement by the libellant. It is not sufficient, therefore, to support the suit, there being no consideration for it; and it is not proof of the terms of the past bargain, because it is put by the master on the supposition or contingency that he might remove the libellant, and seems to have been offered in the way of a consoling suggestion to the libellant in case his place should be taken from him.

The fair import of the whole evidence is, that there was no express agreement for wages, and that the libellant entered into the business as a mere adventure, expecting to receive a monthly compensation for his services, at the rate the owners should consider them worth. This would be a reasonable and appropriate arrangement in appointing him to a situation of trust and responsibility, with the duties of which he was unacquainted. His recompense was not fixed at any price for a general term or period, but was to be a monthly quantum meruit whilst he continued to serve. It is in proof that he was not well qualified for the situation, and I am satisfied there is no just foundation for his claim to a payment exceeding twenty-five dollars per month, for the time he was employed. His action was instituted within a few days after he was discharged from the boat, and cannot be made to embrace more than the time which had then elapsed.

Unless the testimony is clear and unequivocal that the engagement was absolute for a season or definite period, a hiring, at monthly wages, will be regarded an engagement by the month, and thus leaving it optional with either party to terminate the obligation to serve or pay, at the end of the month. If it closes during the running of the month by the discharge of the servant, the master must pay wages for the month; and if by the servant, he loses the wages accruing on the unfinished term. 12 Johns. 165; 13 Johns. 94; Id. 390. The discharge of the libellant in consequence of a judicial sale of the boat must be regarded the act of the owner, leaving her liable to the libellant to the same extent the owner would have been. It was the duty of the libellant to prove clearly the time at which his services commenced. The evidence is, that he went on board the last of February, but the written memorandum of the then master handed over to the purchaser on the sale of the boat, makes it the 2d of March. The former master testifies that date was a mistaken one, yet is not able to supply the time with more certainty. The implication, under such circumstances, is not to be in favor of the libellant, and accordingly I should hold that the time of computing his wages begins with March and ends with July, giving five months payment, at twenty-five dollars per month, or one hundred and twenty-five dollars. The $41.83, alleged by claimants to be due to the boat by the libellant, for various articles had by him on board, cannot be regarded in this action. It at best could enure only by way of set-off, and the admiralty does not take cognizance of cross-demands, unless they are parcel of the contract on which suit is founded, or tend to prove it imperfectly fulfilled, or performed in such manner as to be injurious to the party sued. Willard v. Dorr [Case No. 17,680]; The Mentor [Id. 9,427]. Here the debt claimed to be due by the libellant was incurred by him the preceding year, when he was employed on the boat as bar-keeper. It is alleged to be for the sale of liquors at the bar, the proceeds of which were retained by him, and for passages given his friends on the boat, all being matters of account or implied assumpsit, appertaining to actions at law and not to maritime suits, and the debt in no way arose out of or was connected with his employment on board as steward. The civil law afforded relief for counter or cross-claims of like kind, by an order of compensation or stoppage (Wood, Civ. Law, bk. 3, c. 9, § 5), made in the lis pendens, but that procedure has never gone into the admiralty practice. The action of reconvention (Wood, Civ. Law, bk. 4, c. 3, § 6), employed to the like end, might perhaps be allowable in admiralty when the whole subject is within its jurisdiction. Dig. lib. 16, tit. 1-3; 1 Poth. Analysis, Pandects, 165, verb. "Compensatio"; Code, lib. 7, tit. 45, art. 14. From the amount of wages, $125, is to be deducted the credit given by the libellant of $35 paid to him; $10, in his hands, admitted to have been received by him as steward, making $45, leaving $80, for which a decree must be rendered, with costs. The $53 deposited in court will be applied in part satisfaction of the decree.

Case No. 6,832.

HUDSON v. ADAMS et al.

[18 N. B. R. 102;[1] 3 Cin. Law Bul. 1066.]

District Court, N. D. Ohio. 1878.

ATTACHMENT—PRIORITY OF LIENS — ASSIGNEE IN BANKRUPTCY.

1. When, in an attachment proceeding, a judgment is recovered, and process issues thereon to sell the attached property, its lien relates back to the service of the attachment, and there is then no attachment process in existence upon which section 5044 can operate.

[Cited in Shelley v. Elliston, Case No. 12,750.]

[See In re Badenheim, Case No. 716.]

2. An attachment issued in an action commenced by one A. was levied upon certain lands of the debtor. Subsequently an execution issued upon a judgment recovered by one B. was levied upon the same lands. A. afterwards obtained judgment, and an order was issued thereon to sell the lands attached. The debtor having filed a petition in bankruptcy, the sale was enjoined. The assignee in bankruptcy afterwards sold the lands, and the proceeds proved insufficient to pay both judgments. *Held*, that

[1] [Reprinted from 18 N. B. R. 102, by permission.]

the process issued on A.'s judgment was not affected by section 5044; that the assignee, in fact, took nothing, and that A. was entitled to priority.

Application [by William J. Hudson, assignee of Charles T. Snider], to sell real estate and settle liens.

S. O. Griswold and J. K. McBride, for Wolf, Mayer & Co.

John W. Hiesley, for defendant Sloss & Co.

WELKER, District Judge. From the agreed statement of facts, it appears that, on the 20th of January, 1877, the defendants, Wolf, Mayer & Co., commenced an action against Snider, the bankrupt, in the common pleas of Wayne county, Ohio, and, having obtained an order of attachment, had it levied the same day upon certain lands of the bankrupt in that county, and described in the petition. Sloss & Co., also defendants, obtained a judgment on a cognovit in the common pleas of Cuyahoga county, on the 13th day of January, 1877, upon which execution was issued to the sheriff of Wayne county, who levied it upon the same lands which the sheriff had attached at the suit of Wolf, Mayer & Co., on the same day, but after the attachment was levied. Wolf, Mayer & Co. obtained judgment in their suit on the 13th day of March following, and an order was issued on their judgment to sell the lands attached; but before the sheriff had actually sold the lands (having advertised the same under the order), on the 30th day of April, 1877, Snider filed his petition in bankruptcy, on which he was adjudged a bankrupt on the 1st day of May. At the suit of one of the creditors, this court, on the day before the time for sale, enjoined the sale. The assignee came into the suit, and it was prosecuted in his name. He has since sold the land, and the proceeds are in court, and are not sufficient to satisfy both judgments. There is no question as to fraud or preference in the manner of obtaining these judgments. It is a mere race for priority between these judgment-creditors. It is contended by Wolf, Mayer & Co. that their lien dates back to the service of the writ of attachment. On the other hand, Sloss & Co., admitting the validity of the judgment, insist that its lien only dates from the time of its rendition, to wit, March 13, 1877, and that their levy previously made has priority. Wolf, Mayer & Co. cite Code Ohio, §§ 205, 221, 228; Henkelman v. Smith [42 Md. 164]; In re Cook [Case No. 3,152]. Sloss & Co. cite 14 N. Y. Sup. Ct. (7 Hun), 288; 42 Cal. 528; and 37 Conn. 341. Both these parties claim under state liens, which are protected and saved by the bankrupt act [of 1867 (14 Stat. 517)].

It is, however, contended, on the part of Sloss & Co., that the lien which Wolf, Mayer & Co. otherwise would have had is divested by the operation of section 5044 of the bankrupt act. This section declares that the title of the assignee shall relate back to the date of the filing of the petition, and vest in him all the title then held by the bankrupt to real and personal estate, although the same may then be attached on mesne process, and shall dissolve any such attachment made within four months, next preceding the commencement of the bankruptcy proceeding. Undoubtedly this section was made part of the act from various decisions arising under the bankrupt act of 1841 [5 Stat. 440]. In that act, the same as the present, state liens were preserved. In many of the states suits only were commenced by attachment on mesne process, and it was held that the lien of judgments obtained thereon related back to the service of the process. See In re Cook [supra]. To prevent this sort of preference, section 5044 was adopted. It is to be observed that this section by its own terms relates to existing attachments. It says that the title of the assignee shall relate back to the filing of the petition, and vest in him the title of property attached on mesne process, and such attachment shall be dissolved, provided it was such a one within four months from the commencement of the bankruptcy proceeding. In this case, however, Wolf, Mayer & Co. proceeded to and did obtain judgment nearly two months prior to the filing of the petition. By the operation of section 5044, all the title which Snider had in the land became vested in the assignee. It was bound, however, by both judgments, and subject to their payment; and as the property was insufficient to pay them both, the assignee in fact took nothing. And the question is, does the force of this section operate to discharge the lien which Wolf, Mayer & Co. obtained by the service of their attachment, for the benefit of Sloss & Co., subsequent levying creditors? No question of equity exists. They stand on their legal rights. Such rights as the state law gives them they have, and Wolf, Mayer & Co. have priority, unless section 5044 operates to discharge and vacate their lien. In the case cited from 12 N. B. R., substantially this question was decided. In that case personal property was attached and sold during the pendency of the attachment proceeding. Subsequently, a judgment was obtained, and the money was ordered applied upon the judgment. After the recovery of the judgment the petition was filed within four months from the commencement of the attachment proceeding. The assignee claimed the money. On very full argument, the court held that the assignee could not recover; that although the property had been seized and sold under the attachment process, when the judgment was recovered it was no longer an existing process, but was part and parcel of the judgment and the

money properly applied thereon. In the case cited from 14 N. Y. Sup. Ct., property was attached, and the debtor within a few days afterwards adjudged a bankrupt. Neither the assignee nor the debtor moved to discharge the attachment, and subsequently there was a judgment rendered against the bankrupt in the attachment proceedings, and it was claimed by the attaching creditor that the property attached should be applied in satisfaction of the judgment. The court held it was unnecessary to have moved to discharge the attachment, and refused the order. The case from 37 Conn. does not bear upon the question. In that case the attachment was levied more than four months preceding the bankruptcy, and on an application after bankruptcy for a full judgment the court held that the plaintiff could only have a qualified judgment subjecting the property attached. In the case cited from 42 Cal., the creditor commenced suit against his debtor, and garnished an insurance company. The garnishee answered admitting the indebtedness, but saying it was not due. Subsequently the creditor obtained judgment and issued an execution, but no levy or action was taken thereon. The debtor was adjudged a bankrupt, and the assignee brought suit for the money against the garnishee, making the creditor a party, and it was held that the assignee could recover the money. The court put it expressly upon the ground that this being personal property, the only lien which the plaintiff had was his attachment proceeding, and that he had acquired nothing more by his judgment. The court also states that if the execution had been levied the money would have been held by the creditor. If we look at sections 205, 221, and 228 of the Ohio Code, it will be seen that the property attached is bound from the date of the service of the order of attachment, and that when the plaintiff has obtained his judgment, upon that judgment an order of sale in the nature of an execution could be issued and proceeded with as an execution issued upon a judgment; and on this order of sale the attaching creditor has priority over judgments levied after the service of the attachment. Section 228 provides that prior to the obtaining of the judgment the attachment may be dissolved. The effect, therefore, of these proceedings is, that when in the attachment proceeding a judgment is recovered, and process issues upon the judgment to sell the attached property, its lien relates back to the service of the attachment. There is then no attachment process in existence upon which section 5044 can operate. In this case the order was issued, and the sheriff was proceeding to sell. Section 5044 in nowise affected this subsequent process; there was nothing upon which it could operate. By the state law the lien of Wolf, Mayer & Co. has priority, and a decree may be entered accordingly.

Case No. 6,833.

HUDSON v. BRADLEY et al.

[2 Cliff. 130.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1862.

PAYMENT—PRESUMPTION—PROMISSORY NOTE.

1. Where a party in Massachusetts, bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption, in the absence of any proof to the contrary, is, that such note was accepted by the creditor in satisfaction and discharge of the pre-existing debt.

[Cited in The Helen M. Pierce, Case No. 6,332.

[Cited in Bantz v. Basnett, 12 W. Va. 785.]

2. Such presumption is, however, one of fact only, and may be rebutted and controlled by any evidence showing that such was not the intention of the parties.

3. If it appear that the note was not the obligation of all the parties who were liable for the original debt, and a fortiori, where it appears that the note was that of a third party, and if held to be in satisfaction, would wholly discharge the party previously liable, then the presumption, if it exists at all, may be repelled by slight circumstances evidencing a contrary intention.

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

The libellant [Joseph Hudson], a sail maker, furnished to the bark America materials and labor in making and repairing her sails, and payment being refused, he instituted this suit against the owners of the vessel, to recover his bill for the materials and labor furnished. It was alleged in the libel that he furnished the materials, and rendered the services during the year 1859; that he had repeatedly requested payment for the same, which had been refused. The respondents [Thomas Bradley and others] in their answer admitted that the vessel, while lying in the port of Mattapoisett, was in need of such repairs, and that their agent contracted with the libellant to furnish such labor and materials; but they denied that any demand of payment was ever made of them. They further alleged that the libellant received of their agent certain promissory notes, and accepted the same in payment of his account to the extent of the notes so received, and two receipts were appended to the answer as proof of the fact so alleged. Of these, the first was dated January 24, 1860, and acknowledged the receipt of two notes, "for and on account of vessel's bills." Those notes were signed by the agent who contracted for the repairs, and were each for $1,000. One was dated January 21, 1860, and was payable in six months; the other January 24, 1860, and payable in four months. The second receipt was dated April 30, 1860; was for a note of the agent of the same date with the receipt, for $1,000 on account, and was payable in six months from date. By

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

a supplemental answer the respondents also alleged, that they had adjusted and paid to their agent all the outfit bills of the vessel, including the claim of the libellant, and they averred that they ought not to be required again to pay the same. It was agreed, that the account annexed to the libel was correct, and that the receipts annexed to the answer were executed by the libellant, so that the question was, whether the notes specified in the receipts were accepted as payment to that amount. It was also agreed, that the note mentioned in the second receipt was never paid, and the case showed that it had been duly tendered back to be cancelled. The agreed statement also showed, that half the amount of the notes described in the first receipt was paid by the agent who gave the same, at maturity, and that two other notes, each for the sum of $500, were given by him as an extension of the time of payment. One of the renewed notes was dated May 26, 1860, and the other July 23, in the same year, and each was payable to the order of the libellant, in four months from date. Neither of the notes was ever paid, and both were, at the hearing, tendered back to be cancelled. The first-mentioned notes were indorsed by the libellant, were discounted at bank, and it appeared that he used the proceeds in his business. The renewed notes were also indorsed by him; and being liable therefor, as indorser, he was ultimately obliged to pay them, after protest. He also indorsed and negotiated the note, described in the second receipt, but this he was also obliged to pay his indorsee, at maturity, it being protested for non-payment. No demand of payment of the claim, prior to January 1, 1862, was made of the respondents, otherwise than of their agent, who made the contract for the repairs; and the case showed that on July 28, 1860, the agent died insolvent. In the court below a decree was entered in favor of the libellant.

T. D. Eliot and T. M. Stetson, for libellants.

The respondents say, that their agent gave the plaintiff certain promissory notes, which they claim were a payment, though the notes have not been paid and are now offered back by libellant. That is to say, libellant must lose his property and labor, which went to the respondents' use and benefit, and enabled them to send their vessel on a profitable enterprise. The respondents must prove that the notes were given and received as payment; to do this, they claim that the notes by law constituted payment. This is not pretended to be the case anywhere but in Massachusetts and Maine. Page v. Hubbard [Case No. 10,663]; The Chusan [Id. 2,717]; Fowler v. Bush, 21 Pick. 230; Cushing v. Wyman, 38 Me. 589. Elsewhere the note is only conditional payment; i. e. payment if the note is paid. Arnold v. Delano, 4 Cush. 39. In Maine and Massachusetts the decisions are not rules of law, but only presumptions of fact. The lex loci usually governs, as to the nature, validity, and construction of a contract, but the lex fori as to the remedy. Van Reimsdyk v. Kane [Case No. 16,871]. It is the old distinction between "facts" and ascertainment of facts, rights, and remedies. 2 Pars. Cont. 100–104; Andrews v. Herriot, 4 Cow. 508; Bank of U. S. v. Donally, 8 Pet. [33 U. S.] 361. Besides, it has been held by the supreme court, that in "commercial questions, the general law governs, and not the local, in the admiralty courts of the United States." Swift v. Tyson, 16 Pet. [41 U. S.] 1; Mutual Safety Co. v. The George [Case No. 9,981]. It is distinctly held, both in Massachusetts and Maine, that the note is not a payment and that the presumption is repelled, where there are co-promissors or security to the original claim, because it would be absurd to presume that a person would release them, especially so, in a case like this, where a mechanic is presumed to rely upon the usual securities of a material-man. Melledge v. Boston Iron Co., 5 Cush. 170; Fowler v. Ludwig, 34 Me. 461; Page v. Hubbard [supra]; Curtis v. Hubbard, 9 Metc. [Mass.] 328; Arnold v. Delano, 4 Cush. 41; Thurston v. Blanchard, 22 Pick. 21; Butts v. Dean, 2 Metc. [Mass.] 76; 1 Pars. Mar. Law, 93; 2 Pars. Cont. 136; Palmer v. Priest [Case No. 10,694]; Baker v. Draper [Id. 766]. If there has been any wrong or misapprehension, the presumption of payment arising from giving a note is repelled. See Thurston v. Blanchard, 22 Pick. 18. It makes no difference that the libellant indorsed and negotiated the notes, since he had to pay them at last, and he now offers them back. The Chusan [supra]; Melledge v. Boston Iron Co., 5 Cush. 172; The Harriet [Case No. 6,098]; Drake v. Mitchell, 3 East, 251; Byles, Bills, 435, c. 29; Sweet v. James, 2 R. I. 270; Moore v. Newbury [Case No. 9,772]; Kimball v. The Anna Kimball [Id. 7,772]. Slight evidence is sufficient to rebut the presumption, that notes were given and received as payment. The delay of the libellant in making demand on the owners, was no evidence that the notes were taken as payment; it rather showed that he thought his demand was admitted.

R. C. Pitman and C. T. Bonney, for respondents and appellants.

The contract in question was made in Massachusetts by citizens of that state, and so the law of Massachusetts must control the case. Baker v. Draper [supra]; The Chusan [supra]; Palmer v. Priest [supra]. By express decisions of her courts, the receipt of a negotiable promissory note is, in Massachusetts, prima facie payment of a pre-existing debt. Thacher v. Dinsmore, 5 Mass. 300; Maneely v. M'Gee, 6 Mass. 143; Johnson v. Johnson, 11 Mass. 361; Wilcomb v. Williams, 4 Pick. 230; Reed v. Upton, 10 Pick. 522; Jones v. Kennedy, 11 Pick. 130; Wood v. Bodwell, 12 Pick. 268; Butts v. Dean, 2 Metc. [Mass.] 76; Ilsley v. Jewett, Id. 173; Rindge v. Breck, 10 Cush. 44; Parker v. Os-

good, 4 Gray, 456; Derickson v. Whitney, 6 Gray, 250; Newall v. Hussey, 18 Me. 250; Dickinson v. King, 28 Vt. 380; Collamer v. Langdon, 29 Vt. 32. The presumption exists, although some of the parties liable, or some security is released. Fowler v. Bush, 21 Pick. 230; Rindge v. Breck, 10 Cush. 44. And so it has been expressly decided, that taking the note of one of the owners releases the others. Chapman v. Durant, 10 Mass. 47; French v. Price, 24 Pick. 13, 20; Paige v. Stone, 10 Metc. [Mass.] 160; Stephens v. Thompson, 28 Vt. 77; The Nestor [Case No. 10,126]. The renewal notes were payment of the prior note. Cornwall v. Gould, 4 Pick. 444; 1 Smith, Lead. Cas. (5th Ed.) 458; Castleman v. Holmes, 4 J. J. Marsh. 1; Slaymaker v. Gundacker, 10 Serg. & R. 75. There is nothing in proof to rebut the legal presumption of payment. But the legal presumption is strengthened by several circumstances in proof. The libellant was a citizen of this state, and there is a presumption of fact as well as law, that he knew the long-established Massachusetts doctrine. The libellant negotiated both notes. The delay in making claim on the other owners is plenary evidence of the libellant's understanding. Libellant by his laches is estopped from denying that he gave exclusive credit to the agent. The other owners settled with the agent upon this understanding. Macy v. De Wolf [Case No. 8,933]; James v. Bixby, 11 Mass. 34, 41; Tudor v. Whiting, 12 Mass. 212; Reed v. White, 5 Esp. 122; Evans v. Drummond, 4 Esp. 89; Wyatt v. Hertford, 3 East, 147; Kymer v. Suwercropp, 1 Camp. 109; Thompson v. Percival, 5 Barn. & Ald. 925; Palmer v. Priest [supra]; 1 Pars. Mar. Law, 99; Story, Ag. §§ 249, 439; Abb. Shipp. 136, note. If he had called on us while the agent lived, we might have had reimbursement. Now his estate is insolvent. Libellant, for his own interest probably, chose to indulge the agent for years. He, and not we, should suffer.

CLIFFORD, Circuit Justice. Evidently the question of payment is the only one of any importance in the case. Where a party in this state, who is bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption, in the absence of any proof to the contrary, is, that such note was accepted by the creditor in satisfaction and discharge of the pre-existing debt, but such a presumption is one of fact only, and may be rebutted and controlled by any evidence showing that such was not the intention of the parties. Taking the rule as stated, it is supported by many decisions in this state, but it is now generally admitted, wherever this rule prevails, that when it appears that the note was not the obligation of all the parties who were liable for the original debt, and a fortiori, when it appears that the note was that of a third party, and if held to be in satisfaction, would wholly discharge the party previously liable, the presumption, if it exist at all, may be repelled by slight circumstances evidencing a contrary intention. Melledge v. Boston Iron Co., 5 Cush. 169.

Courts of justice here and in Maine adhere to the rule, as herein stated, in cases where the party accepting the new evidence of the debtor's promise relinquishes no security for the payment of the debt; but wherever the contrary appears, the manifest tendency of the modern decisions is, to regard that circumstance as affording strong evidence to repel the prima facie presumption. Many of the ordinary circumstances, which, as it is held, may have the effect to repel such a presumption are enumerated by Shepley, C. J., in Fowler v. Ludwig, 34 Me. 461, which was referred to by the libellant. He says, if the negotiable paper was accepted in ignorance of the facts, or under a misapprehension of the rights of the parties, it has been held, that the presumption might be considered as rebutted. French v. Price, 24 Pick. 13. So if the paper accepted is not binding upon all the parties previously liable, or if the paper of a third person be received not expressly in payment, the presumption may be considered as repelled.

Applying the qualifications to the general rule adopted in those cases, to the facts of this case, it is clear, that the defence cannot prevail for several reasons. Evidence to show that the notes were received expressly in payment is entirely wanting. On the contrary, the clear presumption from the language of the receipts, especially when considered in connection with the circumstances of the transaction, is that they were not so received. The contract was made by the maker of the notes as agent, and that fact was known to the libellant, as is evident from the manner in which the charges were made for the articles sold and services rendered. No settlement was made when the notes were accepted, and the account was not receipted. Funds were wanted by the libellant, but the agent had none belonging to his principals, and proposed to give his own notes, in a form that would enable the libellant to raise money at the banks. Time notes were accordingly made, without interest, and delivered by the agent to the libellant, but he did not then charge the same to his principals; and the whole transaction on its face shows that the notes were given as a temporary accommodation to the libellant, and not as an absolute payment of the debt.

Circumstances are wholly wanting to show that either party intended to discharge the respondents, and it is their own fault if they have paid the amount to their agent instead of discharging their own obligation.

Cases involving the same conditions as those presented in this case, have so frequently received examination in this court, that it is not deemed necessary to give the subject any further investigation. The decree of the district court is, therefore, affirmed, with costs.

Case No. 6,834.

HUDSON v. DRAPER et al.

[4 Fish. Pat. Cas. 256; 4 Cliff. 178.] [1]

Circuit Court, D. Massachusetts. Oct., 1870.

PATENTS — INFRINGEMENT — BURDEN OF PROOF — ASSESSMENT OF DAMAGES — EXPERT TESTIMONY.

1. Infringement is a material and substantive part of the complainant's case, and the universal rule is that he takes the burden of establishing the affirmative of the issue, whether the suit is at law or in equity.

2. Different rules for the assessment of damages prevail in suits in equity from those which are recognized in actions at law, but in all other respects the rights of the parties depend upon the same considerations.

3. Experts may be introduced to support either side of the issue, and witnesses may be examined as to the practical operation or construction of the two machines, but the question of infringement, after all, must be determined chiefly by a comparison of the mechanism of the complainant, as described in this patent, with the machine made and used or sold by the respondents.

4. Notwithstanding an expert may doubt whether a device can operate in a particular way, the proofs furnished by practical operation and experiment are entitled to greater weight than the opinion of any one.

5. A claim for "said manufacture of printing type, made substantially as described, by the combined process of stamping the letter or figure from a plate or piece of metal, and subsequently reducing the same in the manner and for the purpose set forth," is not a claim for a product, but for a mode of manufacture consisting of the two stages of stamping and reducing, both of which are essential, and must be employed to constitute infringement.

6. Where the defendants used but one of the essential steps in the plaintiff's patent, as a part of their process, and did not use the other, except in exceptional cases, arising from imperfection in their mechanism, *held*, that they did not infringe.

7. Metallic elements of a machine or device often require some fitting to adapt them to their work; and such remedies as are usually applied to overcome or remedy imperfections in machinery cannot be regarded as an infringement of letters patent.

This was a bill in equity, filed to restrain the defendants [Francis Draper and others] from infringing letters patent [No. 55,299] for "improvement in the construction and manufacture of printing type," granted to complainant [Thomas S. Hudson] June 5, 1866. The invention consisted in striking up letters for printing from sheet metal, and grinding or planing off the surface until the roundness is removed and definite square sides and angles are obtained. The claim was as follows: "The said manufacture of printing type, made substantially as described, viz: by the combined processes of stamping the letter or figure from a plate or piece of metal, and subsequently reducing the same in the manner and for the purposes set forth."

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission.]

Walter Curtis and B. R. Curtis, for complainant. James B. Robb, for defendant.

CLIFFORD, Circuit Justice. Inventors, whose improvements are secured by letters patent duly issued, may prosecute infringers of their exclusive rights as well in equity as at law, and all such actions, suits, and controversies are exclusively cognizable in the circuit courts. 5 Stat. 124. Letters patent were granted to the complainant June 5, 1866, for a new and useful improvement in the construction and manufacture of printing type, and he alleges that the respondents have been for a long time and now are manufacturing and selling great numbers of printing types constructed according to the mode set forth in his letters patent, and that the printing types so constructed by them do infringe the exclusive right of making, using and vending such manufactures, as secured to him by his letters patent. Process was issued and served, and the respondents appeared and filed an answer, in which they admit that they have made and sold printing-wheel types, or blocks, for nearly two years prior to the time of filing the original answer, but they deny that the printing-wheel types which they have manufactured were constructed in substantially the same manner as set forth in the letters patent of the complainant. On the contrary, the respondents allege that the printing-wheel types, which they have manufactured and sold, were constructed in the manner and according to the description and directions contained in certain letters patent granted to them May 7, 1867 [No. 64,410], for "a new and useful device" invented by them "for forming letters on type blocks." They explicitly deny that they have infringed the letters patent of the complainant, but they did not in the original answer put in issue the novelty of the complainant's invention. Since that time, to wit: on June 12, 1869, the respondents by consent filed an amended answer, in which they allege that the improvement in the construction and manufacture of printing type described in the patent set forth in the bill of complaint, was described in letters patent granted to the complainant June 20, 1865, as assignee of himself and Anson Hardy, of Brookline, in this district; that the same was therein set forth as a part of the joint invention of the parties; that the manner of constructing or manufacturing printing type, and the mode or manner of making a type chain, set forth in the patent mentioned, in the bill of complaint, was invented by said Hardy; that if the complainant contributed in any degree to the invention, it was jointly with that party and not otherwise.

Much consideration need not be given to the first defense set up in the amended answer, as the patent therein referred to contains no description whatever of any kind

of printing type, or of any process of manufacturing printing type for any purpose. Described in general terms, it is a patent for the combination and arrangement of certain devices therein enumerated, the several parts taken as a whole forming an improved machine for canceling stamps. Reference is made in the description to an endless chain, and it is represented that it contains thirty-one links, with figures projecting from them for printing the various numbers from one to thirty-one, indicative of the days of the month, but it gives no explanation as to the process or processes by which those figures are to be formed, and the respondents have introduced no evidence upon the subject. Extended discussion of the other two propositions presented as defenses in the amended answer is unnecessary, as the evidence introduced in their support fails to satisfy the court that either of them is true. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 606. Subject to these remarks, the case stands as it stood under the original answer, in which the respondents did not put in issue the novelty of the complainant's invention. Examined in that view, as the case must be, and in view of the fact that the complainant has introduced his letters patent in evidence, it must be assumed as a prima facie presumption that the complainant is the original and first inventor of what is described in his letters patent as his improvement. Issued by public authority, as letters patent are, they are presumed to secure to the patentee the exclusive right which they purport to grant, and where the answer is silent upon the subject, or where the respondent introduces no proof to establish the opposite theory, the complainant may safely repose upon that presumption, without offering any evidence to confirm it. Viewed in that light, as the pleadings in every patent suit must be, it is evident that the only question in the case remaining to be considered, is that of infringement alleged by the complainant and denied by the respondent. Infringement is a material and substantive part of the complainant's case, and the universal rule is that he takes the burden of establishing the affirmative of the issue, whether the suit is at law or in equity. Different rules for the assessment of damages prevail in suits in equity from those which are recognized in actions at law, but in all other respects, the rights of the parties depend upon the same considerations. What the court is called upon to determine in this case is, does the machine or device made and sold by the respondent infringe the invention of the complainant, as described and claimed in his letters patent, and if it does not, then the bill of complaint must be dismissed; but if it does infringe the complainant's patent, then he is entitled to his remedy. Expert testimony may be introduced on the one side and the other to support or disprove the affirmative of that issue, and witnesses may also be examined as to the practical operation of the two machines, and the mode in which they were respectively constructed, but the question of infringement after all must be determined chiefly by a comparison of the mechanism of the complainant, as described in his letters patent, and the machine made and used or sold by the respondent, if it be a machine as in this case. Blanchard v. Putman, 8 Wall. [75 U. S.] 426. Tested solely by the short description of the complainant's invention, as given in his letters patent and in the introductory part of the specification, it would seem that he intended to claim the product rather than the means by which the product or manufacture is produced; but the whole instrument must be taken together, and when so considered, it is quite clear that such a construction ought not to be adopted, as the patentee states, in the same paragraph of the specification, that his invention is specially useful for the formation or production of types used in hand stamps for postmarking letters or for canceling revenue or postage stamps. In the descriptive portion of the specification, he divides his invention into two parts, and states that the first part consists in raising the printing surfaces from a thin sheet or piece of metal by means of one or more dies, or a punch and die, suitably formed for the purpose; that the second part consists in making a printing face on the part or parts so raised by planing, filing, or reducing the same so as to remove the round edges and produce an even, flat, and defined surface, suitable for printing the letters or figures, as the case may be. Letters or figures can not, it seems, be easily struck up from a thin plate of metal by a punch or die, so as to make a good printing face, because the edge of the types or figures will be rounded, arising from the fact that the metal, when forced into the female die by the punch, will not completely fill the die, rendering the product unfit to be used for printing, which creates the necessity for reducing the depth of the article sufficiently to remove that defect, and thereby to create a smooth surface, which may be accomplished by planing or grinding the type to the extent required. Description is then given of the mode in which the patentee grinds down or reduces a type chain, or printing plate, band, or strip, which, it is represented, may be done by placing the chain in a groove formed in a metallic plate provided with suitable guides on which the filing or planing instrument may travel, and be used in reducing the types to one plane, and leave the faces of the same with suitably defined edges. Based upon those explanations, the patentee claims as his invention the said manufacture or printing type, made substantially as described, by the combined processes of stamping the letter or figure from a plate or piece of metal, and sub-

sequently reducing the same in the manner and for the purpose set forth. Corresponding examination should be made of the devices made and sold by the respondents in order to compare the two, and to be able to determine understandingly the issue of infringement. Difficulties attended that inquiry at the first hearing, as the proofs in the case, as exhibited at that time, were ambiguous and unsatisfactory on that point. Since that time additional proofs have been taken by leave of court, and the parties have been allowed to file additional printed arguments.

When the respondents first commenced to make such devices, they were struck upon ring blanks, in order to allow the ring to revolve around the centre of the wheel, as the ring only formed a portion of the wheel, while the other portion was formed by a round piece of metal which filled the ring. They were, as represented, struck in ring wheels, in order to index them on the sides, the index upon the ring corresponding with the figures on the ring, and that on the centre of the wheel corresponding to the next wheel to which it was attached. Type-wheels made in that way were used in the index-hand stamp. Exhibits were given in evidence at the same time, but the description of the mode in which the type-wheels were made now seems to be plain and unambiguous. They now use a mold or die, in which they place a round flat piece of metal, as in exhibit marked "forty," and then force is applied to it, striking upon the upper side of a flat piece of metal or blank, which drives the metal laterally into the mold or die. Such is the general description of the process, as given by several witnesses, but another witness enters more into particulars. He says he cuts out the blanks to the size of the die or mold, so that the blank will just slip into the same, crowning it a very little, because the metal when hot is expanded.

Prepared in that way and made sufficiently crowning so that the piece will fill the circular mold, when the metal is cold, the blanks are then heated "red hot" and put into the die or mold, and the blow is then brought on to it with force enough to make the metal flow laterally into the die. Doubts are expressed by the expert called by the complainant, whether the device can be made in that way, but the proofs introduced by the respondents are entitled to greater weight than the opinion of any expert, as the question is one which can be demonstrated by practical operation and experiment. Made and constructed in that way, the respondents allege in their answer, that the letters or figures upon the type-blocks are not reduced in any manner "so as to remove round edges, or to produce a flat surface suitable for printing;" that the letters or figures when the blocks are taken from the dies are already, and by reason of the process of manufacture, "of a defined flat surface suitable for printing," because when the metal is forced into the female die by the plunger, under the pressure, is completely fills the matrix, forming the letters and figures of proper type-faces without requiring any portion of the face of the letters to be reduced to adapt them for printing, as shown by the exhibits filed in the case. Some conflict undoubtedly exists in the proofs upon this subject, but the court is of the opinion that in making printing type, by the respondent's process, the result which they attain is generally accomplished without planing, filing, or reducing the depth of the type. Exceptional instances may, and doubtless do arise, but the evidence satisfies the court that the means of accomplishing such a reduction, for the purpose described in the complainant's patent, is no part of the process of the respondents, and if any necessity ever arises to make any such reduction in the depth of the product, it is, save in very exceptional cases, to overcome the effect of eccentricity in the wheels or of the variations in drilling the wheel-holder to render them coincident with the electrotype plate of the stamp. Such a reduction in depth, for any purpose, it is believed, would be unnecessary if perfect uniformity could be secured in drilling the axle holes of the wheels concentric, and in drilling the axle holes of the wheel-holder the same distance from the bottom; but perfect accuracy in that respect is difficult, and when the variation is considerable, it must be overcome, and the evidence shows that such defects are sometimes cured by filing. Metallic elements of a machine or device often require some "fitting" before the same are put together, and the court is not satisfied that any thing more is done by the respondents, or required to be done in that behalf, in the use of their process, than what properly falls within that rule. Such inequalities and imperfections in the elements of machinery are usually overcome or remedied in that way, and in the judgment of the court no such act can be regarded as an infringement of the complainant's patent. Bill of complaint dismissed with costs.

[For another case involving the same patents see Draper v. Hudson, Case No. 4,069.]

HUDSON (DRAPER v.). See Case No. 4,069.

HUDSON (HALL v.). See Case No. 5,935.

HUDSON (SADDLER v.). See Case No. 12,206.

Case No. 6,835.

HUDSON v. SCHWAB et al.

[18 N. B. R. 480; 26 Pittsb. Leg. J. 140.] [1]

Circuit Court, E. D. Michigan. Nov. 12, 1878.

JURISDICTION IN BANKRUPTCY—POWER OF CIRCUIT COURT TO ENJOIN STATE COURT.

Upon a bill filed by an assignee in bankruptcy, the circuit court has power to enjoin the prosecution of an action of trover in a state court against the marshal for seizing the property of a third person under his warrant in bankruptcy.

On motion for an injunction. Complainant [Joseph L. Hudson], who was the assignee in bankruptcy of Schott & Feibish, filed his bill to restrain the defendant [Samuel] Schwab from the further prosecution of an action of trover against the marshal of this district for taking possession, under a warrant in bankruptcy, of certain goods claimed to belong to him. The bill also prayed that the sale of these goods by Schott & Feibish to Schwab, under which the latter claimed to be entitled to them, be decreed to be fraudulent and void as against the complainant and the creditors of Schott & Feibish.

H. C. Wisner, M. E. Crofoot, and G. V. N. Lothrop, for complainant.

Don M. Dickinson, for defendants.

BROWN, District Judge. This case turns upon the jurisdiction of the bankrupt court to enjoin parties from prosecuting a suit in trover in the state court against the marshal, for seizing property claimed by a third person under his warrant to take possession of the goods of the bankrupt. The question is certainly one of great importance, the more so as it involves a possible conflict with the state courts, in several of which similar actions, arising from seizures under the same warrant, are now pending. I had occasion recently to decide in the case of Evans v. Pack [Case No. 4,566] that this court had no power to enjoin the prosecution of an action of trespass or trover in the state court, brought against the marshal for seizing the property of a third party upon an execution at common law. It was then suggested that if the marshal had been acting under a warrant in bankruptcy, a bill by the assignee might be maintained under the general power given by the bankrupt law [of 1867 (14 Stat. 517)] to administer the estate of the bankrupt, to ascertain and liquidate the liens and other specific claims thereon, and to adjust the various priorities and the conflicting interests of all parties. The case then under consideration was treated as falling clearly within the inhibition of Rev. St. § 720, denying to the federal courts the power of staying proceedings in the state courts; but it was thought that such a bill as this might fall within the exception noted in that section, of "cases authorized by a law relating to proceedings in bankruptcy." Indeed, I had supposed the numerous adjudications of circuit and district judges throughout the country had settled the law in that regard, and no doubt remained of the power of the district court to wind up the entire estate of the bankrupt, and to determine every question connected therewith. It is claimed, however, with great earnestness, that the supreme court has never lent its sanction to the doctrine, and that in the recent cases of Eyser v. Gaff, 91 U. S. 521, and Claflin v. Houseman, 93 U. S. 130, it has expressed its disapprobation of all attempts to interfere with the jurisdiction of the state courts in deciding questions arising incidentally in connection with bankrupt cases. Indeed, counsel for the defendant did not lay so much stress upon the inability of the court to enjoin in this particular case, as upon the want of power in all cases to interfere with parties litigating in state courts.

There are undoubtedly certain expressions used by the learned judge who delivered the opinion in Eyser v. Gaff [supra] which lend some support to the inference drawn by defendant's counsel, but the case itself decided only that a suit for the foreclosure of a mortgage in a state court may proceed to a decree, notwithstanding the bankruptcy of the mortgagor, pending the proceedings, and that the state court is not bound to take notice of the adjudication unless the assignee appears and asks to be made a party. It may be said to establish the proposition that state courts may lawfully proceed with all suits against the bankrupt or his estate, notwithstanding the bankruptcy. It does not decide that the bankrupt court has not the power in its discretion to restrain the plaintiff from prosecuting such suits when, in the opinion of the court, they may have been collusively or improperly begun, or may throw an obstacle in the way of the prompt settlement of the estate. The case of Claflin v. Houseman [supra] decides nothing except that an assignee might, before the late revision, resort to the state courts for the collection of the assets of the bankrupt. Whether this can be done under Rev. St. § 711, is left an open question. It may be remarked, in this connection, that Mr. Justice Bradley, who delivered the opinion in this case, in the case of Goddard v. Weaver [Case No. 5,495], expressed no doubt of the power of the district court to stay a sheriff in proceedings to sell under a mortgage foreclosure or even to set aside the sale, although in that particular case he refused to disturb it. In delivering the opinion, he observes: "I cannot regard the sheriff's acts as void in law nor as voidable or subject to control, except upon cause shown in a court having bankrupt jurisdiction. The bankrupt court is the appropriate court to investigate where any ques-

[1] [Reprinted from 18 N. B. R. 480, by permission. 26 Pittsb. Leg. J. 140, contains only a partial report.]

tion is made as to the validity of the judgment, and proceedings under it may be restrained." If this power does not exist, it is not easy to see how the bankrupt law can be effectually administered. Mortgages may be foreclosed without our assent, and the assignee compelled to pay off the mortgage, or bid the property in at the sale without opportunity for negotiation or power to realize something for the estate by private sale. He can only contest fraudulent claims by appearing in the state court, and where such claims are numerous may be driven from one county to another to defend claims which might all be adjusted in a single suit. The settlement of an estate may be delayed by frivolous appeals, or by new trials, or wasted in fruitless litigation. The assignee may rely upon defences peculiar to the bankrupt law and not available to him in the state courts. Should such defences be improperly overruled, and it is safe to assume that such cases will occur (see Bromley v. Goodrich, 40 Wis. 131), the assignee is remediless except by an appeal to the supreme court of the United States, involving tedious delays and great expense. As observed by the superior court of New York, in Mills v. Davis [35 N. Y. Super. Ct. 355], "the other powers of a bankruptcy court over an estate would accomplish little in dividing the estate among the creditors if the court did not gain the power to save it from dispersion or illegal transfer as soon as the proceeding in bankruptcy began." It was held in this case that where a sheriff had collected money upon an execution, and was afterward enjoined by the district court from "interfering with or disposing of the bankrupt's property," this injunction was a sufficient answer for the sheriff to make to an order from the plaintiff requiring him to pay over the money. The necessity for an occasional interference with actions against the bankrupt's estate in the state courts is forcibly put by Mr. Justice Story, in the case of Ex parte Christy, 3 How. [44 U. S.] 292-319.

The nature and extent of the jurisdiction of the district court as a court of bankruptcy was first considered in this case, and the opinion of the court has afforded a text for most of the subsequent discussions upon the proper functions and office of a bankrupt law. The case was an application for a writ of prohibition to the district court upon the ground it had transcended its powers in decreeing the invalidity of a sale by a state court upon the foreclosure of a mortgage. In affirming the power of a district court in this regard, Mr. Justice Story delivered an exhaustive and learned disquisition, and in the course of his opinion remarks: "We entertain no doubt that under the provisions of the sixth section of the act of 1841 [5 Stat. 445] the district court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other proceedings in equity, upon due application made by the assignee, and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts, for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in the contemplation of congress, indispensable to the practical working of the bankrupt system. But because the district court does possess such a jurisdiction under the act, there is nothing which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the district court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments." These remaks, however, were but dicta.

The direct question of the power of the district court to interfere and set aside proceedings in the state courts came up in Peck v. Jenness, 7 How. [48 U. S.] 612. To an action of assumpsit against the bankrupt in a state court, commenced by attachment, the assignee, who was admitted to defend, pleaded an order of the district court in bankruptcy, upon his petition that the attachment was not a valid lien, decreeing that the sheriff deliver the goods over to him or account for their value. It will be observed that Mr. Justice Story had retired from the bench, and that its personnel had otherwise changed to some extent, since the decision in Ex parte Christy [supra]. The court held, that the suit pending before the court of common pleas was not a suit or proceeding in bankruptcy, and, although the plea of bankruptcy was interposed by the defendants, the court was as competent to entertain and judge of that plea as any other. "It had full and complete jurisdiction over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed." . . . "It follows, therefore, that the district court had no supervisory power over the state court, either by injunction or by the more summary method pursued in this case, unless it has been conferred by the bankrupt act. But we cannot discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on

the bankrupt court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers." . . . "It confers no authority on the district court to restrain proceedings therein by injunction or any other process, much less to take the property out of its custody or possession with a strong hand." This case is obviously irreconcilable with the dicta of Mr. Justice Story in Ex parte Christy, and was so treated by the supreme court in Carroll v. Carroll, 16 How. [57 U. S.] 275–287. The remarks of the court in that connection, with regard to their dicta, are worthy of quotation here, and may well be borne in mind in reading the more recent decisions above cited: "And, therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." Quoting from the opinion of Mr. Chief-Justice Marshall in Cohens v. Virginia, 6 Wheat. [19 U. S.] 399: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." But the case of Peck v. Jenness [supra] must be considered as establishing the proposition that, under the act of 1841, this court had not the power to enjoin or interfere with parties litigant in the state courts. The language of that act, however, was comparatively restricted. It vested in the district court jurisdiction "in all matters and proceedings in bankruptcy arising under this act," extending such jurisdiction "to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy." The act of 1867, however, is much broader and more explicit. The phraseology of the first section is, to a large extent, taken bodily from the language of Mr. Justice Story, in Ex parte Christy. It extends not only to the cases enumerated in the act of 1841, but "to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors."

The argument of the defendant in this case derives some support from the fact that congress did not adopt the whole language of the learned judge in that case, wherein he enumerates among the powers of the district court the "preventing, by injunction, or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by improper use of his rights or his remedies in the state tribunals;" but that omission has certainly not been treated by the circuit and district courts generally as involving a negative pregnant. It is to be regretted that the power of the district court, under the act of 1867, was not, in the early administration of the law, taken up and fully discussed in the light of these opinions. Jurisdiction to enjoin officers of the state courts and parties litigant therein was generally assumed to exist, even before the revision, and the few cases in which it was denied have been disregarded or overruled. In the cases of In re Campbell [Case No. 2,349] and In re Burns [Id. 2,182], Judge McCandless denied the authority of the district courts to issue injunctions to the state courts, or to parties litigating before them, relying upon Peck v. Jenness, 7 How. [48 U. S.] 612. He announced that Justice Grier, who delivered the opinion in Peck v. Jenness, concurred in this case; but in the subsequent case of Irving v. Hughes [Case No. 7,076] the question again came before Justice Grier, sitting with Judge Cadwallader in the Eastern district of Pennsylvania. The court held that where an insolvent debtor had given a warrant of attorney, under which judgment had been rendered in a state court, and an execution levied upon his stock in trade, the bankrupt law gave to the court jurisdiction to prohibit such creditor by injunction from proceeding further under such execution. The court undertook to distinguish the former cases, arising in the Western district, on the ground that they involved questions which the courts of the state were fully competent to decide. "Here, on the contrary, the question is not fully cognizable under the jurisprudence or legislation of the state." Remarking upon the case of Peck v. Jenness, and the act of 1793 [1 Stat. 334] prohibiting injunctions against state courts, the court observes: "But in the present case, if the act of 1793 would otherwise have been applicable, the present bankrupt law would exclude its application so far as the present question is concerned. The state court cannot be enjoined; but the litigant in it may be restrained from doing what would frustrate or impede the jurisdiction expressly conferred by the bankrupt

act." The opinion seemed to have been based upon the ground that the defence was one peculiar to the bankrupt act, of which the state court could not take cognizance. The case seems to be, however, a departure from the rule laid down in Peck v. Jenness, that in no case could the state courts or parties litigant therein be interfered or enjoined, and it possesses additional significance from the fact that the same judge delivered the opinion in both cases. In Re Schnepf [Case No. 12,471], Judge Benedict enjoined the sheriff of a state court from proceeding to sell under an execution certain personal property levied upon prior to the filing of the petition in bankruptcy, and the assignee was directed to take possession and sell at private sale. The power to enjoin was conceded by the judgment creditor, and consequently was not discussed, although the judge intimated an opinion that such power seemed necessary to a proper administration of the bankrupt law. In Re Bernstein [Id. 1,350], Judge Blatchford enjoined a sheriff from selling goods upon an execution, under the 40th section, though the order was subsequently modified so as to permit a sale, directing the sheriff to hold the proceeds subject to the order of the bankrupt court. In Pennington v. Lowenstein [Id. 10,938], a demurrer to a bill, praying that the sheriff be enjoined from paying the proceeds of certain property to the plaintiffs in an attachment, and that he be required to pay the same over to the assignee in bankruptcy, was overruled. The question of power was not discussed.

See, also, as to the power to enjoin, In re Bowie [Id. 1,728]; Jones v. Leach [Id. 7,475]. In Re Wallace [Id. 17,094], the power to enjoin was asserted by Judge Deady as necessary to preserve and distribute the estate of the bankrupt among the creditors. In Bill v. Beckwith [Id. 1,406], Mr. Justice Swayne quoted with approval the language of Mr. Justice Story in Ex parte Christy, 3 How. [44 U. S.] 292, and remarked: "Its success (that of the bankrupt law) was dependent upon the national machinery being made adequate to the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on where the whole jurisdiction was confined to a single court in the collection of assets, in the ascertainment and liquidation of liens and other specific claims thereon." In Re Kerosene Oil Co. [Case No. 7,725], Judge Benedict enjoined the foreclosure of a mortgage in a state court upon the petition of the assignee. In Re Fuller [Id. 5,148], Judge Deady again enjoined a creditor from enforcing a judgment in a state court against the property of the bankrupt. This was, however, upon the petition of the bankrupt. In Re Davis [Id. 3,620], certain creditors were enjoined, upon petition of the assignee, from foreclosing a mortgage in the state court. The injunction was subsequently dissolved, "with the reservation to this court of full power and authority to interfere and control or arrest the proceedings, whenever it shall appear expedient for the interests of all concerned that it should exercise the power given it by law, to assume the exclusive administration of this portion of the bankrupt's estate." The learned judge held that the jurisdiction of the ordinary tribunals was not taken away by the mere force of adjudication, but that the bankruptcy court had jurisdiction to suspend such proceedings by acting upon the party. In Re Mallory [Id. 8,991], a creditor and sheriff were enjoined by the district court from selling the property upon execution. The question here first received an elaborate discussion; all the prior cases were cited, and the jurisdiction of the court fully sustained. This case was affirmed on appeal by Mr. Justice Field, who expressed his unqualified approval of the reasoning of the district judge. The same decision was made in Re Lady Bryan Min. Co. [Id. 7,980]. In Re Clark [Id. 2,801], Judge Woodruff held that the district court had ample power to restrain the claimant of a lien obtained by collusion with the bankrupt from proceeding elsewhere to enforce the lien. "The power to control the creditors in this respect, I think, is clearly given. Two considerations illustrate the importance of the power, which are especially applicable to liens by attachment: 1. Without such power there is no adequate protection to other creditors against collusion between the bankrupt and the claimant, not even aided by the authority given to the assignee to defend; and 2. The early settlement of the estate may sometimes require that the court in bankruptcy should take the determination of claims which are in dispute into its own hands." In Markson v. Heaney [Id. 9,098], Judge Dillon affirmed the power of the district court to enjoin the prosecution of a foreclosure suit begun after the proceedings in bankruptcy were instituted.

Such was the state of the authorities when the Revised Statutes were passed, and the important exception was incorporated in section 720, of "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This literally would include only those cases where the power to stay proceedings was expressly given by the bankrupt law. On referring to this law, we find but two sections to which this language could possibly apply: 1. Section 40, Rev. St. § 5024, by which power is given to the court by injunction to restrain the debtor and any other person in the meantime from making any transfer or disposition of any part of the debtor's property. This evidently refers to preliminary injunctions, which expire with the adjudication, and has no reference to injunctions against parties litigant in the state courts. 2. Section 21, Rev. St. § 5106, providing that any suit or proceeding by a creditor shall, upon application of the bankrupt, be stayed to

await the determination of the court in bankruptcy on the question of discharge. This confers no express power to enjoin. The bankrupt law is the law of the land, and just as binding on the citizens and courts of the several states as are the state laws. Claflin v. Houseman, 93 U. S. 130, 136, 137. This stay of proceedings may be, and usually is, granted by the state court itself upon application of the bankrupt. Such has been the practice in this state; but conceding that this court may by injunction stay such proceedings, it can only be done under this section upon the application of the bankrupt, and the section has no application to injunctions granted upon the petition of the assignee. It was not and could not be claimed as authorizing injunctions in the cases above cited. But, obviously, this section was inserted in the statute for some purpose. It was intended to refer to some power which had been claimed or exercised under the bankrupt law to issue such injunctions, and it seems probable that congress thereby intended to recognize these decisions as settling the power to interfere with state courts wherever it became necessary in the proper administration of the bankrupt law. Since the revision, the decisions have been uniformly in favor of such jurisdiction. In Re Atkinson [Case No. 606], the sheriff of a state court was attached for violating an injunction, issued from the district court, in selling property seized upon execution. In Re Ulrich [Id. 14,328], Judge Blatchford enjoined certain creditors from prosecuting suits against the bankrupt in the state of Illinois. The prior authorities were fully considered, and the learned judge apparently entertained no doubt of his jurisdiction. This ruling he repeated in the following case of U. S. v. Bancroft [Id. 14,513]. In re Dillard [Id. 3,912], Judge Bond, in sustaining an injunction to restrain the commissioners of a state court from selling real estate, observes: "It has never been questioned that the bankrupt court could take possession of the property of a bankrupt incumbered by the liens of judgment creditors, and the fact that process had been had to enforce those liens can make no difference. It is not a question of jurisdiction or of right, but of discretion. In Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co. [Id. 13,643], Judge Emmons fully sustained the power of this court to arrest litigation in the state courts, observing, with his accustomed vigor of language, "The remaining domain of the state tribunals which cannot be interfered with is so trivial and exceptional as to leave the inference a strong one that it was not intended to be protected by congress." See, also, to the same effect, In re Shuey [Id. 12,821]; In re Citizens' Sav. Bank [Id. 2,735]; Zahm v. Fry [Id. 18,198]; Fowler v. Dillon [Id. 5,000]; Walker v. Seigel [Id. 17,085]. In Hewett v. Norton [Id. 6,441], Judge Woods affirmed the action of the district court in restraining parties to an action from proceeding to take property out of the possession of the assignee in bankruptcy. In Re Whipple [Id. 17,512]. Judge Blodgett enjoined complainants in a creditor's bill from further proceeding in the state courts. And, finally, in Re Duryea [Id. 4,196], proceedings for foreclosure in a state court were restrained by the injunction of the district court.

While, if this were an original question, I should feel very grave doubts as to my power to enjoin this suit, and while the law cannot be said to be absolutely settled by any decision short of the court of last resort, the general concurrence of co-ordinate tribunals throughout the country, in asserting this power, fully justifies me in assuming it to exist. It would be simply presumptuous in this court to set itself against such an overwhelming current of authority. In the case under consideration, the action against the marshal is not in replevin, but in trover, so that no question of actual possession arises. This, however, seems to me to make no difference in principle. If judgments are rendered against the marshal, the assets of the estate are diminished by the amount of these judgments. In the case of Kellogg v. Russell.[Id. 7,666], an injunction was granted by Judge Woodruff under precisely similar circumstances. The main purpose of the bill is, as he observes, to set aside alleged fraudulent conveyances to the defendant. This is the fundamental ground and purpose of the suit, and the injunction sought is purely incidental and conservative. Main v. Glen [Id. 8,973] is also upon all fours with the case under consideration. Jurisdiction to enjoin an action in the nature of trespass against the marshal was put upon the ground that the bankruptcy court had "taken the property, and it alone should have the right to determine the question to whom it belonged." It appears, too, that doubts had been expressed by the state courts of their competence to entertain a defence under the bankrupt law. The bill, though in the circuit court, is ancillary and in aid of the jurisdiction of the district court (which by Rev. St. § 711, subd. 6, and section 563, is exclusive in all cases in bankruptcy), and may be maintained regardless of the citizenship of the parties. As the question of jurisdiction was the only one argued, I do not deem it necessary to discuss at length as to whether this is a proper case for the exercise of a discretion to interfere. It is understood, however, that there are six suits pending in four different courts against the marshal, under practically the same state of facts. This would seem to make it a proper case for transferring the litigation to this court. The motion for an injunction is granted.

[NOTE. The defendant moved for an order to show cause why a mandamus should not be issued commanding and enjoining the vacation of the above injunction, but the motion was

denied by the supreme court, in an opinion delivered by Mr. Chief Justice Waite, on the ground that mandamus was not the proper remedy, saying: "Mandamus cannot be used to perform the office of an appeal or writ of error. Ex parte Loring, 94 U. S. 418; Ex parte Flippin, Id. 350. The circuit court had jurisdiction of the action and of the parties, for the purpose of trying the title of the assignee to the goods. The injunction was granted in the course of the administration of the cause. * * * The question arose in the regular progress of the cause, and if decided wrong, an error was committed, which, like other errors, may be corrected on appeal after a final decree below." Ex parte Schwab, 98 U. S. 240.]

HUDSON, The (UNITED STATES v.). See Case No. 6,829.

HUDSON (UNITED STATES v.). See Cases Nos. 15,412 and 15,413.

HUDSON (VERNARD v.). See Case No. 16,921.

Case No. 6,836.

HUDSON COAL CO. v. The MINNIE R. CHILDS.

[1 N. J. Law J. 42.]

District Court, D. New Jersey. Jan. 22, 1878.

MARITIME LIENS—ENFORCEMENT—AMENDMENT OF LIBEL—CONDITIONS IMPOSED.

[After condemnation under a libel to enforce a general admiralty lien for supplies, it appeared that the residence of the owner was at the port where the supplies were furnished, and libelant asked leave to amend so as to claim a lien under the local statutes. *Held* that, where other parties had come in to assert liens, the amendment would only be allowed upon condition that libelant should be entitled only to the balance left after the other claims were paid.]

[This was a libel in rem by the Hudson Coal Company against the Minnie R. Childs to enforce an alleged lien for stores and supplies. Heard on application for leave to amend the libel.]

The proceedings against the steamer were for stores and supplies furnished to her at Hoboken, and the libel filed assumed that her home was the port of New York. After the condemnation, (no one appearing on the return of the monition,) it came out upon an examination, that the owner was a resident of Hoboken, and there, at her home port, the vessel had received the stores, etc.; and hence there was no general maritime lien for the claim, and the libel did not allege any lien under the local laws of New Jersey. Leave was given to the libellants to apply to the court for an amendment of the libel, on notice to all parties in interest. The steamer having been sold, and other claimants having come in to participate in the proceeds of sale, objections were urged that there was not sufficient fund to pay all the liens, and that its allowance would in fact give the libellants a preference over the others, and that, the equities of all parties being equal, the libellants ought not to be put in a superior position.

M. W. Niven, for Hudson Coal Co. Muirheid & McGee, for other libellants.

NIXON, District Judge. There is certainly force in the objection; and especially in view of the fact that it appears from sundry payments made by the owner to the libellants and from the evidence that the libellants knew the residence of the owner when the libel was filed, and were presumed to know that they had no general maritime lien for their demand. Under the 24th admiralty rule the court has ample power to impose terms when amendments, in matters of substance, are asked for, and I think it proper to impose terms in this case. The libellants are allowed to amend the libel by inserting an allegation that they have a lien upon the vessel for the stores and supplies by virtue of the local laws of the state of New Jersey, and that the libel be filed to enforce the same; but upon the conditions, nevertheless, that they shall receive nothing out of the fund, under their amended libel, until the other lien creditors, whose claims have been allowed, have been paid. I have imposed these terms to avoid a precedent, although they are nominal in this case, as there are sufficient funds in the registry, I believe to pay all the claims, including the libellants', in full.

HUDSON, The HENDRICK. See Case No. 6,355.

HUDSON, The HENDRIK. See Case No. 6,358.

HUDSON RIVER BRIDGE CO. (COLEMAN v.). See Case No. 2,983.

HUDSON RIVER BRIDGE CO. (SILLIMAN v.). See Cases Nos. 12,851 and 12,852.

HUDSON RIVER R. CO. (HODGE v.). See Cases Nos. 6,559 and 6,560.

HUFFINGTON (KELLY v.). See Case No. 7,671.

HUFFMAN v. KEMP. See Case No. 13,465.

Case No. 6,837.

In re HUFNAGEL.

[12 N. B. R. 554.] [1]

District Court, E. D. Michigan. 1875.

BANKRUPTCY — JUDGMENT CREDITORS — DUTY OF ASSIGNEE TO PAY RENT—NON-PROVABLE DEBT.

1. Where a judgment creditor has made a levy upon the property of the bankrupt before petition filed, and after commencement of proceedings in bankruptcy procures the sheriff to sell the property upon his execution, the court may set aside the sale, or may confirm it and permit the creditor to retain the proceeds. The latter course is proper where the creditor acted under a misapprehension of his duty, and the property brought its full value.

[Cited in Re Ives, Case No. 7,116.]

2. The assignee should pay from the assets the rent of a store occupied by him, from the

[1] [Reprinted by permission.]

filing of the petition to the date of surrendering possession.

3. Rent and damages for non-performance of covenants in lease, accruing after commencement of proceedings in bankruptcy, are not debts provable against the estate.

Upon the petition of George O. Robinson for an order to realize balance for rent out of the proceeds of certain notes and accounts in his hands, and also for the payment of the rent of certain stores, while the same were in possession of the bankrupt court. The facts are substantially as follows: First. On the 13th of November, 1874 [Peter] Hufnagel was indebted to Robinson on a judgment in the superior court of Detroit, for rent to November 1, 1874, in the sum of three hundred and twenty-two dollars and eighty-five cents, exclusive of costs; Hufnagel also owed him for rent from November 1st to November 15th, at the rate of eighty dollars per month. Second. On the said 13th of November, Hufnagel leased of Robinson, stores Nos. 250 and 252 Woodward avenue, at seventy dollars per month, for a term commencing November 13th, 1874, and ending May 1st, 1875, these being the same rented from Robinson up to said 13th of November, and occupied by said Hufnagel; that in said lease Hufnagel waived demand for rent or for possession of the premises for nonpayment of rent. Third. On said 13th day of November, Hufnagel, in connection with the making of said lease, turned over to Robinson notes and accounts of the face value of seven hundred and nine dollars and twenty-six cents, to secure the payment of the rent due and to become due; and subsequently said Robinson, in addition, received notes and accounts to the amount of two hundred and eighty dollars, in the same manner and for the same purpose. Fourth. On the 31st day of December, 1874, the sheriff of Wayne county, by virtue of an execution taken out upon said judgment, levied upon certain goods and chattels in the possession of and belonging to said Hufnagel; the goods so levied upon were not taken out of Hufnagel's store, but remained there, and were receipted for by Thomas W. Martin, an employee of said Hufnagel, who had one of the keys to the store. Fifth. On the 27th of January, 1875, said Hufnagel filed his petition in bankruptcy. Sixth. On the 2d of February, the said goods levied upon as aforesaid, still remaining in the store of said Hufnagel, were sold under said execution, by said sheriff, for the sum of three hundred and ninety-six dollars. Seventh. Said Hufnagel retained the keys to and remained in possession of said stores until March 1st, 1875, and on said date the assignee took the keys and possession; the assignee remained in possession until March 22, when he delivered the keys to Robinson. Eighth. Robinson knew of the filing of the petition by Hufnagel before the sale by the sheriff. Ninth. On the 5th of March, the assignee demanded of Robinson the said accounts and notes, and goods levied upon, or the proceeds thereof; said demand has not been complied with.

George O. Robinson, in pro. per.
F. G. Russell, assignee, in pro. per.

BROWN, District Judge. It is claimed by the assignee, that the petitioner had no right, after proceedings in bankruptcy had been instituted, to sell the bankrupt's property upon his execution against him. No question is made with regard to the validity of the judgment which was obtained on the 12th of November. Execution was thereupon issued and levied on the 31st day of December, twenty-seven days before the proceedings in bankruptcy were commenced, and receipt taken by the sheriff from a third party for the property seized.

First. It is well settled that an adjudication of bankruptcy sweeps within the purview of the bankrupt court all the property of the debtor, whether incumbered or unincumbered, and that no steps can thereafter be taken to enforce claims against such property, either by way of attachment, execution, distress, replevin, or foreclosure, except through the bankrupt court, or by its permission, in the state court. Phelps v. Sellick [Case No. 11,079], and cases cited therein. In re Cook [Id. 3,151]; In re Vogel [Id. 16,983]; Stuart v. Hines [33 Iowa, 60]. A party who has levied an execution upon the property of the bankrupt before adjudication, ought not to proceed to a sale without such permission, and if he does so, the sale may be set aside, and he may be held liable for the actual value of the property, regardless of the amount realized upon such sale. Davis v. Anderson [Case No. 3,623]; In re Rosenberg [Id. 12,055]; Smith v. Kehr [Id. 13,071]. Bills have frequently been sustained, enjoining sheriffs of state courts from selling the property of bankrupts upon execution, where it was made to appear that the estate would be injuriously affected. In re Kerosene Oil Co. [Id. 7,726]; In re Mallory [Id. 8,991]; Jones v. Leach [Id. 7,475]; In re Snedaker, 3 N. B. R. 629; In re Lady Bryan Min. Co. [Case No. 7,980]; In re Clark [Id. 2,801]; Pennington v. Sale [Id. 10,939]. Regularly, therefore, the petitioner should have proved his judgment as a secured debt, and obtained the permission of this court to sell the property by virtue of his execution. In re Bridgeman [Id. 1,866]; In re Bigelow [Id. 1,396]; In re Davis [Id. 3,618]; In re Ruehle [Id. 12,113]; In re Frizelle [Id. 5,133]; Bromley v. Smith [Id. 1,922]; Davis v. Anderson [Id. 3,623].

As it does not appear, however, in this case, that the judgment was obtained by collusion, nor that the levy was improperly made, nor that the property did not bring its full value upon the sale, I think it within the power of the court to say it will not interfere to disturb it. To refuse to confirm

the sale, and order the proceeds paid to the assignee, and at the same time to permit the petitioner to prove his claim as a secured debt, and receive his money from the proceeds, would result in nothing but the accumulation of costs. As the petitioner has acted under an honest misapprehension of his duty in the premises, I am disposed, under the circumstances, to confirm the sale, and to hold his part of the transaction valid. The same view was taken of the discretion of the court in refusing to interfere in Re Iron Mountain Co. [Case No. 7,065]; Re Bowie [Id. 1,728]; Norton v. Boyd, 3 How. [44 U. S.] 426; McLean v. Rockey [Case No. 8,891]; Re Lambert [Id. 8,026]; Lee v. German Sav. Inst. [Id. 8,188]; Re Schnepf [Id. 12,471]; Re Bernstein [Id. 1,350]. I do not think the fact that petitioner held the notes and accounts as further securities for the judgment, deprived him of the lien of his levy, or that such lien was released by taking the receipt of Martin. Swope v. Arnold [Id. 13,702]; Barker v. Binninger, 14 N. Y. 271; Bond v. Willett, *40 N. Y. 377. After payment of judgment and costs, however, there appears to be a surplus of thirty-two dollars, for which petitioner must account to the assignee.

Second. I think the petitioner is entitled to an order for the payment of one hundred and ninety dollars rent, from the commencement of proceedings in bankruptcy to the day possession was surrendered by the assignee. The securities held by petitioner have nothing to do with this claim. They were placed in his hands to secure the payment of rent from Hufnagel, not from his assignee. As the title of the assignee relates back to the commencement of proceedings in bankruptcy, the assignee must pay rent from that date. In re Walton [Case No. 17,131]; In re Appold [Id. 499]; In re Merrifield [Id. 9,465; In re Rose [Id. 12,043]; Ex parte Faxon [Id. 4,704]; In re Butler [Id. 2,236].

Third. For the rent due upon the new lease, from its date to January 27th, the date of commencement of proceedings, the petitioner must prove his claim before the register as a secured debt. On surrendering his securities to the assignee, he may then file a petition for payment from the proceeds. He has no claim, however, for rent from the surrender of possession by the assignee to the date of re-renting. [Rev. St. U. S.] § 5071 provides that "where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." "No debts other than those above specified shall be proved or allowed against the estate." I think the design of this provision was to apportion the rent at the date of filing the petition, permitting the rent, then accrued, to be proved as a debt against the estate, leaving the subsequent rent unaffected by the discharge in bankruptcy. Indeed, no other construction is practicable. In the cases of long leases, the settlement of the estate might be indefinitely prolonged, if the landlord were permitted, every time he suffered damage by the non-performance of his lease, to prove it as a claim against the estate. Such a claim is, in its nature, almost impossible of liquidation at the date of filing the petition, as the landlord may procure a tenant the next day, and may not be able to find one before the expiration of the lease. There are certain cases of contingent debts and liabilities provided for by section 5068, but I think claims for rent are controlled by section 5071. The reasoning of the learned judge for the Southern district of New York upon this point in Re May [Case No. 9,325] is entirely satisfactory to me, and is supported by the cases of In re Webb [Id. 17,315]; In re Merrifield [Id. 9,465]; Ex parte Houghton [Id. 6,725]; Auriol v. Mills, 4 Term R. 94; Hendricks v. Judah, 2 Caines, 25; Lansing v. Prendergast, 9 Johns. 127; Savory v. Stocking, 4 Cush. 607; Bosler v. Kuhn, 8 Watts & S. 183. This portion of petitioner's claim is therefore disallowed.

An order will be entered in conformity with this opinion.

HUFSCHMIDT (ZINKEISEN v.). See Case No. 18,214.

HUGER (BROWN v.). See Case No. 2,013.

HUGER (UNITED STATES v.). See Case No. 15,415.

Case No. 6,838.

HUGG et al. v. AUGUSTA INSURANCE & BANKING CO.

[Taney, 159.] [1]

Circuit Court, D. Maryland. April Term, 1851.

MARINE INSURANCE—TOTAL LOSS—DUTY TO REPAIR VESSEL—CONTRACT OF INSURANCE—AGENTS—INTEREST.

1. In an action on a policy of insurance, to recover, as for a total loss, the amount insured upon the freight on jerked beef, where it appeared that the vessel in which it was shipped was obliged to put into a port of distress, with the loss of a large portion of the beef, and that the balance was sold there, by an order of court, at a loss, in order to avoid further loss, and in consequence of the supposed inability of the vessel to proceed on her voyage: *held*, that there was not a total loss, when the beef was unladen at the port of distress, because a part of it still remained in specie, and had not been totally destroyed by the disaster.

2. There could be no recovery for a total loss, if the vessel could have been repaired within a reasonable time, and at a reasonable expense; and there was reasonable ground for believing that a portion of the beef might, by that means, be transported to the port of destination, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef.

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

3. If the vessel could not have been repaired in a reasonable time, and at a reasonable expense, at the port of distress, yet if another vessel or vessels could have been procured upon reasonable terms, which could have carried the beef to the port of destination, there could be no such recovery for a total loss.

4. A sale made under such circumstances, by order of court, upon the application of the master, will not entitle the plaintiffs to recover for a total loss, unless the loss was at that time total, independently of such sale.

5. But the loss was total, if the repairs would have produced such a delay as would, in all probability, have occasioned a destruction of the remaining portion of the cargo, before it could arrive at its port of destination, or that it would have become so damaged, as to endanger the health of the crew on the voyage, from the noxious effluvia arising from it.

6. It is also total, if the expense of making the repairs, at the port of distress, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned, by completing the voyage, and delivering at the port of destination, the remainder of the cargo; provided another vessel could not have been procured, upon terms that would have enabled the master to save same portion of the freight, for the benefit of the underwriters.

7. But the plaintiff must show the existence of these obstacles, in order to enable him to recover for a total loss.

8. The agent of the insurance company having made a change in the printed policy, by the following memorandum at the foot—"All losses under this policy to be settled agreeably to the terms of the Baltimore Insurance Company, the above notwithstanding:" *held*, that if this memorandum was made by the agent, acting within the scope of his authority, and before the policy was delivered to the assured and accepted by them, then the loss must be settled according to the terms of the Baltimore Insurance Company.

9. But if the agent was not acting within the scope of his authority, yet the plaintiff would be entitled to recover, if the jury find that the jerked beef was not a perishable article, in the mercantile sense of that term, as used in policies of insurance. And in determining this question, they must not look merely at the preparation and quality of this particular cargo, but must inquire and determine whether jerked beef, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy are regarded as perishable.

10. As to the allowance of interest, in cases of this sort, in Maryland, the weight of authority seems to be in favor of leaving the question to the jury, where the sum due has never been liquidated, and is in dispute between the parties.

This was an action [by Jacob Hugg and John M. Bandel] upon a policy of insurance on the freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, or a port in the United States, &c., to the amount of $5000, upon all kinds of lawful goods, &c.; beginning the adventure upon the said freight, from and immediately following the lading thereof aforesaid, at Baltimore, and continuing the same until the said goods, wares and merchandise shall be safely landed at the port aforesaid. The policy, which was executed at Augusta, Georgia, on the 16th April, 1841, had the following memorandum at the foot: "All losses under this policy to be settled agreeably to the terms of the Baltimore Insurance Company, the above notwithstanding. Geo. C. Morton, Agent. Baltimore, Dec. 9th 1841."

The terms of the Baltimore Insurance Company, in regard to payment of losses, were as follows: "And in case of loss, the same will be paid in ninety days after proof and adjustment thereof, deducting the amount of the premium, if then unpaid, and all sums due to the company from the insured, when such loss becomes due, provided such loss shall amount to five per cent. on the whole sum hereby insured, under which, no payment shall be made, except for general average." The printed terms of the policy sued on were as follows: "And the said the Augusta Insurance and Banking Company of the City of Augusta, do hereby undertake and agree to make good and satisfy unto the said assured, all such loss or damage on the said goods, wares, and merchandise, so laden as aforesaid, not exceeding in amount the sum insured thereon, as shall happen or arise from any (of the aforesaid) causes and casualties, excepting as before excepted, the said loss or damage to be estimated according to the true and actual value of the said property hereby insured, at the time the same shall happen; and to be paid within ninety days after notice and proof thereof, made by the insured: provided always, that the said company shall not be liable to make good any partial loss, or particular average, unless the same shall amount to five per cent. upon the value of the property hereby insured." The policy contained the usual memorandum enumerating the articles warranted free from average, and all others that were perishable in their own nature.

About four hundred tons of jerked beef were shipped on board the vessel, at Montevideo, which were to be delivered, in good order, at the port of Matanzas or Havana, to the consignees, they paying freight. The bill of lading was signed the 25th of April 1842. The vessel sailed from Montevideo the 29th of April, and after being out some forty-seven days, encountered a storm, and was driven on Gingerbread Ground, where she received considerable damage. The rudder was broken and unshipped, and as the extent of the damage could not be ascertained, it was deemed prudent, on consultation with the captain of a wrecking vessel and Bahama pilot, to go into Nassau, for the purpose of a survey and repairs; the wind was fair for that port, but ahead in the direction of Matanzas. The vessel was taken in charge by one of the wreckers; arrived at Nassau on the second day, about the 20th June; and grounded on the bar, while entering the harbor, under the charge of the king's pilot, by which she sustained a good deal of additional damage. A part of the beef had been thrown overboard, to lighten

the vessel, while on the Gingerbread Ground, and a much larger quantity while on the bar at Nassau. She had leaked, while on the ground at the former place, so that it was necessary to work the pumps every half hour; and at the latter place, there was seven or eight feet of water in the hold, with some fourteen men at the pumps. The beef was so much damaged by the sea-water, that the board of health, at Nassau, refused to allow more than 150 tons to be landed. The rest was ordered to be carried outside the bar and thrown into the sea, for fear of disease; it was wet and very much heated, and not in a fit condition to be shipped; and the board of health recommended to the authorities that it should be removed as soon as conveniently could be. The vessel was surveyed after the cargo was discharged, and it was found that the rudder was entirely broken off; the forefoot gone, and the keel greatly shattered and damaged; and it appears to have been conceded that she could not have been repaired at that port, so as to have carried on the cargo, and that if she could, it would have cost more than half her value. She was repaired so as to bring her home in ballast. It also appeared, that there was no vessel in port that could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped.

The salvors libelled the vessel and cargo for salvage services, in the vice-admiralty court of the Bahamas, on the 30th June 1842, to which the master put in an answer, on the 7th of July, insisting that the libellants were entitled to compensation for pilotage only, and not for salvage. The court, on the 18th July, decreed $2100 salvage to the libellants, for services rendered to the vessel and cargo. Appraisers of the vessel, and cargo taken on shore, had been previously appointed; and on an examination of the cargo, it was found to be so much damaged, and in such a condition, that they advised an immediate sale, as it was deteriorating in value daily. The master assented to a sale, accordingly, which was ordered by the court, on his application, on the first of July. The net proceeds amounted to $2664 92. The time occupied in an ordinary voyage from Nassau to Matanzas is three days, and to Baltimore, ten. It was proved by several masters of vessels, that the navigation, at the place where the Margaret Hugg first grounded, and was visited by the pilots, was very hazardous, and that under similar circumstances, they would have considered it their duty to have carried the vessel into the harbor at Nassau. The regular premium for insurance of freight of the cargo covered by the policy for the outward voyage, was about one and one-eighth per cent.

At the first trial of this cause, the court was divided in opinion upon the questions of law presented to them, and the cause was taken to the supreme court upon a certificate of division. That court, at January term, 1849 (see 7 How. [48 U. S.] 595), gave as its opinion, upon the questions submitted to it:

1. That if the jury found that the jerked beef was a perishable article, within the meaning of the policy, the defendant is not liable, as for a total loss of the freight, unless it appears that there was a destruction, in specie, of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been re-shipped, before it could have arrived at Matanzas, the port of destination.

2. If the jury find that from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still that the plaintiff is not entitled to recover, as for a total loss of freight, provided his own vessel could have been repaired, in a reasonable time and at a reasonable expense, so as to perform the voyage, or could he have procured another at Nassau, the port of distress, and have transshipped the portion sold, in specie, to the port of destination.

3. That, assuming the plaintiff is entitled to recover, the defendants are not entitled to deduct from the (amount) insured, the freight earned on the voyage from Baltimore to Rio, upon the outward cargo, as the policy is not for one entire voyage round from Baltimore, out and home.

At the second trial in this court, the parties offered the following prayers:

1. The plaintiffs pray the court to instruct the jury, that if they shall find that the policy declared on, and offered in evidence, was made by the defendants, and through George C. Morton, the agent of the defendants, delivered, with the memorandum thereon, signed by him, to the plaintiffs, and countersigned by him, as by its terms required; and that at the time of effecting the said insurance, the plaintiffs were owners of the vessel insured, and so continued to be; and that said vessel sailed on the voyage described on the policy, and in the course thereof, met with the disaster and encountered the perils stated in the testimony, and that thereby it became necessary, with a view to the interest of all concerned, that the vessel should proceed to Nassau; and that she went thither, and going into that port, met with the disaster mentioned in the testimony, and that by all those disasters, she suffered the damage set forth in the testimony, and that repairs became necessary to render her seaworthy; that a portion of her cargo of jerked beef was thrown overboard for the safety of the vessel in the perils aforesaid; and another part of it, because it had become spoiled by wet from sea-water, during the disasters aforesaid, and had become offensive and injuri-

ous to health, and in consequence of that, and of the orders of the local authorities of Nassau, was thrown overboard, and that the residue was landed and was sold under an order of the vice-admiralty court at Nassau, in manner as set forth in the proceedings in that court, given in testimony; and if the jury shall find that one-third of the quantity of the said cargo of jerked beef belonged to the owners, and two-thirds of said quantity to others, who were to pay freight for it, and that the freight aforesaid was of the amount of $5000, the sum insured, and that said cargo was laden and carried, in the course of the voyage described in the insurance; then the plaintiffs are entitled to recover for a total loss of the freight insured, and to the full amount, with interest from the time it became payable under the terms of the policy of said insurance.

2. If the jury find the facts stated in the aforegoing prayer, and shall further find that, from the condition of the landed beef, when landed, it was uncertain whether the same was sound and merchantable, or whether the same would continue to be so until the Margaret Hugg could be repaired, so as to carry the property, or a vessel or vessels could be found for shipping the same to its destination on the said voyage, and until when so shipped it should reach that destination, then the plaintiffs are entitled to recover for a total loss, the full amount and interest insured.

3. That if the jury find the facts set forth in the first of the above prayers, and shall also find that the Margaret Hugg could not be repaired, in a reasonable time, and be put in a condition for carrying on the cargo that was landed, nor another vessel or vessels be procured, within a reasonable time, and at a reasonable expense, for carrying it on to its destination, then the plaintiffs are, as aforesaid, entitled to recover as for a total loss.

4. That the plaintiffs are entitled to recover for a total loss, as aforesaid, if the jury shall find the facts of the said first prayer, and that it was for the interest of the insured and insurers that the landed cargo aforesaid, looking to its condition, and the uncertainty of the period of removing it, should be sold at Nassau, and not be transported to Matanzas; unless it shall appear to the jury, that the Margaret Hugg could have been repaired in a reasonable time, and at a reasonable expense, so as, with the cargo, to perform the voyage; or another vessel or vessels have been procured in a reasonable time, and at a reasonable expense, to transport it to its destination.

5. That the plaintiffs are entitled to recover, if the jury find the facts of the first prayer, for a partial loss of freight, for the portion of the cargo of jerked beef thrown overboard, notwithstanding it may appear to the jury that the vessel might have been repaired in a reasonable time, so as to carry on the part of the cargo landed at Nassau, or that another vessel or vessels might there have been procured, at a reasonable expense, to carry it on.

Defendants' prayers:

1. The defendants pray the court to instruct the jury, that if they find that the jerked beef was a perishable article, within the meaning of the policy sued on, then the defendants are not liable, as for a total loss of the freight, unless they, the jury, are also satisfied, from the evidence, that there was, by the perils insured against, a total destruction in specie of the entire cargo of beef, so that thereby it had lost its original character of beef, at Nassau, the port of distress; or that the jury shall be satisfied from the evidence, that if it had been there re-shipped for Matanzas, the port of destination, such a total destruction of the entire cargo, annihilating its original character of beef, in consequence of the damage it had then received, would have been inevitable, before it could have arrived at Matanzas.

2. That although the jury may be satisfied from the evidence, that the condition of that portion of the beef sold at Nassau, was then such, that it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still that the plaintiffs are not entitled to recover, provided that their own vessel could have been repaired within a reasonable time and at a reasonable expense, so as to perform the voyage, or they could have procured another vessel at Nassau, and have trans-shipped, in specie, the portion of the cargo sold to Matanzas.

3. That if the jury find that the beef was a perishable article, within the meaning of the policy, then the burden of proving the other facts hypothetically stated in the defendants' first prayer, is upon the plaintiffs; that is to say, it is for the plaintiffs to satisfy the jury that such facts existed.

4. That under the defendants' second prayer, the burden of proof is upon the plaintiffs to show, that their own vessel could not have been repaired within a reasonable time, and at a reasonable expense, so as to perform the voyage to Matanzas; or that they could not have procured another vessel at Nassau, and have trans-shipped for Matanzas, in specie, the portion of the cargo sold at Nassau; that is to say, it is for the plaintiffs to satisfy the jury that said facts existed.

5. That the plaintiffs are not entitled to recover, except under the terms of the policy, as it issued from the defendants' office, and not under any supposed change of such terms, to be found in the written memorandum now appearing at the foot of the policy, dated the 9th December 1841, and signed George C. Morton, agent, because there is no evidence of his having had any authority from the defendants to make such

memorandum, and the defendants, therefore, object to any such memorandum being given in evidence to the jury.

6. To entitle the plaintiffs to recover, they must show a loss within the meaning of the defendants' policy, irrespective of the said written memorandum mentioned in the next preceding prayer, because the only effect of that memorandum is, that when a loss occurs, within the meaning of the defendants' policy, it is to be adjusted within the terms of the policy used by the Baltimore Insurance Company, and not to bind the defendants for losses covered by the policies of that company, but not covered by the terms of defendants' own policy.

C. F. Mayle, for plaintiffs.

D. Stewart, for defendants.

The court declined giving to the jury the instructions asked by either party, and instructed the jury as follows:

TANEY, Circuit Justice. The first question to be decided is, whether the plaintiffs are entitled to recover for a total loss of freight. In deciding this question, it is not material to inquire whether the loss is to be adjusted by the terms of the Baltimore Insurance Company, or by those of the Augusta Insurance Company, without regard to the memorandum of George C. Morton, at the foot of that policy.

1. There was not a total loss, when the cargo of the Margaret Hugg was unladen at Nassau, because a part of the jerked beef still remained in specie, and had not been totally destroyed by the disasters. And the plaintiffs are not entitled for a total loss, if the Margaret Hugg could have been repaired within a reasonable time, and at a reasonable expense, and there was reasonable ground for believing that a portion of this beef might, by that means, be transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef.

2. If this vessel could not have been repaired in a reasonable time, and at a reasonable expense, at Nassau, yet if another vessel or vessels could have been procured upon reasonable terms, which could have carried it to the port of destination, the plaintiffs are not entitled to recover.

3. The sale made by order of the court, having been made upon the application of the master, will not entitle the plaintiffs to recover for a total loss, unless the loss was at that time total, independently of such sale.

4. The loss was total, if the repairs would have produced such a delay, as would, in all probability, have occasioned a destruction of the remaining portion of the cargo before it could arrive at its port of destination; or that it would have become so damaged, as to endanger the health of the crew, on the voyage, from the noxious effluvia arising from it. It is also total, if the expense of making the repairs at Nassau, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned by completing the voyage, and the delivery at Matanzas of the remaining portion of the cargo; provided another vessel or vessels could not have been procured at Nassau, upon terms that would have enabled the master to save some portion of the freight, for the benefit of the underwriters. But in order to justify the sale, and entitle the plaintiffs to recover for a total loss, it is incumbent upon them to show that these obstacles existed, and prevented him from completing the voyage.

If, under these instructions, the jury find that the plaintiffs are not entitled to recover for a total loss, the next question is, whether they are entitled to recover for a partial loss.

5. Upon that question, the court instruct the jury, that if the written memorandum at the foot of the policy, was made by George C. Morton, the agent of the company, acting within the scope of the authority conferred on him by the company, and was made before the policy was delivered to the plaintiffs and accepted by them, then the loss mentioned in the testimony must be settled according to the terms of the policy, at that time adopted and used by the Baltimore Insurance Company. And according to that policy, the plaintiffs are entitled to recover whatever loss of freight they may have actually sustained by the disasters mentioned in the testimony, provided such loss exceeds five per cent., and was occasioned by one of the perils enumerated and insured against in the Augusta policy.

6. If the jury find that the said George C. Morton was not acting within the scope of his authority, in making and signing the memorandum before mentioned, yet the plaintiffs are entitled to recover the amount of loss of freight actually sustained by them, if the jury find that jerked beef is not a perishable article, in the mercantile sense of the term, as used in policies of insurance; but in determining this question, they are not to look merely at the preparation and quality of this particular cargo, but must inquire and determine whether jerked beef, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy of the Augusta Company, are regarded as perishable.

As to interest, in case the verdict was for the plaintiffs, the court were of opinion that, although in some of the states, and in the English courts, interest would be allowed as a matter of course, in a case of this kind, yet, in Maryland, the weight of authority appeared to be in favor of leaving the question to the jury, where the sum due had never been liquidated, and was in dispute between the parties. The jury were, there-

fore, instructed, if they found for the plaintiffs, to allow interest or not, as in their judgment they might deem just, upon the evidence before them. Verdict and judgment for the plaintiffs.

Case No. 6,839.

HUGGINS v. HUBBY et al.

[3 West. Law Month. 347.]

Circuit Court, N. D. Ohio. March Term, 1861.

PATENTS—INFRINGEMENT—WHAT CONSTITUTES AN IMPROVEMENT—SPECIFICATION.

1. What constitutes an improvement, such as will sustain a patent for an improved machine, or for improvement in a machine: Those phrases have the same legal import.

2. To sustain a patent for an improvement, it must effect the same object in a better, cheaper, more expeditious, or more beneficial manner than the instrument improved, or it must effect some further or other beneficial object in connection with the former.

3. Where a patentee, in his specification, claims an improvement, and describes the entire machine, he is not to be understood to claim as new that which was well known to be already in use.

4. Where an inventor claims in his specification, of an improvement, to produce a particular result, as the object of his invention, by the means that he sets forth in his specification, a patent thereon granted is not construed to protect each several particular entering into the improvement, distributively considered; but only the combination of the whole, as one invention.

5. In such case, the use of one of the parts or devices entering into the combination claimed to be invented, without the others, is no violation of the patent.

6. It is immaterial what the claim of an inventor in his summary is if the foundation for such claim is not made in the descriptive part of the specification.

[This was a suit by Sylvester Huggins against L. M. Hubby and others to recover damages for the infringement of a patent.]

Willey & Carey, for plaintiff.

Ranney, Backus & Noble and Mr. Ellsworth, for defendants.

WILSON, District Judge. This action is brought to recover damages for an alleged infringement of a right to an "Improvement in Flour Packers," secured to Nathan Kinman and his assigns, by letters patent, issued Oct. 30th, 1849. The plaintiff is the assignee of the patentee. The validity of the patent, and the plaintiff's title and right to sue for its violation, were facts admitted, on the trial of the cause.

The whole controversy between the parties relates simply to the question, whether, the defendants, in the use of their apparatus for packing flour in the National Mills at Cleveland have infringed upon the right secured to the plaintiff by the letters patent of Nathan Kinman. It therefore becomes necessary to examine the entire specifications connected with this patent, in order to ascertain the scope and purpose of the invention, and thereby determine the extent of the claim and exclusive right secured to the plaintiff. In the schedule attached to the patent, Kinman declares that he "has invented a certain new and useful improvement in the apparatus for packing flour." And he says, that "the most important element in packing flour, in larger mills, is expedition; and however perfect any apparatus may be in packing, if it has not this great desideratum, it is useless in such situations. The great object, therefore, of my improvement is, to give greater expedition to the process of packing flour than has heretofore been done, retaining at the same time such parts of the old and well known apparatus for packing as are necessary to carry out my designs."

He then specifies the structure of the entire machine in all its parts, and the mode of operating it, as follows: "At a proper distance from the packing-floor, I suspend a tube which will contain about a barrel of flour, or a little more: This tube is somewhat larger at the top than at the bottom, which is made just to fit into the top of the barrel, the upper end of the tube connecting with a chest or reservoir of sufficient capacity to hold the bolt of many hours grinding: Directly under the tube is a small moveable platform on which the barrel to be filled is placed; and this platform is raised by means of a lever, till the barrel slips over the lower end of the tube, where it remains till it is packed. The packing apparatus consists of a shaft that extends up vertically through the centre of the tube, to a sufficient height above the chest which contains the flour to be packed. It will vary from fifteen to forty feet, according to the size of the chest through which it passes. It has eight (more or less) arms or inclined blades, radiating in different directions from it, one above the other. near its lower end. This shaft is made hollow, and is open at the bottom, and at the top has lateral holes into it; above which it is solid, and has a groove cut into it on each side. This solid part of the shaft passes up through the hollow shaft of a mitre wheel that has its bearings in two bridge trees between which it is located. Two friction wheels are inserted in the hollow shaft of this mitre wheel, that enter the above named grooves, and guide and turn the grooved shafts. One half the thickness of each of the bridge trees is cut large enough for a bearing for the shaft of the mitre wheel, the other serving as a bearing for the fluted shafts, by which it is steadied. The mitre wheel has another working into it on a horizontal shaft, by which the whole is driven; the last named wheel being looser on the shaft with which it is connected by a clutch of ordinary construction, that is moved by a bent lever. The shaft is suspended at its upper end by a swivel to a lever, which has a connection rod affixed to its other end, by which the shaft is raised and lowered. The operation is as follows: The chest is

filled with flour—say several hundred barrels —which passes down into the tube. A barrel is placed under the tube, and the shaft is lowered into it; and being hollow, permits the air to escape through it from the barrel, by which the dust and waste occasioned by the escape of air through the flour at the sides is avoided. When the shaft reaches the lowest point, a collar thereon strikes the bent lever, and clutches the barrel-gearing into the prime mover, and this causes the shaft to revolve and pack the flour, by means of the inclined blades, into the barrel, and at the same time gradually rise up into the tube where it also packs the flour, and condenses it ready for the next operation. As soon as the lower blades on the shaft have risen to a level with the bottom of the tube, there is another collar set on the shaft, so as to strike the bent lever, and throw the clutch out of gear and stop the revolution of the shaft. The barrel of packed flour is then lowered on the platform on which it rests, and breaks off from the main body in the tube that is retained by means of the blades in the shaft. A new barrel is then put upon the platform in place of the one filled, and it is raised up to the tube. The shaft is then lowered again, carrying with it the condensed flour in the tube, and the process again commences by the revolving of the shaft; but inasmuch as the barrel is filled with flour previously condensed, it is packed, and the shaft ascends more rapidly, than if the previous condensation had not taken place. The process is repeated with each succeeding barrel till the whole of the flour contained in the chest is packed." He then sums up, what he claims as the novelty of his invention, as follows: "Having thus fully described my improved apparatus, and its mode of operation, what I claim therein as new, and for which I desire to secure letters patent, is—First, the packing apparatus consisting of a combination of the tube and inclined blades for condensing the flour and retaining it while moving the barrel, substantially in the manner and for the purpose set forth. Secondly, I claim the hollow shaft for expelling the air from the barrel in packing, as above described. I also claim the self-acting clutch, in combination with the packing apparatus, in the manner above made known."

It becomes necessary to give a construction to these specifications in connection with the patent itself, in order to determine what the subject matter of the patent is, and thereby ascertain whether the patentee claims a combination of several things, or the distinct invention of several things, or both. His invention, as designated in the body of the patent, is a new and useful "Improvement in Flour Packers;" and he has declared in the specifications, that the utility of his invention consists in the increased expedition of packing flour by means of this improvement.

It has been laid down by an author of great merit, "that a patent for the improvement of a machine is the same thing as a patent for an improved machine. Improvement, applied to machinery, is where a specific machine already exists, and an addition or alteration is made, to produce the same effects in a better manner, or some new combinations are added to produce new effects. In such cases, the patent can only be for the improvement or new combination.—When an alleged invention purports to be an improvement of existing machinery, it is important to know whether it be a real or material improvement, or only a change of form. Hence it is necessary to ascertain, with as much accuracy as possible, the boundaries between what was known and used before, and what is new in the mode of operation.—The inquiry, therefore is not, whether the same elements of motion or the same component parts are used, or whether the given effect is produced substantially by the same mode of operation and the same combination of powers, in both machines; or whether some new element or combination has been added to the old machine, which produces either the same effect in a cheaper or more expeditious manner, or an entirely new effect." There is another rule of interpretation which obtains in cases of this kind, which is, that the patentee is presumed not to intend to claim things which he must know to be in use; and that his alleged invention must be considered, with reference to the condition of the art or manufacture to which it belongs, at the time such invention was made.

It is insisted, by the counsel for the plaintiff, that this patent is for three separate and distinct improvements, capable of being used together, or of distinct and independent use when allied with the old and well known apparatus; and that, even if the three alleged inventions are to be considered in combination, it is, nevertheless, insisted, that an invasion of either one, would be equally an infringement.—And this is put upon the ground, that each invention being claimed and conceded to be new, the patent covers not only the combination, but also the parts which compose the combination. The object which an inventor proposes to accomplish, is always the main guide, by which to determine whether the subject matter is a unit or not. It may consist of several distinct inventions, or several machines capable of useful operation separately; but if the inventor has brought them together for a purpose which can only be effected by their union, that purpose indicates the true character of the subject matter, when they are included in one patent which goes for the accomplishment of that purpose. Curt. Pat. § 109. In construing this patent and specifications together, with a view of ascertaining the purpose of the inventor, and his mode of accomplishing a given result, the subject matter, it seems to us, is clearly a unit. The claim of the patentee is for a combination of several things, which combination as a whole, constitutes the invention of

"an improvement in flour packers." In the schedule, the patentee, with great minuteness, describes the structure of "an improved apparatus," and the mode of operating it, not in separate parts, but as a whole, which improved machine, he says, supplies the great desideratum in packing flour in large mills, to wit, "expedition." It is immaterial what the claim of the inventor in his summary is, if the foundation for such claim is not made in the descriptive part of the specifications. The claiming of a part of the apparatus, consisting simply of a combination of the tube and inclined blades for condensing flour and retaining it, has no virtue as a distinct invention, because, the combination of the tube and blades alone, does not constitute an invention capable of useful operation, independent of the other apparatus. It is made effective only, by the vertical shaft revolving by means of the intricate arrangement of friction and mitre wheels—of collars, clutch, and levers, which, together with the moveable platform, operate, as a combined whole, to accomplish the great purpose of the inventor. That purpose is expedition in packing flour. From the condition of the art in 1849, (the time when this patent was issued,) the adjustment of inclined blades to a vertical revolving shaft for pressing, was an improvement well known, and had been in use since the exclusive right to such improvement was secured to Waterman and Learned, by letters patent issued on the 15th of April, 1838. In relation to retaining flour in the tube, while removing the packed barrel, the auger attached to the lower end of the shaft in Jonathan Barrett's machine, (invented in 1836,) undoubtedly, upon scientific principles, would produce that result; and the fact that such was the effect produced by the shaft and auger of Barrett's flour packer, is established by the testimony of Samuel Taggart and other witnesses. So that the devices, in the Kinman machine, of the vertical shaft with inclined blades for pressing, are old and well known contrivances, and can not be presumed to be embraced in the claim of the Kinman patent. But although the first claim in the summary, to wit, "the packing apparatus, consisting of a combination of the tube and inclined blades for condensing flour and retaining it," fails as a distinct invention, on the ground of its being incapable of useful separate operation, yet, we do not think the patentee has thereby so restricted his claim as to cover less than what he invented.

In Winans v. Denmead, 15 How. [56 U. S.] 330, it is said, that, "In this, as in most patent cases, founded on alleged improvements in machines, in order to determine what is the thing patented, it is necessary to inquire: "1st. What is the structure or device described by the patentee as embodying his invention? 2d. What mode of operation is introduced or employed by the structure or device? 3d. What result is obtained by means of this mode of operation? 4th. Do the specifications cover the described mode of operation by which the result is attained?"

Test the specifications, in this case, by these rules, and we think it easy to determine what the invention secured by the patent is. In the body of the specifications, the apparatus, constituting an improved flour packer, is described as a connected whole. Its mode of operation is also described as a connected whole; and the result attained is, in like manner, claimed from the combination of apparatus, operating in the manner and for the purpose set forth. The grant of the patent itself is for an "improvement in flour packers." It nowhere appears that the patent issued for separate improvements. The object of the patentee was to obtain a useful result, and the substance of his invention is a new mode of operation, by means of which that result is attained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new modus operandi is, in view of the patent law, the thing entitled to protection.

We think the patentee has so framed his specifications, that his claim covers this new mode of operation, and that the grant of the patent is for an entire combination of the apparatus in a flour packing machine.

This construction of the Kinman patent and specification we believe to be in accordance with the doctrine established in the case of Prouty v. Ruggles, 16 Pet. [41 U. S.] 336. That was an action for an alleged infringement in the construction of plows, and the claim presented the three following divisions: 1st. The inclining of the standard and land side, so as to form an acute angle with the plane of the share. 2d. The placing the beam on a line parallel to the land side, within the body of the plow and its centre, nearly in the perpendicular of the center of resistance. 3d. The forming the top of the standard for brace and draft.

The plaintiff, in the circuit court, claimed damages for the infringement of their patent for "a new and useful improvement in the construction of a plow." The circuit court charged the jury, that unless it is proved that the whole combination is substantially used in the defendant's plows, it is not a violation of the plaintiff's patent; although one or more parts specified in the letters patent may be used in combination, by the defendants. The plaintiffs, by their specification and summing up, treated the parts described as essential parts of their combination, for the purpose of brace and draft; the use of either alone by the defendant would not be an infringement of the combination patented. The supreme court held that the instructions of the circuit court were correct; and the chief justice, in delivering the opinion of the court, says, that "the patent is for a combination, and the improvement consists in arranging different portions of the plow, and combining them together in the manner stat-

ed in the specification, for the purpose of producing a certain effect. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described; and this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other and to other parts of the plow, in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or two combined with a third, which is substantially different in the form, or in the manner of its arrangement with the others, is, therefore, not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts." If, then, the Kinman patent is for a combination, the plaintiff in the case before us, can not recover for infringement, under the rule of construction established by the supreme court. It is in evidence that the flour packers used by the defendants, are machines constructed in all respects according to specifications contained in the patent to John T. Nage. Whether or not the augers upon the shaft are mechanical equivalents for the inclined blades in Kinman's machine, can make no difference. In all other respects, it is conceded, the two machines of the respective patentees, are entirely dissimilar in construction and in the mode of operation.

We are of the opinion that the defendants, in the use of their flour packers, have not infringed upon the plaintiff's rights, secured by the Kinman patent. Judgment for the defendant.

Case No. 6,840.

HUGH v. McRAE et al.

[Chase, 466.] [1]

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

INSOLVENT CORPORATION — APPLICATION FOR AND APPOINTMENT OF A RECEIVER.

1. The fact that a corporation is insolvent, will not authorize it to apply to a court of equity for a receiver to wind up its affairs; and semble that this would also be the case with a private person.

2. A receiver will be appointed in a proper case at the instance of a creditor, but not at that of the insolvent debtor.

[Cited in Jones v. Bank of Leadville, 10 Colo. 464.]

The defendants, procured judgments in the state courts against the State Bank of South Carolina, and were proceeding to enforce them by execution and levy—whereupon the State Bank filed its bill in this court, stating that it was insolvent; that the defendants were about to procure an inequitable preference over its other creditors; by means of the executions which they were enforcing; praying for an injunction to prohibit them from so doing; and asking that Messrs. Seabring and Lee be appointed receivers to call in the debts and assets of the bank, and to pay out from time to time, under the decree of this court, the moneys collected, according to the respective claims of all the creditors. The defendants in their answers demurred to the bill for want of equity, and plead to the jurisdiction, besides answering further.

W. G. Dessassure, for complainant.

Brewster, Spratt, Burk and J. Phillips, for defendants.

CHASE, Circuit Justice. This is substantially a similar case to that of Southwestern R. Bank v. Parsons [Case No. 13,193], decided at the opening of this court, the only distinction being that, in the present case, the bank confesses insolvency, and in the other case there was no such confession. The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor simply upon the ground of insolvency.

If such a case could be found the court will be called upon to administer every estate where the debtor found himself unable to administer it himself conveniently. A creditor in a proper case might come into a court of equity for the appointment of a receiver, but a debtor could not; this, therefore, is not such a case as calls for the interposition of the court, and the prayer of the bill can not be granted. It must be dismissed.

On motion of Mr. Spratt, the following order was entered: On hearing the bill and answers in this case, and the argument of counsel, it is ordered that the bill be dismissed.

Case No. 6,841.

In re HUGHES.

[2 Ben. 85; 1 N. B. R. 226 (Quarto, 9); 1 Am. Law T. Rep. Bankr. 45.] [1]

District Court, S. D. New York. Jan. 8, 1868.

BANKRUPTCY—REGISTER'S CERTIFICATE — ASSIGNEE'S RETURN—EXPENSES OF BANKRUPT'S EXAMINATION.

1. If a creditor opposes a bankrupt's discharge, the register must make a certificate of his proceedings, and return the papers into court.

[Cited in Re Pulver, Case No. 11,467.]

2. An assignee must make his return, form No. 35, when requested by the bankrupt, when he has not received or paid any money for the estate, even though he has reason to expect that he shall thereafter receive money on that account.

[Cited in Re Van Riper, Case No. 16,874.]

3. Where an assignee examines a bankrupt, under the twenty-sixth section of the bankruptcy act [of 1867 (14 Stat. 529)], the assignee

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

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 45, contains only a partial report.]

must pay the register's fees, whether he has assets of the bankrupt or not.

4. If the examination is for the benefit of creditors, the expenses of it must be advanced or secured, under the twenty-eighth section of the act, by the creditors.

5. If the examination is one of the steps preliminary to the bankrupt's discharge the expenses must be advanced or secured by the bankrupt.

6. These expenses do not include any compensation to the assignee. Provision may be made for securing such compensation to him.

[In bankruptcy. In the matter of William H. Hughes.]

[2] [I, Isaiah T. Williams, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose, pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Francis C. Nye, who appeared for the bankrupt, and Mr. A. M. Bigelow, who appeared as assignee of the said bankrupt. The petition in this case was filed on the 19th day of July, 1867. The schedules set forth no assets. On the 13th of August, Mr. A. M. Bigelow was chosen assignee. On the 23d of November the bankrupt petitioned for his discharge. The order to show cause was made returnable December 23d, on which day the meetings were held pursuant to said order; and two creditors who have proved their debts appeared in opposition to the bankrupt's discharge, whereupon the bankrupt applied for the usual certificate of conformity, insisting that the case must then go before the court to hear the opposing creditors upon the question of a final discharge. This certificate the register was then unable to make for want of the return of the assignee. Application was thereupon made to the assignee for his certificate, that no assets had come to his hands. This the assignee felt unable to give, alleging that he had some reason to believe that a claim for a considerable amount was due from a party to the bankrupt, which had not been put into the schedule. He thereupon, on the 23d day of December, obtained an order for the examination of the bankrupt before the register. On the 27th, the examination was proceeded with before the register and adjourned to the 30th of December; and when it was again about to be proceeded with, the question arose as to which of the parties, the assignee or bankrupt, was liable for the fees of the register, as well as the compensation to the assignee, for his services in procuring said examination, whereupon it was agreed that the question might be certified up to the court, and in the mean time the examination should continue to its close, whereupon it was so proceeded with to its close. Thereupon the bankrupt demanded of the assignee his certificate (form 35) which the assignee refused to give, insisting that the claim aforesaid is assets in his hands, which he is bound further to investigate and perhaps prosecute to collection. These facts seem to raise three questions, as follows: First. Where creditors appear at the last meeting, and oppose the bankrupt's discharge, shall the register make the certificate in the usual form, save that instead of saying that there was no opposition, say A. B. &c., appeared and opposed the discharge, and thereupon return the papers before him in the case to the court in all respects as if there were no opposition? This would perhaps be the most convenient practice. The court can then under another order, if it see fit, refer the case back to the register, to take proof upon the allegations of the opposing creditors or otherwise, as might under the circumstances be proper. Second. Must the assignee make his return, as per form 35, in a case where in fact no assets have come to his hand, even though he have reason to believe that upon some claim in favor of the bankrupt he may thereafter obtain assets? All that form 35 requires the assignee to certify, is that he has neither received, nor paid, any money on account of the estate. It is a principle of law applicable alike to judicial and ministerial officers, that where by law they may do a thing, they must, if so required, do it. A judge has no more right to refuse to render a judgment, grant an order, or issue a process when a case is made from such judgment, order, or process, than a sheriff has to refuse to execute a process when delivered to him for that purpose. The functions of the assignee partake somewhat of the judicial and ministerial, and it cannot be pretended that he has any "caprice," by which, under the much abused word "discretion," he may refuse to give to the bankrupt at all times, when so required, his strict legal rights. The certificate in question in the present case would be strictly true in point of fact. The only question is, would it be true to the tenor and spirit of the act? I think it would. The bankrupt, under certain circumstances, may apply for his discharge in sixty days after he is declared a bankrupt. He must apply for his discharge within a year, or not at all. In the present case it would not be possible for the assignee to test the claim he refers to, in the courts of this city in a year. Besides, the assignee's office does not expire until all his duties are done. He is amenable to the order of the court at all times while he has assets in his hands, which may, and probably in many cases would be, for years. I cannot think he has a right to delay the bankrupt's discharge. But on the other hand he must at all times, when requested, make such certificate as the act requires and the facts permit of. Third. In case the assignee shall examine the bankrupt before the register, and finds no assets, and no

[2] [From 1 N. B. R. 226 (Quarto, 9).]

assets come into his hands in the case, is the bankrupt bound to pay the fees of the register, and compensate the assignee for such examination? I find nothing in the act or general orders that would compel him to do so. He is not the actor in such a proceeding, but is acted against. The act contemplates that the party applying for a service shall pay for it. Suppose the register were to refuse to go on with such an examination (as he may) until he is secured or paid his fees, and the bankrupt were to refuse so to pay the same, would the court feel at liberty to stay his proceedings in the case until he should comply with the demand of the assignee? Assignees chosen by the creditors (as almost all at present are) are universally, if not hostile to the bankrupt, at least in sympathy with, if not attorneys for some of the principal creditors, whose interests almost require them, if they cannot defeat, at least to delay the bankrupt's discharge. If the bankrupt is liable at one time to pay such expenses, he must be at another. The assignee's functions remain, perhaps for years after the bankrupt is discharged. May he always call up the bankrupt or other witnesses, and examine them touching some rumor of property fallen to the bankrupt, as heir or otherwise, to which, as assignee, he may be entitled, and if he fail in his search to obtain anything, can he call upon the bankrupt to reimburse him? Can he in advance in such a case compel the bankrupt to secure the register his fees? I cannot avoid the conclusion that if the assignee sees fit to take such proceedings, he must look to the creditors, for whom and in whose interests he really acts, to reimburse him for his expenses as well as pay him for his services.] [3]

BLATCHFORD, District Judge. In answer to the three questions certified in this case, the court replies: 1st. Where, on the return of an order to show cause before a register why a bankrupt should not be discharged, a creditor appears and opposes the discharge, the register must make a certificate of his proceedings, stating the opposition, and return the papers into court in like manner as if there were no opposition.

2d. An assignee must make his return, when requested by the bankrupt, under form No. 35, when he has in fact not received or paid any moneys on account of the estate, even though he may have reason to believe that he will thereafter receive moneys on account of the estate, as the proceeds of assets thereof.

3d. Under the provisions of section four of the act, and of general order No. 29, where an assignee examines a bankrupt before a register, under section twenty-six of the act, the assignee must pay the fees of the register for such examination, whether he has any assets of the estate or not. If there are assets, the court can, under general order No. 29, reimburse the assignee out of the assets. The bankrupt is not, under such circumstances, bound to pay the fees of the register. By the provisions of section twenty-eight, the assignee, if not in funds from the estate at any time, to a sufficient extent to defray the necessary expenses which will be required for the further execution of his trust, may require that the funds for that purpose shall be advanced or satisfactorily secured to him before he proceeds further. These funds must be advanced or secured by the party for whose benefit the expenses are to be incurred. If they are to be incurred in an examination of the bankrupt, under section twenty-six, with a view to discover assets for the benefit of his creditors, they must be advanced or secured by the creditors. If they are to be incurred in a proceeding by the assignee which is a part of the proper steps preliminary to the discharge of the bankrupt, they must be advanced or secured by the bankrupt. The "expenses," thus provided for by section twenty-eight, do not cover any allowance to the assignee for his services. Section twenty-eight does not provide for any allowance for such services, except by way of a percentage upon moneys received and paid out by the assignee as assets of the estate. But, by section seventeen, the assignee is to be allowed a reasonable compensation for his services, in the discretion of the court; and, if there is any money in his hands, this compensation and all the necessary disbursements made by him in the discharge of his duty, may be retained by him out of such money. This allowance cannot be made until after the services are rendered, because, until the court is advised what the services have been, it cannot determine whether any particular amount of compensation for the services is or is not reasonable, unless perhaps it might, for specific acts, mainly of routine, prescribe specific fees. If there is no money in the hands of the assignee, the payment of the compensation referred to in section seventeen, if it is a compensation for services in steps properly preliminary to the discharge of the bankrupt, can, when the compensation has been allowed, be secured by a withholding by the court of the discharge of the bankrupt, until he makes the payment, on the ground that until then he has not in all things conformed to his duty under the act; and, if it is a compensation for services for which the bankrupt ought not to pay, its payment to the assignee can probably be secured by appropriate means. Compensation to the assignee for his services in an examination of the bankrupt, under section twenty-six, with a view to discover assets for the benefit of his creditors, is not to be paid by the bankrupt.

[3] [From 1 N. B. R. 226 (Quarto, 9).]

Case No. 6,842.

In re HUGHES et al.

[8 Biss. 107;[1] 16 N. B. R. 464.]

District Court, W. D. Wisconsin. Nov. 23, 1877.

EXEMPTIONS IN WISCONSIN—PARTNERSHIP STOCK.

Where there has been an adjudication in bankruptcy against a mercantile partnership and the assets of the firm turned over to the assignee, the individual partners are not entitled to claim as exempt, under the statute of Wisconsin, the sum of two hundred dollars each, out of the partnership stock.

[In bankruptcy. In the matter of Robert Hughes and others.]

Lanyon & Spensley, for assignee.

BUNN, District Judge. This case is certified to this court by the register in bankruptcy for its decision upon the following question: Hughes & Teague were partners doing a general merchandise business at Mineral Point, Wisconsin. In September, 1877, as such partners, and without having severed their interest in the partnership goods, they filed a joint petition in bankruptcy, and were thereupon adjudged bankrupts, and their entire stock and effects assigned to the assignee. Afterwards the several partners filed a claim to be allowed each the sum of two hundred dollars as exempt out of the general stock of partnership goods in the hands of the assignee, naming the articles at length which each claimed, and demanded that the assignee deliver and surrender to each the articles so severally claimed by them as exempt under section 14 of the bankrupt act [of 1867 (14 Stat. 522)].

The question is: Are the goods so claimed, exempt under the law? The language of subdivision 9, § 31, c. 134, Rev. St. Wis. 1858, is: "The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value." It has generally been held in this state that an individual merchant may, under this provision, hold two hundred dollars of his stock as exempt, though the supreme courts of Minnesota and Kansas, under statutes similar but not identical in terms, have held that the provision did not extend to this class of traders; and a strong argument might be made, upon the language of the statute, that it was intended to apply only to mechanics, miners, or other persons similarly situated and requiring tools and implements, and perhaps stock in trade, to carry on their business such as well-diggers and the like. Otherwise, according to a familiar rule of construction, why should not the merchant have been mentioned, which is quite as prominent a class, as well as the mechanic and miner, and not left to be included by inference under the term "other persons"?

But, conceding that a mere liberal interpretation would allow an individual merchant the exemption, does the right extend to each and all the members of a partnership firm so that the exemption may be doubled and quadrupled and indefinitely multiplied, according to the number of the partners, and without any reference to the amount of actual or equitable interest they may severally have in the partnership assets, how much capital each has contributed to the firm, or the condition of the accounts as between themselves, or as between them and the creditors, at the expense and perhaps ruination of the joint creditors' claims? If this were any way an open question, I should have no hesitation in saying that such a claim could not be sustained; that the exemption is a personal privilege given to a debtor who owns the goods, and was never intended to apply to mercantile partnerships or corporations. One partner cannot be said to be the owner of the goods held by the firm; he has no exclusive interest in them. It is entirely uncertain whether any of them will belong to him until the affairs of the partnership are wound up. But I think the question must be considered as settled and rightly so upon reason and authority, by the cases following: In re Blodgett [Case No. 1,555]; Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 30; In re Price [Case No. 11,410]; In re Boothroyd [Id. 1,652]; In re Handlin [Id. 6,018]; In re Stewart [Id. 13,420].

But it is claimed by the bankrupts in this case that the rule is otherwise settled in this state by the case of Russell v. Lennon, 39 Wis. 570. But I do not so understand that case. I do not see that that case is at all in conflict with the general current of authority as settled in the above cited cases. In that case the plaintiffs were partners doing a business as tinners and jobbers. The defendant as sheriff levied on the partnership property in their store to satisfy a judgment against the firm. Thereupon the partners made a claim for an exemption of two hundred dollars each from the partnership goods, and brought a joint action to recover the goods so claimed from the sheriff. The circuit court gave judgment for the plaintiffs, sustaining the claim thus made. The question was whether the judgment was right. The supreme court held that the action could not be maintained, and reversed the judgment. And this is all that the case decides. It is true the court says, in the opinion, that there appeared to be no doubt that if the respondents had held the property in equal moieties in severalty, they would have been entitled to hold each his share as his exemption under the statute. And in another part of the opinion they say, "We have no doubt that, in proper cases, each member of a partnership is entitled to his separate exemp-

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

tion out of the partnership property; and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemption." The court had no occasion to define, and did not undertake to define, just what those proper cases were, in which each member of the firm would be entitled to his separate exemption out of the partnership property; but it is evident that when they arise they must be cases where "the partnership property after levy may be severed by the partners." It is enough to say that this is not one of the cases referred to in that opinion. The partners in this case do not "hold the partnership property in equal moieties in severalty." It is not a case in which "the partners after levy may sever their interests in the property." There is no levy, and the partners have no interest in the property capable of severance. They have, in fact, no interest at all, except the contingent and uncertain one of a right to any surplus that may remain after paying all expenses and disbursements in the bankruptcy proceedings, and the claims of partnership creditors.

It is conceded that there was no severance of the partners' joint interest in the partnership property in this case previous to the adjudication in bankruptcy. But that event dissolved the partnership and transferred the title to all the partnership property, except such as was exempt at the time of the adjudication, to the assignee. So that, if there was no severance at the time of the adjudication, so as to entitle the several partners to the exemptions, there could be none afterwards.

All that case decides, is that copartners cannot under the exemption law in question, and claiming for each an exemption of two hundred dollars, maintain a joint action to recover partnership goods taken under an execution issued against the partnership. The court holds that the principle of exemption, as well as the provisions of the statute, are personal, and they cite with approval the case of Pond v. Kimball, supra.

The decision of the court is that the claims of the bankrupts to an exemption of two hundred dollars each, out of the partnership property, under the exemption laws of this state and the bankrupt law cannot be allowed.

Case No. 6,843.

In re HUGHES et al.

[11 N. B. R. 452;[1] 7 Chi. Leg. News, 162.]

District Court, N. D. Illinois. Feb. 8, 1875.

EXECUTION AGAINST BANKRUPT—VALIDITY OF LEVY—PRIORITY OF LIENS.

1. H. & Co. recovered judgment against the bankrupts, issued execution, and a levy was thereupon made upon the stock of goods in the store of bankrupts. The sheriff was instructed not to close the store, but to put a custodian in charge. A few days afterwards a United States marshal took possession of the store during the temporary absence of the custodian. *Held*, that the levy was a good one; that the claimants had done everything they were bound to do, and were entitled to be paid the amount of their claim out of the proceeds of the sale of the goods.

2. An execution placed in the hands of a constable is not binding until after a levy is made, and when the sheriff has made a prior levy, although the execution to the constable was first issued, the sheriff's execution must first be satisfied; if the levy is made before proceedings in bankruptcy are commenced, the constable's execution is to be satisfied before the assignee is entitled to take the proceeds arising from a sale of the bankrupt's goods.

[In bankruptcy. In the matter of John Hughes and son.]

Lyman & Jackson, for Harrison & Co.

BLODGETT, District Judge. The affidavits upon file in this case show that upon the 14th of April, 1874, Harrison & Co., recovered judgment against the bankrupts, issued execution, and upon the same day placed the execution in the hands of the sheriff with instruction to levy upon the stock of the bankrupts; that the deputy sheriff Galpin, proceeded to the store, indorsed the levy upon the writ, placed a custodian in the store, and received the key to the same. Hughes, by his testimony attempts to put a different phase upon these facts, but his view cannot be sustained. The following day the deputy sheriff called at the office of the attorneys of the plaintiffs with reference to the levy. The attorneys were anxious to have their judgment satisfied, and yet, on account of the promises of Hughes & Son to pay the debt in a few days, were loth to order the store closed. The deputy sheriff was instructed not to close the store, but to keep a custodian in charge, and not to allow any articles to be taken out, except those necessary to finish certain repairs which were being made outside by the bankrupts for their customers. A few days after the United States marshal took possession of the store, proceedings in bankruptcy having been instituted. At the time the marshal took possession the custodian happened to be temporarily out of the store. The question for the decision of the court is, was the levy of the deputy sheriff a good one? My reply is that I think it was a good one, and should be sustained, although the store was not closed. The deputy sheriff had indorsed a levy upon his writ, he had the key to the store, was also in possession, and could give every one actual notice, and the custodian informed the marshal that he held possession. The claimants did everything they were bound to do. I held the opinion some years ago that the statute gave a lien as against an assignee in bankruptcy when the execution is placed in the hands of the sheriff, although I have had occasion since to doubt the soundness of that

[1] [Reprinted from 11 N. B. R. 452, by permission.]

view. But here the sheriff made a levy and consummated his lien. The claimants are, therefore, entitled to be paid the amount of their claim out of the proceeds arising from the sale of the goods, and an order to that effect will be entered.

In regard to the execution in favor of Cornelius & Co., issued against the bankrupts, the facts seem to be these: They recovered a judgment against the bankrupts about the 16th of March, and placed execution in the hands of a constable, but he made no levy till the day after the sheriff had levied. From these facts I think the Cornelius levy was good as against the assignee, but must be held subordinate to the lien of Harrison & Co., as their levy was in fact made first by an officer of another court. The order should therefore be that the assignee pay out of the net proceeds of the goods in his hands: 1. The Harrison execution in full, if there are funds enough to do so. 2. Out of the balance, if any, the Cornelius judgment should be paid in full, if funds are left sufficient to do so.

Case No. 6,844.

HUGHES v. BALTIMORE.

[Taney, 243.] [1]

Circuit Court, D. Maryland. April Term, 1855.

MUNICIPAL CORPORATIONS — OPENING OF STREETS —NEGLIGENCE—UNCOVERED DRAIN—SUIT FOR DAMAGES.

1. Where the mayor and city council of Baltimore were sued for damages sustained by the plaintiff, in falling into an uncovered drain, across one of the defendant's streets; *Held*, that the city authorities were the exclusive judges of the time, place and manner in which the streets should be opened, graded, paved and made highways.

2. The omission of the city to grade and improve Canal street, at the point where the accident happened, and to place a rail on the side, or to cover it over, so as to make it a thoroughfare for public travel, was not, of itself, such negligence as would support the action.

This was an action on the case [against the mayor and city council] to recover damages sustained by the plaintiff [James Hughes], by falling into Harford run, where it crossed Canal street, in the city of Baltimore.

J. M. Harris and W. H. Travers, for plaintiff.

G. L. Dulaney, for defendants.

TANEY, Circuit Justice (charging jury). 1. That the city authorities are the exclusive judges of the time, place and manner in which the streets shall be opened, graded and paved, and made highways.

2. That the omission of the city to grade and improve Canal street, at the point where this accident happened, and to place a rail on the side, or to cover it over, so as to make it a thoroughfare for public travel, is not, of itself, such negligence as will support this action.

3. If the accident which happened to the plaintiff was occasioned by his attempting to walk over Harford run, where there was no bridge, or on the wall by its side, or on the rough and uneven ground between the railroad and canal, or by mistaking his way up and across said street, he is not entitled to recover.

Verdict for defendants.

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

Case No. 6,845.

HUGHES v. BLAKE.

[1 Mason, 515.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1818.[2]

PLEADING—SUFFICIENCY OF THE PLEA—EVIDENCE —PLEA OF FORMER JUDGMENT AT LAW AS A BAR TO SUIT IN EQUITY.

1. Upon a hearing on an issue on a plea in bar to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact.

[Cited in Cottle v. Krementz, 25 Fed. 495.]

[Cited in Wyman v. Campbell, 6 Port. (Ala.) 219; Tucker v. Harris, 13 Ga. 1; Taylor v. Matteson, 86 Wis. 123, 56 N. W. 829.]

[See note at end of case.]

2. The defendant's answer in support of his plea is good evidence; and unless disproved by two witnesses, or by one witness and very strong circumstances, it must prevail in his favor.

[Cited in Hayward v. Eliot Nat. Bank, Case No. 6,273.]

[See note at end of case.]

3. Under what circumstances a plea of a former judgment at law for the same cause of action, is a good bar in equity.

[Cited in Viles v. Moulton, 13 Vt. 514; Sheldon v. Edwards, 35 N. Y. 286.]

[This was a suit by Samuel Hughes against George Blake.] The object of the bill was to recover from the defendant a sum of money arising from the sale of a tract of land, commonly called "Yazoo Lands," alleged to have been effected by the defendant, in the year 1795, as agent of certain persons named in the bill, in which lands the plaintiff claimed to have had an equitable interest, in common with the defendant's immediate principals, and, therefore, as being entitled to a proportion of the proceeds resulting from the sale thereof. It was also charged by the bill, that the defendant had rendered himself distinctly liable for a specific sum of money in virtue of a certain order, having reference to the plaintiff's concern and interest in the lands alluded to, drawn by one Gibson in September, 1796, in favor of the plaintiff, and accepted by the defendant with certain modifications and conditions, as particularly expressed in the

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

[2] [Affirmed in 6 Wheat. (19 U. S.) 453.]

acceptance. The defendant pleaded in bar, both to the relief and discovery sought by the bill, a former verdict and judgment rendered in his favor after a full trial, at the supreme judicial court for the commonwealth of Massachusetts in November, 1810, on a suit at law, commenced against him by the present plaintiff in equity in the year 1804, being long before the exhibition of the present bill, for the same identical causes of action; and denied by the plea, and by his answer given in support of the plea, all the frauds alleged in the bill, and also that any new material evidence, as therein was alleged, had been discovered by the plaintiff subsequently to the rendition of said judgment. To this plea the replication of the plaintiff was the general one in common form, without any impeachment of the record of the former judgment.

On the trial the identity of the causes of action, without the aid of collateral proof, appeared, very clearly, from a comparison of the matters set forth in the bill, with the averments contained in the several counts (eight in number) of the plaintiff's writ; it appearing moreover, that in the trial at law the plaintiff had submitted to the jury, in support of those counts, the depositions of the same witnesses, on whose evidence he now relied for the maintenance of his present bill.

The principal question arising from this state of the case, related to the subject of a certain negotiation respecting the lands before mentioned, alleged in the plaintiff's bill to have taken place between the defendant and one Williams, in the winter of 1814. With regard to the nature of this negotiation, the statement contained in the deposition of Williams, which constituted the only evidence pretended by the plaintiff's counsel to have come to his knowledge, since the rendition of the judgment at law, was explicitly denied by the defendant in his plea, and by his answer under oath in support of the same. Under these circumstances it was insisted, that the evidence of this single witness, (Williams,) even if the facts stated by him were material, (which also was utterly denied,) unsupported as his statement was by any corroborative circumstance, and opposed, indeed, as the counsel for the defendant contended it was, by all the presumptions arising from the nature of the case, could not be received according to the established rules in equity, as sufficient ground for going behind the judgment, and admitting the plaintiff to a second trial of the original merits of his case.

On the part of the plaintiff it was however argued, that owing to a want of technical accuracy in framing his declaration in the suit at law, all the counts therein contained, excepting only the general money counts, were radically defective; that neither of them was sufficient to embrace the entire merits of the case set forth in the present bill; and hence, that any judgment, which might have been rendered thereon in his favor, would have been erroneous and voidable, and consequently, that the judgment now appearing against him, could not be considered a legal bar to his present suit.

On the other hand, the soundness of this position, both with regard to the supposed defectiveness of the declaration, and the legal consequences resulting therefrom in case such defect had appeared in reality to exist, was totally denied by the counsel for the defendant.

Mr. Gorham and D. Davis, Sol. Gen., for plaintiff.

Mr. Blake, Dist. Atty., and Mr. Webster, for defendant.

STORY, Circuit Justice. No question arises in this case on the sufficiency of the plea in point of law; for the parties, by going to issue on the facts alleged in the plea, have waived all considerations of this nature. Mitf. Eq. Pl. 240; Coop. Eq. Pl. 232. It remains, therefore, for the court only to ascertain whether the plea is supported in point of fact. It is admitted by the plaintiff, that the defendant has never received any money on account of the Barrell notes, since the former suit in 1804 was instituted against him. All, that he ever received, was prior to that time. It is also admitted by the plaintiff, that he has no new evidence to offer in support of his original cause of action, beyond what he knew and used in the former suit, except so far as grows out of the compromise made by the defendant at Washington with Mr. Williams, in 1814. As to this compromise, the defendant in his answer in support of his plea, expressly denies, that he ever received any allowance from Williams under that compromise, on account of his liability as bail for Gibson, as charged in the bill. This denial is sufficient to support the plea, unless it is disproved by two witnesses, or by one witness and by other circumstances, which ought to outweigh the defendant's answer on oath. The only witness to sustain the plaintiff's charge is Mr. Williams; and without going farther into the evidence, I do not think his testimony, uncorroborated as it is, can be admitted to have this effect. The grounds of equitable relief averred in the bill being thus removed, the only remaining question is, whether the causes of action in the former and present suit are the same. It seems to me perfectly clear, that they are. Some technical objections have been taken to some of the counts in the declaration in the former suit, which, it is said, would have justified the former verdict, independent of any examination of the merits. It is said, that in five counts on the special contract there is no averment, that any proceeds of the Barrell notes had ever been received by the defendant.

But assuming, that these counts were defective, in not averring a breach of the promise to account for the proceeds of these notes, and alleging, that some money had been received as the proceeds thereof, it is very clear, that the jury could not, under the general issue, have found a verdict for the defendants for this defect. For, if the promise was proved as laid, then the verdict must have been for the plaintiff, although for the defect in the declaration, the latter might have been held bad on demurrer; or judgment might have been arrested; or the judgment reversed for error. I do not say, that these counts were so defective, that if judgment had passed for the plaintiff, the defendant might have reversed it for error. That is a question, not now necessary to be considered. But I cannot doubt, that if judgment had passed for the plaintiff, and the defendant had paid the money on such judgment, that the defendant might now plead that judgment in bar for the same cause of action, while unreversed, notwithstanding the defect. And if so, I do not perceive, why the defendant also is not entitled to plead a judgment on the same counts in his own favor. Where a cause has been tried on the merits, and judgment has passed thereupon for either party, such judgment, while it remains in force, must be a bar to any other suit for the same cause of action, though the declaration be so imperfectly drawn, that it would not stand the test of a demurrer. Suppose a payment were specially pleaded to such defective declaration, and found for the defendant, would it not be a bar to a second suit? I agree, that it must in such case appear, that the trial was on the merits; for if the cause went off on the technical defect, it would in effect negative the averment, that the causes of action were the same. Here it is clear, that the whole merits were in fact tried; and, so far as I can comprehend them, they might at all events, legally be tried upon the count for money had and received, which is clearly well drawn. The plea must be adjudged to be proved, and a decree entered of a dismissal of the bill.

[NOTE. On plaintiff's appeal, the supreme court, in an opinion delivered by Mr. Justice Livingston, affirmed the decree of the lower court, holding that a replication by the complainant to the plea of the defendant was always an admission of the sufficiency of the plea itself, as much so as if it had been set down for argument and allowed; and that in such case, if the facts relied on by the plea were proved, a dismission of the bill on the hearing would be a matter of course. And it was also held in the same opinion that no decree could be made, against a positive denial of the defendant, of any matter directly charged in the bill on the testimony of a single witness, unaccompanied by some corroborating circumstance. 6 Wheat. (19 U. S.) 453.]

HUGHES (FIRST NAT. BANK OF YOUNGTOWN v.). See Case No. 4,811.

Case No. 6,846.

HUGHES et al. v. HOYT.

[Betts' Scr. Bk. 21.]

Circuit Court, S. D. New York. May 24, 1839.

CUSTOMS DUTIES—CLASSIFICATION—SHAWLS.

[Shawls are liable to a duty of 50 per cent. ad valorem if any part is woolen and not worsted, under Act 1832, § 2, art. 2 (4 Stat. 584), imposing such duty upon "merino shawls made of wool, all other manufactures of wool, or of which wool is a component part," and are not duty free, under Act 1833 (4 Stat. 630), as "worsted stuff goods, shawls, and other manufactures of silk and worsted," unless they were known in the market antecedent to the act of 1832 as worsted or worsted and silk goods. Elliott v. Swartwout, 10 Pet. (35 U. S.) 137, followed.]

[This was an action at law by Hughes and Guynett against Jesse Hoyt, collector, etc., to recover back duties alleged to have been illegally exacted.]

BETTS, District Judge (charging jury). Revenue cases always present difficult questions of construction. Acts imposing duties are not framed with professional precision; they are addressed to business men, and usually employ the style and dialect in common acceptation in commercial dealings. Hence it has become a cardinal rule of interpretation, in respect to tariff laws, to understand their language, not in its strictly accurate sense, grammatical or scientific, nor even as it is used in common parlance, but according to its import as received and understood among mercantile men dealing in the articles made subject to duty. From this, it results that courts, instead of declaring the positive application of these laws, have themselves to depend upon the finding of facts out of the law, for the key to its exposition. The importance of having these laws definite and certain has led the highest court, upon facts found in a particular case, to decide and settle the meaning of terms, and thus furnish a rule of exposition which shall control those terms without any reconsideration or review of the facts. Such interpretation has been supplied by the supreme court, with respect to one of the particulars involved in this case.

The plaintiffs bring their action to recover back a payment of $3,145.11 (and interest) exacted from them by the collector, on three several importations of shawls. Ordinarily, a party coming into court and setting up a right against another must establish his case by affirmative proofs, clear and sufficient as to all material points, and the defendant cannot be called upon to make any justification until the evidence places him decidedly in the wrong. In this class of suits that order of proceeding is in some degree reversed. The collector arrests the property, and holds it until the owners pay the duty he demands, and when they prosecute to recover such coerced payment, he must show authority of law for his proceed-

ing. It accordingly devolves upon the defendant in this case to establish the right of the government to the duty exacted. This depends upon two questions, one of law and the other of fact, arising under the duty acts of July 14, 1832 [4 Stat. 584], and March 2, 1833 [4 Stat. 630]. By the 2d article of section 2 of the act of 1832, a duty is imposed "on worsted stuff goods, shawls, and other manufactures of silk and worsted, of ten per cent. ad valorem," and, "upon merino shawls made of wool, all other manufactures of wool, or of which wool is a component part, 50 per cent. ad valorem." The act of 1833 makes free of duty the articles enumerated in the clause first quoted. The duty of 50 per cent. ad valorem is laid upon these shawls, by the collector, under the second clause as read, upon the ground that they are manufactures of wool, or of which wool is a component part.

The plaintiffs contend that the goods are free of duty, (1) because the act of 1833 embraces every description of shawls, subject to duty by section 2, art. 2, of the act of 1832, except merino shawls. The court does not consider this an open question now; if it was, there would probably be a stronger claim in support of the reading, limiting the exemption to shawls of silk and worsted alone, than that which would apply it to every description of shawls. The sentence is: "Worsted stuff goods, shawls, and other manufactures of silk and worsted," shall be free of duty. In considering the same phraseology, the supreme court, however, decided that it applied to shawls entirely worsted, or worsted with cotton borders. Elliott v. Swartwout, 10 Pet. [35 U. S.] 137. The qualification or epithet worsted was understood as repeated after stuff goods, and annexed to shawls, and accordingly, by force of that decision, it is the ascertained meaning of the law that worsted shawls are free of duty. But it is quite manifest, from the collocation of the word, that the legislature did not intend shawls of every description coming within the range of woolen duties, but a specific quality of shawls, either wholly worsted or indifferently woolen and silk.

The plaintiffs insist these goods are free because they have in market the name of worsted shawls, or worsted and silk; and that, moreover, the general residuary clause of the woolen duty provisions does not comprehend them, even if they are in fact composed of woolen. If the court was now called upon to fix the import of this branch of the law, then would many considerations occur inducing at least some difficulty and hesitation. The duty is not laid simply upon "all manufactures of wool, or of which wool is the component part," leaving it thus only to ascertain the presence of wool in the fabric, in order to apply the tax; but the legislature, in the first instance, imposed 50 per cent. duty "upon merino shawls made of wool, and all other manufactures," etc., —a mode of expression indicating that no other shawls than merino fall within the tax, and those only when made of wool. This restriction of the duty in respect to shawls would be strongly countenanced by a rule of interpretation of an extensive influence, that when one particular is selected by the legislature out of a class, and made the subject of a charge or a privilege, all others of the same denomination are excluded from the provision. But I consider this point also settled by the decision of the supreme court, before alluded to, and rendered in a case necessarily bringing this branch of the law under examination. This clause of the law is stated and commented upon by the court, and the scope of reasoning goes upon the assumption that if wool, as distinguished from worsted, is a component part of the shawl, the fabric then becomes subject to the duty of 50 per cent. Under what I regard, then, as a distinct declaration of the supreme court upon this subject, I shall rule, that these articles are liable to the woolen duty if any part of the manufacture is wool and not worsted. This is the question of fact. It has been fully and ably reasoned out upon the proofs by the counsel for the parties; the relative weight of the testimony in relation to the intelligence and position of the witnesses has been amply discussed, and the court leaves it, without restating the evidence, for the jury to decide whether these articles are manufactures of wool, or of which wool is a component part. Some portions of them, it is conceded by the district attorney, upon all the evidence, ought not to be charged with the woolen duty; for these the plaintiffs will be entitled to recover the money they have paid, and for such other parts as the jury are satisfied come within the exception. The verdict will be so modified as to leave with the collector such amount of duties, if any, as were rightfully charged. The general question of fact includes also the inquiry, whether articles manufactured as these are had in our market, antecedent to the act of 1832, the appellation of worsted, or worsted and silk goods. If it appears that such was their known denomination, they must be regarded as falling within the list of those articles now made free, notwithstanding there may have been some wool employed in their manufacture. But if not so exempt, they will be subject to the woolen duty, if any part, however small, of the fabric is wool.

The jury found a verdict for the plaintiffs of $2471.72.

HUGHES (IRVING v.). See Case No. 7,076.

HUGHES (KELLOGG v.). See Case No. 7,662.

HUGHES v. MAXCY. See Case No. 9,093.

HUGHES (SORTWELL v.). See Case No. 13,177.

HUGHES (SWAN v.). See Case No. 13,669.

HUGHES (UNITED STATES v.). See Cases Nos. 15,416-15,419.

HUGO v. The QUICKSTEP. See Case No. 11,509.

HUGUENOT, The (NORTH SHORE S. I. FERRY CO. v.). See Case No. 10,330.

HUGUNON (JACQUETTE v.). See Case No. 7,169.

Case No. 6,847.

HUIDEKOPER v. BUCHANAN COUNTY.

[3 Dill. 175;[1] 1 Cent. Law J. 177.]

Circuit Court, W. D. Missouri. 1874.

COUNTY BONDS—LEGISLATIVE AUTHORITY — PREVIOUS ELECTION—RECITAL IN BONDS.

Where legislative authority is conferred upon a municipal or public corporation to issue bonds on the sanction of the voters to be given at an election, and the officers of the corporation are by the law to decide whether the requisite sanction has been given, and they issue bonds which recite it, no irregularity in the manner of appointing the judges of the election, or in submitting the question, is a defense to the bonds thus issued, when in the hands of bona fide holders for value, without actual notice.

[Cited in Nicolay v. St. Clair County, Case No. 10,257.]

Ths is an action [by F. W. Huidekoper against Buchanan county] upon coupons to bonds issued by the county court of the county of Buchanan in payment for stock subscribed to the St. Louis & St. Joseph Railroad Company. The answer sets out all the orders of the county court, from which it appears that on the 21st day of February, 1868, the county court ordered to be submitted to a vote of the qualified voters, at an election to be held on a specified day in April, 1868, the proposition whether the county court "should subscribe for 4,000 shares of the capital stock of the St. Louis & St. Joseph Railroad Company, amounting, in the aggregate, to $400,000, upon the terms following: Said subscription to be paid for in the bonds of the county at par, payable twenty years after the date of their issue," etc. Then follow conditions that the bonds shall only issue in installments as the work on the road within the county shall progress. The county court appointed certain persons named, "judges of the election to be holden on, etc., for the purpose of submitting to a vote of the taxable and qualified voters of the county (the question of) the subscription of $400,000 to build a railroad known as the St. Louis & St. Joseph Railroad." The records show that the clerk of the county court "brought into court the returns of the votes cast, certified according to law," showing "that there were cast for the subscription to the St. Louis & St. Joseph Railroad, 1,968; and against it, 520 votes." On the 13th day of April, 1868, the county court made an order of record reciting that "whereas, it appears, to the satisfaction of the court, that two-thirds of the qualified voters of Buchanan county, at said special election, held therein as aforesaid, did assent to said subscription of 4,000 shares to the capital stock of the St. Louis & St. Joseph Railroad Company; therefore, it is ordered by the court that the county court of Buchanan county subscribe for and take 4,000 shares, to be paid for according to the order of this court, made on the 21st day of February, 1868." Subsequent orders of the court recite that the subscription was made, that the company complied with the terms and conditions which would entitle it to the bonds, and that the bonds were accordingly, from time to time, executed and delivered to the company to the full amount, in all, of $400,000. The record also shows that taxes were levied to raise the means to pay the interest on these bonds from time to time, and interest ordered to be paid until January 21st, 1873, when the county court directed the treasurer "not to pay interest due on the bonds of the county issued to the St. Louis & St. Joseph Railroad Company until further orders from the court." To this answer the plaintiff demurs.

Joseph Shippen and T. K. Skinker, for plaintiff.

Ensworth & Young, for the County.

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

DILLON, Circuit Judge. The answer shows that there was an election held to enable the voters of the county to determine whether the county court should subscribe to the stock of the St. Louis & St. Joseph Railroad Company, and pay therefor in the negotiable bonds of the county; that more than two-thirds of the voters voting at such election were in favor of the proposition; that the county court thereupon made the subscription, and from time to time issued the bonds as the railroad company became entitled thereto by the terms of the submission. It is not denied in the answer that the plaintiff is a bona fide holder of the coupons in suit.

The counsel for the county contends that the bonds in question are void for three reasons: (1) That the county court had no power to appoint judges of the special election to be held on the 7th day of April, 1868, to decide upon the question of subscription, but that such power, under the act of March 21, 1868 (Laws Mo. 1868, p. 131, § 15), belonged to the board of registration. (2) That the question was ordered to be submitted to the "taxable and qualified voters" of the county, instead of the "qualified voters," as required by the constitution (article 11, § 14). (3) That the submission was not an unqualified one, but contained conditions. These conditions related to the manner in which the bonds should be issued in case the proposition carried, and required work

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

to a specified amount to be done by the company before it should become entitled to the delivery of an installment of the bonds. These conditions were in the interest of the county, and the orders of the county court show that they were complied with by the company.

It will be perceived that all of these objections relate to irregularities in the submission of the question to a vote of the people, and in the manner of appointing the judges of the election. It may be remarked that the record of the county court does not sustain the position of the counsel of the county that the submission was to the "taxable and qualified voters." On the contrary, the submission was to the qualified voters. The use of the words "taxable and qualified voters" occurs in that portion of the order appointing the judges of the election, and is recitative only of the order of submission, and its misrecital is a matter of no importance.

There is, therefore, really but one objection to the validity of these bonds left to be considered, and that is whether, if the defendant's counsel be right that the judges of election should have been appointed by the board of registration, this is a fatal defect. It is not necessary in this case to inquire whether if there had been no election whatever, the bonds could have been enforced against the county, notwithstanding the constitutional provision. Article 11, § 14. Here there was an election, and the proposition received, according to the determination of the county court entered upon its records, the assent of more than the requisite two-thirds of the qualified voters of the county.

Counsel have differed as to whether the decisions of the United States supreme court have gone so far as to hold valid bonds issued by the municipal or public officers without any election whatever having been held, when such an election is required as a condition precedent to the exercise of the power to subscribe for stock and issue bonds to pay therefor—and we are not required to examine or discuss that question. But beyond all doubt that court has time and time again decided that no such defect or irregularity as that which is here set up is available as a defense to the bona fide holder of such securities. The well-known doctrine of that court is that bonds, such as those here in question, are commercial paper, and when in the hands of an innocent holder no defense is available to the maker, except the want of power from the legislature to issue them.

It is not needful to examine the decisions of that court upon this subject. To show, however, that the doctrines announced in the early case of Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539, and often re-affirmed, are still adhered to, we content ourselves by referring to the very recent cases of St. Joseph Tp. v. Rogers, 16 Wall. [83 U. S.] 644, and Kennicott v. Wayne Co., Id. 452, both decided at the December term, 1872. In the case first cited, Mr. Justice Clifford, summarizing the doctrines of the court on this subject, says: "Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, when issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show, by their recitals, that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect, will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which is alleged was not fulfilled."

In the case last cited (Kennicott v. Wayne Co.), Mr. Justice Hunt, delivering the judgment of the court, said: "The following propositions may be considered as settled in this court: (1) If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists or has taken place, this will be sufficient evidence of the fact to all bona fide holders of the bonds. Authorities, infra. (2) If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, can not be urged against a bona fide holder seeking to enforce them. Grand Chute v. Winegar, 15 Wall. [82 U. S.] 572; Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 203; Moran v. Miami Co., 2 Black [67 U. S.] 722. (3) There must, however, be an original authority, by statute, to the municipality to issue bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns, without special authority. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676."

To the same effect see, also, Grand Chute v. Winegar [supra], and the recent decision of the supreme court in the state of Missouri in Smith v. Clarke Co. (November term, 1873) 54 Mo. 58. The demurrer to the answer is sustained. Judgment accordingly.

[NOTE. The plaintiff several years later obtained a mandamus against the judges of the county court requiring them to pay the amount of his judgment. The power of the court to issue the writ was denied. Case No. 14,679.]

Decisions of Missouri supreme court are referred to in Thomas v. Scotland Co. [Case No. 13,909]. Subsequent decisions of United States supreme court made at the October term, 1874, announce the same doctrines.

HUIDEKOPER v. BUCHANAN COUNTY. See Case No. 14,679.

Case No. 6,848.

HUIDEKOPER v. BURRUS.

[1 Wash. C. C. 109.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

EJECTMENT — EVIDENCE OF TITLE — LAND WARRANTS—LAW AND PRACTICE IN PENNSYLVANIA—SURVEY — LOCATION OF WARRANTS — SETTLEMENT.

1. A patent for land is only prima facie evidence of title; but if the previous steps for vesting a title be not performed, proof of such omission will defeat the same.

2. Although the law of Pennsylvania permits only one warrant to issue to one person, the universal practice of the state, upon which land titles rest, has been different; and one person may take out any number of warrants, in the names of different persons; who are considered as merely nominal; and trustees for the person who pays for the warrants, and their execution.

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

3. The practice in Pennsylvania has been, where one person takes out a number of warrants to cover a large tract of land, to describe particularly, in the leading warrant, the tract it is intended to cover; and the other warrants are generally made out as adjoining this, and each other.

4. The uncertainty of the description in the adjoining warrants, is supplied by the survey; and if this act be performed, before any adverse title to the land accrues in a third person, the uncertainty of the warrant forms no objection.

5. Aliter, if in the meantime another person obtains a special warrant and survey, or settles the tract, thus uncertainly described; for in this case, the subsequent survey of the first warrant holder, would not relate back to the date of the warrant, so as to overreach the intermediate title thus acquired.

6. If the outlines of a large tract of land be legally surveyed; no third person has a right to impeach the internal structure; or to object, that any one of the warrants, within the outlines, was not properly surveyed.

7. If a warrant be located on one tract, and it is afterwards lifted, and located on another tract, to which no person has in the meantime acquired a title; this is valid to vest a title in the first locator, to the tract to which the warrant is removed. Aliter, if an intermediate title has been acquired.

8. The nature of a proviso, in a statute.

[Cited in Ryan v. Haeseler, 161 Pa. St. 93, 28 Atl. 1014; County Com'rs v. State (Fla.) 4 South. 797.]

9. To make a survey complete, the lines ought to be run and marked on the ground, where necessary; and if not done, the surveyor may afterwards go on the ground to complete the same. Quere. Whether the not running and marking the lines on the ground, invalidates the survey.

10. The proviso in the act of 1792 [3 Smith's Laws Pa. p. 73] only dispenses with the forfeiture incurred, according to the law, by not making the settlement, and continuing it, within and during the time prescribed by the enacting clause; and requires that it must be made as soon as the prevention ceases.

[Cited in Phillips v. Wilson, Case No. 11,109.]

[Cited in State v. County Com'rs of Duval Co. (Fla.) 3 South. 194.]

11. The prevention to settle upon lands in "the new purchase," continued until the end of the year 1795; and after that time, a reasonable time should be allowed to those who claimed titles to lands within the same, for preparing to make settlements.

12. A warrant and survey of lands within "the new purchase," without a compliance with the terms thereof, enjoining a settlement of the land, would not be sufficient to maintain an ejectment.

[Cited in Murphy v. Packer, 152 U. S. 398, 14 Sup. Ct. 636.]

This ejectment was brought [by the lessee of Huidekoper] to recover four hundred acres of land, situated on Lake Erie; in the triangle conveyed by the United States to the state of Pennsylvania, in March, 1792. Under the act of April, 1792, passed by that state, authorizing the sale and settlement of this tract of country, three hundred and ninety warrants, of 400 acres each, were taken out by a company under the name of "The Population Company;" who, in the fall of 1792, delivered those warrants to the surveyor, to be laid upon the lands within the triangle; and accordingly, in the spring of 1794, the warrants were surveyed, by running lines, by actual survey, from north to south, quite from the point of the triangle, eastward to the New-York line. These lines being protracted, the east and west lines were laid down, not by actual survey, but separating the different tracts on the plat by the intersections of the east and west lines. The surveyor returned this connected survey to the proper office; but finding that he had omitted to lay off the state reserve of two thousand acres, he was directed by the surveyor general to lift the warrants laid upon the land: but finding that this could not be done without altering most of the lines as laid down by the first survey, he went upon the land, and made a new and actual survey, in 1795, marking all the lines and corners of the different tracts. The war-

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

rant, which was laid upon the land in question in 1795, was in the name of William Smith, druggist; and was laid, in 1794, upon a tract some distance from that on which it was laid in 1795. The first warrant, which was in the name of Mary Nicolson, was particularly described on all its sides; and the other three hundred and eighty-nine warrants were adjoining; and adjoining each other. The survey of 1795 being returned, a certificate, called a prevention certificate, was granted in the name of William Smith, druggist, (as well as in all the other cases;) stating that he had been prevented from settling by force of arms of the enemies of the United States, and that he and his assigns have persisted in their endeavours to make such settlement. This was granted in September 1798, in pursuance of a regulation of the board of property; which prescribed this form of certificate, and that patents should issue, where the surveyor and two justices should certify those facts. Certificates having been obtained as directed by the above regulations, patents issued to the managers of the Population Company, for all the lands laid off within the triangle, (except the reserved lands,) on the 6th of March 1799. The defendant, Burrus, claims by settlement under the commonwealth; and adversely to the Population Company.

The points made by the plaintiff's counsel, were—

First. That the patent is conclusive as to the title of the plaintiff, against a tortious entry and settlement by the defendant.

Secondly. That if the regularity or validity of the previous steps can now be inquired into, the plaintiffs were entitled to their patent; because, though no settlement was made under the enacting part of the 9th section of the act of April, 1792; yet, the Population Company were prevented, first, by the danger of doing so during the Indian war, and the hostilities committed in this country during that period; and afterwards, by the opposition of certain intruders, (amongst which the defendant was one,) who associated themselves together in large bodies, drove away settlers placed there by the company, and deterred others from coming; and lastly, because the defendant, in 1795, with his associates, agreed, with the agent of the company, to take certain tracts under the company, (in which the present was included,) upon certain terms agreed upon; that the defendant entered, in 1796, by virtue of this agreement, and afterwards disclaimed to hold under the company, and held in opposition to them. In the construction of the 9th section of the act of April, 1792, it was urged, that persistance for two years was sufficient, under the proviso, to save the forfeiture; or, if not so, if continued for five years, it was sufficient. In either case, the plaintiff's right was preserved, as the company, after the war, persisted in making their settlements, but were prevented.

The plaintiff's right to recover, was resisted upon the following objections:

1st. That the 390 warrants were all taken out by the Population Company, though in the names of different persons; whereas the law does not contemplate any one person obtaining a warrant for more than one tract.

2d. The warrant in 1794, was surveyed on a different tract of land from that now in dispute; and, therefore, the surveyor, having executed his authority, could not resurvey, in 1795: and it is under this last survey, that the land in question was located. The survey of 1794 was merely upon paper; and the act of assembly of April, 1785, declares that the surveyor shall go upon the ground, and mark all the lines and corners.

3d. The condition of settlement is precedent to the vesting of the estate, and the plaintiff cannot recover until he has made a settlement under the proviso in the 9th section. If not a condition precedent, it is a limitation to any settler upon failure of the warrant holder to make the settlement, and no entry of the commonwealth is necessary. 2 Bl. Comm. 155; Harg. Co. Litt. 214b.

4th. The plaintiff was bound, as soon as the impediment which prevented his settling was removed, to settle and improve, and reside for the time mentioned in the law. This was the opinion of the judges in the issue directed to be tried at Sunbury. Chief Justice Shippen, contra.

5th. The warrant is not sufficiently descriptive, within the words and meaning of the law.

Much testimony was produced, which is noticed, generally, in the charge.

Mr. Ingersoll, Mr. Lewis, Ed. Tilghman, and Mr. Dallas, for plaintiff.

Wm. Tilghman, M. Levy, and Mr. Foster, for defendant.

WASHINGTON, Circuit Justice. The first point to be considered, is whether a patent is conclusive evidence of the plaintiff's title; because, if that be the case, there is no necessity for considering the other points. A patent for land in this country, is the act of a public officer, who acts under a special authority delegated to him by law; and which prescribes the terms upon which it is to be granted. If it is to be granted upon a settlement and improvement, or upon a warrant properly surveyed anl located, with settlement, &c.; the patent is prima facie evidence that every thing is regular; and every thing is to be presumed in its favour, until proof is exhibited to the contrary. If it appear that there was no incipient right by settlement, or warrant and survey with settlement, as the law directs, then the patent does not vest a title. The warrant and survey give an incipi-

ent title, to be consummated by settlement and residence, of which title the patent is but the evidence.

2d. The objection to the granting more warrants than one, to one person, is without foundation in the expressions of the law; is opposed, by the practice of the state, without interruption, so that the introduction of such a doctrine, at this day, would be mischievous in the extreme. The person whose name appears on the warrant, is considered as merely a nominal grantee; and a trustee for the person who pays for the warrant, and has it executed.

3d. The uncertainty of the warrant. This objection, too, is answered by the uniform practice of the state. Wherever one person takes out many warrants, he borrows the names of certain persons, no matter who they are; one of the warrants is special, and describes, on its face, the boundaries of it; the next warrant is said to be adjoining the descriptive warrant; the next adjoining this, &c. The survey locates them precisely; and if, when this act is performed, there is no adverse claim to the lands thus surveyed, the uncertainty of the warrant can never afterwards be made an objection; because it had been rendered certain by the survey, before such claims existed. But, if between the warrant and survey, another person obtains a special warrant for one of the tracts, thus uncertainly described; or, if he has, in the meantime, surveyed or settled such tract, a future location and survey of such tract, would not relate back to the date of the warrant, so as to overreach the title acquired in the meantime. But, if the uncertainty of the warrant were an objection in common cases, nothing but the positive injunctions of law, could make it a substantial one in this case; because, to have required a particular description of each tract, would have been to require an impossibility; for, to do this, there must have been a survey of each tract, which, at the time those warrants issued, could not have been made in the part of the country, where these lands lie.

4th. Another objection, much relied upon, was, that the authority of the surveyor to lay this warrant, was executed in 1794, and could not be again executed in 1795. The warrant was functus officio by the first survey, and could not afterwards be lifted, and laid on the land now in dispute. And yet the survey of 1794 was called a paper survey, and the act of assembly, requiring an actual running and marking of the lines and corners was read. Now, it seems to me, that the defendant's counsel are in a plain dilemma. If the survey of 1794 be a paper survey, and void by the law, because the lines were not actually run and marked on the ground, then the warrant was not executed as the law directs, was not functus officio, and might be surveyed in a proper manner in 1795. If the survey of 1794 was legal and complete, then the plaintiff need not rely upon the latter survey at all; because, since the whole of the triangle was surveyed upon regular warrants, and had vested in the Population Company an incipient right to the whole, they must, of necessity, have an incipient right to all the parts of that whole; and a third person coming in afterwards, either tortiously, or by contract with the company, can never impeach their title, by saying that the warrant laid in one place in 1794, could not, in 1795, be removed to another spot. What has he to do with the internal structure of a plat of land, whose outward lines enclose land located by and belonging to the company? If a warrant be located on one tract, and afterwards another person acquires title, by settlement, or warrant and survey, to another tract, the warrant first located cannot be lifted, and laid upon such other tract; but if it be done before any other has acquired a title to it, it cannot be said that a person claiming by posterior title has been injured. But at any rate, the survey of 1794 was incomplete; because the lines were not run and marked on the ground; and though I do not say that such a survey would be void, yet certainly the surveyor might go on to complete and correct the first survey, at a subsequent day.

5th. The important question now remains to be considered, and that is, whether the plaintiff is entitled to recover upon the first construction of the act of 1792? The plaintiff's counsel contend, that the proviso to the 9th section of this law substitutes a persistance in endeavours to make a settlement, for an actual settlement; whereas the defendant's counsel say, that the proviso does no more than dispense with the forfeiture, incurred by not making the actual settlement, and continuing it within and during the time prescribed by the enacting clause; but still, that it must be made as soon as the prevention ceases. I must confess, that my mind strongly inclines to the latter construction. I do not think it necessary for me to go into this part of the subject, because, if persistance is made a substitute for settlement, I shall endeavour to prove, that this settlement means improvement, and five years residence; and if so, it is still incumbent on the plaintiff to show that he persisted for that time, in his endeavours to make and continue his settlement. But, as I never expect to hear this point better argued than it has been, or to have a better opportunity of considering it; I think it best to give an opinion upon it, that the parties may either regulate themselves in respect of the other ejectments, or may take an exception, and have the point settled in the supreme court.

I prefer the construction given by the counsel for the defendant, because it is more consistent with the acknowledged spirit of the law, which was to encourage the population and improvement of this country; and it is liable to fewer difficulties, when applied to the various cases, that may be supposed as occurring under the law. By this construc-

tion, settlement and improvement are obtained instead of endeavours; and a precise criterion, as to the degree and continuance of those endeavours, is afforded by the law itself, instead of being left to fancy and conjecture. If it be asked, how long is the warrant holder, (after a prevention has taken place,) to persist in his endeavours to make a settlement, the answer is afforded by the law itself, "until such actual settlement is made;" for to that object are the exertions to be applied. If it be asked, how such actual settlement is to be made? it is again answered, by the enacting clause of this section,—by making certain improvements, and residing thereon for five years next following the first settlement. If, on the other hand, these questions be put to those who support a contrary construction, they answer—First. That the persistance, if it continue two years, is a performance of the condition. This, I think, cannot be supported; for he is to persist in his endeavours to make such actual settlement as aforesaid, which I take to mean residence as well as improvement; because the ninth section has declared what an actual settlement is, and that it consists in clearing and cultivating two acres in every hundred, building a house, and residing thereon five years, &c. Now, if any thing short of actual settlement will do, and if persistance is substituted by the proviso for the thing required by the enacting clause to be done, the persistance should surely be commensurate with the thing for which it is a substitute, or there is no rule whatever by which the length of persistance can be measured. That actual settlement means residence, as well as improvement, is obvious from this consideration; that if a man had made all the required improvements, before he had been driven away, but had not resided five years, he would be exposed to the full operation of the enacting clause, and subject to the forfeiture, without being saved by the proviso; which only applies to a person persisting in endeavours to make such improvements, (if this is the meaning of actual settlement,) which is absurd as to one who has already made them. Besides, the Indian war was existing at the time this law passed; it was hardly to be supposed it would terminate very shortly; and if a two years persistance was deemed equivalent to actual improvements, which it was so improbable could be made in that time, it was substituting a thing merely imaginary, for what the legislature deemed substantially beneficial. But if the time were extended to five years, it was much more likely that persistance, during some part of that time, might be employed, to effectuate the great objects of the law. But if persistance for two years will not satisfy the proviso, it is contended, that it is sufficient if it continue for five years. This is certainly less objectionable than the former; but when the one or the other is contended for, do not those who argue in this way rely upon conjectures, instead of the more permanent rule afforded by the law itself? And after all, what part of the proviso is it, which authorizes us to say, that the persistance is to continue for two or five years? It declares that the persistance shall be, to make such actual settlement; or in other words, to make such improvements, and to reside thereon for five years; and therefore, the persistance must continue until those things are done. Suppose the prevention should continue four years, and that that time should be taken to be in part satisfaction of the five years, as extended for; from what period will you date the commencement of the five years, so as to know when it is run out? Would it be sufficient to go upon the land, after the prevention has ceased, and reside the remaining one year? Certainly not; because the five years residence is to commence from the first settlement; and if this be not the period of its commencement, I know not in what way I am to say that any other will answer. The law fixes upon no other; and I certainly act at least upon safe ground, when I take the rule which the law has furnished. It therefore seems to me essential, that where no settlement had been made prior to the prevention, the warrant holder must make his settlement in a reasonable time after the prevention ceases, and from that time, continue his residence for five years. If this be not the case, it will be impossible to say, whether the five years are to run from the date of the warrant, from the period of prevention, or from any intervening period.

Persistance, must mean something real; not merely the wishing, or even attempting to do, an act impossible, or so dangerous that no man could be expected to attempt it. If the enemy, who should drive away the settler or warrant holder, should, during the period of two or five years, continue to infest the country, it could never be necessary for them to prove exertions during all that time to settle; because, to require the making them, when they could not be effectual, would be ridiculous. A warrant holder, therefore, who, from 1792 to 1795, should never have made an attempt to settle in this country of constant danger, would have had just as much merit, in my opinion, as another, who had hovered on the borders, sometimes going on, then flying from the enemy, and so on. The truth is, the legislature neither intended nor expected, that attempts, during a war carried on in this country, were to be made for settling. Persistance to settle, when that can be effected, I understand; but if required during a time when you are excused for abandoning your settlement, and if this kind of persistance is to be considered as a substitute for actual settlement, it is giving up the substance for the shadow. A proviso is generally intended to except a particular case, out of a gen-

eral principle; where, from peculiar circumstances attending the supposed case, there would be a hardship if the exception were not made. To understand the proviso, it is always the safest way to discover the mischief or hardship to be removed, and it should be so construed as to afford the remedy. The legislature can seldom intend to carry the remedy farther. Now, in this case, danger from the enemy might prevent the making the improvements and residence within and during the time prescribed, but not the making them at another time, when no such impediment existed. But forfeiture incurred, upon the failure to make the improvements within two years, and to continue the residence for five. This would have been a hardship, when you were prevented by enemies of the United States; and therefore, to remedy this hardship, the forfeiture is saved, if the party persisted, or goes on to make his actual settlement, although he has not done it within the period before prescribed. The proviso does not substitute persistance for settlement, but dispenses with a strict performance of the condition, provided it is performed within a reasonable time; for this is the best and only evidence of "a persistance in his endeavours to make such actual settlement."

The next questions are, was the Population Company prevented from settling, from the cause mentioned in the law, how long did it continue, and have they persisted? Many witnesses have given evidence as to the state of this country during the war, in which we find as great a diversity of opinion, as to the danger of settling there, as there is in the strength of nerves which string different frames. Some think there was not much danger, although they admit many murders were perpetrated, by the hostile Indians, in different parts of this country; and although the lives of those very witnesses were spent in successive advances and retreats, as the danger diminished or increased. Some of them have gone so far as to say, that, in their opinions, the hostilities committed, did not proceed from a national, general war, carried on against this country, but from a spirit of depredation and plunder, conducted by small parties. If these witnesses mean, that regular embodied armies did not march into the country, their testimony of this fact is denied by no person. But, they are greatly mistaken in supposing, the war was not national; and, whether quite as dangerous, when carried on by small invading bodies against a few straggling settlers, is matter of opinion, and certainly of very little consequence. If one man, or many, were daring enough to brave the dangers resulting from the operations of a savage enemy, thus conducted; it is no reason why other men should have been as imprudent; or, if you please, as courageous. The rights of the individuals are not to be measured by the masculine texture of their nerves. It is enough, that, from 1792 to 1795, inclusive, there was a national war subsisting between many of the Indian tribes and the United States; and, though the great scene of action was considerably to the westward of this country, yet it extended itself to the whole of it, and was supported by a force always equal to the occasion. Many families were cut off; and few could venture to leave the forts at so great a distance, as to lose the benefit of the asylum they afforded. The communications from the governor of this state to the legislature; the laws passed at various periods, during the three years I am now considering, for affording protection to that country; the history of that period, as recorded in our own memories; all prove, that settlements were not to be made, without extreme danger, until about the end of 1795. Until the end, then, of 1795, we must consider the prevention, by the enemies of the United States, as continuing; and, although during a great part of it, the company made exertions to settle the country, their rights would have been as perfectly secured, if they had not made a single attempt. After the restoration of peace and safety, a reasonable time should be allowed the company, for preparing to make their settlements; of which the jury are to judge, upon the circumstances of the case. But, it is insisted, by the defendant, that the improvements were not made within the time prescribed; nor has there been any residence at all upon the tract in question. To this, the plaintiff answers: that, the Population Company were prevented from doing either, by the conduct of the defendant himself. First, by his entering upon the land under a contract with them: secondly, by his retaining the possession of it, and so preventing them from putting thereon some one else, who would have made them; and, thirdly, by bodies of associated intruders, (amongst which the defendant was one,) who prevented settlers from coming, by the lawless opposition and outrages, which they, at different times, committed. If the jury should be of opinion, that the evidence is with the plaintiff, upon all, or any of these points, they must find for the plaintiff; for it shall not, in such cases, lie in the mouth of the defendant to avail himself of a forfeiture, which he has himself produced. As to the contract, it is clearly proved; and it is as clear, that the defendant, early in 1796, entered on the land in virtue of that agreement. Whether, in the summer of that year, or in 1797, he disclaimed the title of the Population Company, is uncertain from the evidence; nor is it material: because, as he had gained the possession, and always after retained it, in opposition to the company, the only remedy for them to regain it was, by an ejectment, to recover that right of possession, which their warrant and survey vested in them; for I will here observe, that though

such a settlement, as is mentioned in the ninth section, is necessary for the vesting and consummation of the right of a warrant holder, yet, they have such an inceptive title, under the warrant, as will enable them to maintain a possessory action against a tortious possessor; for this was essential to enable them to perform the condition. So, although no proof is given to fix upon the defendant any specific act of violence; and, although the mere circumstance of his being associated with a company of intruders, would not make him a principal in the trespasses they committed, unless he was present; yet, if a settlement of this tract was prevented by this society, it would be highly unjust to permit the defendant to avail himself of the defence, now set up, under such circumstances.

The jury found a verdict for plaintiff.

[A motion in arrest of judgment was made by the defendant. Case No. 6,849. For similar cases, see Huidekoper v. Douglass, Case No. 6,851, and Huidekoper v. McClean, Id. 6,852.]

Case No. 6,849.

HUIDEKOPER v. BURRUS.

[1 Wash. C. C. 257.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1805.

PLEADING — MOTION IN ARREST OF JUDGMENT — FORMAL DEFECTS IN DECLARATION.

Motion for arrest of judgment; because, the ejectment against the casual ejector, was wrong entitled, and for other defendants. The declaration to which the real defendant had pleaded, was right. The motion was overruled.

This was a motion in arrest of judgment [in the case of Huidekoper v. Burrus, Case No. 6,848], because the action is brought, as of April sessions, 1802, in the circuit court of the United States, in and for the Eastern district of Pennsylvania; whereas no such sessions was ever held or established by law. 2d. The land is not stated to be in the Eastern district of Pennsylvania, though the action is brought in and for the Eastern district. 3d. No title in the plaintiff at the time of the entry and ouster, stated in the declaration.

Mr. Ingersoll, for plaintiff, admitted; that, in the declaration against the casual ejector, there exists the mistake alleged; but, a new declaration was filed in the present circuit court, and properly entitled: to which declaration the defendant pleaded, that the land, in this declaration, is stated to lie in the district of Pennsylvania; which, after the repeal of the former circuit court law, was sufficient.

Rule discharged.

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

Case No. 6,850.

HUIDEKOPER v. DALLAS COUNTY.

[3 Dill. 171.] [1]

Circuit Court, W. D. Missouri. 1875.[2]

MUNICIPAL BONDS — CONSTITUTIONAL PROVISION — PRECEDENT VOTE — MACON COUNTY COURT CASE (41 MO. 453) FOLLOWED.

Charters of railroad corporations existing at the date of the adoption of the constitution of Missouri of 1865, and which granted authority to counties to subscribe for the stock of railroads, and to issue bonds to pay for the same without a vote of the people, were not affected by the provision of the constitution (article 11, § 14), requiring a two-thirds vote: So *held* by the state supreme court in what is known as the Macon County Court Case, 41 Mo. 453, and which is followed by this court.

[See note at end of case.]

This is an action on coupons of bonds issued by Dallas county, to the Laclede and Fort Scott Railroad Company or bearer. The petition refers to the act under which the bonds were issued, alleges that for the subscription made the county obtained stock certificates which it still holds; that the county has exercised the rights of a stockholder; that it paid the three first installments of interest, but has failed to pay the coupons in suit on presentation. The defense is that the order of the county court making the subscription was without authority of law; that the issuing of the bonds was made dependent on conditions in the order of subscription, which conditions have not been fulfilled; that the order of subscription had been repealed before the bonds were actually issued. The reply denies all of the allegations of the answer. Plaintiff [Alfred Huidekoper] on trial read the order of the county court of August 5th, 1869, making the subscription and the amendments thereto, produced the bonds and coupons, dated July 1st, 1870, read from the record of the county court the appointment of the agent of the county to prepare the bonds, and directing the presiding justice and clerk to sign and seal the same, read the report of the county agent, showing the obtaining of stock certificates for bonds issued at various times, and the approval thereof by the county court, and various orders authorizing the borrowing of money to pay interest coupons as they become due. The only testimony offered by defendant is an order of the county court dated August 2, 1870.

Mr. Shippen, for plaintiff.

Ellis & Botsford, for county.

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

KREKEL, District Judge. There is no inherent power in the county courts of Missouri to make railroad subscriptions, and hence the power must either be granted in the charter

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

[2] [Affirmed in 154 U. S. 654, 14 Sup. Ct. 1190.]

of the company to which subscription is made, or must be found in the general law upon the subject. In the case before the court, power to subscribe is found in the 14th section of the act incorporating the Laclede and Fort Scott Railroad Company, approved Feb. 11th, 1860, in the following words: "It shall be lawful for the county court of any county in the state to subscribe to the stock of said company; and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay for the same, and to take proper steps to protect the interest of the county." [Laws Mo. 1859–60, p. 438.] Here then we have the power of the county court to subscribe without submission, and in the exercise of that power the county court of Dallas county on the 5th day of August, 1869, made and entered the following order upon its record: "It is ordered by the court that one hundred and fifty thousand dollars be, and the same is hereby, subscribed to the capital stock of the Laclede and Fort Scott Railroad Company for and on behalf and for the use and benefit of said county of Dallas." After providing the size of the bonds, the rate of interest, how and where to be paid, the order referred to exacts conditions as to the issue and delivery of the bonds as the work progresses, which conditions were afterward modified so that the bonds might be issued at once. There are no allegations of fraud in the issuing of these bonds, nor has there been any attempt made to show such fraud, but the objection is that the subscription was not submitted to a vote of the people. Provisions of law as to subscriptions of this kind are found upon the statute books of Missouri as early as 1837, and continued to be granted in a large majority of charters which were passed by the legislatures from time to time. The 30th section of the general railroad law of 1855 [Rev. St. 1855, p. 427], gives power to subscribe to railroads in the following words: "It shall be lawful for the county court of any county and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this state, and the county court or city council subscribing or proposing to subscribe to such capital stock, may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city, as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation." The act of January 14th, 1860 [Laws Mo. 1859–60, p. 88], changed the word "may" in the act quoted, to "shall." The act of March 23, 1861 [Laws Mo. 1860–61, p. 60], made it the duty of the county court or city council of any city, whenever satisfied that the people wanted to subscribe stock to any railroad company, to order an election, and if a majority of the resident qualified voters voted therefor, to subscribe such stock.

The second section of the last quoted act provides that no subscription should be made unless the same had been voted for by a majority of the resident voters. Thus stood the law when the convention which framed the present constitution of the state met. The increasing interest in railroad improvements and the evasions of existing laws caused the enactment of a constitutional provision in the following words: "The general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." This provision would, no doubt, have prevented many unwise subscriptions for railroads, but for the existence of a very large number of charters at the time, and the opinion of the supreme court of Missouri, construing the constitutional provision as not applying to them. Many of these charters were by special enactment exempted from the provision of the general railroad law requiring submission, being, at the same time, authorized to build branches. The question as to the rights of the corporation under these charters came before the supreme court of Missouri at the October term, 1867, in the Macon County Court Case, 41 Mo. 453, and it was there held that it did not apply to them, and subscriptions could still be made to corporations having special charters, as stated, without submission.

To this doctrine the supreme court of Missouri has steadily adhered up to this time. Clark County Case, 54 Mo. 58. The construction of a special constitutional or statutory provision, given by the highest judicial tribunal of a state, is binding upon the federal judiciary, and has been applied in many similar cases determined at this term. It must be held, then, that the subscription made by the county court of Dallas county, under the authority of the provisions of the charter of the Laclede and Fort Scott Railroad to its stock, was valid and binding. The irregularities set up in the answer can not avail the defendant, a holder for value. The only one relied on is the order of the county court of August 2, 1870. It will be observed that the bonds and coupons bear date prior to this last mentioned order. Supposing, however, that the bonds were actually issued, as alleged in the answer, after August 2, 1870, could that avail the defendant? The court thinks not. In the first place the repealing order referred to is utterly ignored in the after proceedings of the county court, and treated as a nullity. But not only that, the county court proceeds to pay the interest from time to time, and may be said to have thus waived the irregularity, if such. Even if a fraud had been committed in the issuing of the bonds under those circumstances, an innocent holder is not affected thereby. The bonds must be held valid, and judgment will

be rendered for the plaintiff in the amount of the coupons sued on. Judgment accordingly.

[NOTE. The defendant appealed, but the supreme court, in an opinion delivered by Mr. Chief Justice Waite, affirmed the judgment below. (154 U. S. 654, 14 Sup. Ct. 1190), following County of Macon v. Shores, 97 U. S. 272, and Smith v. Clark Co., 54 Mo. 59.]

Case No. 6,851.

HUIDEKOPER v. DOUGLASS.

[1 Wash. C. C. 258; [1] 4 Dall. 392.]

Circuit Court, D. Pennsylvania. April Term, 1805.

LAND WARRANTS—CONSTRUCTION OF STATUTE.

1. What was prevention from making a settlement on lands within the "new purchase"?

2. What was the persistence required by the law of Pennsylvania, under which those lands were sold?

This cause resembled the two former cases of the same plaintiff, against Burrus and McClean [Cases Nos. 6,848, 6,852], and was tried at the last term. The judges differing in opinion, upon the construction of the 9th section of the law, the case was adjourned to the supreme court; who have certified their opinion, that a warrant holder who, from 10th April, 1793, to the 1st of January, 1796, was prevented by the enemies of the United States from making such settlement as the law required, but who during that period persisted in his endeavors to make such settlement and residence, is entitled to hold his land in fee simple, although, after the prevention ceased, he made no attempt to make such settlement. [3 Cranch (7 U. S.) 1.] The cause now came on, and was tried on the same evidence.

Mr. Ingersoll, E. Tilghman, Mr. Lewis, and Mr. Dallas, for plaintiff.

Mr. M'Kean, W. Tilghman and M. Levy, for defendant.

WASHINGTON, Circuit Justice (charging jury). The plaintiff appears before you with a regular paper title from the warrant to the patent. When this cause was tried before, the counsel for the defendant insisted, that the plaintiff's title was built upon a contract which he had not complied with, that he was to make a settlement, such as the enacting clause of the 9th section requires, unless prevented from doing so, by the enemies of the United States; in which latter case, he was not only to prove a persistance in endeavours to make the settlement, during the period of the war; but was to go on to make it, after the prevention ceased. This question was so difficult, as to divide, not only this court, but the courts of this state. The question was adjourned to the supreme court, who have decided [3 Cranch (7 U. S.) 1], that a warrantee, who, from April, 1793, to the 1st of January, 1796, was prevented, by the enemies of the United States, from making such settlement as the law required, but who, during that period, persisted in his endeavours to make such settlement, is entitled to hold his land in fee simple, although, after the prevention ceased, he made no attempt to make such settlement. This we must consider as the law of the land, and govern our decision by it.

The questions then are, 1st. Was the Holland Company, from April 1793, to January 1796, prevented from making their settlement? and, 2d. Did they persist in endeavours, during that period, to make it?

What is the legal meaning of prevention, and persistence in endeavours? Were they prevented, and did they persist, within this meaning? The first are questions of law, which the court are to decide; the latter are questions of fact, proper for your determination. What were they prevented from doing, in order to excuse them? The answer is, from clearing, fencing, and cultivating, two acres of land in every hundred acres contained in their warrant, from building a house thereon, fit for the habitation of man, and from residing, or causing a family to reside thereon. To what extent were their endeavours to go? The answer is, to effect these objects. It was not every slight or temporary danger, which was to excuse them from making such settlement, but such as a prudent man ought to regard. The plaintiffs stipulated to settle as a society of husbandmen, not as a band of soldiers. They were not bound to effect every thing which might be expected from military men, whose profession is to meet, to combat, and to overcome danger. To such men it would be a poor excuse, to say, they were prevented by danger, from the performance of their duty. The husbandman flourishes in the less glorious, but not less honourable, walks of life. So far from the legislature expecting, that they were to brave the dangers of a savage enemy, in order to effect their settlements, they are excused from making them, if such dangers exist. But they must persist in their endeavours to make them, that is, they are to persist if the danger is over, which prevented them from making them. For it would be a monstrous absurdity to say, that the danger, which, by preventing them from making the settlements, would excuse them, would not, at the same time, excuse them from endeavours to make them, so long as it existed. It would be a mockery to say, that I should be excused from putting my finger into the blaze of this candle, provided I would persevere in my endeavours to do it, because, by making the endeavours, I could do it, although the consequences would be such as I was excused from incurring. If, then, the company were prevented from making their settlements, by dangers

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

from a public enemy, which no prudent man would or ought to encounter, and if they made those endeavours, which the same man would have made, to effect the object, they have fully complied with the proviso of the 9th section. How then are the facts? That a public war between the United States and the Indian tribes, subsisted from April, 1793, and previous to that period, until late in 1795, is not denied; and, though the great theatre of the war lay far to the north west of the land in dispute, yet it is clearly proved, that this country, during this period, was exposed to repeated irruptions of the enemy, killing and plundering such of the whites as they met with, in situations where they could not defend themselves. What was the degree of danger produced by those hostile incursions, can only be estimated by the conduct of those, who attempted to face it. We find them sometimes working out in the day time in the neighbourhood of the forts, and returning within their walls, at night, for protection; sometimes giving up the pursuit in despair, and retiring to the settled parts of the country; then returning to this country, and again abandoning it. We sometimes meet with a few men hardy enough to attempt the cultivation of their lands, associating implements of husbandry, with the instruments of war, the character of the husbandman, with that of a soldier; and yet I do not recollect any instance, where, with this enterprising, daring spirit, a single individual was enabled to make such a settlement as the law required. You have heard what exertions were made by the Holland Company, you will consider what was the state of that country during the period in question, you will apply the principles laid down by the court to the evidence in the cause, and then say, whether the title is with the plaintiff or not.

Verdict for the plaintiff.

Case No. 6,852.

HUIDEKOPER v. McCLEAN.

[1 Wash. C. C. 136.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

EJECTMENT — SURVEY UNDER LAND-WARRANT — CONSTRUCTION OF STATUTE—INCEPTIVE TITLE —VACATING WARRANT—FORFEITURE.

1. By the practice of Pennsylvania, relative to land titles, if a warrant is taken out for land adjoining A. B., and it is found that the land adjoining A. B. has been previously taken up; it may be laid upon land adjoining that so held by a previous title.

2. The inceptive title of a warrant holder for lands in "the new purchase," is a mere right of possession, to be consummated by a compliance with the requisites of the law; and unless they were performed, no estate vested in him, and he lost his right of possession.

3. Upon a forfeiture being incurred, by a non-compliance with the terms of the warrant, no third person could enter on the land; no vacating warrant could issue, as it is provided by the law, that it can only issue to an actual settler.

This case did not differ materially from that of Huidekoper v. Burrus [Case No. 6,848]. In 1796 a cabin was built by a person claiming under the company, and some land was cleared; but upon the evidence, the question left to the jury was, whether a settlement was commenced within a reasonable time after the prevention ceased; and whether ten acres were cleared within five years after the first settlement.

But in this case, the following objections were made to the plaintiff's title:—First. That the warrant was issued to Charles Levi, for four hundred acres, north, or adjoining land this day granted to Charles Hall. But the land in question did not adjoin Charles Hall; there being between this and Charles Hall's, another tract to which another was entitled.

On the part of the plaintiff, the construction of the law was re-argued, much as in the former case, with this additional observation: that if actual settlement means improvement within two years, and residence for five, that this absurdity would follow; that by the preceding part of the ninth section, it would require a settlement of five years to be performed in the course of two.

The plaintiff also relied upon a prevention, from unlawful combinations of settlers.

WASHINGTON, Circuit Justice (charging jury). As to the objection made by the defendant; it sufficiently appears in evidence, that the warrant for four hundred acres, in the name of Charles Hall, was claimed by a prior improvement of Luke Hill; and that Charles Hall's warrant was considered as a lost one. Consequently the company could not survey Charles Hall's warrant on that land, and were necessarily obliged to go on to the next adjoining, to survey Charles Levi's warrant. This is the constant practice in this state, and a contrary decision now, would be of most mischievous consequences. The patent states, that it is for the land surveyed for Charles Levi, by virtue of his warrant, which must be adjoining Charles Hall, unless an interruption had taken place.

It has been contended by the plaintiff's counsel, that even if they have failed to comply with the law; yet, until the commonwealth has taken advantage of the forfeiture, no other person can enter upon the land, and defeat the title of the plaintiff. We think there is no weight in this argument. It is true, the warrant holder had an incipient title; but it was merely a right of possession for particular purposes; that is, to settle and improve, so as to comply with these conditions, on the performance of

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which an estate was to vest in him; but unless those conditions were performed, no estate did vest in him, and he lost his right of possession. The state was not bound to pursue any particular mode for regaining the possession. The law authorized any person to acquire a title to lands, for which warrants had been granted, and the condition not performed by warrant or settlement. But if no person can enter and settle on lands, where the warrant holder has neglected to perform the conditions on which he was to have an estate in it; then no vacating warrant could ever issue; as that must be to an actual settler; and yet by the express words of the law, such a warrant may issue, in cases where the conditions imposed on the warrant holder have not been complied with.

I come now to the construction of the law. have listened with great pleasure to the second argument of this question, with a mind I think unprejudiced by the opinion I delivered in the case of Huideköper v. Burrus [supra], and if I know myself, I would with pleasure have retracted that opinion, if I felt myself convinced by the able and ingenious argument I have now heard. My opinion then was stated to be, that actual settlement meant improvements made within two years, and residence for five. This is controverted, upon the ground that it would be to require a five years' residence, to be performed in the space of two. This absurdity really grows out of the literal reading of the enacting clause of the 9th section; but we must see if it may not be avoided, by such an interpretation as will make all the parts of the law consistent and harmonious. The words are "that no warrant or survey, &c. shall vest any title to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, &c., or shall within two years next after the date of the same, make, or &c. an actual settlement thereon, by clearing, fencing, and cultivating, two acres on each hundred, erecting a habitation for the residence of man, and residing, or causing a family to reside thereon, for five years next following his first settling the same, if, &c."

Now, the actual settlement is thus declared to consist; in making certain improvements within two years; and a residence for five; but the apparent absurdity arises merely from the order in which the sentence is arranged, and by an easy transposition will be removed. I read the sentence thus,—that to give a title, there must be an actual settlement, by making certain improvements thereon within two years after the date of the warrant, and residing thereon for five years, so as to make an actual settlement consist in those two things, improvement within two, and residence for five years after date of the warrant. That this is the plain legislative definition of actual settlement, appears obvious to me, from the words of the law itself, as above quoted. If actual settlement means improvements, made within two years, independent of residence, then the difficulty I stated in the case of Huideköper v. Burrus must exist; viz. that if a man had made the improvements required in the enacting clause, but had been driven off, so that he could not continue his residence, he would have been exposed to the complete operation of the enacting clause, without being saved by the proviso; for the latter could not apply to such a case.

But in truth it is of no consequence in this, any more than in the other case, whether actual settlement means both improvement and residence, or only the former; because, in neither is it pretended that the improvements were made, within two years from a reasonable time after the prevention ceased. The great question is, whether persistance to make the settlement, was intended to consist in endeavours merely, or in actually making the settlement; whatever may be sufficient to constitute it. If the party is not to persist to effect, after the prevention had ceased, that which he must have done had it never existed; then he must persist, during the time when he is prevented, whether that be long or short. Now, to require persistance in doing what he is prevented, and therefore excused from doing, is, to my comprehension, an absurdity, with which the legislature should not be charged. Persist how, and for what purpose? The law supposes the party to be driven off and prevented from settling; and if, under such circumstances, he is to persist in his endeavours to settle, nothing short of actually settling himself upon the land can do; for although he may risk his life in the attempt, yet if he can attempt it, and run the risk, and if he is not to go thus far, what is he to do to afford evidence of persistance? Will his hovering on the borders of the land; sometimes in a moment of tranquillity, going on at the imminent hazard of his life, and then flying when he hears of an enemy, answer the purpose? Could the law have intended this? Is not its meaning obviously otherwise? And if he was not required to do this, by what scale are we to graduate the degrees of persistence? Would not a man, who, (during a period when it was madness to attempt a settlement,) resided generally in the interior of the country, without spending a thought upon his intended settlement, until the danger was over, be considered as having complied with the conditions of the law, as fully as the company, whose agents had made preparations for settling when the danger should be over? If not, then how will the company enter into competition, upon the score of merit, or rather of hardihood, and culpable temerity, with those fearless adventurers, who went on the lands at a time when they associated arms of defence with the instruments of agriculture: who never went to their fields but

with their rifles, and carried them from one cornhill to another. The truth is, that persistance can never be considered as contemporaneous with prevention. So long as prevention continues, the law excuses the party from persisting; for it would be unavailing. But if persistence was to consist in making not one effort, during the period of prevention, then to say that such a persistence is a compliance with the requisites of the law, is to substitute, in the place of a substantial good, viz. the settlement of the country, a sort of merit merely imaginary. The only way therefore to make sense of the law, and to comply with the manifest intention of the legislature, is to construe the proviso as requiring the party to do that, after the impediments had ceased, which he must have performed had they never existed. He must persist until his endeavours are crowned with success. Instead of being obliged, at the risk of his life, to improve within two years from the date of his warrant, and to reside for five, it is enough, under the proviso, if he does the same things after the prevention had ceased.

As to what shall be deemed a reasonable time for commencing the settlement, after the prevention had ceased, I shall leave it entirely to the jury to decide, upon the circumstances of that country, after the war had entirely ceased, and the preparations necessary for such an undertaking.

As to the combination of associated intruders, if they went no farther than to support what they supposed to be their rights, for it appears they asserted titles adverse to that of the company; I do not think that this ought to excuse the plaintiffs, for not making their settlement in time; if you should be of opinion they were not made in time, neither do I think, that, if their opposition was unlawful, and to support tortious intrusions, that they should affect the defendant, unless he appeared to have been one of the associates, or to have opposed the settlement of the country.

The jury found for the plaintiff.

[NOTE. Cases Nos. 6,851 and 6,853 were similar suits, involving the titles of different parts of the same original tract, but the latter turned upon points not raised in the case at bar.]

Case No. 6,853.

HUIDEKOPER v. STILES.

[1 Wash. C. C. 135.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

EJECTMENT—SERVICE OF DECLARATION—POWER OF JUSTICE OF THE PEACE.

1. Justices of the peace of the state of Pennsylvania may receive proof of the service of process of ejectment, issuing out of the circuit court of the United States.

2. What will be deemed a sufficient service of a declaration in ejectment.

Motion for judgment against the casual ejector, on notice to the tenant in possession, served and proved by the affidavit of the deputy marshal, before D. Meade; who, by a certificate of the prothonotary, is stated to have qualified as a justice of the peace, of the common pleas of Crawford county. Levy objected, that a state magistrate has no power to take proofs of service of process. His having a power to administer the oath of office to the deputy marshal, in a particular case,—4 Laws [by Folwell] 274 [1 Stat. 624].—shows that he has no such authority in other cases. He also objected to the affidavit, that it did not state positively, that the tenant found in possession was tenant in possession; it is left to implication: it is said to have been served on A. B., tenant in possession. 2 Bac. Abr. 162. The affidavit should be positive, that J. D. was tenant in possession, or acknowledged himself to be so. Affidavits of service on A. B., tenant, or C., his wife, or the wives of A. & B., who, or one of them, are tenants, are not sufficient. Id. In one of the cases on which this motion is made, the declaration was delivered to the father of the tenant in possession, on the land, and in the house of the tenant in possession. In another, it is served by nailing the declaration on the door of W. M., on the premises. But the defendant does not state that the house was empty. If the defendant did not live there, but the marshal knew where he lived, it ought to have been served personally on him.

THE COURT granted a rule to show cause, at the adjourned court, why judgment should not be entered up.

[NOTE. Cases Nos. 6,851 and 6,852 were similar suits, involving the titles to different parts of the same original survey, but the decisions in these cases turned upon points not involved in the case at bar.]

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

Case No. 6,854.

HUKILL v. PAGE et al.

[6 Biss. 183.] [1]

Circuit Court, N. D. Illinois. Aug., 1874.

EQUITY JURISDICTION—REMEDY AGAINST TRUSTEE.

The remedy of the cestui que trust against the trustee for negligence must be in equity, not at law.

Action on the case by plaintiff [Edwin M. Hukill], holder of certain bonds of the Riverside Improvement Company, secured by deed of trust to the defendants [Benjamin V. Page and others], the declaration alleging that the plaintiff purchased the bonds relying upon the security of the trust deed, but

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

that the defendants wrongfully executed and delivered to the said company a release of said trust deed, which was duly filed for record, whereby plaintiff's bonds became of little or no value. Defendants file general demurrer.

Lawrence, Winston, Campbell & Lawrence, for plaintiff.

Geo. W. Smith and Ayer & Kales, for defendants, cited Alton v. Midland R. Co., 115 E. C. L. 213; Himes v. Keighblingher, 14 Ill. 469; Saund. Pl. & Ev. 726; Perry, Trusts, § 843; 1 Chit. Pl. 60; Hill, Trustees, 42; 2 Story, Eq. Jur. § 962; Dias v. Brunell, 24 Wend. 9; Bartlett v. Dimond, 14 Mees. & W. 49; Pardoe v. Price, 16 Mees. & W. 450.

BLODGETT, District Judge. Inasmuch as no fraud was charged, but negligence only is alleged in the declaration, the remedy should be by a bill of chancery. It is possible that an action on the case might lie against the trustees if fraud were alleged, but as plaintiff simply alleged negligence the only remedy is in equity. The demurrer will be sustained and leave given to amend, if the plaintiff thinks he can make a good declaration.

HULBERT (MARSH v.). See Case No. 9,116.

HULBURD (VAN ANTWERP v.). See Cases Nos. 16,826 and 16,827.

Case No. 6,855.

HULBURT et al. v. SQUIRES et al.

[Brunner, Col. Cas. 13;[1] 1 West. Law Month. 443.]

Circuit Court, N. D. Ohio. Jan., 1859.

PAYMENT OF NOTE HELD BY BANK FOR COLLECTION—WHAT CONSTITUTES.

Where one of three makers of a promissory note, payable at the office of a banking association, thirteen days before the note became due, deposited with the company at their office a sum of money sufficient to meet the note, and received from the cashier a certificate of credit for that sum, "to pay your note to" the payees named in the note, and the bank failed on the day the note fell due, having, from the time of the deposit up to the day of failure, constantly more than sufficient funds on hand to pay the note; and after the deposit of the money, and before the note became due, it was deposited with the company, who held it up to the day of failure, with authority to receive payment upon it, but no further application of the money deposited had been made to its payment, *held*, that the note remained unpaid, and that the makers were liable upon it to the payees.

At law.

Paine & Wade, for plaintiffs.

S. B. & F. J. Prentiss, for defendants.

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

WILLSON, District Judge. This case was tried by a jury, and a verdict rendered for the plaintiffs.

The defendants have moved for a new trial upon the following assigned causes:—1st. That the verdict was against the evidence. 2d. That the verdict was against the law. 3d. That the court erred in refusing to charge the jury as requested by the counsel for the defendants.

The plaintiffs, upon the trial, produced in evidence a promissory note, of which the following is a copy:—

"Monroeville, Ohio, May 9, 1857.

"$600. Six months after date, for value received, we jointly and severally promise to pay to the order of Hulburt, Sweetzer & Co., at the office of the Norwalk Savings Company, six hundred dollars, with interest.

"Signed { Douglass Squires, John Clary, Lewis Zahu."

And thereupon the plaintiffs rested their cause.

The facts disclosed by the defendants' testimony were that the note in suit was the last of three notes of equal amount, bearing the same date, payable at the same place, and given by the defendants in the settlement of one and the same transaction. Each of the two first notes, which severally matured on the 12th of July and the 12th of September, 1857, was sent by the holder to the Norwalk Savings Company for collection, and received by it before maturity. It appears that these two notes were paid by the defendants, who deposited sufficient money with the savings company for that purpose, comprising a deposit on the 30th of June, and one on the 8th of July, 1857, as applicable to the first note, and another on the 11th of September, 1857, as applicable to the second. The note in suit matured on the 12th of November, 1857. The plaintiffs indorsed it over to C. L. Latimer, treasurer of said savings company for collection, who received it a day or two before it fell due. Just before its receipt by him, to wit, on the 30th day of October, 1857, one of the defendants made a deposit with said savings company, and took from it the following paper: —"Office of Norwalk Savings Company, Norwalk, Ohio, Oct. 30, 1857. Mr. D. Squires—Dear Sir: We credit you this day six hundred and eighteen dollars, to pay your note to Hulburt, Sweetzer & Co.—$618. Yours truly, (Signed) J. S. Cole, Cashier." On the 12th of November, 1857, the very day on which this note became due, the Norwalk Savings Company failed, and at which time Latimer indorsed and delivered over the note to the Bank of Norfolk for collection. And it further appeared in evidence that from the 30th of October to the 12th of November, the savings company had continuously on hand cash means more than sufficient to pay the note.

Upon this evidence the court instructed the jury in substance that when a note is payable in a specified time, the law neither gives the maker the right to pay, or imposes on the holder the obligation to receive and apply the money in discharge of the note before its maturity. That when the relation of principal and agent exists, the conduct of the agent in all matters pertaining to his employment within the scope of his authority is conclusive upon his principal; and that in this case, if that relation existed between Squires and the savings company, and the latter failed to apply the money of its principal in its possession to the discharge of the note, then there was no payment, and the plaintiff ought to recover.

The material question presented by this motion is whether, under all the circumstances of the case, this note was paid by the defendants' deposit of the six hundred and eighteen dollars with the Norwalk Savings Company. It is claimed by the counsel for the defendants that inasmuch as before and on the day of the maturity of the note it was in the hands of the savings company, with authority to receive payment upon it, and the money to pay it also in the possession of said company, that the duties growing out of this condition of things imply payment of the note, and that then and thereafter the company held the note as the agent of the defendants, and the money as the agent of the plaintiffs. This position of counsel cannot be maintained. Before the note was received by the savings company for collection, the defendant Squires deposited the money with that institution to his own credit, and this credit was so entered upon the books of the company. Squires controlled the money, and although he constituted the company his agent, to dispose of the fund for a specific object, yet until that disposition was made he not only controlled the money but could also revoke the agency. The original parties to the note, by making it payable at the office of the savings company, did not create that institution the agent of either of them. The company was not, by virtue of the contract of the parties, the agent to pay, or the agent to receive payment. The makers of the note were not required to place funds in the possession or under the control of the savings company to meet their obligation. When the paper matured they had a right to go to the place of payment, either in person or by an agent, tender the amount due, and take up and cancel the evidence of indebtedness. If the note was not then and there ready to be delivered up on such tender of payment, the effect would have been to stop the accumulation of interest, and in case of suit upon the note the maker could plead the tender, bring the money into court, and be discharged from further liability.

It is a principle of law, well settled by a course of uniform decisions, that the maker of a promissory note has not the right to pay, nor is the holder obliged to receive payment before the note matures. This money was deposited with the savings company before the note came into its possession, and there could be no legal implication of payment, especially as at that time the company was not in fact the agent of the plaintiffs and by them authorized to receive the money on their account. But it is said, this company had held for collection the two previous notes, and upon those notes had received payments before they became due, and that to this conduct of the company the plaintiffs never objected, but on the contrary ratified and approved it by their reception of the money thus paid. Such, however, was not the proof. The evidence simply established the fact that money was deposited for the purpose of paying those two notes; but whether it was received and applied in payment of the paper before maturity did not appear. And had it so appeared, it would not, in our opinion, have been conclusive of a course of dealing between these parties that would have changed a rule of law governing their rights and duties in the premises. The three notes were all negotiable commercial paper. They came to the place of payment through different channels, and were indorsed by different parties. There was nothing on the notes to indicate their uniform ownership, or that they belonged to the plaintiffs to whose order they were originally made payable. If there had been a course of dealing understood and acted upon by these parties, by which the defendants were accustomed to pay like notes belonging to the plaintiffs at the savings company's office before they fell due, there would be force in the presumption that like authority was granted to pay this note in the same way. This course of dealing, however, the proof failed to establish. On the contrary, it is clear the defendants acted upon no such understanding in making the deposit, as in that case they would have paid the money to the credit of the plaintiffs and taken up the note, or obtained an acquittance therefor from the company.

The case presented then is simply this: The defendants deposited money with the Norwalk Savings Company to their own credit, with which they intended to pay this note when it should fall due. Now, it cannot be disputed that immediately upon the credit being given upon the books of the savings company, that institution became debtor to the depositor; and that it was not thereafter competent for the company, as agent for the plaintiffs, to pay the note by a transfer of this credit on its books to the plaintiffs. Such a transaction would have been nothing more than the simple case of the agent "writing off" money due from him to the debtor, by way of discharging the debt due from the

debtor to the agent's principal. It is well settled by authority that such a transfer of credit cannot be made by an agent.

Russell v. Bangley, 4 Barn. & Ald. 398, was the case of a policy of insurance delivered to an agent to adjust the loss and collect the money from the underwriter. The agent adjusted the loss, and being himself at the time indebted to the underwriter, charged him with the amount of the loss in account, and credited the assured. The agent having failed before accounting to his principal, the question was whether, in fact, the debt was paid. Chief Justice Abbott in that case held the general rule of law to be, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, "writes off" money due from him to the debtor, then the latter is not discharged. That decision was in accordance with the principle established in the leading case of Todd v. Reid [Id. 210], where it was held that the agent of the assured was only entitled to receive payment in money; and that the attempt to pay the debt of one person with the money of another could not be sanctioned. The same principle was again affirmed in the late case of Underwood v. Nicholls, 33 Eng. Law & Eq. 321.

This doctrine is well settled and established in England, and is not contravened by any decision of the courts in the United States. We are therefore of the opinion that in its charge to the jury the court committed no error, and that the verdict rendered was in accordance with the law and the evidence. Judgment upon the verdict.

HULERY (CLINE v.). See Case No. 2,897.

HULINGS (ROACH v.). See Case No. 11,874.

Case No. 6,856.

Ex parte HULL et al.

[1 N. Y. Leg. Obs. 1; 5 Law Rep. 319.]

District Court, S. D. New York. Aug., 1842.

BANKRUPTCY — OPERATION OF BANKRUPT ACT — RETROSPECTIVE LAWS—INSOLVENCY.

1. A debt contracted prior to the passing of the bankrupt act is within its operation, and will support an adverse decree in bankruptcy.

2. The word "insolvency," in the 14th section of the act [of 1841 (5 Stat. 448)], as applied to voluntary applications for a decree, means inability to meet engagements; but in relation to compulsory proceedings by creditors, it means the bankruptcy of the debtor as known to the court as a ground for proceedings, and must be proved in the manner indicated by the first section of the statute.

This was an application by John W. Hull and Abraham H. Smith to show cause against being declared bankrupts. It appeared by the petition of the creditors: That previous to December last, Hull and Smith were merchants and partners in trade in the city of New York. That in the months of August, September, October and November last, they purchased of the petitioner, or other mercantile firms in New York, large quantities of merchandise, exceeding in value $40,000, and that, in the early part of December last, they failed in business and declared themselves insolvent, leaving the whole of the said debt of $40,000 unpaid. The petitioners alleged various acts of fraud, and among other things, that in the month of December last, Hull departed from the state of New York, with intent to defraud his creditors and to prevent his being arrested, and that he still continued from the state, and concealed himself in some place unknown to the petitioner; and that Smith, since the departure of Hull, and within a short time past, had declared that the firm of Hull & Smith was utterly insolvent and able to pay but a very small part of their just debts. It appeared to be conceded on the argument, that enough was shown in this matter to support the proceedings as against Hull, because of his continued concealment to avoid being arrested. The questions raised for the consideration of the court were: 1st. Whether the acts of fraudulent bankruptcy, committed anterior to the passage of the act, could be brought within its operation and redress. 2d. Whether, in the case of partners, a mere insolvency of the firm will enable creditors to sue out a decree.

A. S. Johnson, for bankrupt.
Salem Dutcher, for creditors.

BETTS, District Judge. Statutes of a penal character will not be construed to have a retrospect beyond the time of their commencement (Bac. Abr. "Statutes," C; 7 Johns. 477; Dwar. St. 680); such retrospect is the acting of the law by its own vigor to change the interests or rights of parties, because of some fact or circumstance existing before the law was passed, so as to divert or diminish an interest then subsisting, or to render an act criminal which was not interdicted at the time it was committed. A distinction, however, has been taken between laws which operate directly to abrogate vested rights, and those which annul or vary the remedies existing when the right accrued for its maintenance or enforcement. [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 122; [Mason v. Haile] 12 Wheat. [25 U. S.] 370; 2 Kent, Comm. 462. Such laws supply the rule governing courts in administering remedies in all cases pursued before them, without regard to the nature of the remedy authorized antecedently, and at the time the right in suit was created or perfected. [Bank of U. S. v. Halstead] 10 Wheat. [23 U. S.] 51; [Beers v. Haughton] 9 Pet. [34 U. S.] 329. The principle upon which this distinction rests, is of familiar and constant application, although to practical purposes the remedy often becomes the all essential qual-

ity of the right. [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; [Bank of U. S. v. Halstead] Id. 51; Beers v. Haughton [supra]; Lehoy v. Crowninshield [Case No. 8,269]; [Suydam v. Broadnax] 14 Pet. [39 U. S.] 67.

Notwithstanding the commingling of right and remedy, as to every purpose of useful enjoyment, the law has always marked a broad distinction between statutes having relation to the one or the other; those touching the remedy being mandatory to the courts only, and governing their proceedings; whilst those affecting right of persons or property attach to individuals, and the rights, once having acquired existence, cannot be abrogated or changed by posterior enactments, particularly under an equitable interpretation of the constitution of the United States. This distinction is frequently presented and acted on. A penalty or forfeiture arising under a statute cannot be recovered after the statute is repealed. [The Rachel v. U. S.] 6 Cranch [10 U. S.] 329. So also statutes of limitation take away the remedy (5 Dane, Abr. 392), and operate upon matters in litigation alike where the right of action existed previous to the enactment of the law as when it accrues subsequently (U. S. v. Gooding, 12 Wheat. [25 U. S.] 478; [Wilkinson v. Leland] 2 Pet. [27 U. S.] 627, 660; [Satterlee v. Matthewson] Id. 413; [Charles River Bridge v. Warren Bridge] 11 Pet. [36 U. S.] 509; [Watson v. Mercer] 8 Pet. [33 U. S.] 110; [Suydam v. Broadnax] 14 Pet. [39 U. S.] 74).

Whatever may be the difficulty as to the exercise of legislative powers over vested rights in prohibiting their enforcement, or introducing new limitations or bars to them, it seems the opinion of our most distinguished tribunals, that under our government the legislative authority is paramount, and may prescribe the rule of judging to the judiciary only in the excepted case of a constitutional interdiction, which would check or supersede the action of the legislature. Suydam v. Broadnax [supra].

The subject has been largely discussed in the state courts and those of the United States (1 Kent, Comm. 455; 3 Story, Const. Law, 266); and an attentive perusal of the opinions of the judges, and the qualifications with which they are announced, I think, will show, that in every case where a retrospective action has been denied to a statute, it has been upon the ground that the act itself has not distinctly and clearly assumed that power (1 Kent, Comm. 455, 456, and notes). Here, and in England, the plain and positive terms of a statute must be executed, if within the competency of the legislative power, without regard to its consonance with reason, justice, or the natural rights of individuals. 1 Gill. 158; [The Hoppet v. U. S.] 7 Cranch [11 U. S.] 389. These remarks apply to laws of a general bearing affecting the rights of parties, and have still greater force, as has been already intimated, in respect to enactments touching the practice of the courts, and the privileges of suitors therein, to retain the like remedy for rights as were in force when the rights accrued.

It would seem, therefore, then singly with the exception of laws ex parte facto, that the courts of this country and England claim no authority to intercept the execution of the legislative will affecting by its laws a past condition of things when the legislative intention so to do is manifest; they only refrain from construing a law so as to give it a retrospective operation when its provisions may be otherwise satisfied. Upon this doctrine I can see nothing in the way of applying the provisions of the bankrupt act to the particulars antecedent to its passage, if its language denotes the intention of congress to give it such operation. Clearly this is so in respect to the effect of a discharge, for the bankrupt is exonerated alike from debts due at the passage of the law, with those subsequently incurred, or not yet due (sections 4, 5), and the benefit of a discharge is withheld, when a preference has been given by a bankrupt to creditors after the first of January, 1841, or at any other time, in contemplation of the passage of a bankrupt law, although it is believed that by the laws of all the states such preferences were lawful anterior to the passage of this act. In another particular, the act clearly retrospects, in giving the courts cognizance of cases of voluntary bankruptcy, because it embraces all persons owing debts at the time of its enactment, which shall not have been created in a particular manner; necessarily excluding the idea that debts must be created subsequently to the passage of the act to come within its operation.

A reference to contemporaneous history would fortify this reading of the act, for it was made a prominent incident to the policy of this law, that it should apply relief to that oppressive condition of indebtedness then weighing upon the community. Taking it to be undeniable, that congress intended the act should apply to debts contracted previous to its passage when the proceedings are voluntary on the part of the bankrupt, the argument must be a most difficult one to establish any sound discrimination that excludes cases of involuntary bankruptcies from a like operation and construction of the act. The involuntary proceedings are applied at once on the enactment of the statute to the classes of persons designated, owing debts at the time, and though there might be grievous injustice in treating past acts of the debtor in the creation of the debts, or disposition of his property, as grounds for punishment, or privation of any rights by force of the posterior law, still such past acts may, with greatly less incongruity, be called for to show the quality of the indebtedness, and to found thereupon such relief as equity may interpose in behalf of creditors.

This view of the case need not be pursued, because whatever decision the court

might adopt on the naked question, whether the bankrupt act does or can retroact so as to affect interests legally existing at its enactment, the point now presented requires no more of the court than to pronounce whether the proceedings by creditors against a bankrupt to obtain a decree of bankruptcy, and the distribution of his effects, is necessarily an interference with vested rights of such debtor in respect to person or estate. If it is not anything more than a remedy supplied to creditors for the collection of their debts against evasive or fraudulent debtors, the only further inquiry would be whether such remedy does not necessarily embrace any indebtedness in existence at the time it is put in force. The bankruptcy of a debtor is nothing else than his inability or refusal to pay his debts. The legislation of various periods and governments has attached to this condition of the debtors, provisions intended to protect creditors sometime operating upon the person of the debtor, and at others upon his estate, with an energy and promptitude varied according to the character of the government or people, or disposition of the times. Cleared of the features which render fraudulent bankruptcy a crime, bankruptcy laws in principle and operation are no more than an instrumentality for the collection of debts with vigor and celerity. They are based upon the plain equity that the estate and means of a debtor ought not to be enjoyed by him and his creditors be left unsatisfied, and they supply the creditors ready means to compel an unwilling debtor to do what in justice he ought to do towards them: this is their eminent characteristic; they wrest from the possession of the bankrupt his estate, and place it under the control of some tribunal charged with its proper disposition. The spirit of this proceeding has always been familiar to our laws and usages, in case the debtor could not be found personally, so that the powers of the court could act on him individually to secure the rights of his creditors. The process is as efficacious and summary in case of an absent or concealed debtor as in bankruptcy, and no sound reason is discerned for regarding the absence or presence of the debtor, a controlling consideration in providing a remedy for his creditors against his estate. In many states an attachment of a debtor's estate is the first process granted a creditor, and it places at once his property under the control of the law without demanding a previous judicial ascertainment of the right of the creditor.

The enlarged remedy now supplied in chancery by creditors' bills covers as wide a field of relief and by a procedure as cogent and searching in relation to the debtor as that given by the bankrupt act, and a process still more summary and efficacious is secured the government by the act of March 3, 1797 [1 Stat. 512], to recover its balances against receivers of public moneys. There would be no anomaly in principle, therefore, in regarding the bankrupt act, in so far as the arrest and distribution of a debtor's effects are concerned, of no higher claim or force than an attachment procedure constructed to secure an equal participation by all creditors in a failing debtor's estate, and in that point of view it would be wholly immaterial whether the facts upon which the remedy acts, come into existence before or after the passage of the statute. The relief on a creditor's bill is administered in chancery on this principle, for not only debts accrued antecedent to the act of 1830 (2 Rev. St. p. 173, § 38), but judgments rendered before the passage of the act receive the aid of chancery without any language of the statute retroactive in terms. 4 Paige, 309.

The supreme court, in discussing the character and effect of bankrupt laws, intimates most significantly that an act may be a bankrupt law without containing any clause discharging the obligation of the debt,—[Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 199,—and then it need be no more than a power to the court to proceed in a particular method on the proof of the insolvency of debtors, to put their property within reach of their creditors; in effect to substitute a summary sequestration on adequate notices and causes shown, for the ordinary processes of collection by suit at law. The earlier frame of the bankrupt laws in England made no provision for the discharge or release of the debt, or even of the person, their purpose being to give to the law the administration of an insolvent debtor's effects, so as to insure their entire and equitable appropriation to that object. Should our legislatures accordingly put the estates of insolvent debtors, living or deceased, upon the same footing, and arrange their laws so that a ratable distribution amongst creditors should be enforced alike in both cases, it could be regarded no more than a mere scheme of relief or practice, and would necessarily control the action of the court the moment it came in force.

I think, then, that upon the first point of the case, the petition is sustainable, and that the debtors, still being copartners, are liable to be decreed bankrupts for the fraudulent disposition or concealment of their partnership property, charged in this case. This remedy, it is to be further remarked, does not reach to the consequences attending bankruptcy in England, for no person who fairly received the property of these debtors, after their acts of bankruptcy, can be called in question for it under these proceedings. The remedy acts exclusively upon the debtors, and the estate remaining in their right at the time of the decree.

With a view to the ulterior relief of parties in respect to this decree, it is proper also to dispose of the other point involved in the objections, although a decision upon

it, the one way or the other, would not vary the result in this case; that is, whether the debtors, as insolvent parties, are subject to this proceeding without other proof of bankruptcy than their inability to pay their debts. A decision made by the district court of Tennessee—Ex parte Galbraith [Case No. 5,187]—on this point in the affirmative of the question is cited and relied upon by the counsel for the petitioners as a judicial construction of the act, independent of what is claimed to be the obvious and direct language of the statute itself. The 14th section provides, that where "two or more persons who are partners in trade become insolvent, an order may be made in the manner prescribed in this act either on the petition of such partners or any one of them, or on the petition of any creditor of the partners," &c.

A new rule it is supposed is here introduced in respect to copartners, and that a mere insolvency or inability to pay their debts induces all the consequences of bankruptcy. In a general sense and to all practical ends in business transactions, there is no sound distinction between bankruptcy and insolvency. It is believed that the terms are used convertibly in ordinary parlance; they are so historically. Montifiore, Com. Dict. voce "Bankrupt"; M'Culloch, Dict. (Last Ed.) Id. Legal compilers recognize the same common import of the words in the law. Petersd. Abr. Id. And our highest tribunals, called upon to collate and discriminate the one from the other, admit there is no principle even in a statute applicable to either condition of debtors, which marks with exactness when it is an insolvent law and when it becomes a bankrupt law. [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 122; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 273. The difference lies essentially in the scheme of remedies adopted in reference to bankruptcy or insolvency, to effectuate which the law arbitrarily pronounces a man bankrupt upon the commission of particular acts, though he be indisputably solvent. Doug. 92, note. The same course also is sometimes applied to insolvents, as our revenue laws declare a debtor on custom-house bonds insolvent on the assignment of his property, or its attachment on the commission by him of an act of bankruptcy—Act March 2, 1799, § 65 [1 Stat. 675]—irrespective of the sufficiency of the assigned or attached property to satisfy all his debts, and nothing but the statutory proof is regarded as evidence of the fact. [Reily v. Lamar] 2 Cranch [6 U. S.] 356; [U. S. v. Hooe] 3 Cranch [7 U. S.] 73; [Prince v. Bartlett] 8 Cranch [12 U. S.] 431; [Thelusson v. Smith] 2 Wheat. [15 U. S.] 396.

It is manifest that congress, adopting these principles in defining and classing cases that fall within the bankrupt act, has legislated with a view to an assumed or artificial state of insolvency or bankruptcy in debtors, and not upon the actual circumstances of such debtors, because the proceedings are carefully made to depend on certain specified evidence or proofs of bankruptcy, and no provision is made to arrest them on any degree of proof showing the ability and readiness of the party to discharge all his debts. The first section evinces the clear purpose of congress in this respect, and points out, with precision and exactness, the cases coming within the cognizance of the court under the act. The jurisdiction of the court does not attach on the petition of a party himself or that of his creditors, however clearly his insolvency may be established, unless the very evidence specified by the statute is supplied. Indeed, the court has no authority to institute or entertain an inquiry into the fact of insolvency, for it is compelled to declare a petitioner bankrupt on his own sworn representation of his inability to pay his debts, or on that of his creditors if he has done any act indicated by the statutes, and owes $2,000, whatever may be his real wealth and responsibility. It would not be probable that congress, after this minute and specific legislation on insolvency and bankruptcy, should intend in a subsequent clause to discard the entire principle on which the jurisdiction of the courts over them was made to rest, and establish, by the 14th section, a substantive scheme of bankruptcy upon an untried and unheard of principle. For it must be borne in mind, that if mere insolvency subjects copartners to a commission of bankruptcy, the state and responsibility of every trading firm may be made the subject of judicial investigation at the instance of any creditor who may allege that it is unable to pay its debts.

But aside of the general considerations opposed to giving such operation to the 14th section, and the incongruity with other provisions of the act, does the language of that section demand or authorize such construction? I think not. Although partners in trade who become insolvent may be proceeded against as bankrupts, yet the order must be made in the manner provided in the act, and that qualification would be repugnant to the notion that mere insolvency supplied grounds for the decree, it being already shown that the pervading principle of the act requires the order in case of compulsory bankruptcy to be made without regard to the fact of solvency, and on the proof of other and distinct facts from that of insolvency. This clause would seem to have been introduced to mark that procedures against partners are to be the same as against individuals; and to carry out such intent the insolvency referred to in the 14th section must be identical with that defined in the first, and it denotes that congress contemplated in this provision insolvency to be synonymous with bankruptcy. The purpose of congress in this behalf is not left wholly to inference and presump-

tion, for in the last clause of the section, after designating the course of procedure in respect to joint and separate estates and liabilities of co-partners, and making various specific provisions on those topics, it is declared that in all other respects the proceedings against partners shall be conducted in like manner as if they had been commenced and prosecuted against one person alone. Not merely prosecuted, leaving ground for an intendment that the foundation of the proceedings might be dissimilar, but in respect to partners they are to be carried out in every particular not distinctly named in the sentence, as if commenced and prosecuted against an individual.

The section, thus taken together, indicates the purpose of congress with sufficient clearness. The act had established the principles upon which the bankruptcy of individuals should be decreed, and the method by which the proceedings should be conducted from the commencement of the termination. These provisions would conformably to the uniform practice under the English bankrupt laws, have supported a joint commission against all the members of a copartnership, on acts of bankruptcy committed by all, or a separate commission against each party as an individual bankrupt. Cullen, 451. But the court there had been sometimes embarrassed with the distribution of the estates of the individual parties under the general commission, and also with the question, whether a joint commission against the partnership, and a separate one against the individual parties, could be maintained at the same time. The decisions of the chancellor had overcome the difficulties in a good degree, and probably all impediments resulting from that double relationship of the bankrupt were removed by the later English statutes. Cullen, 451; 2 Eden, 60.

With a view undoubtedly to free our system from all uncertainties on this subject, congress embodied in the 14th section, and established by express enactment, the rules upon which the law is now administered in this behalf in England,—Eden, 60; Com. Dig. (by Hammond) 7, art. "Bankrupt,"—the leading purpose of the section being manifestly to provide for the application of the law on a joint commission, to the compound relationship of the bankrupt in his individual and copartnership indebtedness.

The circuit court of this district at the last term, decided that the evident general intent of the section must give interpretation to peculiarities of phraseology, so as to render all parts of the section consonant with such intent, and that accordingly a decree of bankruptcy upon the petition of one partner in his own behalf, and as a member of a firm, alleging his own bankruptcy, would not pass the partnership effects to his assignee. Case of Paulson.

In my judgment, therefore, the insolvency spoken of in the 14th section, is in case of voluntary petition by the debtor, the inability to meet his debts and engagements referred to in the first and must be made known and established before the court in precisely the same manner: and in relation to compulsory proceedings by creditors, it is the bankruptcy of the debtor, known to the court as a ground for these proceedings only when proved in the manner indicated by the first section. This reading of the 14th section brings it into harmony with other parts of the act, and comports also with the course of legislation of congress on kindred subjects. Besides, if the 14th section is to be understood as introducing a rule peculiar to copartners, its operation would be to supersede the provisions of the first section so far as relates to that class of debtors, and accordingly a decree of bankruptcy could not be obtained against them on the commission of every act of fraud specified by that section, unless their actual insolvency could also be established. This would defeat in a great measure the principal object of the statute, which is to protect creditors against contrivances by debtors to avoid an equal distribution of their effects. Traders are parties most liable to sudden and heavy indebtedness, and would be those most apt to attempt to favor and secure portions of their creditors to the sacrifice of others. Mercantile business in this country is almost entirely conducted by copartnerships, and if those clauses of this statute, supposed by many to be the only legitimate provisions indicating a bankrupt law, are withdrawn from partnership dealers and merchants, and limited to individual debtors, the statute would be to a great degree a dead letter; essentially so in the particulars where its searching and summary energies are most urgently called for.

The conclusion to which I am led in the consideration of this case differs from the construction given the act by the district court of Tennessee. Ex parte Galbraith [Case No. 5,187]. It is to be deeply regretted that varying views should be entertained by courts in different parts of the Union, each of which is called upon to interpret and enforce the statute, and all of them being clothed with co-ordinate powers. This result must, however, occasionally occur from the nature of things. The courts have no consultation or interchange of opinions with each other, but each judge forms and declares the opinion to which his mind is led by his individual investigations and reflections. These opinions too are sometimes formed upon aspects of subjects calculated to produce exceedingly differing views. The thoroughness and learning of the arguments considered by one court may not be addressed to another, and the rules of construction which govern one judge may have but slight influence in a particular case upon the opinions of another; and the circumstance of

each court acting exclusively by itself will necessarily tend, most of all others, to introduce discrepancies between the decisions of these numerous tribunals. It must be an occurrence familiar to the experience of judges, that sitting together and hearing the same arguments upon the same statement of the case, their impressions are frequently, in the first instance, exceedingly diverse; and it would be a most rare event for two or more to hear a point really debatable, well discussed at the bar, and yet form within their own minds exactly the same conclusions. It is only by free conference, by mutual study of the question, by explanations and reasonings, reiterated with each other, and cautiously reviewed with an earnest anxiety to arrive at the correct result, that a common opinion can ordinarily be attained between men of equal intelligence, and examining the same subject from one point of view, and with advantages common to all. In the thirty district courts of the United States, officiating under circumstances of extraordinary diversity in respect to each other, the chances of opposing judgments upon the same questions must almost equal in number the points to be decided. And it certainly argues creditably for the perspicuity and precision of our statute laws, that they can be administered in so many tribunals, over a country so wide in extent, with practically so few and unimportant collisions in their construction.

Considering these debtors as continuing indebted and partners up to the time the petition was filed, I shall hold that their mere insolvency, without evidence of fraudulent acts, would not be sufficient to sustain the proceedings; but that they are liable to be decreed bankrupts upon the acts of fraud committed by their partnership, anterior to the passage of the bankrupt act, as set forth in the petition.

Case No. 6,856a.

In re HULL et al.

[See Case No. 6,856.]

Case No. 6,857.

In re HULL.

[14 Blatchf. 257;[1] 18 N. B. R. 1.]

Circuit Court, E. D. New York. June 11, 1877.

BANKRUPTCY—RIGHTS OF PRIOR EXECUTION CREDITOR—LIEN OF EXECUTION.

1. C. docketted a judgment against H., and an execution thereon was delivered to the sheriff, who at the time had in his possession the goods of H., by virtue of an attachment issued in a suit against H. by W. Afterwards, H. filed a petition in bankruptcy and was adjudged a bankrupt, and J. was appointed his assignee. Independently of the attachment, the sheriff took no possession of the goods of H. until after the petition in bankruptcy was filed. C. applied to the district court to be paid the amount of his judgment in full, but his application was denied: *Held*, on review, that C. was entitled to be paid his claim in full.

[Cited in Re Wheeler, Case No. 17,490; Claridge v. Kulmer, 1 Fed. 402; Crane v. Penny, 2 Fed. 189.]

2. The property being in the possession of the sheriff under the attachment, the lien of the execution attached to it, and remained, although the operation of the bankruptcy proceedings was to vacate the attachment.

3. The case of In re Beisenthal [Case No. 1,236] distinguished.

[See Bartlett v. Russell, Case No. 1,080.]

[In bankruptcy. In the matter of Arthur A. Hull.]

Thomas L. Robinson, for assignee in bankruptcy.

Taylor & Fowler, for Collins, Downing & Co.

HUNT, Circuit Justice. This is a petition for a review of the decision of the district court, in which the conceded facts are as follows: A petition was presented to the district court, and a motion made thereon, by Collins, Downing & Co., for an order directing John C. Cutter, the assignee of the bankrupt, to pay to Collins, Downing & Co. the amount of their claim in full, upon the following statement of facts, agreed upon by the counsel of the respective parties: "On the 9th of September, 1873, at 12.25 p. m., Collins, Downing & Co. docketted in the office of the clerk of Kings county, a judgment against the bankrupt for $158.62. At 12.30 p. m., of that day, an execution was delivered to the sheriff of Kings county on said judgment. At the time of the delivery of said execution to the sheriff, the sheriff was in possession of the goods of the bankrupt, by virtue of an attachment issued in a suit begun against the bankrupt by West, Call & Whittemore. At 1.20 p. m., of the same day, the petition of the bankrupt to be adjudicated a bankrupt was filed. No actual possession of the bankrupt's property was taken by the sheriff, independently of the attachment of West, Call & Whittemore, until after the filing of the petition. There are no other claims against the estate claiming security or priority, and there are assets in the hands of the assignee sufficient to pay this claim." The district court denied the motion. [On the 3d day of May, 1876, at a special term of the said United States district court, the Hon. Charles L. Benedict being present, an order was entered to the following effect, viz.: "On a motion having been made by Collins, Downing & Co. for an order directing John C. Cutter, the assignee of said bankrupt, to pay to said Collins, Downing & Co. the amount of their claim in full, now upon said motion and stipulation of admission as to facts made by the solicitors of the respective parties, and upon all the proceedings herein, after hearing Taylor & Fowler, solicitors for the petitioners, Col-

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

lins, Downing & Co., in behalf of said motion, and Thomas D. Robinson, solicitor for John C. Cutter, in opposition thereto, it is hereby ordered that the said motion be, and the same hereby is denied."] [2]

The attachment under which the sheriff held the property of the bankrupt was issued by virtue of a statute of the state of New York. Code, § 227. It was the duty of the sheriff to seize the property of the alleged debtor, to take it into his possession, and to hold it, as security for the satisfaction, of such debt as should be recovered in the proceeding. The general or ultimate property in the goods levied upon was in the debtor. Thus, if the attachment proceedings had been vacated, or, upon trial, the plaintiff had failed to establish his right of action, the title to the property, and the right to possession free from lien or claim, would have existed in the debtor, and this without any affirmative proceeding on his part. The special property, lien and control of the sheriff to and over the property are of the same character as in the case of an execution upon a judgment. If the judgment in such case should be vacated, the special interest of the sheriff, (unless there might be a lien for his fees,) would cease, and the entire property would at once be in the debtor.

In the case of property levied upon and held by a sheriff by virtue of an execution, it is well settled, that, when another execution is placed in his hands, no new levy is needed, but the first levy applies to, and is deemed to be made upon the second execution, equally as upon the first. Cresson v. Stout, 17 Johns. 117; Russell v. Gibbs, 5 Cow. 390. In Birdseye v. Ray, 4 Hill, 158, 160, speaking for the court, Judge Nelson says: "The object, as well as the effect, of an actual levy is, to bring the goods into the possession and under the control of the sheriff, for the double purpose of safe keeping, and to enable him, by a sale, to apply the proceeds in payment of the debt. After seizure, they are in the custody of the law, or of one of its ministers, until a sale and delivery to the purchaser; and an actual levy under the second execution would, therefore, be but an idle formality."

We may assume the case, then, as one in which a judgment had been obtained, an execution issued, and a levy made, before the petition in bankruptcy was filed. Wilson v. City Bank, 17 Wall. [84 U. S.] 473, holds such a lien to be good against the bankrupt proceedings.

I am also of the opinion that the lien would have been complete under the laws of New York, if there had been no levy by the sheriff before the petition in bankruptcy was filed. The statute of New York enacts, that, upon the delivery of an execution to a sheriff, the same becomes a lien from the time of such delivery, upon all the personal property of the debtor within the county, as against every one, except a purchaser for a valuable consideration, without notice of the execution, though no actual levy be made. 2 Rev. St. pp. 365, 366, §§ 13–17; Lambert v. Paulding, 18 Johns. 311.

It is argued, however, that to allow this levy to hold the property would be in violation of the spirit of the bankrupt law [of 1867 (14 Stat. 517)], which intends, it is said, an equal distribution among the creditors of all the bankrupt's property. It is said, also, that the attachment was not vacated in favor of or for the benefit of the execution debtor, but of all the creditors. No doubt the attachment, when declared by the bankrupt act to be dissolved, if issued within four months before the commencement of the bankrupt proceedings, is dissolved for the benefit of the estate. But such dissolution does not affect any prior liens upon the property, which are recognized by law. The bankrupt act (section 14), aims a particular blow at attachment proceedings, as mesne process, and declares, that, if made within the preceding four months, the process shall be dissolved. But it makes no such declaration as to an execution, which is final process, or as to the lien of a mortgage. The effect of these liens is determined by a subsequent section (section 35), and the bona fides of the security, with reference to the bankrupt act, furnishes the test of validity. By the decision of the supreme court of the United States, already cited, an execution upon a judgment obtained without the aid or connivance of a debtor, is valid under the bankrupt law. The judgment of Collins, Downing & Co. is not impeached as improperly obtained, and is, therefore, good in its claim as a prior lien upon the property of the bankrupt.

Nor am I able to see any force in the argument, that a defective levy upon an execution does not create a valid levy in favor of a subsequent execution. In this case, the sheriff's possession under the attachment was perfect in fact, and was good in law, when the Collins execution was placed in his hands. The law then and there applied his possession and interest to the execution, and, although the first lien was declared to be void, I see nothing in the statute, or in principle, to impair the lien of the execution.

The case of In re Beisenthal [Case No. 1,236], decided by Judge Johnson, is cited. That case, however, may well be sustained without interfering with the views here expressed. An assignment good at the common law, and valid by the laws of New York, had been made by the bankrupt before the petition was filed. Under that assignment the entire property in the goods in question passed to the common law assignee. There was no interest left in the debtor to which the levy of an execution could attach. The execution, therefore, fixed no lien on the goods, as in the present case, and, when the

[2] [From 18 N. B. R. 1.]

assignment was vacated by the bankruptcy proceedings, the goods came to the bankrupt assignee free from any lien or charge. The case is essentially different from one where the general property in the goods remains in the debtor, where an execution is levied upon that interest, and the goods come into bankruptcy charged with that lien.

Upon the whole case I am of the opinion that an order should be entered directing the assignee in bankruptcy to pay to the petitioners the amount of their claim proved against the bankrupt's estate, and it is ordered accordingly.

Case No. 6,858.

HULL OF A NEW BRIG.

[The case reported under above title, in 3 Law Rep. 69, and 23 Am. Jur. 453, is the same as Case No. 2,316.]

HULL OF A NEW BRIG (READ v.). See Case No. 11,609.

Case No. 6,859.

The HULL OF A NEW SHIP.

[2 Ware (Dav. 199) 203.] [1]

District Court, D. Maine. Sept. Term, 1842.

ADMIRALTY JURISDICTION — MECHANIC'S LIEN — PARTIES TO SUIT — HYPOTHECATION OF AFTER-ACQUIRED PROPERTY—PRIORITY OF LIENS—SUBROGATION — ASSIGNMENT OF CLAIM — SPLITTING OF CLAIM.

1. When the local law gives a lien to material-men and mechanics, for their demands against a ship, it may be enforced in the admiralty.

[Cited in The Richard Busteed, Case No. 11,764; The Kate Tremaine, Id. 7,622.]

2. All the privileged creditors may unite in one libel, or if a libel has been filed by any one separately, then others may come in by petition and make themselves parties to the suit.

[Cited in The Prinz Georg, 19 Fed. 654.]

3. A valid contract of hypothecation may be made not only of things which the party has at the time of the contract, but of what he expects to have, and of things not then in existence. It will attach to, and find, the party's interest in the thing as soon as it comes into being.

4. A ship-builder, before he commenced building a vessel, entered into a contract with a merchant by which he hypothecated the vessel to be built for advances. This was held to be a valid hypothecation of the builder's interest in the vessel, and to give a lien upon it.

5. By a statute of Maine, material-men and mechanics have a lien on vessels for materials and labor employed in making it, which has precedence over the claims of all other creditors. The lien created by the contract of hypothecation was postponed to those of the material-men and laborers.

[Cited in The Hiawatha, Case No. 6,453.]

6. Nor was the hypothecary creditor subrogated to their privilege, merely by paying their claims on orders drawn by the builder.

7. But when he actually furnished materials, he was allowed to claim concurrently with them.

8. When a creditor transfers his debt, the assignment of the debt carries with it all the accessory obligations, as pawns, hypothecations, or sureties, by which the debt is secured.

[Cited in The Sarah J. Weed, Case No. 12,350; Hooper v. Robinson, 98 U. S. 538. Approved in The New Idea, 60 Fed. 294.]

9. But where a creditor has a debt due him on a single contract or obligation, he cannot divide it by assigning part to one and part to another so as to enable each assignee to maintain a separate action without the assent of the debtor.

This was a libel by Richard Abbott, a carpenter, against the hull of a new ship, for work and labor performed by him in building her. She was launched March 31, 1842, and the libel was filed the next day, April 1. He claimed a privileged lien on the vessel for his pay, under a law of the state which provides, that "any ship-carpenter, calker, blacksmith, joiner, or other person, who shall perform labor or furnish materials, for, or on account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages and materials until four days after such vessel is launched, or such repairs have been completed" (Rev. St. Me. c. 125, § 35), and giving them a priority and precedence over all other creditors of the owner. After the vessel was arrested on this libel, a large number of other creditors, amounting to thirty-one in all, intervened by petition, claiming to have similar demands and praying to have their liens allowed, and to be paid out of the proceeds of the ship.

The libel and all the petitions were committed to S. Longfellow, Esq., a master in chancery, to examine into the several claims set forth, and to report to the court: First. What sum is justly due to each of said libellants and petitioners for labor performed and materials furnished for and on account of said ship. Second. Where any of the parties have furnished materials for or on account of said ship, and the whole of the same have not been used in the building of the vessel, to distinguish and report: (1) Such as have been used, from such as have not been used. (2) What part of the materials not used were furnished by the material-men, under a just belief and expectation that they were wanted for the vessel and intended to be used in the construction of the same. Third. To report what sums, if any, are claimed as liens on the vessel for money paid to the workmen for labor in satisfaction of their wages, or to material-men for materials furnished, and at whose request they were paid.

The vessel was sold on an interlocutory order for $13,000, and the proceeds paid into the registry. The master reported a large number of debts due to laborers and material-men about which there was no controversy. With respect to two large debts, which were claimed as chargeable on the vessel in concurrence with those of the ma-

[1] [Reported by Edward H. Daveis, Esq.]

terial-men and mechanics, he reported the facts specially. One was a claim of Purinton for $7,727.15, and one of Richardson for $1,558.20. The owner, Knight, made no defense, but the question, whether these were liens on the vessel, and if so whether they were of the same rank and entitled to be paid concurrently and pro rata with the material-men and laborers, the fund being insufficient to pay the whole was argued by—

Willis & Daveis, for Purinton and Richardson.

Mr. Fox, for opposing creditors.

WARE, District Judge. With respect to most of the claims that were presented and proved before the master, there was no controversy before him, and there has been no opposition to their allowance before me. Being for labor performed and materials furnished for the vessel and actually used, it is admitted that under the statute they attach to her as privileged debts, and the suits having been commenced within four days after she was launched, the vessel is bound for them in specie. Being maritime liens, there is no doubt that they may be enforced by process in the admiralty where all may join and have their rights settled in a single suit, or may intervene for their own interest, after a libel has been filed, and have the whole matter disposed of in, or under, one proceeding or one attachment, instead of having as many suits as there are creditors. Where the local law gives a lien, it may be enforced in the admiralty. Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The General Smith, 4 Wheat. [17 U. S.] 438.

Two of the claims against the vessel have been contested; not by the owner, he admits them, but by the other creditors, and the contest has been not so much whether these are privileged debts against the vessel, as whether they stand in the same rank of privilege with the others. The first and the most considerable, is Purinton's claim. Before Knight began to build the ship he entered into a contract by which Purinton agreed to make advances to him for the purchase of materials and payment of the laborers, while the ship was being built, and on the part of Knight it was agreed that he should have a lien on the ship for his security. A doubt was suggested at the argument whether a contract for the hypothecation of a thing not in existence at the time of the contract is not ipso jure void. It is true that one cannot give an interest or lien on future things by way of pawn or pledge, because the delivery of the possession is necessary for the completion of this contract. But an interest may be given by a contract of hypothecation independent of the possession; and I see nothing in the nature of the thing that should prevent one from giving such a right, not only in what he has in present possession, but in what he may afterwards acquire. A man may by a valid contract of sale dispose not only of what he has at the time of the contract, but by such a contract he may bind his future acquisitions. As when one sells his harvest of corn before it is grown, or his share in a fishing voyage before the fish are taken. There is no doubt that such contracts are binding on the parties when not prohibited by any special law, although there is nothing in being at the time to which they apply. They attach to and bind the thing as soon as it comes into existence. If future acquisitions, not in existence at the time, may be bound by a contract of sale, so that the interest passes to the vendee as soon as they come into existence, no obvious reason occurs to me why they may not as well be bound by a contract of hypothecation. In the case of Macomber v. Parker, 14 Pick. 497, such a contract for the hypothecation of bricks, before they were made, was held to be a valid and binding contract, and that it attached and gave to the creditor an interest in the bricks as fast as they were made. Story, Bailm. § 294. A contract for the hypothecation of one's future acquisitions not yet in being was clearly valid by the Roman law. "Quae nondum sunt, futura tamen sunt, hypothecae dari possunt; ut fructus pendentes, partus ancillae, foetus pecorum, et ea quae nascantur, sint hypothecae obligata." Dig. 20, 1, 15; Dom. Lois Civiles, liv. 3, tit. 1, § 1, No. 5.

There is then no reason why the contract of Knight should not operate as a valid hypothecation of the vessel, and bind the property while it was in progress and as fast as it was built. It was obligatory between the parties, and it binds Knight's interest in the vessel. Whether Purinton could hold it under this contract, against a third person, as a purchaser or an attaching creditor without notice, is not necessary to be considered in this case. The only question here is, whether it gave him a lien holding the same rank of privilege with those of the mechanics and material-men. The lien of Purinton stands on his contract, and can have no other force and extent than what is derived from that. That of the material-men and laborers has its origin in the law independent of contract, and is to be allowed such an extent and operation as will carry into effect the intention of the law-maker. The lien of Purinton covers the whole interest which Knight had in the vessel, but no more. He could give no more. "Nemo plus juris in alium transferre potest quam ipse haberet." Dig. 50, 18, 54. If this had been a contract of sale instead of hypothecation, the vendee, when the ship was completed, would have taken precisely the interest which the vendor then had. That would have been the whole ship, subject to the unpaid demands for labor and ma-

terials used in her construction, and would have taken precedence of these, if process was not sued out within four days after she was launched. But during that time the rights of the material-men and laborers continued under the statute, as privileged liens having precedence over all others. The builder could give no more extensive rights by a contract of hypothecation than he could by a sale. The title of Purinton under his contract must therefore be postponed to the liens of the opposing creditors who claim under the statute.

There is another ground on which he claims to be paid part of his demand concurrently with those who claim under the statute lien. It is this, that the advances made by him were in payment of this very class of creditors. The amount under this head is $2,368.43, and the argument is that he may be substituted as a privileged creditor in the place of those whose claims he has paid. These payments were made by him on orders drawn by Knight in favor of the workmen, and the payments extinguished the debts. They were not kept alive by an assignment of them by the creditors, but by the payment they were absolutely extinguished and gone, and Purinton became a creditor of Knight, not as assignee of the original debt, but by virtue of the order which was paid. When the debt was extinguished, the lien which was incidental to it was gone also. The only way by which the lien could be preserved would have been by an assignment of the debt, unless there had been a special agreement with Knight, the debtor, that upon the payment, the lien should be continued in his favor. Dom. Lois Civiles, liv. 3, tit. 1, § 6. No. 5. By such an agreement, in the Roman law, the new creditor might be subrogated to the privileges of the old one without an assignment of the debt, and in our law perhaps the same might be allowed where it did not conflict with the rights of other parties. But these advances and payments were made under the contract. The ship was hypothecated as a security for them, and by this contract Purinton was put in the place of the owner. If either of these precautions had been taken, it is at least doubtful whether it would have strengthened his claim.

Another part of his demand, for which he claims an equal privilege with the material-men and mechanics, is for money procured by him and expended on the ship, in payment for materials and of the wages of the workmen. In this is included $838.75, obtained on notes of Knight, indorsed and taken up and paid by him, and also $2,500 procured on Knight's note, indorsed by him, which remains unpaid, and which, as Knight is insolvent, must be paid by him. Here again, the security originally contemplated was the hypothecation of the ship. It is a good and valid security, and covers all Knight's interest in it. But its operation is merely to put the lender of the money in the place of the builder. It gives him no greater rights than Knight had. It does not enable him to come in competition with those who have the statute lien.

There is a small part of his demand, amounting to $30, which is admitted to be for materials furnished, and which were actually used in the construction of the ship. For this, I think, notwithstanding his contract, he may be allowed to claim in concurrence with the other material-men and mechanics. He claims also another small sum of $11.21 as assignee of Foss. For this, Foss had a lien under the statute, as it is admitted to have been for materials furnished for the ship. If Foss had a lien, why should not the privilege follow the debt into the hands of his assignee? The debt is the principal and the lien is the incident, and the general rule is that the principal carries with it the accessory. When a debt secured by a mortgage is assigned, in equity it carries with it the mortgagee's interest in the land. The interest in the land is in fact nothing independent of the debt, and, after the assignment of the debt, the legal interest remains in the mortgagee as a mere naked trustee for the benefit of the assignee of the debt. 4 Kent, Comm. 194; 2 Story, Eq. Jur. §§ 1016, 1023, note. A payment of the debt extinguishes the interest in the land without any formal reconveyance. Gray v. Jenks [Case No. 5,720]. Why should not the same doctrine hold in the mortgage or hypothecation of personal chattels. There is the same reason in one case as the other. If a lien creditor cannot transfer his privilege with his debt, he does not have the full benefit of his contract. For if the debtor happens to be insolvent, as in this case, the creditor cannot avail himself of the debt by an assignment unless he can transfer his privilege with it. For this sum, Purinton succeeds to all the rights of his assignee, and is entitled to the lien. The same principles prevailed in the Roman law. A creditor, by a simple assignment or cession of the debt, transferred to his assignee all the accessory obligations and securities by which it was secured to him. The assignee had the same benefit from pawns and hypothecations to which the assignor was entitled. Dig. 18, 4, 6–23. Dom. Lois Civiles, liv. 3, tit. 1, § 6, No. 1; Warkoenig, Jus Rom. Priv. §§ 443, 448; 7 Toullier, Droit Civil, No. 120. The accessorial being a mere dependency on the principal obligation, could not be assigned separately from it. Warkoenig, Jus Rom. Priv. § 440, No. 3.

It is objected that if a creditor, having a lien, may thus assign his privilege with his debt, he may, by assigning his claim to different persons, split a single demand into a number of debts, and thus harass the debtor by a multiplicity of suits. But this consequence will not necessarily follow. In strict law a chose in action cannot be assigned at

all. The ancient rigor of the common law in this particular, has, in favor of commerce, long been relaxed. An assignment will be supported in law, and the assignee may enforce his rights by a suit in the name of the assignor. But a creditor is not allowed to divide a single debt into parts, so as to give to each a separate action in his name, without the assent of the debtor. The debtor has a right to insist on the singleness of the obligation, and to be protected against a multiplicity of suits. An order, drawn by the creditor for the whole debt, is an assignment of the fund, and as soon as the debtor is notified, he becomes, even without his own consent, obligated to pay to the assignee; but an order drawn for a part of it will not bind him unless he assents to it by accepting the draft. Mandeville v. Welch, 5 Wheat. [18 U. S.] 277; Tiernan v. Jackson, 5 Pet. [30 U. S.] 580.

This equitable temperament of the creditor's right, which prevents him from dividing a single obligation into several by assigning part of it to one and part to another, is recognized in the Roman law. He might assign part of his debt, but not so as to make it more onerous to the debtor. When a single debt was divided into several, the debtor was not rendered liable to several actions, but he might require all the assignees to join in one suit and receive the whole debt at one time. 2 Warkoenig, Jus Rom. Priv. No. 442; 7 Toullier, Droit Civil, No. 120, note.

The other contested claim is that of Richardson. This amounts to $1,552.20, and is admitted to be, for the greater part, for materials actually used in the construction of the ship. The whole were furnished under a special contract, by which it was agreed that 'Richardson is to hold a lien on said vessel and the timber until paid for, and it is also agreed that the said timber and planks are to be paid for when said vessel shall be built and ready to launch, or within four days after being launched.' The lien which was intended to be created by the contract, is precisely coëxtensive with that given by the statute, and to the extent of the materials actually used in the construction of the vessel, it is entitled to all the privileges of the statute lien. If the excess had been small and had been furnished under a belief that the whole was wanted and intended to be used in building the ship, I should think that the lien ought to extend to the whole. But the excess here was considerable, and it is in proof that, at the time when the contract was made, Richardson was informed that the whole might not be wanted for the vessel. Now, though the contract might create a valid hypothecation of the vessel for the whole amount of the debt, against the owner and all claiming under him with notice, this will not place him, as to the portion of materials not used, in the same rank of privilege with the laborers and material-men who claim under the statute. For this part of the debt his lien must be postponed to theirs. The statute privilege extends only to materials which are furnished for the vessel and intended to be actually used in building it.

Interlocutory Decree.

Maine District, ss. District Court, December Term, 1842. In the Matter of Richard Abbott and Others, Libellants and Petitioners, vs. The Hull of a New Ship.

And now on the coming in of the master's report, the parties were heard by their counsel on the acceptance of the same; in consideration whereof, it is ordered and decreed that the same be accepted and confirmed in all its parts, except as is hereinafter provided, and the several claims and demands therein reported and allowed are declared to be liens on the vessel, which is decreed to be subject to the same in the order and rank of privilege hereinafter stated, viz.: (The several claims of the first class, amounting to $6213.55, are here specified in detail in the same manner as in the final decree.) And it is ordered that the several claims above named, with the costs, be first paid from the proceeds of the sale, when in the registry, and if there is not enough to pay the whole in full, that each be paid pro rata in proportion to the sums allowed. And it is further ordered, declared, and decreed, that the several claims hereinafter named are allowed as liens on the vessel in the second rank, and are to be paid from the proceeds of the sale of the vessel with costs fully, if the proceeds are sufficient, and if not, each to be paid pro rata in proportion to the claim allowed, viz.:

John Purinton	$5634 97
Joshua Richardson	228 83
Thomas E. Knight	1323 84
Robert H. Knight	1179 12
Total	$8366 76

And it is further ordered and decreed that the claim of John Purinton of the sum of $2019.97 be disallowed, the same not being a lien on the vessel. Ashur Ware.

December 10, 1842.

Final Decree.

Maine District, ss. District Court of the United States, December Term, 1842, Holden by Adjournment on the First Tuesday, being the Third Day of January, A. D. 1843. In the Matter of Richard Abbott et als., Libellants and Petitioners, vs. The Hull of a New Ship.

Upon the return, by the marshal, of the interlocutory order of sale issued in this case, it appears that the said Hull of a New Ship was sold at public vendue, on the seventh day of November last past, for the sum of $13,000. That the costs and charges of sale, and of custody and expenses attending the keeping of said vessel, from the first day of April last past to the said day of sale, is $421.28, and the balance, being $12,578.72, had been, pursuant to said order, paid into the registry of the court. It is therefore ordered, that

the same be paid out of the registry and distributed among the several libellants and petitioners, according to the decree passed herein on the tenth day of December last, in the manner following, viz., to those in the first class of liens, as follows:

To Richard Abbott	in full..	$ 199	75
Isaac Milliken	do....	101	33
David Allen	do....	84	20
Joseph A. Means	do....	9	77
George Chase	do....	7	63
Charles F. Safford	do....	42	59
Ebenezer C. Field	do....	22	29
Alpha Turner	do....	12	04
Tristram C. Stevens	do....	361	75
Ezra Harford	do....	383	33
Joshua P. Chamberlain	do....	454	92
Mathew Gerrish	do....	115	08
Nathan Chapman	do....	20	00
F. Bradbury & Co.	do....	22	62
Joshua Richardson	do....	1329	37
John C. Brooks	do....	977	49
Staples & Bartol	do....	1088	89
Blanchard & Foye	do....	37	08
Forbes & Wilson	do....	432	00
John Purinton	do....	72	21
Elez'r Wyer, jr., & Co.	do....	24	10
J. R. Mathews & S. Fogg	do....	95	83
John Swett	do....	151	14
Reuben Allen	do....	20	20
James Breslin et al.	do....	3	64
George Marston	do....		34
Joseph F. Sawyer	do....	42	54
Joshua Maxwell	do....	18	78
J. Symonds & A. Jordan	do....	82	64
		$6213	55

And that the costs and charges taxed upon the several libels and petitions be paid out to the several proctors, officers, and others interested therein, viz.:

Amount taxed on libel of—		
Richard Abbott	$	226 39
Isaac Milliken		34 05
David Allen et als		34 05
Eben C. Field et als		34 05
Joshua Richardson et als		51 05
J. R. Mathews et als		34 05
John Swett et als		34 05
Jos. T. Sawyer		34 05
Joshua Maxwell		34 05
Jos. Symonds et al		34 05
Amounting in the whole to	$	6,763 39
The balance remaining in registry		5,815 33
	$	12,578 72

And it is further ordered that after the payment of the aforesaid sums, the balance remaining being insufficient to pay in full the claims allowed as liens on said vessel, in the second rank, there be paid out to each of said claimants pro rata, in proportion to the claim allowed, as follows, viz.:

To John Purinton, whose claim as allowed is..... the sum of.....	$5634 97	$3916 60
To Joshua Richardson, whose claim as allowed is the sum of.....	228 83	159 05
To Thomas E. Knight, whose claim as allowed is the sum of.....	1323 84	920 14
To Robert H. Knight, whose claim as allowed is the sum of.....	1179 12	819 54
	$8366 76	$5815 33

And it is further ordered that the several aforesaid sums be paid out of the registry, for the use and benefit of the respective libellants and petitioners, to their respective proctors of record.

Attest John Mussey, Clerk.

[NOTE. For similar libels filed under Rev. St. Me. c. 125, § 35, see Purinton v. Hull of a New Ship, Case No. 11,473; Sewall v. Same, Id. 12,682. See, also, The Calisto, Id. 2,316; Read v. Hull of a New Brig, Id. 11,609.]

HULL OF A NEW SHIP (DREW v.). See Case No. 4,078.

HULL OF A NEW SHIP (PURINTON v.). See Cases Nos. 11,472 and 11,473.

HULL OF A NEW SHIP (SEWALL v.). See Case No. 12,682.

Case No. 6,860.

HULL'S TRUSS.

[6 Jour. Fr. Inst. 132.]

Circuit Court, S. D. New York. 1828.

INFRINGEMENT OF PATENT—DAMAGES.

This suit was brought for violating Dr. Hull's patent for trusses. A number of respectable witnesses were introduced on the part of the patentee, viz: Drs. Mott, Perkins, Reese, Osborne, and Stearns.

THOMPSON, Circuit Justice, in his charge to the jury, told them that it had been clearly proved that the trusses in question were an imitation of Dr. Hull's. He further remarked that it appeared that they were of the greatest value in surgery, and had been the means of effecting cures in cases where the art had failed heretofore; had enabled persons afflicted with the disease of rupture to pursue their business and labours without inconvenience; and in fact, its invention had formed a new era in the treatment of that disease; that the instruments sold by the defendant, the one known as Mr. Farr's, and the other as Mr. Hovey's trusses, and by them patented, are clearly infringements of Dr. Hull's patent. The jury rendered a verdict for the plaintiff, to the value of the articles sold; and the court, on motion, trebled the damages, according to the statute, with costs. And it was intimated that any further violation of the plaintiff's patent would be restrained by injunction.

HULL (AYLING v.). See Case No. 686.

Case No. 6,861.

HULL v. RICHMOND.

[2 Woodb. & M. 337.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1846.

INJURY FROM DEFECTIVE HIGHWAY—PRESCRIPTION—WIDTH OF HIGHWAY—REMEDY AT COMMON LAW—PROOF OF DAMAGES—DUTY OF DEFENDANT.

1. A notice to a town to pay damages for neglect in repairing a highway, under the stat-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

ute of Rhode Island, is probably not necessary before suit; it being not required in connection with the statute rendering towns liable for such neglect, and being applicable in its terms rather to claims ex contractu than ex delicto.

[Cited in Holland v. Cranston, Case No. 6,606; Heckscher v. Binney, Id. 6,316.]

2. And, if necessary, it is sufficient if stating when, how, and where the injury happened, without estimating its amount.

3. Use of a road for more than twenty years is evidence of its being a public highway, especially if yearly repaired during that time, and included within the limits of surveyors' warrants.

[Cited in Greeley v. Quimby, 22 N. H. 338; Willey v. Portsmouth, 35 N. H. 312.]

4. Its width, in such case, where not fenced out on both sides as a road, will extend the usual distance each side from the travelled path.

5. When an action for damages on such a road, by neglect to keep it in repair, is brought on a statute, the last must be followed strictly; and in this state no remedy has been held to exist at common law.

[Cited in Commissioners of Highways v. Martin, 4 Mich. 561.]

6. If the neglect to repair is averred to be on the sides, and without the travelled path, and to be injurious in turning out to go by a team with a cart-load of wood, the plaintiff must show that he exercised due care in turning out and passing by, and that the damage arose from the want of proper attention by the town to the sides of the road, and not from himself or some independent accident.

7. A town is not obliged to make the sides of all its roads passable with wheels, with safety and convenience; but it must have so much of them passable, as not to delay travellers, or endanger them, in getting by at places not very remote or very inconvenient.

[Cited in Smith v. County Court, 33 W. Va. 722, 11 S. E. 4; City of Wellington v. Gregson, 31 Kan. 103, 1 Pac. 253; Jones v. Baltimore & P. R. Co., 4 D. C. 108.]

8. The nature of the country, rough and hilly, or smooth; the amount of travel; the places near, on which carriages could be turned out; and the ordinary care exercised usually by towns on this subject, must fix whether this town was guilty, in this instance, of culpable neglect or not.

9. The rule of damages in such case, if the plaintiff recovers, is, as near as may be, the extent of the injury or loss.

10. Damages are not to be aggravated in such a case, if this road had never before been complained of, had been in this condition half a century, and no injury before had been apprehended or happened, even if it can be in any instance for mere example or vindictiveness.

[Distinguished in Sewall's Falls Bridge v. Fisk, 23 N. H. 179. Cited in Norris v. Litchfield, 35 N. H. 276.]

This was an action on the case under a statute of Rhode Island, to recover damages for an injury received by the plaintiff [Latham Hull] on what was alleged to be a highway in said town, on the 15th of October, 1845. The declaration averred, that the highway was not in good repair through the neglect of the town, and claimed damages for the injury thus caused to him to the amount of six thousand dollars. The treasurer pleaded for the town not guilty. At the trial here at this term, the plaintiff gave evidence of the use of a travelled road at the place, where he in a one-horse wagon met an ox team, at the time alleged in the declaration; and that this use by the town and the public had existed for half a century, and that the town had usually put this road in a surveyor's warrant to be repaired, and work had been done on it for that purpose for twenty or thirty years. It further appeared, that on the sides of the travelled path, at and near this place, there was a stone fence, at the usual distance from the south side, but no fence within several rods on the north side. In order to prove the neglect of the town to repair the road at this place, evidence was offered, that, though the travelled path was smooth, the bank near the ruts, made by the wheels, was from six to twelve inches high, some loose rocks were left on it a foot high, and many shrubs and small trees, so as to make it very difficult and dangerous to turn out at that point, or any other nearer to it than three rods; and that these shrubs and rocks could be removed and the bank lowered for the expense of five dollars at this place, so as to make it safe to turn out. Respecting the injury, it was shown, that when the plaintiff met the ox team at this place, neither the driver of that nor himself had noticed each other till within a few feet, though the road was such that persons by attention could see each other for twenty rods' distance; that convenient places to turn out existed about two rods each way from where they met; that both were in the centre of the road, though either, if seeing the other, could have turned partly out, and the other doing the same, they might have passed even at this place; that the plaintiff thought his horse would not back the wagon two rods and there turn out, as it was descending ground towards where they stood; that the plaintiff declined to unharness his horse and run his wagon out by hand, though it was not loaded, or to attempt to back it on the south side, but led his horse, holding him by the head, and the teamster assisting, over the bank and rocks on the north side. After he had got over them, and after the teamster, supposing there would be no further difficulty in passing round into the road, had taken up his goad and returned to his team, he heard a shriek, and running to the wagon of the plaintiff, he found it had gone forward about a rod, and the plaintiff lay under it with his leg broken, and the reins of his harness entangled in the bushes so as to hold fast his horse. There was no other evidence or explanation how the injury arose. The plaintiff was shown to have had good medical attention, but had undergone a confinement of several months; had suffered much pain, and was not likely ever to recover the perfect use of his leg.

Dixon & Ames, for plaintiff.

D. J. Pearce and A. Greene, for the Town.

WOODBURY, Circuit Justice, in the course of the trial, admitted a written notice, which

had been given by the plaintiff to the town, stating particularly when, how and where he had been injured, and demanding indemnity therefor. The defendants objected, that this notice was insufficient under the statute of Rhode Island, which requires before a recovery against a town for any demand whatever, a particular notice of his "debt" or "demand," and "how contracted," and that this was not sufficiently particular. But the court considered it doubtful whether any notice was necessary in this case of a suit ex delicto rather than ex contractu. Firstly, because the statute, which gave the remedy in this case, required no notice by any express terms. And if the former statute was a general one, applying to subsequent rights of action authorized like this, it was doubtful, in the next place, if it was not confined to demands in the nature of contracts and debts. It used words applicable in common parlance only to such; and such only could be described with much particularity and certainty. But if it should be considered as including demands for torts or neglects, this notice was considered as containing particulars sufficient for its object. There was no defect imputed to it in that particular, except the failure to state the amount of damages. But the plaintiff could not do that, as the damages had not then all been developed. The object of the notice, too, was not at once to get payment of a sum ascertained or liquidated as in case of debts or contracts, but to state an inquiry, which the town was to look into, and was notified to do this, and then discharge the amount, after seeing what the true damage was. Enough was stated here to induce the town to do this, if it pleased, and time enough was allowed before bringing this suit, from June to October, to enable the town to make every necessary inquiry and to settle, should it choose to do so. It would be unreasonable to require all the technicality of special pleading in such a case. Under these circumstances, we think the plaintiff is entitled to proceed so far as regards the notice.

After the arguments of counsel on the testimony, WOODBURY, Circuit Justice, charged the jury; and, in the course of his remarks, laid down the following principles of law, as to the questions arising on the merits: (1) That a road, though not proved to have been laid out by any committee, or by any survey, formally adopted by a town, might be a public highway, and a town be indictable in this state for not keeping it in good repair, or be answerable for any injury happening in it by the neglect of the town. One case of this kind would be where a road had been travelled by the public for more than twenty years before the statute of 1829, and the town not only had thus used but repaired it yearly, and included it in the limits of a warrant of one of its surveyors of highways. The width of such a road in that part beyond the travelled path, must be governed by the fences, if near, or if not, the usual distance on road sides in this section of the country; or, in other words, the open space on each side of the travelled path, which is usually allowed in this state. The width of the travelled path to be kept in repair is, in such case, to be governed by the width which it had been customary to keep in good order. (2) The liability of the town to keep such public highways in repair, and to pay for damages by injuries on it, caused by the town's neglect, is founded, in this state and in the present case, on an express statute. It is said to have been decided in this state, that no such remedy exists at common law. See Russell v. Men of Devon, 2 Durn. & E. [2 Term R.] 667. But it has been held to exist at common law in other states, and would require consideration before deciding the point here, if necessary to decide it. But, proceeding on the statute, it is immaterial whether he has a remedy at common law or not; and hence I forbear to go into that question.

The first rule of construction in such remedy on a statute, is, that the plaintiff must follow it strictly, and bring his case within it with clearness. See cases cited in The Reindeer [Case No. 11,679] Rhode Island Dist. 1848. The neglect to keep such a road in repair, which makes a town liable here, must be a neglect to keep it so that travellers can pass and repass on it with "safety and convenience." The law says (page 318), keep "necessary" and "safe and convenient highways." This means, "safe and convenient" not only in the travelled path, by having it free from large rocks and gullies, and from an uneven surface dangerous to pass over, but we think also on the sides so as to turn out without unusual delay and difficulty when travellers meet with carriages and wagons. This does not mean, that towns must incur the expense of having the whole width of a highway, of two or four roads, passable safely with wheels on the sides, or a double track for wheels over all public roads, including causeways and bridges. This, in a rough and mountainous country, like much of New England, would vastly and unnecessarily increase the public burthens in maintaining highways. 16 Pick. 189. Some towns of six miles square have over sixty miles in length of public roads within their limits, with many bridges. And though in the place where this accident happened, the expense would have been small to level the bank, remove the large rocks and cut up the brush, yet if bound to do it in all places as well as there, the aggregate would be enormous.

What then was the true guide and test? It seems to be the public convenience and safety; and if that was insured in the travelled path, all beyond that depended on circumstances. If a road was on a steep mountain's side, or was carried up from the bed

of a stream against a steep cliff of rocks, or through a narrow notch, or gorge among the hills, a double track would seldom be expected, though places should be made at no great distances for persons to turn out entirely, and others, where by each turning out in part, each could safely pass. Some of these distances, like the Jew's Leap in Africa, or the notch of the White Hills, or some modern tunnels, might be so far apart as to require a horn to be blown, or a loud halloo made to apprize others at the other end to wait. Some of them, where the road was straight, might be seen by common vigilance for some distance as travellers approach, and a stop be made by either at the first convenient spot, for two teams to pass each other. There must be an accommodating spirit and cautious watchfulness on these matters, in order to avoid difficulties, and more especially must these be attended to in large falls of snow in winter. While, then, on the one hand, the whole width of the highway need not be made passable with two teams, where it cannot be without great expense, and especially where the country is newly settled or the travel small, yet it ought to be at places not so far from each other as to make it inconvenient for travellers to see them and stop at them if others are approaching; or to back to them if near, and not very difficult by the load or the rising of the ground. Thus on rail-roads, where a double track would be more convenient and safe, yet it is seldom resorted to, unless the travel it too great for one track, and by having turn outs, not very far distant and by backing, and being exact as to times of departure, much of the inconvenience and danger of a single track are avoided. A town must exercise ordinary or common care on this subject, considering the amount of travel, the difficulties of the geographical features of the country, and all the other circumstances, which will readily occur to practical men like those usually on our juries. And the reason why evidence was allowed to be offered here, whether this road was kept as convenient and safe in this respect as other roads near, was not that it should exonerate the town if culpable, or that it might merely mitigate the damages, if the town was found to be still liable; but to show, that the vigilance it used, was a common and ordinary vigilance; and if so, was not probably a culpable misbehavior. So, too, under this aspect, evidence was admitted, that this road had never been complained against by townsmen or strangers, though in this condition at the sides in this place for half a century, and that no accident had ever occurred there before, since the country was settled. These would all bear more or less strongly to show, that ordinary care had been used by the town in respect to it.

In the next place, if the jury should believe that an improper neglect had here happened on the part of the town, the further and a very important inquiry was, whether the injury happened from the plaintiff's own imprudence, or from that neglect of the town. He may not have been watchful enough to turn out two rods before he reached the other team, and where there was a convenient place. He may not have backed his wagon to that place when he could, after finding none convenient opposite to him. He might, as one witness swears, have backed out more easily on the south side. He might have unharnessed his horse and got by in that way, as his wagon had no load, pulling it out till the loaded carriage passed; and he may have been rash, after finding himself in such a contracted spot, to drive over the stones and brush, at all hazards, on the north side. He was bound to exercise proper vigilance and care in driving and in turning out, as well as the town in taking care of the road; and if his own misbehavior was the immediate or proximate cause of the injury, he ought not to recover for it of the town. 2 Pick. 621; Adams v. Carlisle, 21 Pick. 146; Butterfield v. Forrester, 11 East, 60. Nor ought he, if his neglect or rashness contributed to the injury, though not producing it entirely. Palmer v. Barker, 2 Fairf. 339; Rathbun v. Payne, 19 Wend. 399; Hartfield v. Roper, 21 Wend. 615; 12 Pick. 177. "If the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to a verdict." Pluckwell v. Wilson, 5 Car. & P. 375; 25 Me. 48; Williams v. Holland, 6 Car. & P. 23. If the plaintiff be negligent, yet could not avoid an injury by ordinary care, he may recover. Butterfield v. Forrester, 11 East, 60. The burden of proof to show his own due care is on him. 25 Me. 49; 12 Pick. 177. But he denies any neglect or wrong on his part, or if any, that it helped to cause the injury; and the jury are to weigh his facts and explanations in his vindication, and decide on them, as their weight may demand.

Finally, if the injury occurred from some cause unknown, or some accident disconnected from the neglect of the town, the plaintiff cannot recover. It happened here from no cause seen, or able to be described by any witness on the stand. To be sure it happened after he had turned out of the travelled path, and had got over the bank, the bad rocks, and into a smooth place, so as easily to return to the road again, and probably occurred by a fall, with his foot being caught and his leg bent over a rock, or by a start and blow of his horse, or by the wagon running over him when entangled by the bushes or reins. If it be quite as likely to have happened from mere accident, or the viciousness or fright of his horse, as from the badness of the road, it is not a case for subjecting the town to damages. There is much room for conjecture on this head; but jurors, as men of great observation and experience in these matters, can generally eviscerate the truth, and having

done that, it is their duty to follow it, whether it leads for the plaintiff or defendant. Sympathies in such cases are usually enlisted in favor of individuals rather than corporations; and the latter can usually bear heavy losses, divided among all their members, better than a single sufferer can. But we are not referees to apportion this misfortune in any way, except where the law shall place it, or where some positive wrong may place it. And when they interpose to place it on the plaintiff or defendant, they are to be obeyed, though at the loss and expense either of one person or many. We may and must commiserate a calamity like this, fallen on a man in the prime of life; and if others have produced it by their wrong and neglect, it is right they should atone for it; but otherwise, "the tree lieth where it falleth." If damages are given at all, the measure should be, as near as possible, the exact extent of the injury, or the whole loss by it, and no more. If the testimony is credited, that the travelled path was and had been long in good condition; that the town had never been notified of any danger or difficulty at this point out of the travelled path in passing by; that the road in this respect showed as much care and attention to the convenience and safety of travellers as was customary in that section of the country, and for one used no more extensively, it seemed to remove any ground for vindictive damages, even if it was ever proper to give them. How in strict law this last point was, need not, therefore, be here discussed or settled. See Taylor v. Carpenter [Case No. 13,785].

The jury disagreed, and were discharged. On a third trial in January, 1849, the jury agreed for the defendants.

HULLIHEN (GOODYEAR v.). See Case No. 5,573.

HULME (PARKER v.). See Case No. 10,740.

Case No. 6,862.

HULSECAMP v. TEEL.

[2 Dall. 358.] [1]

Circuit Court, D. Pennsylvania. April Term, 1796.

ASSAULT AND BATTERY—JURISDICTION.

In an action for tort the amount of damages laid in the declaration fixes the jurisdiction.

[Cited in Greene v. Bateman, Case No. 5,762; Crawford v. Burnham, Id. 3,366.]

This was an action for an assault and battery committed on the high seas, and the damages were laid in the declaration at 1000 dollars; but the controversy being referred, the referees reported only 45 dollars in favor of the plaintiff. In April term, 1795, Mr. Levy, for the defendant, obtained a rule to shew cause, why the report of the referees should not be quashed, and the action dismissed; and the question was now argued by him on the one side, and by Mr. Rawle upon the other.

In support of the rule, Mr. Levy, having adverted to the 3d article of the constitution of the United States, as the foundation of the judicial authority, contended, that by the 11th section of the judicial act [1 Stat. 78], which establishes the jurisdiction of the circuit court, no suit could be there instituted and maintained, unless the plaintiff was entitled to recover, and actually recovered, a sum exceeding 500 dollars, exclusive of costs. He drew a similar inference from the provision in the 12th section of the act, which requires that suits removed into the circuit court from a state court, should be of the same value: and he distinguished between actions for tort, and actions upon contract, in order more forcibly to exclude the cognizance of the court in the former, than in the latter, instances. The 20th section, empowering the court to adjudge the plaintiff to pay costs, was manifestly designed, in that respect, to give a jurisdiction, which the court would not, otherwise, possess on account of the general limitation of jurisdiction, as to the sum or matter in dispute: And in the provision, that the district court shall have jurisdiction of offences where the fine does not exceed 100 dollars, it is evident, that the jurisdiction cannot be ascertained 'till the judge is about to pronounce sentence.

Mr. Rawle, in opposing the rule, observed that the act of congress did not recognize any distinction between actions for tort, and actions upon contract; but barely required that the matter in dispute should exceed the sum, or value, of 500 dollars, exclusive of costs; and the language is the same in the 9th section, in relation to the jurisdiction of the district court in suits brought by the United States. The very provision, indeed, which authorizes the court, in the 20th section to adjudge that the plaintiff shall pay costs, where less than the sum of 500 dollars is recovered, shews clearly that the jurisdiction was intended to be vested, if the matter in dispute, as stated in the declaration, exceeds the specified amount, though a jury, or referees, should not give so much. The matter in dispute in this cause was an aggravated personal injury, which might have endangered the plaintiff's life, and certainly would have justified heavier damages.

Before IREDELL, Circuit Justice, and PETERS, District Judge.

BY THE COURT. That the sum, or value of the object in controversy, should amount to 500 dollars, was deemed by the legislature a reasonable limit to the jurisdiction

[1] [Reported by A. J. Dallas, Esq.]

of this court; but the law has itself, likewise, provided the remedy against any transgression of that limitation, by declaring that the plaintiff, who recovers less, may be adjudged to pay costs. The very force of the expression vests a jurisdiction; since it would be impossible to adjudge that the plaintiff should pay costs, without taking cognizance of the cause. But whatever distinction might be made in other respects, between suits instituted to recover a sum certain, and suits brought to recover damages for a tort, certain it is, that in the latter cases there can be no rule to ascertain the jurisdiction of the court, but the value laid in the declaration. If the finding of the jury was the criterion, then the jurisdiction of the court would depend entirely on the verdict; and if a verdict in favor of the plaintiff, for less than 500 dollars, would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal. We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute; and that upon a fair comparison and construction of the 11th and 20th sections of the judicial act, the mere finding of a jury, or of referees, upon the question of damages, cannot affect the jurisdiction of the court.[2] Rule discharged.

HULSHIZER (GRAY v.). See Case No. 5,717.

Case No. 6,863.

In re HULST.

[7 Ben. 17.] [1]

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

ASSIGNEE AND RECEIVER—SALE OF PROPERTY.

1. Property was forcibly taken by the marshal, under a warrant issued in bankruptcy proceedings, from the possession of a receiver appointed by a state court, in proceedings supplementary to execution against the bankrupt, and was by the marshal handed over to the assignee, when appointed. The assignee applied for an order to sell the property: *Held*, that the court would not summarily order a sale of property so taken, against the protest of the receiver.

2. The title of the assignee to the property must be enforced by a plenary suit.

This matter came up on a certificate of the register, who certified to the court that the marshal had taken a stock of goods by virtue of the warrant issued in these proceedings, which he had delivered to the assignee on his appointment; that the property was claimed by one Daniel Adee, as receiver appointed by the supreme court of the state of New York, in proceedings supplementary to execution issued upon a judgment against the bankrupt [William W. Hulst]; and that the assignee had asked for an order of sale of the property. The register gave reasons why he considered the judgment in question fraudulent as against the assignee, and gave it as his opinion that the order for sale should be granted.

BLATCHFORD, District Judge. It seems to be established by the evidence, that the property in question, a sale of which is asked, was forcibly taken from the possession of the receiver appointed by the state court, after the title to it had completely vested in him, by a deputy of the United States marshal, who afterwards delivered it to the assignee in bankruptcy. Under these circumstances, it does not seem to me proper that this court should, by ordering a sale of the property, against the protest of the receiver, who here asserts his title to the property, affirm and sanction the act of summarily dispossessing the receiver. This is one of the cases in which the possession of and title to the property, if to be enforced by the officer of the bankruptcy court in his own favor, on the ground that he has a superior title under the bankruptcy act [of 1867 (14 Stat. 517)], which gives him the right of possession, must be enforced by a plenary suit conducted according to the requirements of that act. The possession of the state court, through its officer, and his vested title, cannot be summarily displaced by a forcible seizure, unsustained by sufficient legal process, even though, in the end, such possession and title may, as the result of a proper suit, be held to be fraudulent and void as against the right of the assignee in bankruptcy.

Case No. 6,864.

In re HULST.

[7 Ben. 40.] [1]

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

PRIVILEGE OF WITNESS—RECEIVER APPOINTED BY A STATE COURT A WITNESS IN BANKRUPTCY PROCEEDINGS — POSSESSION OF BOOKS AND PAPERS.

A. was appointed receiver by the New York supreme court, in supplemental proceedings against H. Afterwards, in bankruptcy proceedings against H., A. was summoned as a witness before the register, under section 26 of the bankruptcy act [of 1867 (14 Stat. 529)]. A suit was pending against him, for the possession of the bankrupt's books, brought by the assignee

[2] The following authorities were cited by Peters, District Judge: Debt, detinue, &c. will not lie for a debt under 40 shillings, 2 Inst. 311, 312; Comyn, Dig.; yet, the smallness of the sum must appear on the face of the declaration, 3 Burrows, 1592; Barnes, Notes Cas. 497; and though reduced by a set-off, it will not affect the jurisdiction of the court, 3 Wils. 48; Comyn, Dig. 590.

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

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in bankruptcy. He appeared, but declined to be sworn, or to produce the books, except upon the order of the court which appointed him receiver: *Held*, that the receiver was not privileged, but must be sworn as a witness under the bankruptcy act, and answer the questions put to him; that he must also produce the bankrupt's books, to be used, on the examination, as evidence; but that the books were to remain in his possession, and were not to be surrendered to the assignee.

The register certified the facts in this case for the decision of the court, as follows: Daniel Adee was appointed receiver by the New York supreme court, upon supplemental proceedings instituted by a judgment creditor of [William W.] Hulst, the bankrupt. During the proceedings in bankruptcy, in this case, before the register, Adee was summoned as a witness, and required to produce the books and accounts of Hulst, under his control as receiver. He came, but declined to be sworn and examined. It was contended against him, that section 26 of the bankruptcy act (Rev. St. §§ 5086, 5087 [14 Stat. 529]), allows no privilege to a witness as officer of a state court, but covers all persons.

S. G. Courtney, for assignee.
G. W. Niles, for witness.

BLATCHFORD, District Judge. The witness must be sworn, and submit to be examined, under section 26. It must depend upon the course of examination, whether any books must be produced.

In accordance with this decision, the receiver, Adee, appeared, was sworn as a witness, and was examined. He was then required to produce the books and papers in his control. He was willing to produce them, but only for use as evidence at the examination before the register, alleging that an equity suit for the possession of them was then pending, brought against him, as receiver, by said assignee, and that he was entitled to retain possession until the determination of that suit. He further claimed, that section 14 of the bankruptcy act applies to clerks and others having custody of books and accounts, but not to a receiver, who, by authority of court, owns them. The register held that the receiver must produce and surrender the books, &c., to the assignee. This he refused to do; and the register, by request, certified the question for decision of the court.

BLATCHFORD, District Judge. Mr. Adee is entitled, at present, to refuse to deliver up the books to the assignee, or to give him possession thereof. But he must produce them to be used, on the examination, as evidence.

HUMASON (UNITED STATES v.). See Case No. 15,421.

Case No. 6,865.

HUME v. PITTSBURGH, C. & ST. L. R. CO.

[8 Biss. 31.] [1]

Circuit Court, D. Indiana. Aug., 1877.

SERVICE ON CORPORATION — DOMICILE OF CORPORATION—SERVICE ON AGENT OUTSIDE OF STATE.

1. Service upon a corporation in order to bring it into court must be made under the United States, not under a state, statute.

2. A corporation, being the creature of local law, dwells only within the territorial boundaries of the sovereign or state which creates it, and it cannot be an inhabitant of another state.

3. Under the act of congress of March 3, 1875 [18 Stat. 470], which declares that, "No civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant or in which he shall be found," a corporation can not be served by process outside of the state where it was created.

[Cited in Zanebrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. 452.]

4. The presence of an agent of a foreign corporation is not the presence of the corporation within the meaning of the act.

George Hume, administrator of the estate of Mary E. Hume, deceased, a citizen of Indiana, sues the Pittsburgh, Cincinnati and St. Louis Railroad Company, a corporation organized under the laws of Ohio and operating a line of railway between the city of Columbus, Ohio, and the city of Indianapolis, Indiana, for damages resulting from negligently running its cars over and killing the said Mary E. Hume, his wife. The summons was served by the marshal by reading and delivering a copy to J. A. Perkins, the defendant's agent at Indianapolis; the defendant appears specially by counsel and moves to quash the service of the process.

Dye & Harris, for plaintiff.
Baker, Hord & Hendricks, for defendant.

GRESHAM, District Judge. There are provisions in the statutes of Indiana requiring a foreign corporation, wishing to do business in this state, to consent by a resolution of its board of directors that it may be sued in the courts of this state, and that service on its agent found within the state shall be valid service on the corporation. 2 Davis' Rev. St. 45, 46, 281; 1 Davis' Rev. St. 373.

Section 1 of the act of congress approved March 3, 1875 (18 Stat. 470), declares that "no civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found." To this extent there is no difference between the act of 1875 and the judiciary act of 1789 [1 Stat. 73]. If the service on the agent brought the defendant, a foreign corporation, into court, it was by virtue of section 1 of the act of 1875, and not under the statutes of Indiana.

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

This is a civil suit brought against an Ohio corporation by original process. A corporation being the creature of local law, dwelling only within the territorial boundaries of the sovereign or state which creates it, it follows that the defendant is not, and cannot be, an inhabitant of this state. Bank of Augusta v. Earl, 13 Pet. [38 U. S.] 584. Was the defendant "found" within this district when the summons was served on the agent?

The act of congress requires that the defendant, and not the defendant's agent, should be found within the district. The presence here of the agent of a foreign corporation is not the presence of the corporation, within the meaning of the act, any more than the presence of the agent of a natural person, a citizen of another state, is the presence of the principal. It does not follow that because the law of comity allows a corporation by its agents to transact business and enter into contracts beyond the limits of the state which brings it into being, that the corporation itself, like a natural person, may be found in a state other than that of which it is a citizen. In Bank of Augusta v. Earl, 13 Pet. [38 U. S.] 584, Chief Justice Taney, in delivering the opinion of the court, said: "But although it must live and have its being in that state only (the state of its creation), yet it does not by any means follow that its existence there will not be recognized in other places. * * * Now, natural persons through the intervention of agents, are constantly making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these engagements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by the laws of the place?" And in Paul v. Virginia, 8 Wall. [75 U. S.] 181, the court says: "The corporation being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created." It is too plain for argument that a corporation can not be found where it can have no legal existence. Pomeroy v. New York R. Co. [Case No. 11,261]; Stillwell v. Empire Fire Ins. Co. [Id. 13,449].

The statutes of Indiana, relied on by the plaintiff, do not proceed upon the idea that the presence of the agent of a foreign corporation is the presence of the corporation itself. By contract between the state and the foreign corporation, service on the local agent is made as effectual as service on the corporation itself. This legislation, in effect, concedes that a foreign corporation can not be found within the state.

If the legislature meant to declare that the presence of the agent of a foreign corporation was the presence of the corporation itself, it was quite unnecessary to require the corporation to agree that service on the agent should be equivalent to service on itself. But, as already stated, the question before the court must be decided on the terms of section 1 of the act of 1875. The motion to quash the service is sustained.

See Wilson Packing Co. v. Hunter [Case No. 17,852], and cases cited in the note.

HUMISTON (STAINTHORP v.). See Cases Nos. 13,279–13,281.

Case No. 6,866.

In re HUMMITSH.

[2 N. B. R. 12 (Quarto, 3); 15 Pittsb. Leg. J. (O. S.) 494.] [1]

District Court, E. D. Missouri. 1868.

BANKRUPTCY — DISCHARGE — INTEREST OF BANKRUPT—FALSE SWEARING.

Where the husband's equitable interest in the estate or property of the wife has been levied upon and sold under execution, the husband has no longer any interest or estate to be returned in his schedules; and he cannot be charged with swearing falsely in stating that he has no interest or estate in such property.

The bankrupt, in 1857, owning real estate, then subject to encumbrance for part of the purchase money, commenced the erection of several houses upon the property, and further encumbered parts of the property by deeds of trust, and becoming embarrassed and unable to complete his undertakings the property was further encumbered with mechanic's liens. Three of the lots, with the unfinished houses upon them, were exposed to sale upon the original encumbrance, and purchased in by the encumbrancer, Mrs. Rutgers. The remaining five were sold under the late encumbrances, and were purchased by Miller & Lich. Subsequently, Mrs. Rutgers sold the houses purchased by her to Mrs. Hummitsh, the wife of the bankrupt, taking her notes for the purchase money, and conveying the property to J. B. Evans, as trustee for Mrs. Hummitsh. The lien creditors recovered judgment for their debts, and sold the bankrupt's interest in the whole property under special execution, and Miller & Lich became the purchasers. Miller & Lich brought suit against Mrs. Hummitsh and her trustees, the bankrupt and the parties to the original encumbrance, to set aside the sale as improperly made, and for leave to redeem. This case will be found reported, 35 Mo. 50. The supreme court of Missouri upheld the validity of the sale and of the deed. Mrs. Hummitsh had no separate estate, but by sale of two of the houses she procured means to complete one of the houses and also received a surplus, which was invested from time to time until it amounted to some twelve thousand dollars. Opposition was made to the dis-

[1] [Reprinted by permission.]

charge, on the grounds that the bankrupt had failed to return his interest in this property held by the wife's trustee, the creditors contending that a wife having no separate estate could not by the use of his name cover up property from the creditors of the husband, the credit being really that of the husband and not that of the wife. Opposition was further made, in that the bankrupt had wilfully sworn falsely in his examination, by stating that as a substitute broker during the war he had made only about seven hundred dollars, when in fact he had made many thousand dollars which were invested in the name of the wife of the bankrupt. Much testimony was offered to show how much money was made by different brokers, fully developing the fact that the poor substitutes were swindled right and left, receiving sometimes not a tenth of the sums paid by the parties offering substitutes. The creditors attempted to show that of the money deposited by the wife with a note broker for the purpose of investment, a large proportion must have been derived from the husband's profits as a substitute broker.

TREAT, District Judge, held that as after Mrs. Rutgers had conveyed the real estate to the trustee of Mrs. Hummitsh, the creditors had sold under execution all the estate of the husband in the same, that the bankrupt had no longer any title or estate in the same to be returned in his schedule. And that, as related to the moneys invested in the name of the wife, the evidence did not show that any part thereof had been derived from the bankrupt's profits in the business of a substitute broker, and that the sums invested might be fully accounted for from the profits the wife had made from the sale of two of the houses conveyed to her by Mr. Rutgers. That it was not enough to show that the bankrupt might have made moneys which he had not accounted for, but that to prevent his discharge the bankrupt act [of 1867 (14 Stat. 531)] required the creditor to show that the bankrupt had wilfully sworn falsely, and that fact must be shown by the opposing creditors. Objections overruled and discharge granted.

HUMPHREVILLE COPPER CO. v. STERLING. See Case No. 6,872.

Case No. 6,867.

Ex parte HUMPHREY.

[2 Blatchf. 228.] [1]

Circuit Court, S. D. New York. June 9, 1851.

JUDICIARY ACT 1789—ATTENDANCE OF WITNESS—ATTACHMENT FOR CONTEMPT—AFFIDAVIT.

1. The 30th section of the judiciary act of September 24th, 1789 (1 Stat. 88), gives authority to this court to compel witnesses to attend before a commissioner for examination de bene esse, in the same manner as to compel them to appear and testify in court. And, upon due proof of service of a subpoena upon a witness, requiring his attendance before a commissioner, and the certificate of the commissioner that the witness did not attend before him, it is proper that an attachment should issue against the witness.

[Cited in Re Dunn, Case No. 4,173; U. S. v. Tilden, Id. 16,522.]

2. But that statute does not apply to a witness who is casually absent from home, although he is found at a place more than one hundred miles from the place of trial of the cause, unless he is about going to sea, or is aged, infirm, &c.

3. Where an attachment is issued against such a witness, the question of the authority of the commissioner and of the regularity of the proceedings before him, is properly brought before the court by affidavit.

William S. Humphrey was brought before this court upon a writ of attachment issued against him, for his refusal to obey a subpoena from this court, requiring him to appear and testify before a United States commissioner in the city of New-York, under the 30th section of the judiciary act of 1789 (1 Stat. 88), as a witness de bene esse in a suit pending in the circuit court for the district of Massachusetts. The witness had been duly subpoenaed and had failed to attend. But it also appeared, by his own affidavit, that he resided in Massachusetts, about fifty miles from Boston, and was temporarily in New-York on business, and purposed returning to his family and place of residence within a few days.

Seth P. Staples objected, that the witness could not be compelled to appear before the commissioner to give his deposition; but that the proper course was to take his testimony on commission.

George Gifford, contra.

BETTS, District Judge. The 30th section of the judiciary act of 1789 gives authority to this court to compel witnesses to attend before a commissioner for examination de bene esse, in the same manner as to compel them to appear and testify in court. And, upon due proof of service of a subpoena upon a witness, requiring his attendance before a commissioner, and the certificate of the commissioner that the witness did not attend before him, it is proper that an attachment should issue against the witness. But that statute does not apply to a witness who is casually absent from home, although he is found at a place more than one hundred miles from the place of trial of the cause, unless he is about going to sea, or is aged, infirm, &c. In the present case, the contempt of court imputed to the witness in disobeying the subpoena is purged. He could not rightfully be subjected to an examination de bene esse under the statute. The question of the authority of the commissioner and of the regularity of the proceedings before him,

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

is properly brought before the court by affidavit, and the witness must be discharged from the attachment.

Case No. 6,868.

Case of HUMPHREYS.

[Crabbe, 19.] [1]

District Court, E. D. Pennsylvania. May 20, 1836.

BANKRUPTCY — DISCHARGE FROM IMPRISONMENT— ASSIGNMENT OF LEGACY—FRAUD— PROPERTY OATH.

A party imprisoned on process of this court petitioned for the benefit of the act of 6th January, 1800 (1 Story, Laws, 715 [2 Stat. 4]), and its various supplements: on investigation it appeared doubtful whether or not he had any property in a certain legacy, all his interest in which he had assigned for a small consideration; the court suggested to the party opposing the petition—being the same on whose suit the petitioner was imprisoned—that an assignment should be executed giving to him all the petitioner's remaining right to the legacy, which being refused by the opposing party, the court ordered such an assignment to be executed to the clerk of the court, in trust for the creditors generally, and the petitioner to be discharged on taking the prescribed oath.

This was a petition of a party imprisoned on process issued from this court, praying for the benefit of the act of 6th January, 1800 (1 Story, Laws, 715 [2 Stat. 4]), and its various supplements. It appeared that, before the commencement of the suit on which he was then imprisoned, and before the debt on which it was founded had accrued, the petitioner [Richard Humphreys] had been discharged under the insolvent laws of the state of Pennsylvania; afterwards, and after the accruing of the debt sued on in this court, but before suit begun, a legacy expectant on the death of a third party was devised to the petitioner; he assigned all his interest in this legacy for a sum much less than its estimated value, and was afterwards sued and imprisoned by the party opposing the present petition. It having been suggested that the petitioner could not safely make the oath required by the act of congress, it being doubtful whether the assignment of the legacy would be held, in equity, to pass more than the value of the consideration on which it was made, the court proposed to the opposing creditor that he should take from the petitioner an assignment of any remaining interest he might have in the legacy, which the creditor refused to do.

HOPKINSON, District Judge. The petitioner was discharged on the 8th of September, 1831, under the insolvent law of the state of Pennsylvania, and returned no property but a few debts, amounting in all to $457 84. In February, 1832, R. Humphreys, the grandfather of the petitioner, died, leaving him one-eighth part of his property not particularly devised, which, the petitioner says, the executors have informed him, will entitle him to about five or six thousand dollars. This legacy is given after the death of the widow of the testator, who is now seventy-seven years old. On the 1st April, 1833, the petitioner made a complete transfer to Robert M. Lee, for the sum of two thousand dollars, of all his right and interest in his grandfather's estate. This consideration of two thousand dollars is said and sworn by the petitioner and by Mr. Lee to be for boarding and moneys advanced to the petitioner at various times, for which his bonds were given, and destroyed when the transfer was made. No property is shown or alleged to be held by the petitioner, other than that he may be entitled to under the will of his grandfather. The question then is, whether I am so satisfied that the petitioner has absolutely divested himself of all his right and interest in his grandfather's estate, by the transfer to Mr. Lee, that I can permit or direct him to take the oath prescribed by the act of congress? Until the death of his grandmother, the petitioner can claim nothing of this estate, and it is said that his right is contingent on his surviving his grandmother. Granting this to be so, what is the contingency that an old lady of seventy-seven years of age will survive a healthy young man of two or three and twenty? Suppose the petitioner shall survive his grandmother; the question then occurs whether Mr. Lee can, in equity, claim more by this assignment than his debt and interest; and supposing that debt shall be established to be the sum mentioned of two thousand dollars, there will be a large surplus in his hands beyond his debt. This was a young, and, evidently, a thoughtless and imprudent young man; a pupil with Mr. Lee at the time this assignment was made. Will not equity decree Mr. Lee to be a trustee for the petitioner for all beyond his debt and interest? I give no opinion on this question, either for or against the validity of this assignment, or for what amount it may be valid and effectual. It is enough for my purpose that I am not clear that this assignment has passed, irrevocably, to Mr. Lee, all the interest of the petitioner in his grandfather's estate.

In this situation of the affair, what can I do to administer the law justly between these parties? Is the petitioner to remain in prison until this question can be tried and decided, which may not be for several years? Or can I administer the oath to him while I doubt its truth; and discharge him when he may hereafter receive a property fully sufficient to pay his debts, or, at least, much more than the plaintiff's claim, on which he is imprisoned? Under these circumstances, I suggested to the parties that the petitioner should make an assignment, to the opposing creditor, of whatever

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

interest or estate he may have in the property devised to him by his grandfather. If this were done, then the petitioner might safely take the oath required by the law, and swear that he has no property, &c.; because, if his assignment to Mr. Lee is good and valid, then his whole interest in that estate is gone from him; but if any right or interest remains in him, notwithstanding that assignment, then it would be passed by the transfer I suggested. This proposition is refused by the opposing creditor, at whose suit the petitioner is now imprisoned. But the refusal ought not to prevent me from doing justice in the case, if I can come to it in another way. If the assignment to Mr. Lee appeared to be fraudulent in fact, or in the intention of the petitioner, I should not hesitate to remand him to prison, and refuse him the benefit of the act of congress. But the willingness of the petitioner to execute the assignment suggested, is evidence of fair intention on his part, although the law may give him, or his creditors, the right to call Mr. Lee to account for all he receives beyond the payment of his debt. If the petitioner had no creditors interested in the property, I might leave him to his own will, and his own remedy in this affair. But others are concerned, and I know not how they could try their right, if they should wish to do so, but in the manner I have suggested—that is, under an assignment from the petitioner. It is only thus that any creditor can call Mr. Lee to account. Let the petitioner make an assignment of all his interest in his grandfather's estate, to the clerk of the court, in trust for the creditors generally, as it has been refused by the opposing creditor; and, on taking the oath prescribed by the act of congress, let the petitioner be discharged.

Case No. 6,869.

HUMPHREYS v. The AMERICA.

[Bee, 237.] [1]

District Court, D. South Carolina. Feb. 24, 1807.

ADMIRALTY—SEAMEN'S WAGES—FORFEITURE.

Forfeiture of half wages, in consequence of such improper behaviour, as made it necessary to dismiss the seaman when the voyage was about half performed.

[Cited in The Mentor, Case No. 9,427.]

BEE, District Judge. The actor, on the 18th November last, shipped as first mate on a voyage from the coast of Africa to this port. His wages were not payable monthly, but he was to receive sixty guineas when he should arrive, and the vessel be entered, at Charleston; provided he acted as first mate on board the brig to the intended port. The vessel sailed on the 4th December following, and arrived here on the 4th instant. It appears that on the 11th of January, the actor was dismissed from his station of first mate, and was not reinstated when they arrived here. It is contended on behalf of the owners that he has forfeited all claim to wages on account of improper behaviour on board, and an attempt to raise a mutiny. If this defence be maintainable, mutinous behaviour at sea amounts to loss of wages; and this point I am to determine. It was admitted that the actor performed his duty as mate till the 11th of January, when he was dismissed from that station. That he is an able seaman, and that he had committed no previous fault, except that, at times, he was abusive to the captain and passengers. The immediate cause of his dismissal was his refusal to obey an order of the captain to send a barrel of flour to the quarter deck, which, however, was afterwards complied with. No other charge is alleged against him. The laws of the United States are silent as to forfeiture of wages, except in the single case of desertion. I have carefully examined the marine law as to causes of forfeiture like the present, and find it laid down in the book called "Dominion of the Sea," 203, that for mutiny seamen shall be corporally punished. Moll. de J. Mar. bk. 2, c. 3, § 2, says a disobedient mariner may be discharged at the first port, and that he shall forfeit half his wages, and all his goods within the ship. By the rules of the navy of the United States, mutiny is punishable by death, or such other punishment as a court martial shall direct. By the marine law the master may punish contumacious behaviour corporally, or by putting in irons, if necessary. In the present case, the behaviour of the actor was very improper, but the captain chose to inflict no other punishment than removal from his station as mate; after which he does not appear to have behaved improperly, or to have interfered in the management of the vessel. He was, however, the only navigator on board, except the captain; and would have been necessary to the safety of the vessel, if any accident had befallen the captain. No ill consequence arose from his improper behaviour; and as he was dismissed, instead of suffering corporal punishment, which might justly have been inflicted, I do not think the whole of his wages ought to be retained. That he did not continue to act as mate throughout the voyage was the act of another; not voluntary on his part. On the whole, I think he must receive compensation for the time he actually did duty, that is, for about half the voyage. I decree that he be paid one half the sum mentioned in his contract; and that each party pay his own costs.

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

Case No. 6,870.

HUMPHREYS v. BLIGHT'S ASSIGNEES.

[1 Wash. C. C. 44; [1] 4 Dall. 370.]

Circuit Court, D. Pennsylvania. April Term, 1803.

BANKRUPTCY—ASSIGNEE OF NEGOTIABLE PAPER—RIGHT TO PROVE DEBT—OFFSETS.

1. The holder of negotiable paper, payable "without defalcation," under the laws of Pennsylvania, assigned after a commission of bankruptcy has issued, may come in under the commission, allowing all just offsets, existing at the time of the bankruptcy; and which would have been admitted, if the assignment had not been made.

[Cited in Jones v. Van Zandt, 5 How. (46 U. S.) 225; Towne v. Smith, Case No. 14,115; Re Strachan, Id. 13,519.]

2. The purchaser of a negotiable note, who becomes so after a commission of bankruptcy has issued, may prove under the commission; and he holds the note, subject to all legal offsets.

After a commission of bankruptcy had been issued against Blight, the plaintiff took an assignment from Murgatroyd of two notes of hand due from the bankrupt. He applied to Blight, informing him of the assignment, and desiring to know what dividend of his estate would be made; and was informed it would pay ten shillings in the pound, without mentioning any offsets existing against the notes. The plaintiff put in his claim under the commission, and demanded a trial by jury, which was directed by the commissioners; and an agreement was entered into to try, on a feigned issue in this court, the questions—1st, whether the plaintiff could come in under the commission? and if he could, 2dly, if he was bound to admit offsets against the notes. If decided in the affirmative, the settlement to be referred to arbitrators. The notes were made payable "without defalcation," and were protested for non-payment.

Mr. Rawle, for defendants, insisted, that the notes of a bankrupt, after a commission issued, are not negotiable. 2dly. That the notes in this case having been protested, the assignee took them liable to offsets, or any equity which existed between Blight and Murgatroyd. That a debtor of the bankrupt cannot after an act of bankruptcy purchase up debts due from the bankrupt, to offset them. 4 Term R. 714; 6 Term R. 57; 2 Strange, 1234. The reason of these cases applies to this.

Mr. Hare, for plaintiff, controverted the first point, upon the ground that there is nothing in the bankrupt law [of 1800 (2 Stat. 19)] which forbids an assignment of a debt due from the bankrupt, after the commission. That if the plaintiff could not come in under the commission, it would put it in the power of an ill-natured creditor of the bankrupt to harass him, by assigning over claims against him after the commission issued; for where the claim could not be proved under the commission, the certificate does not bar it.

On the second point, he insisted that he was not obliged to admit offsets, because the act of assembly of Pennsylvania of 27th February, 1797 (volume 4, p. 102), declares that notes payable without defalcation shall not be liable to offsets or equity.

Cases cited by Mr. Hare: 1 Atk. 73; 2 Wils. 135; Cullen, Bankr. 99, 100; Evans, 220; Coke, Bankr. 19; 3 Term R. 80; [Wilkinson v. Nicklin] 2 Dall. [2 U. S.] 396; 7 Term R. 429; 2 Fonbl. 150; Anstr. 427.

WASHINGTON, Circuit Justice. The first question to be decided on principle, as the bankrupt law is silent upon this subject, neither permitting nor forbidding the assignment of notes due from the bankrupt, after a commission has issued against him. It would be unreasonable that such an assignee should not be allowed to prove under the commission, since the debt would most certainly be barred by the certificate, being a debt due at the time of the bankruptcy, and such a one as might have been proved under the commission. It can produce injury to no person, as it can make no difference to the assignees, whether the debt be proved as due to A. or to his assignees; and as they ought not to be injured, so they ought not to derive a benefit from this change, not of the debt, but of the creditor. It will be perceived that the very principle upon which this first point is decided, decides the second. It struck me, at first, that if the plaintiff's counsel were right as to the first question, they must be wrong upon the second. If by the assignment the assignee would take the debt discharged of offsets, or of any equity attached to it in the hands of the assignor, it would furnish a decisive objection to the right of the assignee to prove under the commission. It is true, that in general, a negotiable instrument passes to a fair bona fide assignee, discharged of any equity attached to it, of which the assignee had not notice; for having paid value for it, his equity is equal to that of the debtor, and he has the law in his favour. If payments have been made, or mutual demands exist between the parties, and they do not accompany the instrument, a fair purchaser ought not to be injured by the omission of the parties to endorse such offsets, and thus to give notice of their existence. The assignment therefore passes a right to the entire sum appearing due on the face of the instrument. But the bankrupt law declares, that where mutual debts have existed between the bankrupt and any other person, at any time before he became a bankrupt, no more shall be paid than the balance due after an adjustment of the accounts. By force then of this law, a creditor of the bankrupt can assign, and the as-

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

signee can purchase, no more than the balance due from the bankrupt after all credits are admitted. The rule therefore may be laid down to meet the present case, that where a creditor of the bankrupt assigns a negotiable paper, or one payable "without defalcation," under the laws of the state, after a commission has issued against the debtor; and the assignee may come in under the commission, but he must allow all just offsets existing at the time the debtor became bankrupt, and which must have been admitted if he assignment had not been made.

The jury found according to the charge. Referees were appointed to settle the accounts.

HUMPHREYS (DWIGHT v.). See Case No. 4,216.

HUMPHREYS (GLENN v.). See Case No. 5,480.

Case No. 6,871.

HUMPHREYS v. UNION INS. CO.

[3 Mason, 429.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

MARINE INSURANCE—ABANDONMENT—AMOUNT OF RECOVERY—CONTRIBUTORY VALUE OF CARGO—COST OF REPAIRS—AVERAGE.

1. A vessel was insured from Messina to Boston. She met with disasters in the course of her voyage, put into Lisbon for repairs, and they were made, exceeding half her value. A bottomry bond was given for the amount. She proceeded on her voyage and safely arrived. Four days before her arrival, the owner abandoned, not having previous information. Subsequently, the vessel was sold under the bottomry bond. *Held*, that the loss was not total at the time of the abandonment, and the plaintiff could not recover for a total loss.

2. In this case, the underwriter was entitled to have the usual deduction on the repairs of one third new for old, as the sale of the vessel was by the default of the owner.

[Cited in Newlin v. Insurance Co., 20 Pa. St. 316.]

3. The contributory value of freight to a general average, is ascertained by a deduction of one third of the gross freight.

4. The actual cost of the repairs at its true value, and not the cost estimated at so much per milrea in a depreciated currency, is the rule, by which the underwriter is to pay for the repairs.

5. In an insurance on "cargo," composed principally of lemons and oranges, if the whole of the oranges are lost in the voyage by perils insured against, and the lemons are saved and arrive, the underwriter is not liable for the loss of the oranges under the usual memorandum, which warrants the underwriter free from particular average on "fruit," &c.

[Cited in Mutual Safety Ins. Co. v. Cargo of The George, Case No. 9,982; Pearse v. Quebec S. S. Co., 24 Fed. 287.]

[Cited in Dickey v. American Ins. Co., 3 Wend. 658; Wallerstein v. Columbian Ins. Co., 44 N. Y. 213; Silloway v. Neptune Ins. Co., 12 Gray, 87; Pierce v. Columbian Ins. Co., 14 Allen, 322; Mansur v. New England Mut. Mar. Ins. Co., 12 Gray, 521.]

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

This was a suit on a policy of insurance of $2000 on the schooner Zephyr and appurtenances, and $1500 on her cargo, at and from Messina to Boston, with liberty to touch at Gibraltar. The loss stated was a total loss by the perils of the seas. Upon a summary hearing of the facts, at the last term, the court intimated an opinion, that the plaintiff was not entitled to recover for a total loss, and the cause was, thereupon, by consent, referred to auditors to report and state the loss, with liberty for the plaintiff to argue the case upon the questions of law upon the coming in of the report. The schooner duly sailed on the voyage from Messina for Boston, and having met with severe injuries from the perils of the sea, was obliged to put into Lisbon for repairs; and was there repaired at an expense exceeding half her value; to pay which the master, having no other funds, was obliged to give a bottomry bond on ship, cargo, and freight. After being repaired, that portion of her cargo (which was principally fruit) which remained undamaged was taken again on board, together with some additional cargo, and the schooner sailed for and safely arrived at Boston. Proceedings were there had against her upon the bottomry bond, under which she was sold, and the proceeds applied to the payment thereof. The abandonment was actually made about four days before the arrival of the schooner at Boston; the plaintiff, who was owner, not having previously had knowledge of the loss, so as to make an abandonment. The policy contained the usual memorandum against losses on perishable articles.

In respect to the loss upon the cargo, the following statement was contained in the report of the auditors: "In regard to the loss upon the fruit, it appears from the captain's protest at Lisbon, and from his testimony given before the commissioners, that he sailed from Messina on the 20th February, 1822, for Boston, with a cargo consisting of six bales of lamb skins, five or six cases of manna, three or four cases of essences of bergamot, two cases of hats, ten tons of brimstone, eleven hundred boxes of lemons, and two hundred and ninety nine boxes of oranges. The brimstone was stowed in bulk at the bottom of the vessel. The depth of the brimstone was about ten inches. A flooring was placed upon the brimstone, upon which flooring the fruit was stowed under and forward of the hatches, and filled the hold quite up to the deck amid ships. Nothing extraordinary happened until the 1st of April. On that day a gale commenced, which continued several days; on the next day, April 2d, the Zephyr, being then in lat. 41° 50" north, longitude west at 1 o'clock p. m., and lying to, was struck by a heavy sea and capsized; her masts and yards being under water, so that 'it came down below, the whole bigness of the gang-

way.' She soon, however, began to right a little, while it was with the utmost difficulty any of the crew could get on deck. But the master and some of the crew having got on deck, and succeeded in getting the helm up, the vessel righted; but having five ringbolts drawn out of her deck with other damage. The vessel lay in the trough of the sea, where the sea washed over her; and, to prevent her foundering, the mainmast was cut away. At about 2 o'clock the same day, the vessel then scudding and the gale still continuing, she took a heavy sea over the stern, which swept away every thing remaining upon deck. The holes made in the deck by the ringbolts being drawn were stopped up as soon as possible in the course of the afternoon, but not until towards night. The gale continued, and the weather was rough during the three or four following days. The vessel worked and strained a good deal during the time, and opened her seams and waterways more or less. When the vessel was capsized, the cargo was shifted so as to make the vessel incline about two streaks to the starboard. At the time of the vessel's capsizing, the captain thinks the water in the hold must have washed quite up to the deck on the side upon which the vessel was thrown. The vessel was found to make water after the time of being capsized, which the captain attributes partly to the holes of the ringbolts in the deck, and partly to the vessel's rolling and straining, and also to her receiving considerable water through the seams of the deck, when she lay upon her side. But he thinks the water did not accumulate in the hold to a depth exceeding that of the brimstone, and that none of the boxes of fruit were at any time immersed in water. On the 19th of April, seventeen days after being upset, the hold was opened and the cargo shifted in part, to bring the vessel on an even keel. The protest says, 'they found the cargo much wet under where the ringbolts were hauled out of the deck, and also much jammed and broken.' He testifies, that the brimstone was found to be washed quite up to the deck fore and aft, and that the boxes of fruit were wet on both sides, but most on the starboard side. The vessel arrived at Lisbon on the 26th of April, being twenty four days after upsetting; she remained at quarantine twelve days, until the 7th of May, when pratique was obtained, and the cargo allowed to be discharged. The boxes of oranges were discharged and put into the government stores. The lemons were examined and repacked, and out of 1100 boxes, 806 were repacked as sound. The oranges and lemons had been stored promiscuously. The captain thinks the boxes of oranges were more wet than those of the lemons. He is confident three quarters of the boxes of oranges had been wet; and says, those which had been wet were more decayed than those that had not been wet. Those in boxes, which had been wet, he says were all decayed; but on the first examination at the expiration of the quarantine, the boxes that had not been wet contained some sound oranges. He thinks as many as twenty of the boxes did not at that time contain any sound oranges. Of the other boxes, some contained a few sound oranges, say five or six, and others only pieces. In the boxes least damaged, he says, not one tenth part of the oranges were sound. On the second examination, about two months subsequent to the first, all the oranges were found entirely decayed and rotten. A survey was had upon the cargo, at the request of the captain, by two English fruit merchants, and the American vice consul, who recommended selling the oranges. But he understood, that they would not be allowed to be sold, at least for any purpose except for exportation, and is not certain that they could have been sold for this purpose. But he thought it not advisable to take the oranges from the public stores, as the fees, for which he would have been liable in that case, would have exceeded their value."

Upon the report of the auditors, Mr. Peabody, for plaintiff, made several points. 1. That the plaintiff was entitled to recover for a total loss of the vessel, notwithstanding the abandonment was made, while she was in good safety on her voyage. She was never returned free to the owner, being then under the lien of the bottomry bond, upon proceedings to enforce which she was subsequently sold; so that the loss, which was originally total by injuries exceeding half her value, always remained total as to the owner. For this, he cited [Moreau v. United States Ins. Co.] 1 Wheat. [14 U. S.] 219; [Biays v. Chesapeake Ins. Co.] 7 Cranch [11 U. S.] 415; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 47; 3 Bos. & P. 477; 15 East, 566; 2 Term R. 407; 4 Maule & S. 575. 2. That the auditors were wrong in this case, supposing the loss on the schooner to be only a partial loss, in making a deduction of the one third new for old from the cost of the repairs, she never having been restored to the owner, so that he derived no benefit therefrom. Da Costa v. Newnham, 2 Term R. 407. 3. That the auditors in their report had estimated the milrea in the account of the repairs at 96 cents only (that being the true value paid,) whereas it ought to be estimated at 125 cents, that being the value in the currency of the country. 4. That in the general average the auditors ought not to have ascertained the contributory value of the freight by deducting one third of the gross amount; but they ought to have taken the true amount of the wages then due from the gross amount, and nothing more. 5. As to the cargo, that the plaintiff was entitled to recover for a total loss of the oranges, since

all the boxes were lost, notwithstanding the memorandum in the policy. That the memorandum applied only, where part of the cargo was composed of perishable articles; that where the whole of any one memorandum article was lost, the assured might recover for that, notwithstanding the rest of the cargo was safe. 3 Bos. & P. 474; 15 East, 559.

Mr. Webster, for defendants, contended contra. 1. That the plaintiff was not entitled to recover for a total loss. The loss was not total at the time of the abandonment, which is required by our law to justify it. The existence of a bottomry bond was no cause of abandonment. It was a mere lien. The owner was never dispossessed of the vessel, and she was ultimately lost by his neglect to pay the debt for the repairs. 2. That the deduction of the one third new for old was properly made by the auditors. That the case was unlike that in 2 Term R. 407. There, the underwriters had ordered the repairs. Here, the vessel came to the possession of the owner; and he, and not the underwriters, was bound to pay the bottomry bond. 3. That the auditors had estimated the milrea at its true value and allowed the real cost of the repairs, and they were not bound to allow a nominal value in a depreciated currency. 4. That the deduction of one third of the gross freight, in cases of general average, was now settled by usage and not to be disturbed. That even if the deduction were made of the wages, the result, as the auditors stated it, would be less favourable to the owner. 4. That the point, as to the memorandum, was not maintainable, for the exception in the memorandum was not of oranges, but of fruit generally. The lemons were saved, so that the whole of the memorandum article was not lost. But the principle was wrong. The late English cases were not law on this subject. The insurance in this case was on cargo generally. To entitle the assured to recover, there must be a total loss of the memorandum articles. A partial loss of them was not sufficient. [Biays v. Chesapeake Ins. Co.] 7 Cranch [11 U. S.] 415; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 47.

STORY, Circuit Justice. The first question is, as to the right of the plaintiff to recover for a total loss of the vessel. She sustained an injury, the repairs of which cost more than half her value. A bottomry bond was executed to secure the payment of the amount of the repairs. She sailed on the voyage and safely arrived at Boston. The abandonment was made, while she was on the high seas in the prosecution of her voyage in good safety, a few days only before her arrival in port. She was subsequently proceeded against upon the bottomry bond, sold by a degree of court, and the proceeds applied to the payment of the bond. Under these circumstances the question arises, whether the abandonment was valid, so as to bind the underwriters. It has been settled in the courts of the United States, that an abandonment is not good, unless the loss is, in fact, total at the time of the abandonment. The state of the information, or the existence of a total loss at an antecedent period, if it has no longer a continuance, gives no title to abandon. And when once the right of abandonment is fixed and acted upon, no subsequent events, which change the total into a partial loss, have any effect to divest the antecedent right of the parties. Such are the principles decided by the court, whose judgment I am bound to follow; and, as far as I have knowledge, they have received the sanction of the state tribunals most conversant with subjects of this nature throughout the Union. Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch. [8 U. S.] 29; Marshall v. Delaware Ins. Co., Id. 402; 6 Mass. 479; 3 Bin. 287; 7 Johns. 412; Peele v. Merchants' Ins. Co. [Case No. 10,905].

Applying this doctrine to the present case, how can it be said, that at the time of the abandonment there was a total loss? The vessel was physically safe, and in good repair. The voyage was not lost, for it was then in a successful progress, and was afterwards accomplished without further loss. It is true, that the vessel has been injured more than half her value; and if the owner had then elected to abandon without repairing her, he would have been justified by the established law on this subject. But the owner is in no case bound to abandon. He is entitled to repair the injury, however great, at the expense of the underwriter, and proceed in the voyage. In the present case, he elected through his agent, the master, to make the necessary repairs and continue the voyage; and for this purpose, the hypothecation of the vessel became necessary. The underwriters do not object to pay these expenses; but the attempt is made after the adventure is again put successfully in motion to compel them to pay a total loss. If there had been no bottomry bond given for the repairs, there would be no pretence to say, that the loss was total. But it is said, that the bottomry bond constituted a lien, which encumbered the vessel in her whole progress, and that she never came free to the possession of the plaintiff. The existence of such a lien is not per se a cause of abandonment. The vessel is not either technically or physically lost by it. It constituted during the voyage a contingent right. If the vessel had been subsequently lost in the voyage, all right under it would have been gone from the bottomry holder. But nevertheless the plaintiff would have been entitled to recover for a total loss from the underwriters. In the present case, the bottomry bond was not at the time of the abandonment a fixed and absolute lien; and the proceedings, under which the vessel

was sold, were long after the abandonment. A subsequent total loss will not aid an abandonment, bad at the time and ineffectual. In point of fact, however, the subsequent loss of the vessel was not occasioned by any peril insured against. "Causa proxima, non remota, spectatur." The ultimate loss was by the act of the owner himself, in not paying the bond after the successful termination of the voyage. If there was any default, it was his; and he ought consequently to sustain the loss. The case of Da Costa v. Newnham, 2 Term R. 407, is distinguishable. There, the repairs had been made by the express order of the underwriters, who afterwards refused to pay the bottomry bond given for expenses, and the vessel was sold upon proceedings under the bond occasioned solely by this default of the underwriters. No abandonment was ever made in that case; and the question was, notwithstanding, whether the owner was not entitled to recover for a total loss. At the trial, Mr. Justice Buller held, that he was. He said: "The bottomry bond was only £600, but the ship never came free into the plaintiff's hands; for in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold. As for all the subsequent injury, which had accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damnified to the whole amount of the insurance, the underwriters were liable, because it was their own fault in not taking up the bond for the expenses of those repairs, which had been incurred by their own express directions." The court affirmed his opinion. In the present case there are no correspondent circumstances. The underwriters never advised the repairs, and never refused to pay for them. In 2 Term R. 407, the existence of the bottomry bond was not deemed a continuance of the total loss. But the subsequent loss was attributed to the express default of the underwriters. The case of McIver v. Henderson, 4 Maule & S. 576, does not apply. Independently of all other circumstances, there the voyage was lost. My opinion on this point is, that in no legal sense was the loss total at the time of the abandonment, and therefore the plaintiff is not entitled to recover for more than the partial loss.

The next point is, as to the deduction of the one third new for old from the repairs. The case of Da Costa v. Newnham, 2 Term R. 407, as to this point need not be disputed. There the court said, that the ground, why the deduction of one third new for old was ordinarily made, was because the owner had the possession of the vessel, and she was so far made better by the repairs. But in that case, by the default of the underwriters, the owner never had possession again of the vessel; and therefore the court very properly held, that he ought not to pay for a benefit, which he had never received. But in the present case, the loss has been voluntary on the part of the owner by his own default. He was never dispossessed of his vessel but under a decree, which he suffered, because he did not choose to pay the ship's debt contracted for his benefit and by the order of his own agent. The underwriters are therefore entitled to the deduction, because they have done no act to prevent the fullest possession by the owner.

As to the third point, the question is, whether the underwriters are to pay the actual expense at its true and real amount, or an increased amount by calculating it at a nominal value in a depreciated currency. The real sum paid by the owner was in milreas calculated at 96 cents, and he now attempts to get, not what he has paid, but an increased sum, such as the milrea would amount to, calculated in a depreciated currency at 125 cents per milrea. It is sufficient to say, that the underwriter is to pay the real, and not the imaginary expenses.

As to the fourth point, the practice in this state has long been in cases of general average to ascertain the contributory value of the freight by deducting one third of the gross amount. The rule was doubtless originally arbitrary, but founded upon a general average estimate of the usual deductions of wages and expenses from the freight in ordinary voyages. The object was to relieve each particular case from the embarrassment of nice calculations and questions about small items, which could not always be fixed by evidence absolutely exact. It has the benefit of certainty and universality in its application; and this consideration outweighs any slight deviation from principle, which may possibly be involved in it. It as often works in favour of one party as the other. If such a practice, existing for a long time by the acquiescence of the commercial community, were now for the first time in question, I should not hesitate to adopt it as reasonable. But it has been long acted upon by the profession, and has received general sanction in our courts. It cannot now be departed from without removing landmarks. See Phil. Ins. 363. The auditors, in their report state: "The nett freight brought into contribution is, according to usage, two thirds of the freight, (viz. $745). The assured proposes to determine the amount of the contributory interest of freight by deducting from the gross freight, i. e. $1117.50, the whole amount of the wages actually paid, viz. $546.58, leaving the contributory value of freight to be $570.92. But as wages are allowed in general average from the time of turning off for Lisbon to the time of sailing from that port (4 Mass. 548; Phil. Ins. 348; 14 Mass. 74), if the wages for this time be deducted, the remainder of wages will be less than one third of the gross freight." The rule, therefore, adopted by the auditors is, in this particular case, the most favourable for the assured. But I confirm it, as standing upon a reasonable and settled usage.

The fifth and last point is, whether the plaintiff is entitled to recover for a total loss of the oranges. The argument is, that the memorandum is not designed to exclude losses, where there is a total destruction of any specific, separated portion, as a box, hogshead, or bale of the memorandum articles; and a fortiori not, where there is a total destruction of the whole of any single memorandum article. The present insurance is upon cargo generally, and the memorandum in express terms exempts the underwriter from particular averages or partial losses on "salt, fish, fruit, grain," &c. &c. The memorandum does not designate oranges particularly by name, but they are comprehended, merely because they fall under the general description of "fruit." In the present case there were 1100 boxes of lemons, and 299 boxes of oranges on board. Of the lemons 806 boxes were saved; and supposing there was, upon the facts stated by the auditors, a total loss of the oranges, still there is no pretence to say, that the whole of the memorandum article "fruit" was lost. The argument, therefore, if it is to stand at all, must stand upon the ground, that the loss of the whole of any one article falling under the description of "fruit" in the memorandum, is a loss, for which the underwriters are liable. It is not distinguishable in principle from the case of the loss of a whole hogshead of sugar in policies, where sugar is warranted free from particular average. The case of Dyson v. Rowcroft, 3 Bos. & P. 474, seems to me to be perfectly correct in principle, but it turned altogether upon different principles. The insurance was on fruit, and in the course of the voyage the fruit was so much damaged by the perils of the seas, that it was rotten, and was necessarily thrown overboard at an intermediate port, into which the ship was driven. The loss was completely total by the destruction of the fruit, before it arrived at the port of destination. That case applies to the present, no farther than it has a tendency to prove, that there was in contemplation of law a total loss of the oranges by the events of the voyage. That point has not been much contested at the argument, and may be passed over without farther observation. The case of Davy v. Milford, 15 East, 559, is however a very strong authority for the plaintiff. There, the policy was on "flax," valued at £400, and warranted free from particular average. The ship was wrecked in the voyage. Part of the packages of flax was wholly lost, and part of them was saved in a damaged state. The court held the plaintiff entitled to recover for the packages entirely lost, but not for those, of which there was a partial loss or damage. It was admitted by the court, that the point was new, and finding no authority against it, they construed the policy divise; as to the damaged part within the warranty; as to that, which was totally lost, not. Upon this case, I confess myself to have great difficulties. No reasons are assigned by the court for the determination, and as at present advised, I think the rationale to be the other way. What is this but a determination, that the loss of the whole or any portion of the thing insured, capable of a distinct enumeration, and separated from the rest, is out of the warranty? Suppose the insurance had been on coffee, or corn, what difference is there between the loss of a single kernel and a bag? between the loss of part of an aggregate made up of artificial and separate parcels, and of an aggregate made of things, in their own nature single and separate? The loss of the whole of a bag of coffee or corn does not seem to me to differ in principle from the loss of an equal quantity of coffee or corn in bulk. The true meaning of the memorandum has hitherto been supposed to be, that it shall exempt the underwriter from all partial losses or particular averages of the thing insured. What difference is there in principle or reason between a partial loss or average by the damage of a part, and a partial loss by the destruction of an integral part of the thing insured? To ascertain what the loss is, it must be estimated with reference to the whole. The insurance is not on each separate parcel or part of the thing insured, as an integral subject, but on the whole as an aggregate. The insurance in Davy v. Milford was not on each parcel of flax separately, but on the aggregate, as a totality. The memorandum warrants the underwriter free of particular average on the thing insured. It binds him only to a total loss of the thing insured. It seems to me, that the error of the reasoning is in considering the insurance as a separate insurance on each distinct parcel, and not as an insurance on the aggregate. This is a departure from the words of the policy. The court, in Thompson v. Royal Exchange Assur. Co., 16 East, 214, and Hedburg v. Pearson, 7 Taunt. 154, 2 Marsh. 432, refused to apply the same rule, where sugars were insured, and a part of the contents of each of the hogsheads was lost by sea damage. In the former case the policy was on "goods" (tobacco and sugar) generally, in the latter "on hogsheads of sugar." In each case the sugar was not merely damaged, but a part of the contents was wholly gone and destroyed. The distinction is certainly nice between the loss of a whole hogshead and the loss of the whole of a part of several hogsheads. If it had been the case of tobacco or rice or coffee, where the whole might have been saved, but in a damaged state, the ground of distinction would be more obvious. But when the very substance is gone, what difference can it make, whether it is the whole of one parcel, or a part of many parcels? See, also, Anderson v. Royal Exch. Ins. Co., 7 East, 38, and Glennie v. London Assur. Co., 2 Maule & S. 371. If, therefore, I were called upon to decide this question de novo, my judgment would re-

luctantly acquiesce in, if it did not lead me to dissent from, the opinion in Davy v. Milford. But the question has been definitively settled against the distinction in Davy v. Milford, by the supreme court of the United States, in Biays v. Chesapeake Ins. Co., 7 Cranch [11 U. S.] 415, and Moreau v. United States Ins. Co., 1 Wheat. [14 U. S.] 219. See, also, Guerlain v. Columbian Ins. Co., 7 Johns. 527; 1 Emerig. Ins. c. 12, § 45; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 39. These decisions are imperative upon me, and coincide with what I cannot but consider as the true and rational exposition of the memorandum. The report of the auditors is therefore confirmed. Decree accordingly.

HUMPHREYS (UNITED STATES v.). See Case No. 15,422.

HUMPHREYS (WEBBER v.). See Case No. 17,326.

Case No. 6,872.

HUMPHREYVILLE COPPER CO. v. STERLING.

[Brunner, Col. Cas. 3:[1] 1 West. Law Month. 126.]

Circuit Court, N. D. Ohio. 1859.

CORPORATIONS—GENERAL POWERS—PRESUMPTION—CONSTRUCTION OF STATUTES—STATE LAWS IN OTHER STATES.

1. It is a well-settled principle, that a corporation has only such powers as are specifically granted, and such as are necessary for carrying the former into effect; and that these powers can be exercised only for the purposes contemplated by its charter or act of incorporation. But it may borrow money or deal in credits, or become a party to negotiable paper, by purchase or otherwise, in the transaction of its legitimate business, if that is a convenient mode of conducting it, unless expressly prohibited. And the legal presumption, until the contrary is shown, is that its acts of that kind are done in the regular course of its authorized business.

2. The statutes of one state or country, when they become the subject of adjudication in another state or country, are to receive the same construction that is given them in the courts of the former, where that construction is made to appear.

At law.

Ranney, Backus & Noble, for plaintiff.
Kelly & Griswold, for defendants.

WILLSON, District Judge. This is an action of assumpsit against the defendants, [J. M. and E. T. Sterling], as makers of two promissory notes of two hundred and fifty dollars each. The notes were dated and executed at Cleveland, Nov. 1, 1853, and payable respectively in one and two years, to the order of T. Dwight, and by him indorsed. The plaintiff is a corporation, organized under a general statute of the state of Connecticut (passed in May, 1857), which authorizes the formation of joint stock corporations, etc. The one hundred and ninety-sixth section of this law provides that "any number of persons, not less than three, who, by articles of agreement in writing, have associated or shall associate according to the provisions of this chapter, under any name assumed by them, for the purpose of engaging in and carrying on any kind of manufacturing, mechanical, mining, or quarrying business, or any other lawful business, and who shall comply with the provisions of this chapter, shall, with their successors or assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association." It is also provided in the one hundred and ninety-eighth section of the same act that "the purposes for which every such corporation shall be established, shall be distinctly and definitely specified by the stockholders in their articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds to any other purpose." The plaintiff, by written articles of association, obtained a legal existence and a name as a corporation under this law, on the 5th day of January, 1849. Its declared purposes are set forth in the second article of the association. This article declares, "the object and business of said corporation, and the business for which it is established, is the refining of metal and the manufacture of rolled copper and brass and other metals and articles manufactured therefrom; and the buying and selling of other articles of trade and merchandise, and generally to do all acts connected with or incident to said business, or the prosecution of the same." The right of recovery here is resisted upon the grounds that the plaintiff had no power to make the contract whereby it became the holder of the notes in question, and that, hence, the notes in the possession of the plaintiff as indorsee are void, and the defendants discharged from liability. The testimony of Timothy Dwight (the payee of the notes) in relation to their negotiation and transfer, is that on the 1st of September, 1854, he sold the one that first became due to the plaintiff, for cash, and received its full value, which at the time was the face of the note and interest, less discount. At a subsequent period, and before its maturity, he negotiated the other note for a valuable consideration, and indorsed the same to William Cornwell. Cornwell testifies that he received this last note of Dwight in 1855, and in payment of a pre-existing debt, and that before the note matured he transferred it to the plaintiff for a monied consideration, he at the time being indebted to the plaintiff. This is the substance of the evidence introduced by the defendants. This defense brings to its aid no equitable considerations. It is not pretended that the debt, evidenced by these notes, has been paid, or that it is not justly

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

due to somebody. Nor is it denied that these notes were duly indorsed to the plaintiff, and full value paid for them. The question presented is strictly a legal one, and involves the inquiry of the power and capacity of the plaintiff to contract and thereby become the lawful owner of this commercial paper.

The principle is well established and of universal application that a corporation has no powers except those specifically granted, or such as are necessary for carrying into effect the powers expressly granted. Or, as Mr. Angel illustrates the principle, "if the object of a corporation is to insure property, it cannot exercise the power of acting as a banking institution." And when a corporation is not in any degree restricted or curtailed as to the mode of doing its business, its powers, whether expressed or implied, can only be exercised to effect the purposes for which they were conferred by the legislature. And yet an express authority is not indispensable to confer upon such an institution the right to borrow money, to deal on credit, or become drawer or indorser or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient if it be implied, as the usual and proper means to accomplish the purposes of the law of its creation; and these implied powers are incident to all corporations created for manufacturing, mining, or mechanical purposes, when not expressly prohibited in their character or by a general law of the state. The presumptions of law arising in favor of the contracts of a corporation are well defined by numerous well adjudged cases. The doctrine is this: "If a corporation is authorized to raise money on promissory notes for a particular purpose, or if, as is frequently the case with other than banking institutions, it may receive notes in the course of its proper business, evidence may be admitted in the one case in favor of the corporation, and in the other against it to impeach the notes, by showing they were issued for another purpose, or received in the course of business improper or forbidden to it. As in ordinary cases, 'ut res magis valeat quam pereat,' the presumption is always in favor of the validity of the contract; or, in other words, it will be presumed that the debt was due, or the note or other security given in the lawful course of business, until the contrary is shown." Ang. & A. Corp. 242; 4 Hill, 442.

The real inquiry, then, or rather the material question for determination, is whether the negotiation and transfer of the notes to the plaintiff was an act which falls under any legal prohibition. The transaction, upon a careful consideration of the proofs in the case, was clearly a purchase of the paper by the plaintiff. There is no evidence that this corporation ever kept an office of discount and deposit, or was at any time engaged in a business foreign to the objects specified in its charter. Hence, the legal presumption is that the notes were purchased for a legitimate purpose, in the absence of proof to the contrary; and it certainly requires no forced construction of the law to declare the transaction appropriate and needful in the ordinary business affairs of the company. The plaintiff's location and place of business were in Connecticut. Its chartered powers (as declared by the articles of association), comprise the refining of metals—the manufacture of rolled copper and brass and other metals, and articles manufactured therefrom, and the buying and selling of other articles of trade and merchandise. Suppose the company, in its business operations, found it necessary to purchase brass in Boston, or copper in Cleveland, two well-known markets for those commodities? Can it be urged that it could not purchase a bill of exchange on Boston at a premium, or a certificate of deposit on Clevelend at a discount, in order to place its funds where they were required for use? And if drafts and certificates of deposit could be bought for such an object, why not promissory notes? We can discover no difference of principle in the two cases, as the object to be attained is the same in both.

The necessities of trade, in a country so widely extended as our own, have brought into use various modes of effecting the exchanges between different and distant localities; and it is accomplished in most instances by the purchase and sale of commercial paper. This corporation, then, has done no more in the purchase of the notes in question than was authorized by its charter, or more than its declared purpose of doing, as expressed in the second article of its association. And as the transaction itself stands unimpeached by any proof, the presumption of law is that the notes were obtained by the company as an incident to its business and in the legitimate prosecution of the same. But it is urged by counsel that the weight of authority is against the capacity of the plaintiff to purchase these notes by way of discount, and maintain suit upon them. At first view there would seem to be force in the objection. In the cases of People v. Utica Ins. Co., 15 Johns. 358, and Utica Ins. Co. v. Scott, 19 Johns. 1, this question was fully discussed. The court there held an insurance company incapable of discounting a promissory note, and consequently unauthorized to bring suit upon it as indorsee. The note there was adjudged void. These decisions of the courts of New York and the subsequent adjudications of those courts upon the same question, turned entirely upon the restraining act of the state, which act declares, "that all notes and securities for the payment of money or the delivery of property, made or given to any such as-

sociation, institution, or company not authorized for banking purposes, shall be null and void." And it has been properly held that this act could not be evaded by making the note payable to individuals, the corporation claiming as indorsee. We cannot well see how the New York courts could have decided otherwise under this prohibitory law. In the case of New York Fireman Ins. Co. v. Ely, 5 Conn. 560, the supreme court of Connecticut followed the line of decisions previously marked out and defined by the courts of New York. The insurance company in that case was a corporation, chartered by the legislature of New York; and not only was it restricted in its powers by express terms in its charter, but it was also subject to the disabling statute of that state. Its charter being a legislative enactment of New York, it was to be governed in its construction and in the interpretation of its powers by the judicial decisions of the state of its creation. We see nothing in the doctrine of these authorities (cited by the defendant's counsel), to change or vary the principle of law which obtains in, and which in our opinion governs this case. We are satisfied that the notes were purchased by the plaintiff in the prosecution of its legitimate business, and that the transaction was lawful by virtue of the statute of Connecticut, and of the general power contained in the second article of the company's organization, viz., to do all acts connected with or incident to said business, or the prosecution of the same. Judgment will be rendered for the amount of the notes and interest, in favor of the plaintiff.

HUMPHRIES (SPRAGGINS v.). See Case No. 13,246.

Case No. 6,873.

HUMPHRIES v. TENCH.

[2 Cranch, C. C. 337.] [1]

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

PETITION FOR FREEDOM — DEPOSITIONS AS EVIDENCE.

Depositions taken in another suit for freedom, by one of the same family, cannot be read in evidence as hearsay respecting the condition of their common ancestor.

Petition for freedom. The defendant offered to read the depositions in a record of Charles county court in Maryland, in a suit for freedom, by one of the same family of negroes, as hearsay, in relation to the common ancestor of that family.

Mr. Key and Mr. Caldwell, for petitioner, objected, and cited 1 Phil. Ev. 190.

Mr. Smith and Mr. Swann, contrà, cited 1 Phil. Ev. 174; Wheat. Dig. p. 153, § 16.

THE COURT (nem. con.) said that the depositions could not be read in evidence, to prove the condition of the ancestor, (Airy.)

Verdict for the petitioner.

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

Case No. 6,874.

HUMPHRY v. HARTFORD FIRE INS. CO.

[15 Blatchf. 35.] [1]

Circuit Court, N. D. New York. July 2, 1878.

INSURANCE—CONTRACT TO ISSUE POLICY — DAMAGES — CHANGE IN TITLE OF PROPERTY—DEED AS EVIDENCE.

1. A complaint setting up a contract to insure against fire, and to issue a policy in accordance with such contract, and alleging a breach of such contract, and claiming damages for such breach, sets up a legal cause of action; and the plaintiff can recover thereon, at law, the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued.

2. A policy of insurance against fire provided, that, if there should be any change in the title or possession of the property without the consent of the insurer, endorsed on the policy, the policy should be void. In a suit on the policy, the insurer, to sustain such defence, offered in evidence a deed from the insured, covering the property. The deed was acknowledged on the day of its date, but there was no evidence that it had been recorded, nor any evidence of any delivery of the deed or of any possession under it: *Held*, that it could not be read in evidence.

[This was an action by Walter H. Humphry against the Hartford Fire Insurance Company for damages for breach of contract. At trial, a verdict was rendered for the defendant, and the case is now heard on a motion for a new trial.]

A. M. Bingham, for plaintiff.

William F. Cogswell, for defendants.

BLATCHFORD, Circuit Judge. At the trial, the defendant's counsel asked the court to rule and decide that the plaintiff could not give evidence to sustain the first cause of action stated in the complaint, upon the ground that the same was an equitable cause of action, and could not be brought on the law side of the court; that the same could not be united with the second cause of action; and that it could not be tried before a jury. The court so ruled and decided. The plaintiff then offered testimony to prove such first cause of action. The defendant objected to the allowance of any evidence to prove such first cause of action, for the reasons above stated, and the court sustained the objection, to which decision the plaintiff excepted.

The first count of the complaint sets forth, in substance, that the plaintiff was the owner of a certain mortgage on a mill, for $1,-

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

000, and was personally liable to pay two other mortgage liens on the same property, held by other parties, amounting in all to over $4,000; that the defendants agreed with him to issue to him a policy of insurance against loss by fire, on the mill, to the amount of $1,500, for one year, both on account of his said mortgage lien and of his said personal liability; that, in part fulfilment of said agreement, the defendants issued a policy insuring William M. Calvert for $1,500, for one year, against loss by fire, on the mill, loss payable to the plaintiff, as mortgagee of the premises; that such policy was not delivered to the plaintiff, but was held by the agents of the defendants, in trust for the plaintiff, till after the insured property was totally destroyed by fire; that due notice and proof of loss were given by the plaintiff to the defendants; that the policy so issued was not in accordance with the agreement of the parties, in that it did not insure the plaintiff against loss on account of his interest, both as a mortgagee of the premises, and on account of his personal liability for the payment of other mortgages which were a lien on the premises, and were owned by other parties; that the plaintiff had no knowledge, until after the fire, that the policy did not conform to the terms of the agreement so made; and that, by reason of the failure of the defendants to fulfil said contract, the plaintiff has sustained damages in the sum of $1,500, with interest.

The second count is founded on the policy as issued, and alleges that the plaintiff had an interest in the property insured, as a mortgagee thereof, and also on account of mortgages held by third parties thereon, for the payment of which the plaintiff was personally liable, to more than $4,000, and claims judgment for $1,500, and interest.

The first count sets up, I think, a legal cause of action. It claims damages for the breach of the alleged contract to insure. If a valid contract, in the form set up, is proved, the plaintiff can recover, at law, the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued. Pratt v. Hudson River R. Co., 21 N. Y. 305; Tayloe v. Merchants' Fire Ins. Co., 9 How. [50 U. S.] 390, 405; Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318, 323.

In respect to the count on the policy as issued, the answer sets up, as a defence, that the policy provided, that, if there should be any change in the title or possession of the property, without the consent of the defendants, endorsed on the policy, the policy should be void; that a change in the title of the property took place, in that Calvert conveyed it, by deed, to one Reynolds; that such change was made without the consent of the defendants endorsed on the policy; and that thereby the policy became void. To sustain this defence the defendants offered in evidence a deed from Calvert to Reynolds, covering the premises. The plaintiff objected that there was no evidence of delivery or possession under the deed. The court overruled the objection, and the plaintiff excepted. The deed was received in evidence, and a verdict was directed for the defendants, to which direction the plaintiff excepted. The deed was acknowledged on the day it bore date, but there was no evidence that it had been recorded.

The question on the policy was, whether a change of title or possession had taken place. Proof of the execution of the deed, without delivery of it, was not sufficient. It not having been recorded, there was no presumption it had been delivered, and nothing appeared as to delivery, except execution and acknowledgment. Fisher v. Hall, 41 N. Y. 416, 423; Younge v. Guilbeau, 3 Wall. [70 U. S.] 636, 641. An instrument is not a conveyance within the meaning of 1 Rev. St. N. Y. p. 756, § 16, so as to entitle it to be read in evidence, when acknowledged and certified as prescribed, unless it has been delivered, so as to take effect as a grant, vesting the estate or interest intended to be conveyed, as prescribed by Id. p. 738, § 138.

For the foregoing reasons, there must be a new trial, the costs to abide the event.

[The case was submitted for a new trial to the court for a decision upon the law and the evidence, both parties waiving a trial by jury, and the court rendered judgment for the plaintiff. Case No. 6,875.]

Case No. 6,875.

HUMPHRY v. HARTFORD FIRE INS. CO.

[15 Blatchf. 504; 9 Ins. Law J. 265; 9 Reporter, 106.] [1]

Circuit Court, N. D. New York. Jan. 29, 1879.

INSURANCE—PAROL CONTRACT—EVIDENCE—MERGER—EXTENT OF RECOVERY—BREACH OF CONDITIONS—AUTHORITY OF AGENT.

1. A contract of insurance can be made by parol, unless prohibited by statute or other positive regulation, and, on proof of such a contract, the insured can recover at law the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued.

[Cited in Bailey v. American Cent. Ins. Co., 13 Fed. 254.]

2. In the present case, it was *held* that such a parol contract was proved.

3. Such a parol contract cannot be held to have been merged in a policy issued, which did not conform to such contract.

4. When a contract of insurance is made with a mortgagor for the insurance of his interest, the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself, instead of being payable, for his benefit, to the mortgagee, and cannot recover where the mortgagor has committed a breach of the conditions of the policy.

5. But, where the contract is with A., to insure his interest, no alienation by another person of the property in respect of which the in-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 9 Ins. Law J. 265, and 9 Reporter, 106, contain only partial reports.]

surance is effected can affect or prejudice the rights of A.

6. Where the agent of an insurance company knows, at the time insurance on a mill is effected, that it is not being operated as a mill, its continuance in that state is not a breach of a condition that the policy shall be void if the mill shall cease to be operated as a mill.

7. An unrestricted authority to negotiate a contract of insurance, by issuing a policy, includes authority to make a valid preliminary contract for such issue.

[Cited in Commercial Union Assur. Co. v. State, 113 Ind. 338, 15 N. E. 518.]

[This was a suit by Walter H. Humphry against the Hartford Fire Insurance Company on a policy of insurance. The suit was brought in the supreme court of the state of New York, and was removed to the United States circuit court at the request of both parties. On the first trial a verdict was rendered for the defendant, but on motion of the plaintiff a new trial was granted. Case No. 6,874. The case is now heard on the new trial, on the evidence and law, by the court, both parties having waived a trial by a jury.]

A. M. Bingham, for plaintiff.

William F. Cogswell, for defendant.

BLATCHFORD, Circuit Judge. This case was removed into this court, by the defendant, from the supreme court of New York, and, under a written stipulation by both parties waiving a jury, has been tried before the court, without a jury. The complaint contains two separate causes of action. The first count sets forth, that the business of the defendant, a Connecticut corporation, in insuring against loss or damage by fire, was carried on at Mount Morris, Livingston county, New York, through Bingham, Brothers & Brace, a copartnership firm, who were the general agents of the defendant for Mount Morris and its vicinity, and were authorized to enter into contracts of insurance, and to issue policies of insurance, for, and in the name of the defendant; that, on or about November 1st, 1874, the plaintiff was the owner of a certain mortgage on a mill, for about $1,000, and was personally liable to pay two other mortgage liens on the same property, held by other parties, amounting, in all, to over $4,000; that, on or about said day, the defendant, through said agents, in consideration of $78 75, which was at the time, or soon thereafter, paid, agreed with him to issue to him its policy of insurance against loss or damage by fire, upon said mill and machinery therein, in such appropriate terms as to insure him against loss or damage by fire to the amount of $1,500, upon said mill and machinery, for the term of one year, both on account of said mortgage lien, and on account of the personal liability of the plaintiff for the payment of the said mortgage liens held by other parties; that, on or about the 4th of November, 1874, the defendant, in partial fulfilment of said agreement, issued its policy of insurance, dated on that day, whereby, in consideration of the payment to it of $78 75, it insured Wm. M. Calvert, against loss or damage by fire, for the amount of $1,500, for the term of one year, on his flouring and grist mill, known as the "Farmers' Mill," in Mount Morris, and on fixed machinery, including shafting and belting, therein, one half of the said sum on each, the loss, if any, to be payable to Walter H. Humphry, as mortgagee of the premises; that, by said policy, the defendant promised and agreed to insure said Calvert against all such loss or damage as might accrue to the property specified, by reason of fire, from November 4th, 1874, at noon, to November 4th, 1875, at noon, and to pay the amount of such loss to Walter H. Humphry, as mortgagee of such premises, within sixty days after due notice and satisfactory proof of such loss; that the policy so issued by the defendant was not delivered to the plaintiff, but was held by the said agents in trust for the plaintiff, until after the 13th of March, 1875; that the property so insured was totally destroyed by fire, without the fault of the plaintiff, on the 13th of March, 1875; that, immediately thereafter, the plaintiff furnished to the defendant due notice and proof of the destruction of said property by fire, and otherwise fully performed all the conditions of said policy of insurance on his part, and, at and from the time of the making of such agreement to insure, and of the issuing of such policy of insurance, to the commencement of this action, the plaintiff has had an interest in said property, as a mortgagee thereof, and also on account of the sums of money secured to be paid by mortgages held by other parties upon said property, and for the payment of which the plaintiff was, and still is, personally liable, to more than the amount of $4,000; that the policy so issued was not in accordance with the agreement of said parties, so made, to insure the plaintiff, as above set forth, in that said policy did not, by its terms, insure the plaintiff against loss or damage by fire on account both of his interest in said premises as a mortgagee thereof, and on account of his personal liability for the payment of other mortgages which constituted a lien on said premises, and were held and owned by other parties; that the said policy so issued contained, among other things, certain conditions, as follows: "If any change takes place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, * * * or, if the property insured be a mill or manufactory, shall cease to be operated and so remain for a period of more than fifteen days, without notice to the company and consent endorsed hereon, * * * in every such case this policy shall be void;" that such conditions were not in accordance with the said agreement of the defendant to insure the plaintiff against loss from fire to

said property on account of the interest which the plaintiff held therein, as above set forth, but were unreasonable and burthensome, and beyond the power or ability of the plaintiff to control or in any way prevent the occurrence of; that the legal title to said property, at the time of the making of said agreement, was in one William M. Calvert, who had the control of the same and the power to convey said property; that the premises described in said policy are the same that the defendant so agreed to insure; that the plaintiff had no knowledge that said policy did not conform to the terms of such agreement so made to insure the plaintiff, in all respects, until after said property was so destroyed by fire; that more than sixty days have elapsed since the plaintiff furnished due proof of the loss and destruction of said property by fire, and no part of the said sum of $1,500 has been paid by the defendant; and that, by reason of the failure of the defendant to fulfil said contract, the plaintiff has sustained damage in the sum of $1,500, and interest thereon from July 5th, 1875, which amount is due the plaintiff, with said interest thereon.

The second count sets forth, that the defendant, on or about the 4th of November, 1874, in consideration of the payment to it of $78 75 by Walter H. Humphry, at the time of issuing its policy of insurance, executed to William M. Calvert a policy of insurance against loss or damage by fire, for the amount of $1,500, for the term of one year, on his flouring and grist mill known as the "Farmers' Mill," in Mount Morris, and on fixed machinery, including shafting and belting, therein, one-half of the said sum on each, the loss, if any, to be payable to Walter H. Humphry, as mortgagee of the premises, by which policy of insurance the defendant promised and agreed to insure the said Calvert against all such loss or damage as might accrue to the property specified, by reason of fire, from November 4th, 1874, at noon, to November 4th, 1875, at noon, and to pay the amount of such loss to Walter H. Humphry, as mortgagee of such premises, within sixty days after due notice and satisfactory proofs of such loss; that the property so insured was totally destroyed by fire, without the fault of the plaintiff, on the 13th of March, 1875; that, on or about the 6th of May, 1875, the plaintiff furnished to the defendant due notice and proofs of the destruction of said property by fire, and otherwise fully performed all the conditions of said policy of insurance, and, at and from the time of the execution of such policy to the commencement of this action, the plaintiff has had an interest in said property, as a mortgagee thereof, and also on account of mortgages held by third parties thereon, for the payment of which the plaintiff was personally liable, to more than the amount of $4,000; that more than sixty days have elapsed since the plaintiff furnished due proof of the loss and destruction of the said property by fire, and no part of said sum of $1,500 has been paid by the defendant; and that the plaintiff demands judgment for $1,500 and interest thereon from July 5th, 1875.

The answer admits that the business of the defendant was carried on at Mount Morris by the firm of Bingham, Brothers & Brace, but denies that that firm were its general agents, and alleges that they were its local agents. It avers, that, on or about November 4th, 1873, its policy of insurance was issued to the plaintiff, as owner of the property therein described; and that, subsequent to that date, the plaintiff had conveyed the title of the property to William M. Calvert. It denies that on or about November 4th, 1874, the defendant agreed to insure the plaintiff against loss or damage by fire to certain property, as the owner of a mortgage thereon, except as thereinafter stated. It denies that the defendant ever agreed to, or did, insure the plaintiff against loss or damage by fire to said property, as being liable personally for the payment of liens upon said property. It avers that the defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff paid to the defendant the sum of $78 75, as alleged, but avers that such payment was made to it by said Calvert. It admits that on or about November 4th, 1874, the defendant issued its policy of insurance to William M. Calvert, loss, if any, payable to Walter H. Humphry, as mortgagee of the property therein described, upon the terms and conditions alleged in the complaint, and that said property was destroyed by fire on the 13th of March, 1875. It denies that the plaintiff furnished to the defendant due notice and proof of the destruction of said property by fire, or that he has fully performed the conditions on his part required to be performed. It admits that the plaintiff had an interest in the property so insured, as mortgagee, but denies that he had any interest therein on account of mortgages held by third parties for which he was liable, and avers that in no event is the defendant liable to the plaintiff for such liability. It denies that the policy issued by it November 4th, 1874, was not in accordance with the agreement of the parties, and alleges that such policy was issued by the defendant, and accepted by said Calvert, in exact accordance with the agreement of the parties. It denies that sixty days have elapsed since the plaintiff furnished due proofs of loss and of the destruction of said premises by fire, but it admits that no part of said $1,500 has been paid by the defendant. For a second and separate defence, it says that it was provided in and by the terms of said policy, that, in case any change took place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, without the consent of the defendant, endorsed thereon, then such policy should be void;

that a change did take place, in the title of the property, in that said William M. Calvert did, on or about the 1st of January, 1875, convey by deed the said property unto one Reynolds, and that such change was made without the consent of the defendant endorsed thereon; and that thereby said policy became and is void. For a third and separate defence, it avers that it was provided in and by the terms of said policy, that, if the property insured was a mill or manufactory, and should cease to be operated, and should so remain, for a period of more than fifteen days, without notice to the defendant, and consent endorsed thereon, then such policy should be void; that the property so insured was a mill and did cease to be operated for a period of more than fifteen days, and no notice thereof was given to the defendant, nor was its consent thereto endorsed thereon; and that said policy thereby became and was and is void. It further avers, that the assured has never furnished to the defendant any notice of loss, nor any account of such loss, nor in other respects complied with the conditions of said policy, nor has any one furnished such notice and account of such loss as was required by the terms of said policy. For a fifth and separate answer it says, that it was provided by said policy, that, in no case should the assured be entitled to recover of the defendant any greater proportion of the loss or damage than the amount thereby insured bore to the whole sum insured on said property, whether such insurance was by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers; that at the time of said fire there was other insurance upon the property covered by the policy of the defendant, to the amount of $1,500, in the Atlas Insurance Company of Hartford; that the interest of the plaintiff in the building so insured did not exceed the sum of $600; and that the defendant, if liable at all, is liable only for its proportion of the plaintiff's loss, to wit, $300.

That a contract of insurance can be made by parol, unless prohibited by statute, or other positive regulation, is well settled. Sanborn v. Fireman's Ins. Co., 16 Gray, 448; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574. It has already been held, in this suit, by this court [Case No. 6,874], that the first count of the complaint sets forth a legal cause of action; that it claims damages for the breach of the alleged parol contract to insure; and that, if a valid contract in the form set up in such first count is proved, the plaintiff can recover at law the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued. Pratt v. Hudson River R. Co., 21 N. Y. 305; Tayloe v. Merchants' Fire Ins. Co., 9 How. [50 U. S.] 390, 405; Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318, 323; Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402. In the present case, it is not shown that there is any statute or regulation which prohibits the making by the defendant, by parol, of such a contract of insurance as is set forth in the first count of the complaint. It is a question of fact as to whether the parol contract set up was made.

The plaintiff had owned the mill and machinery in question and the land on which the mill was erected. While he was such owner, and on the 4th of November, 1873, he effected an insurance on the mill and machinery, with the defendant, for one year, for $1,500, he being the person named in the policy as owner and assured. By a deed dated the 8th of January, 1874, the plaintiff and his wife conveyed to William M. Calvert the said mill, machinery and land. The deed was acknowledged by the grantors on the same day and was recorded June 24th, 1874. The deed stated that there were two mortgages on the premises, both given by the plaintiff, one held by John F. Barbour and the other by James H. McNair or daughters, both dated January 1st, 1872, and recorded on the next day, and that the grantee thereby assumed, upon said mortgages, the payment of the sum of $3,334 and interest from January 1st, 1874. The policy issued in November, 1873, was assigned to Calvert by the plaintiff. By a mortgage dated the 8th of January, 1874, Calvert mortgaged to the plaintiff the premises so conveyed to him by the plaintiff, as security for the payment of $906 75 and interest from date. Nothing has ever been paid on that mortgage. There was a clause in the mortgage, that the mortgagor should keep the buildings erected on the premises insured against loss and damage by fire, by insurers, and in an amount approved by the mortgagee, and assign the policy and certificate thereof to the mortgagee; and that, in default thereof, it should be lawful for the mortgagee to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same should be a lien on the mortgaged premises, added to the amount secured by the mortgage, and payable on demand, with interest at 7 per cent. per annum.

The plaintiff testifies as follows, in relation to the circumstances attending the issuing of the policy of November 4th, 1874: "I was passing Bingham's place of business. He called me in and notified me that the policy of insurance for $1,500 would expire the next day at noon. He asked me what he should do with it. I told him I thought I should let it drop, as I had transferred the property. He asked me if I could afford to let that insurance drop. I told him I didn't know whether I could or not. He then asked me if I had not a considerable interest in the property yet. I told him I had. He wanted to know what my interest was. I told him I took a mortgage back from Calvert for

about $1,000, and that I was personally liable for two other mortgages, amounting to $3,300. He asked me if I knew anything about the responsibility of Mr. Calvert. I told him I did not. He then asked me if the mortgages did not have an insurance clause in them. I told him they had. He then said, 'You certainly can't afford to let that insurance run out,' as the property was good for all the money I had paid out for insurance on it. I told Mr. Bingham I would think it over and let him know before it expired. I went in the next day and told him to keep my interest in that property insured for $1,500. He asked me what I was doing with the property. I told him I was using it to store coarse grains and flour barrels. He said that was all right, if the property was in use; that the company did not like to issue insurance on property that was lying idle. He then directed the clerk to write a policy for me for $1,500. He told me what the premium was and I wrote a check for $78 75 and left the office. That was all I did about the policy till the night of the fire. I had been in the habit of leaving my policies there with them. The mill was worth $4,000; the fixed machinery, &c., $4,000. The mill had been running as a flouring mill till a month before the insurance. Bingham understood I was using it by permission of Calvert. He knew that the mill was not then running. The policy remained at the Binghams' office till after the fire. It was delivered to me the same week. Mr. C. L. Bingham handed it to me."

Charles L. Bingham, the person with whom the plaintiff had the transaction in question, testifies as follows, as to the circumstances attending the making of the insurance: "There was a policy on the property, held by William M. Calvert, as assignee of Walter H. Humphry, which, by its terms, expired November 4th, 1874, or was to expire. At or about that day, I think the day before, I called Mr. Humphry into our bank, as he was passing, and asked him if he wanted the policy renewed. He said he did not know as he did. We talked about it. I think I asked him if his interest in the property did not continue as it was before; whether he had not a mortgage on the property. He said he had. His liability on a bond accompanying a prior mortgage on the property was also spoken of. He said he would see and let me know. He came in that day, or the day after, and said he would have the policy renewed. I turned to my clerk, in his presence, and directed him to renew the policy. Mr. Humphry paid the premium and the policy was issued. I do not know where the old policy that expired November 4th, 1874, is. I do not know whether it is in existence. That policy was originally issued to W. H. Humphry. It had been assigned to William M. Calvert, by assignment dated January 16th, 1874. By the terms of the assignment, the loss, if any, was payable to the assignor, Mr. Humphry; I can't say whether as mortgagee or not. My best impression is, that it was payable to him generally, but it may have been the other way. I don't think that policy was in my possession at the time the policy in suit was issued. It may have been. I now say, on reflection, it was not in my possession at that time. After the policy in suit was written, I can't tell, from recollection, what was done with it. I have no recollection on the subject, as to whether it was left with me or not. The property insured was a flouring and grist mill. I knew the property. I think the mill was not running at the time the fire occurred. I cannot tell for how long a period before that it had been idle. I should think it had been idle two or three months. I do not think it had been running that winter. The first policy of which I have spoken was in the defendant's company. At the time that first policy was issued I understood that Mr. Humphry was the owner of the property. It was issued to him as such. It was assigned January 16th, 1874. At the time of the assignment of this policy, I understood that the deed of the mill property was transferred to Calvert. I cannot tell, from recollection, whether the mill was in operation at any time from the date of the transfer to Calvert, up to the time of the fire. I have no recollection on the subject. There was nothing to call my attention to it. The more I think of it, the more I am impressed that it had not been running for some time, and I think it was not running at the time the policy in suit was issued. The manner of our doing business for the company at that time was this: We were furnished with policies signed by the company, and issued them without their being submitted to the company. The first policy was in the same amount as the policy in suit. My firm was doing a large insurance business, and we kept a large number of policies on file in our office, instead of the assured taking them away. At the time I issued the policy in suit, I presume I knew the condition of the property insured, and whether the mill was running or not." It was admitted, on the trial, by the defendant, that Bingham, Brothers & Brace were duly authorized to issue policies of insurance furnished to them in blank by the defendant, duly executed by the defendant, without submitting to the defendant the question as to whether the policy should be issued or not.

The policy in suit is dated November 4th, 1874, and is numbered 2,859. It contains these provisions: "The Hartford Fire Insurance Company, Hartford, Conn., by this policy of insurance, in consideration of the receipt of seventy-eight and 75/100 dollars, do insure Wm. M. Calvert, of ——, for the amount of fifteen hundred dollars, for the

term of one year, as follows, viz: $750 on his frame flouring and grist mill, known as the 'Farmers' Mill,' on Mill Race, in Mt. Morris, N. Y.; $750 on fixed machinery, including shafting and belting therein; kerosene for light; like ins. in Lycoming; loss, if any, payable to W. H. Humphry, mortgagee; $1,500, against all such immediate loss or damage sustained by the assured and his legal representatives, as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the 4th day of November, 1874, at 12 o'clock noon, to the 4th day of November, 1875, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of this company, in Hartford. * * * If any change takes place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, or the policy is assigned without consent of the company, endorsed thereon, * * * or, if the premises hereby insured shall become vacant or unoccupied, or, if the property insured be a mill or manufactory, shall cease to be operated, and so remain for a period of more than fifteen days, without notice to the company and consent endorsed hereon, then and in every such case, this policy shall be void. * * * In case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire, the occupancy of the building insured or containing the property insured, other insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate, under seal, of a magistrate, notary public or commissioner of deeds, nearest the place of the fire and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the assured be entitled to recover of the company any greater proportion of the loss or damage, than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general or floating, policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required."

It was admitted, on the trial, by the defendant, that due notice of the fire and loss was immediately given to the defendant. The only account of the loss, or proof of the loss, furnished to the defendant, was a statement signed by the plaintiff, and sworn to by him before a notary public, on the 1st of May, 1875. In that statement, it is set forth, that, on the 4th of November, 1874, the defendant, by its policy of insurance, numbered 2,859, insured Walter H. Humphry against loss or damage by fire, to the amount of $1,500; that said policy was issued in consideration of $78 75 "paid to said company by Walter H. Humphry, the holder of one mortgage against the premises insured, of $960, or about that sum, and also being liable to the payment of two other mortgages, amounting to over three thousand dollars, upon the premises insured;" and that the policy was made out as follows: "The Hartford Fire Insurance Company, Hartford, Connecticut, by this policy of insurance, do insure Wm. M. Calvert, of ——, for the consideration above set forth, for the amount of fifteen hundred dollars, for the term of one year, against loss by fire, loss, if any, payable to W. H. Humphry, mortgagee; $750 upon the flouring and grist mill known as the 'Farmers' Mill;' $750 on fixed machinery, including shafting and belting therein." The statement continues: "That the above described policy was issued in pursuance of an agreement to renew a policy issued for the benefit and for the protection of said Humphry, on the 4th day of November, 1873, upon the same property and for the same amount, while said Humphry held the title to said property, for the term of one year, from the 4th day of November, A. D. 1873, to the 4th day of November, A. D. 1874, at noon, which said policy was subsequently continued in force, by renewal, as above set forth, until the 4th day of November, A. D. 1875, at noon. That, in addition to the sum insured by said policy of said company, on said property, there was other insurance made thereon, to the amount of fifteen hundred dollars, as specified in the schedule hereto attached, in which is given the name of each company and the written portions of each policy, with endorsements, besides which there was no other insurance thereon. The whole cash value of the property so insured, at the time immediately preceding the fire, was six thousand dollars. The property insured belonged exclusively to William M. Calvert, at the time of such insurance, and at the time the same was destroyed by fire, and that said Calvert refuses to make proof of loss, on the ground that he has no interest in this policy of insurance. The building insured or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: By Humphry & Fraley, as a storeroom for grain and materials

used in the manufacture of flour and feed and for no other purpose whatever. * * * The value of property belonging to or in which said Humphry was so interested, and totally destroyed by fire, as hereinbefore stated, and the total insurance thereon, was as follows: On grist mill, value of property, $3,000, total insurance, $1,500; on fixed machinery, value of property, $3,000, total insurance, $1,500. * * * Total loss and damage, $6,000; total insurance, $3,000." The schedule referred to in the statement was in these words: "The Atlas Insurance Company, of Hartford, Connecticut, insure William M. Calvert to the amount of fifteen hundred dollars, payable to Walter H. Humphry, mortgage lien. Building, 'Farmers' Mill,' $750. Fixed machinery, shafting and belting, $750. Hartford Fire Insurance Company, as stated within."

Before the plaintiff signed and swore to said statement, his counsel had applied to Calvert to make proof of loss under the policy, but Calvert declined to do so. A mortgage on the premises, accompanied by his bond, was given by the plaintiff to George S. McNair, January 1st, 1872, for the payment of $2,500, with interest from that date. In June, 1873, that bond and mortgage was assigned to Ann E. McNair. The only payments ever made on that mortgage were $100, December 12th, 1873, and $75, January 15th, 1874. Another mortgage on the premises, accompanied by his bond, was given by the plaintiff to George S. McNair, January 1st, 1872, for the payment of $2,500, with interest from that date. That bond and mortgage was assigned to John F. Barbour, and the mortgage was foreclosed, and the premises were sold, and, on the 30th of June, 1875, a judgment for a deficiency was entered against the plaintiff, for $860 14, with interest from June 26th, 1875. The amount of that judgment was paid by the plaintiff after the commencement of this suit. The proofs of loss were furnished May 4th, 1875, and this suit was commenced in the state court July 19th, 1875.

A complaint, sworn to by the plaintiff on the 14th of July, 1875, was put in the suit in the state court, before the suit was removed into this court. That complaint contained but one count and one cause of action, which was a count on the policy as issued, and was in the same words as the second count in the complaint in this court, and contained no such cause of action as is set forth in the first count of the complaint in this court.

The plaintiff, being the owner of the premises on which the mill and machinery were situated, effected, in November, 1873, an insurance on such mill and machinery, for $1,500, for one year, with the defendant. No other inference can be drawn from the evidence, than that the mill and machinery were then worth as much as $6,000. In January, 1874, the plaintiff conveyed the premises to Calvert. There were, at that time, two mortgages on the premises, on which there was unpaid $3,334 and interest from that time. Those mortgages had been given by the plaintiff in January, 1872, and with them he had given his personal bonds. When he deeded the property to Calvert, Calvert gave him back a mortgage on it for $906 75, with interest. Calvert assumed the payment of the mortgages for $3,334. The plaintiff, with the assent of the defendant, assigned to Calvert the policy of insurance then running, which assignment made the loss, if any, payable to the plaintiff. This state of things substantially continued down to November, 1874. At that time, the plaintiff clearly had an insurable interest in the mill and machinery, as respected the mortgages for $3,334, inasmuch as such mill and machinery stood between him and his personal liability on the bonds accompanying such mortgages, even though Calvert had assumed the payment of the amounts of those mortgages. The plaintiff also had, in addition, an insurable interest in the mill and machinery, as respected the mortgage to him for $906 75. Calvert, also, had an insurable interest, as owner of the premises. Under this state of facts, the transaction took place between Mr. Bingham and the plaintiff. It is manifest, from the testimony of both the plaintiff and Bingham, that both parties had in view the interest of the plaintiff and the insurance of that interest, and that that interest was fully disclosed to, and known by, Bingham, at the time. Neither of them was looking to the interest of Calvert. The mortgage from Calvert and the two prior mortgages were all of them referred to in the negotiation, specifically, as constituting the insurable interest of the plaintiff. Bingham urged the insurance of such interest, knowing that it was insurable. Herkimer v. Rice, 27 N. Y. 163; Waring v. Loder, 53 N. Y. 581, 585; Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 60. The insurance clause in the mortgage from Calvert to the plaintiff was to the effect, that the insurance should be in an amount approved by the plaintiff, that the plaintiff might effect it, as mortgagee or otherwise, and that the premium should be secured by the mortgage. When the mortgage containing such insurance clause was executed and delivered, the parties to it must be held to have contracted with reference to the insurable interest of the plaintiff, then known to both of them to be not only the amount of such mortgage but the amount, also, of the two prior mortgages. In the negotiation between the plaintiff and Bingham, the latter, after being advised of such insurable interest of the plaintiff, referred to the fact of an insurance clause in the mortgage and to the liability of the premises for the amount of premium paid by the plaintiff. This could have been referred to for no other purpose than as an inducement to the plaintiff to insure all his insurable interest. Moreover, the then amount of insurance with the de-

fendant was $1,500, and, as the proposition of Bingham was, that the plaintiff should continue $1,500 of insurance with the defendant, while there should be $1,500 more in the Lycoming Insurance Company, and as the interest of the plaintiff, as mortgagee, under the mortgage from Calvert, was not over $1,000, it is plain, that Bingham, in accepting a premium on $1,500, must have understood that he was agreeing to insure more than the $1,000 interest, and that the insured interest was the $4,300, and that it was the plaintiff's interest, and was insured for him, and was insured, in all, for $3,000. The plaintiff testified: "I went in the next day and told him to keep my interest in that property insured for $1,500." What Bingham must have understood by the words "my interest" has been shown. Bingham testifies, that he asked the plaintiff if he wanted the existing policy "renewed;" that the plaintiff said, the next day, "he would have the policy renewed;" and that the direction Bingham gave to his clerk, in the presence of the plaintiff, was, "to renew the policy." Even if the word "renew" was used, it is plain that both parties used it in the view, that, under the then existing policy and the assignment of it, all the insurable interest of the plaintiff was covered. Bingham says, that, by the assignment, the loss, if any, was payable to the plaintiff, and that his best impression is, that it was payable to him generally. He further says: "I think I asked him if his interest in the property did not continue as it was before; whether he had not a mortgage on the property. He said he had. His liability on a bond accompanying a prior mortgage on the property was also spoken of." This shows, that Bingham regarded all the insurable interest of the plaintiff as covered under the then existing policy and its assignment, and that, if such interest continued as it was before, the new policy was to cover the same interest. Hence, the use of the word "renew," under the circumstances, can have no effect to destroy the plaintiff's claim. He paid the premium for the insurance of all his insurable interest in the mill and machinery, and was entitled to a policy to that effect. His right is not affected unfavorably by the fact that he could collect the amount of the premium from Calvert, under the terms of Calvert's mortgage. He never saw the policy that was made out, until after the fire had occurred, and had no opportunity before the fire, and before the rights of the parties had become fixed by the loss, to accept or reject it.

The proof of loss says, that the policy numbered 2,859 was issued, but it also says, that the defendant insured the plaintiff thereby, in consideration of $78 75 paid to it by him, he being the holder of one mortgage on the premises for $960, and being liable to pay two other mortgages thereon, amounting to over $3,000; that such policy was issued in pursuance of an agreement to renew a policy issued November 4th, 1873, for the benefit and for the protection of the plaintiff, on the same property, and for the same amount, while he held the title to the said property; that said policy was subsequently continued in force by renewal, "as above set forth," until November 4th, 1875; and that Calvert refuses to make proof of loss, on the ground that he has no interest in this policy of insurance. There is nothing in these portions of the proof of loss which is inconsistent with the claim made by the plaintiff in the first count of the complaint in this court. On the contrary, the substance of such claim is contained in the proof of loss, in the portions referred to.

In the proof of loss, the plaintiff states that the property belonged to Calvert at the time of the insurance, and at the time of the fire. The evidence shows that the plaintiff so believed. In point of fact, Calvert had, before the fire occurred, delivered to Thomas Reynolds a deed of the property, executed by Calvert. This deed was acknowledged January 18th, 1875, and was made in pursuance of a contract between Calvert and Reynolds for the exchange of property, but was not delivered till after the last named date. The evidence shows, at most, that the plaintiff had, before the fire, heard of the contract between Calvert and Reynolds, but there is nothing to show that the plaintiff, when he made the proof of loss, knew that any deed had passed from Calvert to Reynolds. It does not appear when he afterwards learned of the deed, or that he learned of it before he brought the suit in the state court, nor does it appear that, before he brought such suit, he learned that the deed had passed before the fire. Until he learned that the defence of a transfer of the title of the property by Calvert before the fire, would be set up as a defence, or that the foundation existed for setting up such a defence, he might well sue on the policy according to its terms. After that, and only then, it became important that he should be put in a position where the conveyance by Calvert would not affect his right to recover. There is, therefore, nothing prejudicial to the plaintiff in the fact that he applied to Calvert to make proof of loss under the policy made out, or that he made the proof himself in the form set forth, or that he brought the suit at first on such policy. The fact that the second count in the complaint in this court is on such policy, cannot affect his right to recover on the first count, in view of the averments of the first count as to such policy, and as to the contract.

The point is taken by the defendant, as to the cause of action in the first count, that the parol contract was merged in the policy. When the gravamen of the first count is, that the policy does not set forth the complete parol contract, it is a petitio principii to allege that the parol contract is merged in the policy, especially when it appears that the

plaintiff never saw or had possession of the policy until after the loss.

It must now be regarded as the settled law of the state of New York, that, when a contract of insurance is made with a mortgagor for the insurance of his interest, the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself, instead of being payable, for his benefit, to the mortgagee, and cannot recover where the mortgagor has committed a breach of the conditions of the policy. Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391; Buffalo Steam Engine Works v. Sun Mut. Ins. Co., Id. 401. This is in accordance with the views of the supreme court of the United States, in Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 495, 501, 502; and the contrary doctrine of the supreme court of New York, in Traders' Ins. Co. v. Robert, 9 Wend. 404, and of the court of appeals of New York, in Tillou v. Kingston Mut. Ins. Co., 1 Seld. [5 N. Y.] 405, is no longer the law in New York. Therefore, in the present case, if the contract of insurance had been made with Calvert, and the insurance had been an insurance of his interest, his breach of the condition of the policy as to alienation would have avoided the policy. But, where the contract is with A., to insure his interest, no alienation by another person of the property in respect of which the insurance is effected, can affect or prejudice the rights of A. If the policy in the present case had been made out in accordance with the terms of the actual contract, as they are now decided to have been, and if such policy had contained a clause, that it should be void if any change should take place in the title of the property without the consent of the company, endorsed on the policy, such clause would be held to mean, that the change, if by voluntary deed, must be by the deed of the assured, and not by the deed of some other person.

When the insurance was effected, Bingham was advised that the mill was being used as a place for storage, and was not being operated as a mill. He was satisfied that the place was in use. Bingham testifies that he thinks the mill was not running when the policy in suit was issued, and that he presumes he knew, when such policy was issued, the condition of the property and whether the mill was running or not. The mill did not cease to be operated as a mill after the policy was issued, because, to the knowledge of Bingham, it was not being operated as a mill when the policy was issued. Therefore, the defence on that point, set up in the answer, fails.

There is no defect in the proofs of loss. They were received and retained by the defendant, and no defect was, or is, pointed out. The admission that the agents were duly authorized to issue policies of insurance furnished to them in blank by the defendant, duly executed by the defendant, without submitting to the defendant the question as to whether the policy should be issued or not, makes it proper to apply to this case the doctrine, that an unrestricted authority to negotiate a contract of insurance by issuing a policy, includes authority to make a valid preliminary contract for such issue. Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402, 407.

As the interest of the plaintiff which was insured exceeded the entire amount of the insurance made by the defendant and by the Atlas Company, the plaintiff is entitled to a judgment for $1,500, with interest from July 5th, 1875, and costs.

Case No. 6,876.

HUNGERFORD v. BURR.

[4 Cranch, C. C. 349.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

REPLEVIN—PLEA OF NO RENT-ARREAR—BURDEN OF PROOF.

Upon the plea of no rent-arrear, in replevin, the whole burden of proof is on the party pleading it.

Replevin. Avowry for rent-arrear. Plea, no rent-arrear.

Mr. Wallach, for defendant [R. R. Burr], contended that the burden of proof was on the plaintiff, to show that he had paid the rent; the plea admits every thing necessary, namely, the demise, the tenancy for the time, and the amount of rent accruing for the time. 4 Starkie, Ev. 1297; Alexander v. Harris, 4 Cranch [8 U. S.] 304.

THE COURT (MORSELL, Circuit Judge, contrà) was of opinion that the whole burden of proof was on the plaintiff.

MORSELL, Circuit Judge, was of opinion that the defendant must give some slight evidence of the arrears. 2 Saund. Pl. 768; 2 Esp. 669.

HUNKELE (ENOCH MORGAN'S SON'S CO. v.). See Case No. 4,493.

Case No. 6,877.

HUNN et al. v. MARSHALL.

[Nowhere reported; opinion not now accessible.]

Case No. 6,878.

HUNNEMAN et al. v. MILWAUKEE.

[3 Am. Law J. (N. S.) 419.]

District Court, D. Wisconsin. Oct. Term, 1849.

INTEREST—RATE REGULATED BY CONTRACT.

1. By the law of Wisconsin now in force, "any rate of interest agreed upon by the parties

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

in contract, specifying the same in writing, is legal and proper." Where not so specified the rate is 7 per cent.

2. A bond payable of the 31st Dec., 1848, with interest thereon "at the rate of 10 per cent. per annum," draws 10 per cent. until payable, and only 7 per cent. afterwards.

[Suit by Samuel H. Hunneman and Joseph H. Hunneman against the city of Milwaukee.]

MILLER, District Judge. This suit is upon a city bond, for the payment of seventeen hundred and forty-seven dollars and fifty-nine cents, on the thirty-first day of December, A. D. 1848, with interest thereon, at the rate of ten per cent. per annum. The only point presented for the consideration of the court is, the rate of interest recoverable after this bond became payable. By the law of this state in force at the date of this bond, "any rate of interest which persons may agree upon, not exceeding twelve per centum per annum, shall be legal and valid: provided, that where the rate of interest is not otherwise specified, it shall be computed at seven dollars for the given day of payment on the sum of one hundred dollars for one year." By the law of this state now in force, "any rate of interest agreed upon by parties in contract, specifying the same in writing, shall be legal and proper." And "where no rate of interest is agreed upon, or specified in a note, or contract, seven per centum per annum shall be the legal rate." The rate of interest until this bond became payable is fixed by agreement of the parties at ten per cent.; but there is no allusion to it subsequent to that date. The parties did not contract for any rate of interest until the bond was paid, but only until it became payable. The defendant did not bind itself to pay ten per cent. to the thirty-first day of December, one thousand eight hundred and forty-eight, the day on which both principal and interest became payable; but no longer. This bond does not admit of any other construction. After the bond became payable, the law interposed, both to allow and to regulate the rate of interest to be paid for and on account of, the illegal detention of the debt; which, in the absence of an express agreement, is seven per cent. I find in 2 U. S. Dig. p. 624, § 244, this reference to the case of Henry v. Thompson, Min. (Ala.) 209: "In Alabama, a contract to pay interest at a rate exceeding eight per cent. per annum, must be in writing, signed by the party to be charged, and express that it is for the loan of money, &c. And such interest is recoverable only for the stipulated time of forbearance." In Ludwick v. Huntzinger, 5 Watts & S. 51, it is decided that on a bond for the payment of money on a certain day after that date, with three per cent. interest from date, the plaintiff was entitled to recover interest at three per cent. until the time of payment, and after that, legal interest at the rate of six per cent. See, also, 1 Nott & McC. 67. The only case in opposition to this rule, that I have been able to find, is Kilgore v. Powers, 5 Blackf. 22. The court made no allusion to the statute of the state of Indiana, upon the subject of interest; but merely contented itself with the remark, that interest to the time of judgment at ten per cent. was correctly calculated according to the contract. The note was for the payment of one hundred and fifty dollars on a certain day after date, with ten per cent. interest. This case is not entitled to consideration sufficient to influence a decision against the weight of authority, and what I deem the legal construction and effect of the contract. It is therefore ordered, that interest be calculated on this bond at the rate of ten per cent., until the time it became payable, and after that to this time, at seven per cent.

Case No. 6,879.

HUNNEWELL v. BURLINGTON & M. R. R. CO. et al.

[3 Dill. 313.] [1]

Circuit Court, D. Nebraska. 1874.[2]

CONSTRUCTION OF LAND GRANT TO THE BURLINGTON RAILROAD COMPANY — TAXABILITY OF ITS LANDS—ACT JULY 2, 1864, § 21, CONSTRUED.

1. The land grant to the Burlington and Missouri River Railroad Company (Act July 2, 1864, §§ 17, 20; 13 Stat. 356, 364), is not subject to the proviso in section 3 of the original act of July 1, 1862 (12 Stat. 489), giving to the public the right of settlement and pre-emption if the lands granted be not sold or disposed of within three years after the entire line of the road is completed.

2. Where the lands had not been fully earned by the railroad company in 1871, and the cost of surveying paid as required by section 21 of said act of July 2, 1864, before the period of assessing lands for 1872 had passed, it was held that the lands were taxable, although the company did not pay the local land officer's fees until a few days after the period for making the assessment for 1872 had expired.

[See note at end of case.]

This is a bill [by Horatio H. Hunnewell, suing for himself and others] to restrain the collection of taxes levied upon the lands granted by congress to the defendant railroad company. It is filed by the plaintiff, as a stockholder of the company, after he had represented to its board of directors the impropriety of paying the taxes, and requested them to bring an action to enjoin their collection, or otherwise take efficient measures to protect it therefrom, and after they had declined to do so, because it would be a difficult and unpopular step to take. The taxes complained of were, in 1872, levied by the several counties made defendants [Cass County and others], in which the lands are

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

[2] [Affirmed in 22 Wall. (89 U. S.) 464.]

situated, and were, in point of form, regular in all respects. They are sought to be avoided on the ground that the lands upon which they were levied were not taxable, on account of certain provisions of the acts by which they were granted to the company. The provisions of these acts of congress, upon which the plaintiff's claim rests are the 3d and 13th sections of the act of 1862 (12 Stat. 489, 492), and sections 18, 19, 20, and 21 of the act of 1864 (13 Stat. 356, 364). The work of constructing the railroad was commenced on the 4th of July, 1869, at Plattsmouth, on the Missouri river, and was prosecuted with such vigor that it was completed to a junction with the Union Pacific Railroad, at Kearney Junction, in the fall of 1872, and its last section was, on the 4th of November of that year, accepted by the commissioners. Early in its enterprise the company mortgaged its lands to raise the means, or a part thereof, with which to carry forward the work, to which purpose those means were applied; and it has applied the proceeds arising from the sale of the lands, and has pledged the proceeds thereof, to that purpose. On the 7th of March, 1872, the company paid to the United States the cost of surveying the lands opposite the first one hundred and forty miles of the road, including field work and office work, and, on the 6th of May, 1872, paid the cost of surveying the lands opposite the remainder of said road. On the 19th and 20th days of April, and the 1st and 2d days of May, of the same year, the fees of the register and receiver in respect to said lands were paid. The revenue laws of the state require the assessors to meet for the purpose of equalizing their assessments on the first Monday in April, and to return their rolls to the county clerk on the second Monday of that month, and the county commissioners to sit as a board of equalization on the third Monday and for the two succeeding days. The sessions of said board for 1872 closed on the 17th day of April. The proper duplicates and warrants to collect and enforce the tax were placed in the hands of the treasurers of the several counties which are impleaded in the bill, and, when the injunction was allowed, they were about to sell the lands. About one-half of the taxes go to the state. The cause is before the court on final hearing on the bill, answer, replication, and proofs. This suit relates to lands along the first one hundred and forty miles of the company's road. Another suit by the same plaintiff relates to lands along the residue of the road.

James M. Woolworth, for plaintiff.

Clinton Briggs, G. B. Scofield, Bowen & Laird, and Brown & England, for the Counties.

DILLON, Circuit Judge. The taxes for the year 1872 upon lands granted by congress to the Burlington and Missouri River Railroad Company in Nebraska, and levied thereon by authority of the state, are sought to be restrained upon two principal grounds. One of these is temporary, and applies alone to the taxes of 1872; the other is permanent, and applies, if well founded, to the lands so long as they shall remain unsold and not disposed of by the railroad company. We notice the last objection first, for if it is sound the other is immaterial.

The Burlington Company's grant is contained in sections 19 and 20 of the act of July 2d, 1864 (13 Stat. 356, 364), this being the amendatory act under which, in connection with the original act of July 1, 1862, the Union Pacific Railroad and its branches were constructed.

Section 3 of the original act of 1862 made a grant of lands to the Union Pacific Railroad Company, within certain limits on each side of its road, with a proviso that "all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." This proviso was under consideration by the supreme court of the United States in the case of Kansas Pacific R. Co. v. Prescott, 16 Wall. [83 U. S.] 603. It is maintained by the plaintiffs that the effect of that proviso, as construed by the supreme court, is to exempt from taxation all lands granted to the companies by the acts of 1862 and 1864, which have not been actually sold or otherwise absolutely disposed of; and it is also maintained that the mortgage of the lands by the company is not such a "sale or disposition" of them as will defeat the right to settle upon and pre-empt them. After a careful consideration of the language of sections 18, 19, and 20 of the act of 1864, upon which the rights of the Burlington Company rest, and a comparison of it with the language used in respect to the main company and its branches, my judgment is that the grant to the Burlington Company is an independent grant, not made by referring to the the grants to the other companies, and, therefore, that section 3 of the act of 1862, whatever may be its scope and effect, has no application to the Burlington Company. This last road was not a part of the original scheme; it was to have no government bonds; and was simply aided as many other roads in Iowa, Wisconsin, Minnesota, and other states had been, by a grant of public lands. As to the effect of the proviso in section 3 upon the status of lands to which it applies, see the case of Union Pacific R. Co. v. McShane [Case No. 14,382], decided at the same time with the present case.

The other alleged ground of exemption from taxation is that, at all events, the lands were not taxable for 1872, because the company's right to them was not perfected until

after the time when, under the laws of the state, property can be taxed. The proofs show that the road of the Burlington Company had been constructed and accepted as being complete for the distance of one hundred and forty miles by December 13, 1871. The balance of the distance, fifty and three-fourths miles, was accepted as complete November 4, 1872. On the 7th day of March, 1872, the company paid all the costs of surveying the lands, including field work and office work, for the first one hundred and forty miles, and the cost of surveying the balance of the lands on the 6th day of May, 1872.

The plaintiffs claim that, under the revenue laws of the state, no property can be taxed which becomes taxable after the third Monday in April, and that this time ended by the 17th day of that month, in 1872, when the board of equalization closed its session. And their further claim is that, as the register's and receiver's fees were not paid until the 19th day of April, 1872, the company had no taxable interest in the land until this date, which was too late to make the land taxable for that year; and to support this position the case of Kansas Pacific R. Co. v. Prescott, 16 Wall. [83 U. S.] 603, is relied on.

Section 21 of the act of 1864 is in these words: "Before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company; which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land office for the prosecution of the survey of the public lands along the line of said road; and so, from year to year, until the whole shall be completed, as provided under the provisions of this act."

The proofs show that the lands for the first one hundred and forty miles were fully earned in 1871, and that the company was then entitled to patents therefor, on the payment of "the cost of surveying, selecting, and conveying the same," and that this payment was made on March 7, 1872; and if the right of the company to the lands was then perfect, it is conceded that, if taxable at all, they were taxable for the year 1872. It is said, however, that because the register's and receiver's fees were not paid until April 19, the lands were not before that time taxable.

It does not appear from the proofs when the certificates and patents were dated or delivered to the company, and, whatever may be the facts in this regard, I am of opinion that the fees to the registers and receivers of the local land offices, under the act of July 1, 1864 (13 Stat. 335), are not embraced within those required to be paid by the aforementioned section 21 of the act of 1864. These are fees for "locating," not for "selecting" and "conveying," the land. But, again, it may be remarked that the cost of surveying was paid in time to make the lands taxable; the work of selecting the lands was done by the company without, so far as shown, any expense to the government, and for the cost of conveying it does not appear that the government makes or has any claim.

The result is that the bill in No. 284, which relates to counties along the first one hundred and forty miles of the defendant company's road, must be dismissed, and the bill in the second case, as to lands west of the west line of range 7, in Clay county, where the road was not completed until the fall of 1872, must be sustained, and the injunction made perpetual; but as to lands east of said west line of range 7, in Clay county, the bill must be dismissed. Decrees accordingly.

[NOTE. An appeal was then taken by the plaintiff to the supreme court, when the decree was affirmed in an opinion by Mr. Justice Miller, who said that under the uncertainty which existed as to what the "cost of conveying" is, which is mentioned in the act of July 2, 1864, and there being no decision of the state supreme court or well-settled practice as to the meaning of the Nebraska statute fixing the last day to assess lands for taxation, the court would refuse to enjoin the county officers from collecting the tax. 22 Wall. (89 U. S.) 464.]

Case No. 6,880.

HUNNEWELL v. TABER.

[2 Spr. 1.] [1]

District Court, D. Massachusetts. Sept., 1854.

BILL OF LADING—LIABILITY OF CARRIER FOR LOSS UNDER.

1. Under a bill of lading containing a stipulation that the oil, which was part of the cargo, should be wet twice a week, and also the clause "not accountable for leakage or stowage," the carrier is liable for loss of oil by leakage caused by the casks not being properly wet.

2. It seems that the carrier is also liable, under such a bill of lading, for leakage occasioned by want of reasonable care of the cargo on the voyage.

The respondents in this case were agents of the ship Good Return, and shipped a large cargo of oil on board the Eliza Warwick, the libellants' ship, at Honolulu, in the spring of 1853. This oil was mostly stowed aft of the main hatch in the lower hold. Upon its delivery at New Bedford, it was found that there had been a loss by leakage, to the value of between three and four thousand dollars. The respondents contended that the libellants should account to them for this extraordinary loss; and resisted payment of the freight money, except an amount tendered by them as the difference between this and their loss through the carrier's fault.

C. P. Curtis and C. P. Curtis, Jr., for libellants.

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

T. D. Eliot and R. C. Pitman, for respondents.

SPRAGUE, District Judge. This is a libel for freight. It is not disputed that the ship performed her voyage and earned her freight; but the question made is, whether certain deductions ought not to be made for loss of oil which the respondents say is attributable to causes for which the libellants are responsible.

The bill of lading in this case is in the ordinary form, except that in the body of it is the stipulation, "oil to be wet twice a week," and that in the margin is the clause "not accountable for leakage or stowage." The respondents insist that the oil was not wet twice a week, that the ship was not seaworthy, and that proper attention was not bestowed upon the oil in other respects than the omission to properly wet it.

First, as to the wetting. The bill of lading does not say how the oil is to be wet; but the construction must be that it is to be wet in such a manner as reasonably to accomplish the object of wetting, which is to prevent leakage by shrinkage of the casks. The main ground of respondents in regard to the wetting is, that the means were inadequate with which the ship was furnished. It is proved clearly, that the usual manner of wetting oil on board whalemen, and, so far as may be inferred from the absence of testimony, in other vessels, is by having long hose which is carried so as to pour the water over all parts of the cargo;—a man carrying it into the wings of the vessel as well as towards the extremities. In the present instance, instead of such a hose, a short hose, which, after going into the lower hold, had but two or three feet to spare, was used, but with a force-pump which would send the water as far as the casks reached. The question is, whether this apparatus in fact answered the purpose. The respondents say it did not; and contend, first, that it appears from the evidence that their oil was not wet; and, second, that it was impracticable to have wet it with such means.

Several experts have been called, experienced whaling captains, who all say that it was impracticable. The question was fairly put to them by the counsel for respondents, whether with such a hose, even if the force-pump would send the water to the end of the ship, the respondents' cargo could have been properly wet. They all say that it could not, and this evidence is uncontradicted. The hose was produced in court, and the opinion formed from actual inspection. Such testimony is entitled to great weight; still it is not conclusive, and the court ought to look into the reason of the opinion. The reason assigned is that the intervention of the beams and carlings of the ship and the tops of projecting casks would prevent the water reaching parts of the cargo. That seems to me a satisfactory reason. Owners of ships generally desire full stowage; and, especially with so buoyant a cargo as that of oil, casks would naturally fill all the space practicable.

This cargo was stowed aft in the lower hold. In order to wet it, the hose was carried down the main hatch, and at the after-hatch there was only a small place for a boy to get down. To water the cargo there, the boy got between decks and reached down and pointed the hose. There is no evidence that he had a light, and it would naturally be quite dark there. Stooping down on the casks, just able to squeeze himself through the hatchway, the hatch not taken off because cargo was on it, but only some planks ripped off, he had to direct the hose as best he could. It was somewhat like pointing a pistol, which in a small, low space must go with great accuracy not to strike by the way. The whalemen all say it was not practicable. It is also to be observed that only the boy was sent, nobody overseeing him; and it is not to be expected that he would, under the circumstances, guide the hose with much accuracy. The counsel for the libellants suggests that the water was all thrown among the casks. But the difficulty is that it did not fall in the right place.

Now the facts appearing when the oil was broken out corroborate the respondents' theory. That is to say, Captain Gardner and others state results which the experts say would follow from such a method of wetting. "Aft, the oil leaked most,"—"grew worse as you went on," is the language. To be sure, the leakage was not uniform, and, indeed, it would not have been if the oil was not wet at all. This is illustrated by the condition of the casks under the bone, for which the libellants admit their liability. One of these four casks was full, one nearly so, while the others were nearly or quite empty. It is clear these casks were none of them wet; and yet from some cause, perhaps we cannot satisfactorily ascertain what, there was this difference. The testimony of all the witnesses who examined the cargo of respondents at the home port, at the time of breaking out, is that the beams and knees of the ship, and the casks themselves, were dry, and the hoops loose, indicating shrinkage of casks, and that it seemed attributable to want of wetting. It is evident that there was a loss of oil for want of proper wetting. I have no doubt of this since hearing the evidence.

The question which I have had to consider more especially is, whether there is any concurrent cause for the loss for which the carrier is not liable, and which may diminish his responsibility for a part of it. The carrier insists that the oil was badly stowed. The bill of lading, as I have said, contains the clause "not accountable for stowage." There are two questions of fact to be examined: first, whether the stowage was good or bad; and second, whether any loss is to be attributable to the stowage. The respondents say their oil was well stowed by their agents;

and that, if any loss arises from stowage, it was from displacement by the working of the ship, and want of proper care of the oil when thus adrift. As to the stowage, the direct evidence, except that of Watson the master, and perhaps, to some extent, of the boy Cornell, is all one way. The officers of the Good Return who stowed the oil at Honolulu did it under a sense of responsibility. They were interested in its safety, and must, from their station, be presumed to be competent whalemen. The mate in his deposition, and the second and third mates by libellants' admission that if present they would so testify, all say that the oil was well stowed, in the ordinary manner, that is, stowed properly. These witnesses would naturally have a bias to justify their own acts, and, so far as this consideration goes, it must detract from their testimony. I give a good deal of weight to the testimony of Captain Cox. He was stowing the cargo of the Magnolia at the same time, and in close proximity to the cargo of respondents; was in the hold superintending personally, and saw the manner of stowage aft. Captain Watson, having been disabled by an accident, had requested Cox to have a general oversight over matters. This would naturally lead him to take better notice than otherwise. He appeared to be a competent and intelligent witness, and he says the oil of the respondents was well stowed. I may also add, though the consideration belongs to the branch of the case I have already disposed of, that, as to the practicability of wetting, Captain Cox, when he says their hose would not answer, speaks from knowledge of how that cargo was actually stowed. The evidence of all the home witnesses, coopers and stevedores, is in the same direction. Even Captain Gardner—called on the discharge of the cargo by Captain Watson, to examine its condition, as a competent person for that purpose—testifies that the oil was well stowed.

There is no contradiction on this point, except from some of the witnesses on board the carrier vessel, who say the oil was not well stowed,—that improper spaces intervened. Captain Watson says he noticed such appearances between decks. The suggestion made by the respondents is, that to make close stowage, certain small casks called breakers are put between the large ones, and, being entirely out of sight, might give the appearance testified to. If improper spaces had in fact been left between the casks, Captain Gardner and the stevedores would have seen this from the size of the casks and the space occupied. But all of them say the oil was well stowed. I think the respondents' suggestion must be adopted. At all events the preponderance of evidence is very strong that the cargo was well stowed.

The evidence is that the cargo got adrift. The libellants say it was from want of good stowage. It must have occurred from this cause or from perils of the sea, or from unseaworthiness of the vessel I do not think it is made out that the vessel was unseaworthy. No person has been called who gives it as his opinion that she was so. The vessel was open for examination at New Bedford on her arrival, and the respondents might have proved this, if it were so in fact. The vessel worked and leaked somewhat. The evidence is not, however, carried far enough to establish her unseaworthiness. But, being a weak vessel, this may have contributed to the oil getting adrift. If the oil was adrift through perils of the sea, the carrier would not be responsible, except to the extent, and in the manner, I will indicate. The libellants contend, as matter of law, that they are not responsible for leakage so caused, even if it arose from their own neglect; that they are not responsible under this contract for leakage arising from their ship's state, or from any neglect to care for the oil, provided they complied with the stipulation to wet twice a week. By the general rules of the maritime law, if perils of the sea have loosened a cargo, it is the duty of officers and crew to take care of the cargo as well as they reasonably can,—not to stand idle by. They are to exercise reasonable care. The question is, how is it under this bill of lading? I think the same rule must exist. I see nothing to exempt the carriers from this. They are to obviate the dangers of the sea as well as they can, and must use reasonable diligence to remedy any mischief that occurs. If for example they see a cask leaking, they must use reasonable care to stop the leak.

I have said the vessel was not unseaworthy. I will add that the captain and crew, it would appear, used diligence according to their means, in the care of the cargo. I am not satisfied that any loss occurred from oil getting adrift. If it did, the captain and crew in point of fact bestowed all the attention they ought upon it. They did the best they could. But the owners allowed other cargo to be so stowed as to interfere with this. There was no access to the lower hold. After the vessel had been at sea some time, the crew heard a noise there as of the working of the cargo. They became alarmed. They then had to cut a hole through the storeroom or steerage. This was because the cargo was so placed at the after-hatch by other shippers as to leave too little room to get down there. The cabin floor was also covered over with bone, and they could not get down through the run scuttle. No proper means of access were left to the respondents' oil. This also bears upon the other point, as to the wetting. They waited till they were alarmed before this hole was cut.

The remaining question is, whether any actual loss occurred from the cargo being adrift. The evidence is that no casks were found stove, no chines broken, and, as Captain Gardner testifies, not even chafed, upon the arrival of the cargo at New Bedford. In conclusion, I am not satisfied that any loss

arose from the cargo getting adrift. If there were, the question would be whether it was the fault of the carrier or fault of the stowage.

I think the loss is to be wholly attributable to not wetting the oil properly; and for this the carrier is responsible. From the evidence the loss must be confined to the cargo in the lower hold, and the case will be sent to an assessor to report how much of the respondents' oil in the lower hold was lost by leakage, and the value of the oil when the residue was delivered, and what is the usual and average loss of oil by leakage in such a voyage, when properly wet down twice a week.

See Phillips v. Clark, 5 C. B. (N. S.; Am. Ed.) 881, 2 C. B. (N. S.) 156; Ohrloff v. Briscall, L. R. 1 P. C. 231.

Case No. 6,881.

In re HUNT.

[2 N. B. R. 539 (Quarto, 166) [1]; 1 Chi. Leg. News, 169.]

District Court, D. Rhode Island. Feb. Term, 1869.

BANKRUPTCY — SALE IN CONTEMPLATION OF—EVIDENCE—GOOD FAITH OF VENDEE—PROCEDURE.

1. Congress may, within the limits of federal jurisdiction, modify or repeal the existing rules of evidence, and any such modification should not be left to inference, but should be the subject of clear and unambiguous enactment.

2. A sale made by a person contemplating bankruptcy is not ipso facto void; but if made without the usual course of trade, or is unusual in the time, or place, or price, or character, or quantity of the goods sold, such facts as against the vendee are held to be prima facie evidence of fraud in him.

[Cited in Graham v. Stark, Case No. 5,676; Potter v. Coggeshall, Id. 11,322; Hall v. Hayner, Id. 5,933; Re Marter, Id. 9,143.]

[Cited in Washburn v. Huntington, 78 Cal. 576, 21 Pac. 305.]

3. Sales involving all the elements of fraud, so far as the vendor is concerned, may still stand, on account of the good faith of the vendee.

4. In such case the proper and only remedy for the creditors is to oppose the bankrupt's discharge, as provided in the twenty-ninth section of the bankrupt act [of 1867 (14 Stat. 531)]

5. Section six of said act contains the only provision for the determination of substantial rights by informal or summary proceedings; i. e., where the parties by consent submit to the jurisdiction, and present the issue informally to the court for its decision.

6. In cases of fraud the court may assume the custody of personal property in the hands of the vendee of the bankrupt, purchased before the vendor is adjudged a bankrupt. *Held*, in this case, the vendees having purchased in good faith, without knowledge of the bad faith of the vendor, and being able to respond to an adverse final judgment upon the question of title, that the court would not settle the question upon motion.

[1] [Reprinted from 2 N. B. R. 539 (Quarto, 166), by permission.]

[In bankruptcy. In the matter of Josiah D. Hunt.]

BULLOCK, District Judge. This is an application in the nature of a motion by the assignee in bankruptcy, that A. Alexander and others, co-partners, &c., pay into the registry of the court certain moneys, and deliver over to the marshal certain merchandise. In support of the application, is the sworn statement of the assignee to the effect that, the day before Hunt was adjudged a bankrupt, he conveyed his stock in trade, tools, fixtures, &c., of a large value, to the said Alexander & Co.; that Hunt was then insolvent; that this sale and conveyance was made by him in contemplation of bankruptcy, and in fraud of the provisions of the bankrupt law; and was not made in the usual course of his business as a trader; and that this property, or its proceeds, which is the property and moneys before referred to, still remains in the hands of the said Alexander & Co. In further support of the application, the assignee put in proof the bill of sale of this property by the bankrupt to Alexander & Co., for the purpose of showing that the instrument of transfer, although purporting to convey merchandise of a large value, and of some variety of character, and situated in three different stores, was most general in its terms, and without particular recital or description of the property, and was not accompanied with such invoices, bills, or other documentary evidence of sale as ordinarily accompany transfers of this character from one trader to another. The respondents, Alexander & Co., do not controvert the material allegations of the assignee, but set forth, under oath, as cause why the interlocutory order asked for should not be made, that they purchased the property in question of the bankrupt, before he was adjudged such, in good faith, for a valuable consideration, and at a price, though somewhat less than its value, yet not so grossly inadequate as to be a badge of fraud on their part; that, at the time of such purchase, they had no knowledge of Hunt's insolvency, or that he contemplated bankruptcy, or that the sale so made by him was made by him to defeat, or would have the effect of defeating the provisions of the bankrupt act; and (which is not controverted by the assignee) that they are responsible, having ample means to answer any judgment or decree that, upon final hearing, may be entered against them, upon a trial of the issue of title.

It also informally appeared at the hearing, that a portion of the stock in question was now the subject of a suit or suits in replevin, by creditors claiming both, adversely to Alexander & Co., as well as the assignee, and that its actual possession was not now with the respondents. It is not averred in the record, nor is proof adduced by the assignee, that the respondents, Alexander & Co., at the time of purchase, had reason to believe

the bankrupt insolvent. They deny, upon oath, any such knowledge. How far such an allegation, followed by corresponding proofs, may be evidence of the gravamen of the case upon an issue of title, I will not undertake to say, as this application does not involve that issue absolutely and ultimately. I have not thought it expedient to rule the motion, upon the somewhat technical, because amendable ground, of the materiality or immateriality of such allegation; and especially since the assignee claims that the sale in question, not being in the usual course of business, no title passes to the vendee of the bankrupt, except and until this legal presumption is overcome by proof. An examination of the law will, I think, show this not to be a sound construction of the provision referred to. Congress undoubtedly may, within the limits of federal jurisdiction, modify or repeal even the existing rules of evidence; but since these rules have been so long established, are so reasonable, and serve so wise a purpose in the elucidation of truth in the administration of justice, any such modification should not be left to inference, but should be the subject of clear and unambiguous enactment. The thirty-fifth section of the act does not declare any sale by a bankrupt, or a person contemplating bankruptcy ipso facto void; but the sale, if to a pre-existing creditor, must be made within four months; if to one not such a creditor, must be made within six months, before petition is filed; and must be to a vendee who then, that is, at the time of purchase, has reasonable cause to believe the vendor to be insolvent, or to be acting in contemplation of insolvency, and who has reasonable cause to believe that the sale is made with a view to prevent the property from coming into the possession of the assignee, for the purpose of equal pro rata distribution among all the creditors of the bankrupt, and so defeating one of the main objects for which this law was enacted. Such a sale is void. And if the sale is made, not without the usual course of general trade, but without the usual course of trade of the debtor—that is, if it is unusual in the time, or place, or price, or character, or quantity of the goods sold, or in other respects, having reference to the then business of the vendor; such facts, as against the vendee, shall be prima facie evidence of fraud in him; in other words, in the absence of counter testimony, it will be presumed that he, at the time of purchase, knew that the vendor was insolvent, or was contemplating bankruptcy, and that the vendor was making the sale to prevent all, or some portion of his property, as the case may be, from passing to his assignee, and so evading and defeating the provisions of the law. But upon an issue of title, between the assignee and vendee, it would be first incumbent upon the former to show a sale, and within the time limited, and its unusual character, before the presumption of fraud would arise against the vendee. Cases may occur of sales involving all the elements of fraud, so far as the vendor is concerned, and yet stand, by the palpable presence of good faith, in the vendee. And in such cases the proper and only redress for the creditor is to oppose the bankrupt's discharge as provided in the twenty-ninth section, and subject him to the penalties provided by that and the forty-fourth section; for it does not follow, especially in cases of involuntary bankruptcy, that the instituting of proceedings necessarily involves a discharge of the bankrupt.

Having thus reviewed some of the questions incidentally involved and discussed at the hearing, I now proceed to consider the more distinct issue which the motion presents, and it is this: Shall the court, by summary order, assume the custody of moneys and personal assets, now in the hands of the vendee of the bankrupt, and purchased before the vendor is adjudged such upon the precise state of facts existing here, as shown by the ex parte proofs of the litigants, and anterior to a trial upon the issue of title. That the court may, in a proper case, exercise such control, was substantially conceded upon the argument—I, therefore, in passing, only remark, that it is a power necessary to the due administration of the law—it is a power impliedly, if not expressly granted in the first section of the act. It is a power impliedly granted by the twenty-fifth section, though not to be exercised under that section in a given state of case, which may or may not arise. That, in a proper case, this power should be exercised, and if need be, in this form of procedure, there can be no doubt; as when, from the nature or situation of the property, or the character of the alleged purchaser, or from both causes, the safety of the fund calls for the speedy intervention of the law. The bankrupt act necessarily vests a large measure of discretion in the court or judge administering it. This discretion, however, is not a wanton power. It is not a power to order this or that summarily and upon motion, because it may. Neither is it the power that makes the court the counsel, or advisor even, of the assignee, to enforce his rights, and especially not to prejudge questions that may afterwards come before it for adjudication. It is a judicial discretion to be carefully exercised in view of the rights of all, to be exercised so far as may be in accordance with sound precedent, and is so to mould itself to, and meet the necessarily new questions, not of practice alone, but of right, as they arise, that while on the one hand it is administering this law in the true intent and spirit of its enactment, so as to effectuate the really equitable and beneficial ends it seeks to attain; it is not, on the other, abrogating those useful and striking analogies so well known to the profession, nor those rules of practice and judicial pro-

cedure now so interwoven with our system of jurisprudence as to have become almost an inherent and essential part thereof.

Assuming all the facts put in proof by the assignee to be true, and also their permanency and materiality, it still appears that the property in question came to the possession of the respondents before an act of bankruptcy, adjudged under a purchase, for a monied consideration, paid at or about the time, and one not by any means grossly inadequate; that only a part of this property is now in their custody, having been removed therefrom by the legal proceeding involving its title. The respondents swear that they bought it in good faith, and did not know of the mala fides of the vendor, and that they are able to respond to an adverse final judgment upon the question of title. The forty-second section provides generally for the taking possession of the property of the bankrupt. General order thirteen, as recently amended, and undoubtedly so amended and adopted because of the too general terms of the original order to meet vexed questions of possession pendente lite, provides a particular course of procedure in all cases of controverted possession, both when the property has already come to the hands of the marshal as when it is in the hands of the adverse claimant, and the assignee or petitioning creditor seeks its possession. It is a course of procedure in principle familiar to the common law in actions of replevin, and undoubtedly borrowed from it, because of its analogy and fitness. It is an appropriate and just course of procedure. By the bond it requires it makes the provisional custodian careful of the right. With this remedy prescribed, and in a case where no haste is required, where no risk of irretrievable loss is shown or suggested, to change the custody of this property by summary order upon mere motion would be almost to create rather than administer a remedial process.

A review of the bankrupt law as a whole, and of the general orders promulgated under, and in pursuance of it, and to carry its provisions into effect, will show that ample as are the powers vested in the courts and in the judges who are to administer it, these powers are to be exercised as far as may be, and when no special provision is otherwise made, in accordance with settled and well-known forms of judicial procedure. The thirty-second general order provides that the rules of the circuit and supreme courts, respectively, at law and in equity, shall govern the practice and procedure in this court in administering this law. The amendment to this general order empowers this court not to repeal, but to modify these rules, to speed the progress of cases here, with the further power to make special orders to meet the exigencies of a particular case. The tenth section of the act provides for the taking of appeals, and the suing out of writs of error. The twenty-sixth general order prescribes that such appeals shall be taken, and such writs sued out, in the modes now provided by law or by rule. The language of the fourteenth, sixteenth, and thirty-fifth sections clearly implies that an assignee in bankruptcy shall establish his rights and enforce his remedies as other creditors establish and enforce theirs. And the fair construction of the first section is that, in cases of disputed title, unless it is otherwise specially provided, the proceedings shall be as in the circuit court, under the second section, in equity and by bill or petition. The tenth section of the act imposes upon the judges of the supreme court the duty of framing general orders, to regulate the practice and procedure of the district court in bankruptcy. No order has been framed to regulate the course of procedure in cases of disputed possession, pendente lite. There is, so far as I am aware, but one provision in the whole act for the determination of substantial rights, by informal or summary proceedings, and that provision is found in the sixth section, where the parties, by consent, submit to the jurisdiction, and present the issue informally, so far as the mode of procedure is concerned. to the decision of the court. For these reasons the motion in this case is overruled.

Case No. 6,882.

In re HUNT et al.

[5 N. B. R. 433.] [1]

District Court, D. New Jersey. Oct. 17, 1871.

BANKRUPTCY—PETITIONING CREDITOR—PROVABLE DEBT—MERGER IN JUDGMENT—PREFERENCE—SURRENDER.

1. Creditors petitioned to have debtors adjudged bankrupts. The debt due the creditors had been merged in a judgment which was clearly a fraudulent preference. *Held*, that the debt having been thus merged it was not a provable debt, and a petition founded upon it could not be sustained.

2. In such a case, however, creditors will be allowed to surrender their preference, and upon their doing so, the acts of bankruptcy being confessed, an adjudication will be ordered.

[In bankruptcy. In the matter of M. Hunt and W. E. Hornell.]

NIXON, District Judge. Objections are made to an adjudication of bankruptcy in this case, because the petitioning creditor's debt is not one provable in bankruptcy. The petition alleges that the nature of the creditor's demand against the alleged bankrupts is, first, a promissory note dated February eighth, eighteen hundred and seventy-one, for one hundred and ninety-one dollars and ninety-seven cents, payable two months after date, and a book account for goods, wares and merchandise, sold and delivered by the petitioning creditors to the debtors, amounting in the aggregate to four hundred and seven-

[1] [Reprinted by permission.]

teen dollars and five cents: and that the acts of bankruptcy committed are (1) a general assignment of their property under the state law, and (2) the non-payment of commercial paper more than fourteen days after its maturity. The acts of bankruptcy are admitted, but the adjudication is resisted upon the ground that the debt of the petitioning creditors has been merged in a judgment; that a suit has been brought upon the said debt in the state court and a judgment obtained thereon against the debtors; that said judgment is still outstanding and a lien upon their property, and that the same was obtained by the creditors after they had reasonable cause to believe the debtors to be insolvent, and hence is a fraud upon the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. This is an involuntary proceeding, and one of the facts necessary to exist in order that the court may have jurisdiction is that the petitioning creditor shall have a debt against the alleged bankrupt provable under this act amounting at least to two hundred and fifty dollars.

As this case is now presented to the court, the petitioning creditors have not a debt of this character. With a full knowledge that their debtors had committed an act of bankruptcy by allowing their commercial paper to go to protest, and not paying it within a period of fourteen days, and thus having reasonable cause to believe them to be insolvent, instead of taking their debtors into the court of bankruptcy, that their property might be administered and equally distributed according to the beneficient aims of the bankrupt act, they hurried into the state courts and obtained a judgment upon their claim hoping, in a race of diligence, to outstrip and obtain a preference over other creditors, contrary to and in fraud of its provisions. Finding that they were foiled in their endeavor to acquire a lien upon their debtors' property by the conveyance of all their estate to an assignee, for the benefit of their creditors, under the state law the petitioning creditors then filed their petition in bankruptcy in this court, against their debtors, alleging their debt to consist of the promissory note and book account, which had already been merged in the judgment then and now subsisting and outstanding against their debtors. The evidence of debt which the petitioning creditors have against the alleged bankrupts, is not the promissory note and book accounts, but the judgment in which they have merged, and the judgment obtained under these circumstances is clearly not a debt provable under the act, but is void as a fraudulent preference.

The petitioning creditors having placed themselves in this dilemma, is there no remedy for them? The answer to this question will be found in a lawful consideration of the provisions of the twenty-third and thirty-ninth sections of the act. By the twenty-third section it is provided that, "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference." In the thirty-ninth section it is enacted "that any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, * * * or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, or to defeat or delay the operation of this act, * * * shall be deemed to have committed an act of bankruptcy, * * * and shall be adjudged a bankrupt, * * * and if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to the act, provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy."

The provisions of these two sections, upon their face so contradictory, must, if possible, be so reconciled that both may stand. The most satisfactory way to do this is to hold that the prohibition of the creditor to prove his debt, in the thirty-ninth section, only applies to those cases where he has refused upon demand to surrender his preference and compelled the assignee by suit, to recover back the money or property so claimed and held by him in fraud of the provisions of the act. He may surrender his preference under either section, and prove his debt before a recovery against him by judgment, but after a recovery he is not permitted to prove under either. In re Montgomery [Case No. 9,728]; In re Davidson [Id. 3,599]. But this construction of the apparently contradictory provisions of these sections does not quite reach the difficulty in the present case. The surrender provided for is a surrender to the assignee. Can it be made by a petitioning creditor, when he files his petition and before an assignee has been appointed, so as to make his debt provable under the act? Looking at the spirit of the law and the design of the surrender, I am of the opinion that he can, by setting forth in his petition all the proceedings that have been had to obtain the preference, and by voluntarily surrendering such preference for the general benefit of the creditors of the estate. After the petition has been filed, the creditor himself and all his interest in the alleged bankrupt's property as well, are under the

control of the court, and the court is in a position to compel him, at any subsequent stage of the proceedings, to make good his tender, and to surrender to the assignee, before he shall participate in a dividend, and thus the object of the law, to wit, equality in the distribution of the assets, is secured.

In the present case, if the petitioning creditor shall amend his petition, setting forth to the court the judgment obtained and making a surrender of all preference under or by virtue of it, an order of adjudication will be made upon the acts of bankruptcy alleged and confessed. If not so amended, the proceedings do not disclose a provable debt under the act, and the petition must be dismissed with costs.

Case No. 6,883.

In re HUNT.

[5 N. B. R. 493;[1] 4 Chi. Leg. News, 5; 2 Pac. Law Rep. 146.]

District Court, D. California. Sept. 30, 1871.

BANKRUPTCY—HOMESTEAD.

A bankrupt applied to the court in bankruptcy for an order to the assignee, requiring him to set apart certain real estate as his homestead, and for an injunction restraining a creditor who had recovered a judgment and issued an execution thereon prior to the bankruptcy, from proceeding to sell the property. The application was denied for the reasons that if the property in question be a homestead, the title is unaffected by the bankrupt act [of 1867 (14 Stat. 517)]. If it is not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has been wrongfully seized in execution, the bankrupt has the same rights before the state tribunals as any other person whom it is sought to deprive of a lawful homestead.

[Cited in Re Wyllie, Case No. 18,112; Re Everitt, Id. 4,579; Re McKenna, 9 Fed. 36.]

[In bankruptcy. In the matter of C. Hunt.]

HOFFMAN, District Judge. This was an application by the bankrupt for an order to the assignee requiring him to set apart certain real estate as the homestead of the bankrupt, and for an injunction restraining a creditor who had recovered a judgment against the bankrupt, and issued an execution thereon prior to the bankruptcy, from proceeding to sell the property. The register has reported that in his opinion the property in question has been duly declared a homestead and is exempt from forced sale. In this opinion I am inclined to concur, but I see no reason for making the order and issuing the injunction prayed for. If the property be the legally declared homestead of the bankrupt, no title to it passed to the assignee, and it was wholly unaffected by the assignment. The setting it apart by the assignee could therefore convey no additional title. It would only amount, when approved by the court, to a declaration that this court, as a court of bankruptcy, has no concern with it.

The provisions of general orders in bankruptcy No. 19, requiring the assignee to report to the court the "articles set off to the bankrupt under the fourteenth section of the act, with the estimated value of each article," evidently refer to the "necessary household and kitchen furniture and other articles and necessaries not exceeding $500 in value," which the assignee is, by that section, required to "designate and set apart," and not to real estate held as a homestead, the title to which, as the act expressly declares, does not pass to the assignee and is not "impaired or affected by any of the provisions of the act." Undoubtedly if the assignee were proceeding to sell or to treat as assets property exempted from forced sale, the court, on the application of the bankrupt would restrain him. But in this case the assignee makes no such attempt, nor has he any interest in the question; for the property, if not a homestead, is subject to the judgment lien of a creditor for an amount which would absorb its proceeds. The real contest is between the bankrupt and the judgment creditor, and the application is an attempt to procure from the bankruptcy court a decision of a question which properly belongs to the tribunals of the state, under whose laws the homestead rights were acquired. I think it clear that no such use can or ought to be made of this court. A homestead is not a "necessary article" to be set off by the assignee. The provisions of the nineteenth rule are therefore inapplicable. The assignee makes his[2] claim to the property and if it be a homestead, the title to it is unaffected by the bankrupt act. If it be not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has wrongfully been seized in execution, the bankrupt has the same rights before the state tribunals as any person whom it is sought to deprive of a lawful homestead. The application is, therefore, refused, and the temporary injunction dissolved.

Case No. 6,884.

In re HUNT.

[17 N. B. R. 205;[1] 35 Leg. Int. 71.]

District Court, D. New Jersey. Feb. 5, 1878.

BANKRUPTCY—PROOF OF DEBT—ASCERTAINMENT OF VALUE OF MORTGAGE SECURITY.

After the adjudication, a creditor, who held a mortgage for fifteen thousand dollars on the bankrupt's real estate, had it sold at public auction and purchased it himself for one hundred and forty-two dollars and fifty cents. He then proved for the residue of the mortgage as an

[1] [Reprinted from 5 N. B. R. 493, by permission.]

[2] [4 Chi. Leg. News, 5, gives "no."]

[1] [Reprinted from 17 N. B. R. 205, by permission.]

unsecured claim at the first meeting of creditors. The register allowed the proof against objections and permitted him to vote for assignee, whereby a majority in value of the creditors was obtained: *Held*, that no such mode of ascertaining the value of mortgage security is recognized by the bankrupt act [of 1867 (14 Stat. 517)]; that the register had no authority to admit the proof and allow the vote against objection; and that the choice of the assignee under such circumstances was irregular.

[In bankruptcy. In the matter of William R. Hunt.]

NIXON, District Judge. At the first meeting of creditors, in the above case, held for the choice of an assignee, before Mr. Register Stratton, at his office, in the city of Camden, on the 28th and 29th days of January, 1878, twenty-nine creditors, proving debts to the amount of forty thousand three hundred and fifty-five dollars and eighty-nine cents, voted for Mr. Lincoln D. Farr, and forty-three, proving debts to the amount of forty-six thousand six hundred and ninety-nine dollars and fifty-five cents, cast their votes for Mr. James Flynn, a majority in number and value being in favor of Mr. Flynn, I am asked to prove and confirm his election. It appears, however, that amongst the proofs of claim offered was one by Andrew M. Moore, for twenty-one thousand eight hundred and fifty-seven dollars and fifty cents, and that objections were duly made by other creditors to his proving or voting, upon the ground that a large portion of his debt was secured, and that he had not surrendered his security before making proof, as required by section 5075 of the act. The register overruled the objections, and allowed the creditor to vote for Mr. Flynn, whereby the requisite majority in value was obtained for him. If his vote was improper, or, under the circumstances, unlawful, then an election by the creditors fails, as the greatest part of the creditors in number is for one candidate, and the greatest part in value for the other. The objection to the proof of claim was this: The creditor held a fourth mortgage upon the real estate of the bankrupt for fifteen thousand dollars. Instead of surrendering it before proof of his debt, he attempted to determine its value by a public sale of the mortgage. He sent it, without the accompanying bond, to M. Thomas & Sons, auctioneers, and caused it to be advertised for sale, at their auction store in the city of Philadelphia, on the 26th of January, 1878. He, of course, became the purchaser, for the net sum of one hundred and forty-two dollars and fifty cents, and reckoning that to be the value of his security, he made a proof of claim for the residue of his mortgage debt, to wit, fourteen thousand eight hundred and fifty-seven dollars and fifty cents, which amount went to make up his whole claim against the bankrupt estate of twenty-one thousand eight hundred and fifty-seven dollars and fifty cents.

These facts appear by the affidavit of the attorney for the excepting creditors sent up by the register with the other papers in the case. It is objected that no such mode of ascertaining the value of a mortgage security is recognized by the bankrupt act, and that the register exceeded his authority when he decided in favor of the validity of the proof of claim and allowed the creditor to vote. Both objections are well taken. The register ought to have said to the proving creditor: "The bankrupt act has provided no machinery for determining the value of your mortgage security, before an election is had of an assignee. If you wish to vote upon the debt, which the mortgage was given to secure, you must here and now surrender the mortgage, and give your lien and stand as an unsecured creditor. If you do not consent to this, I must postpone the proof of your claim until after the election, and allow you to prove and vote only upon that portion for which you hold no security. Your method of determining the value of your mortgage was essentially ex parte, peculiar, and unauthorized by the law at this stage of the proceedings. The forms of sale that you invoked do not change your relations to the bankrupt's estate. You were the purchaser, and you still hold the security, as perfect a lien as it was before the sale took place." Or, if he had taken a different view of the objections raised by the excepting creditors, and had deemed them too trivial to authorize him to postpone the proof of claim, he should have said to the exceptants: "I cannot postpone this proof, because, in my judgment, it is admissible, notwithstanding your objections. But, unless your objections are withdrawn, I shall adjourn the election to a future day, and send the question to the court for decision. I have no power under the law to admit the proof. My power ends with the postponement. All unsecured creditors have the right to vote for an assignee, and believing that this creditor ought to be permitted to cast his vote for the whole amount of his claim—less the sum that the mortgage brought at the sale—I must await the action of the court upon the matters raised by the exception."

I did not suppose it was an open question, that a secured creditor cannot vote for an assignee without first surrendering his security. If authority is needed for such a proposition, see Blum. Bankr. 169; Bump, Bankr. (8th Ed.) 117; In re Davis [Case No. 3,614]; In re Hanna [Id. 6,027]; In re Parkes [Id. 10,754]. And that the power of the register is exhausted when he postpones the proof of claim, and that he cannot admit the claim and allow the vote against objection, see In re Noble [Id. 10,282], and In re Bartusch [Id. 1,086]. In the last case, Judge Lowell, in discussing the power of registers, says: "If debts are objected to, and the register considers them not doubtful, but

clearly valid and admissible, he yet cannot admit them to proof against objection, because that would be the decision of a question which the statute gives him no power to decide." The admission of the proof complained of determined the choice of the assignee. If the creditor had proved for his unsecured debt of seven [thousand] [2] dollars he would have been entitled to vote, but such a reduction of his claim would have given to the opposing candidate the greater part of the creditors in value, and hence defeated the election. For these reasons I cannot approve the choice of Mr. Flynn, but will hear the counsel representing the opposing interests on the question whether a new election should be ordered, or an assignee be appointed by the court.

HUNT, In re. See Case No. 5,305.

HUNT (BEDFORD v.). See Case No. 1,217.

HUNT (BLABON v.). See Case No. 1,455.

HUNT v. The CLEMENT. See Case No. 2,880.

Case No. 6,885.

HUNT v. The CLEVELAND.

[6 McLean, 76; [1] Newb. 221.]

Circuit Court, D. Illinois. Oct. Term, 1853.

COMMON CARRIERS OF GOODS—PROVISION OF BILL OF LADING—NEGLIGENCE—BURDEN OF PROOF—ACCIDENT — NOTE OF PROTEST BY MASTER OF VESSEL.

1. Several casks of hardware were shipped at Ogdensburg for Chicago. The casks were opened and examined at Chicago, and the hardware was found damaged. During the voyage, the propeller encountered a storm, and shipped water and leaked. No positive proof was given as to how the damage was done. The bill of lading promised to deliver the merchandise in good order, the dangers of navigation only excepted. The vessel was tight, staunch and well manned at the time of shipment. The damage being shown, it devolved on the carrier to establish it was within the exception of the bill of lading.

[See Bearse v. Ropes, Case No. 1,192.]

2. He has shown facts from which this can fairly be inferred.

3. The shipper has not proved that the damage could have been avoided by the exercise of reasonable care and skill. The carrier is therefore not liable.

[Cited in Steele v. Townsend, 37 Ala. 247.]

4. It is a useful and proper precaution for a master of a vessel to note a protest at the first port of his arrival, after an accident, but it is not an indispensable duty.

[Appeal from the district court of the United States for the district of Illinois.

[This was a libel by Edwin Hunt against the propeller Cleveland for damages, alleged to have been caused by the negligence of the claimant, to certain goods belonging to the libellant.]

[2] [35 Leg. Int. 71, gives "hundred."]

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

Mr. Stickney, for libellant.

Mr. Waite, for claimant.

DRUMMOND, District Judge. On the 8th of October, 1851, were shipped on the propeller Cleveland, at Ogdensburg, New York, several casks of hardware, for Chicago, belonging to the libellant. On the arrival of the propeller at Chicago, on the 1st of November, when the casks were opened and examined, it was ascertained that the hardware had been wet and damaged to an amount varying from three to five per cent., according to the kind of goods. The libel alleges that this damage was sustained in consequence of the carelessness and unskillfulness of the carrier. The claimants, in their answer, insist that the injury was the result of the dangers of the sea, and was unavoidable. The bill of lading states that the merchandise was shipped in good order and condition, and was to be delivered in like good order and condition—the dangers of navigation only excepted. The sole question in the case is whether the damage was within the exception in the bill of lading. The proof is that the vessel was tight, staunch, well manned and equipped in every respect. The injury being established, it is incumbent on the carrier to show that it was caused by the dangers of navigation, and if it appear it was the consequence of such dangers, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill on the part of the carrier. Clark v. Barnwell, 12 How. [53 U. S.] 272.

Apply these principles to the facts in this case. The casks were stowed in the after part of the forward hold, which was a proper and safe place for that kind of merchandise. The propeller had a cargo of various goods, for Cleveland, Sheboygan, Port Washington, Milwaukee, Racine, Southport and Chicago. Nothing of importance occurred till the 16th of October, when being off Saginaw Bay, the cylinder of one of the engines broke, and other damage was done which compelled the vessel to return to St. Clair to repair. The engine was repaired and they left St. Cloud on the 21st. After leaving St. Clair, and passing Point of Barques, about midnight of that day they were met with a very severe gale from the West. The sea made a clean breach over the vessel, washed things from the promenade deck, stove in the larboard gangway, which caused her to ship a considerable quantity of water which went through the hatch-way into the fire-hold, and to leak. All hands were immediately called and set to pumping. The propeller was put head to the wind and worked up under the lea of the land. At the end of about four hours' labor, they succeeded in freeing her from the water, and she did not afterwards leak more than usual. The gangway had been well and se-

curely fastened. They had heavy weather the remainder of the voyage, but nothing further occurred of any moment. The witnesses who testify to these facts are the captain, the engineer, the clerk and the mate. There is no contradictory testimony. They all concur in the belief, that whatever damage was done to the hardware was in this gale of wind, and that no human skill or prudence could have prevented it.

It seems fairly to be inferred from the proofs, that the damage was caused by the gale of wind, which resulted in wetting the merchandise, either by leakage of the vessel or by shipping water. The damage is thus shown to be caused by the dangers of navigation. It follows, that the shipper must establish negligence or want of skill in the carrier. It must not be matter of doubt merely, but it shall clearly appear there was a want of proper care, skill or diligence. Now, in this case, the court must be satisfied, notwithstanding the statements of the witnesses that there was proper care and skill, that there was not. It is certainly true that the court is not bound by the mere statements of the witnesses on this point; but facts must appear from which the court is able to infer there was a want of due care on the part of those who had the management of the propeller. There is nothing in the facts shown, to warrant such a conclusion. The testimony comes from those on board the vessel, and this should lead to great caution in receiving it. Any considerable experience in this class of cases teaches us to scrutinize closely everything that may be said. But the testimony cannot, obviously, come from any other source. We must endeavor to draw just conclusions from it, making all due allowance for the influences which may be supposed to affect the minds and memory of the witnesses.

Some stress was laid on the circumstance of there having been no protest noted until the arrival of the vessel in Chicago, notwithstanding she stopped at various places before her arrival at that port. It is a useful and proper precaution for a master of a vessel to note a protest on his arrival at the first port—when it is in his power to do so—in all cases where any accident has occurred, or any injury been sustained, or any possibility thereof; but it is not an indispensable duty, without which the carrier cannot be relieved from liability. It is always highly desirable that a statement should be made of all the circumstances attending any casualty or accident on ship board, while the facts are fresh in the mind, and before controversy has sprung up in relation to them. Still, if it be omitted, it operates against the carrier only by throwing a cloud over the transaction—at most, by casting something of suspicion on the affair. It cannot be said that the omission of the carrier shall throw upon him all the consequences of negligence in a clear case of none in fact. It may well have its effect in a doubtful case, but not in one where there is nothing to cause the mind to hesitate in its conclusion. Abb. Shipp. 497 (side paging 380); 9 Leigh, 54; Conk. Adm. 684, etc.; Senat v. Porter, 7 Term R. 158; Arn. Ins. 1337; The Emma, 2 W. Rob. Adm. 315. There was a protest noted and properly extended on the arrival of the propeller at Chicago, but it has not been introduced. No objection has been taken on that point by the libellant. It is said to be lost or mislaid. I think it is reasonable to conclude under the circumstances of this case, if it were here it would shed no new light upon the subject of this controversy. The libel must be dismissed with costs.

Case No. 6,886.

HUNT v. COLBURN et al.

[1 Spr. 215.] [1]

District Court, D. Massachusetts. Oct., 1853.

SEAMEN—WRONGFUL DISMISSAL IN FOREIGN PORT—MEASURE OF DAMAGES.

1. If, during a voyage for which a seaman has shipped, he is wrongfully left by the master in a foreign port, the owners are liable.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925.]

[See The America, Case No. 286.]

2. The measure of damages, is an indemnity for all that he has lost and suffered.

3. This indemnity may be either more or less than wages and expenses, up to the time of his own, or of the ship's return home. It may include the value of his clothing detained by the master.

4. The circumstances of his particular case will be examined, to ascertain what would be adequate compensation, for the violation of his contract by the master.

This was a libel in personam, promoted by John Hunt, second mate of the bark Trinity, against the master and owners, claiming damages for the wrongful dismissal of the libellant, by the master, at Galveston, Texas. There was also a claim for the value of his clothes, which the libellant was compelled to leave on board of the Trinity, and for wages.

C. G. Thomas, for libellant.

C. B. Goodrich, for respondent.

SPRAGUE, District Judge. The libellant, while ill, at Galveston, requested to be discharged from the bark, that he might go to the hospital. He was told by the captain, that he would discharge him, when the return cargo of cotton was stowed in the vessel. This service was performed under the superintendence of the libellant. Afterwards, as the vessel was casting off from the wharf, the libellant not having been discharged, stepped on shore, and refused to go on board, saying that he wished to

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

consult a physician, and also to take counsel as to his legal rights. His clothes remained on board. Within twenty-four hours from this time, he procured a man to take him down to the bark, lying about ten miles distant. When he reached the vessel, the captain pointed a pistol at him, and threatened to shoot him, if he came on board. The libellant replied that he wanted his clothes, and also two dollars to pay the man for bringing him down to the bark. He offered to go on board, and work his passage to Boston. But the captain refusing, told him he would not have him come on board again; but if he wanted his clothes, to come down again in a pilot-boat for them. The captain sailed without the libellant, and detained his clothes. The libellant was detained at Galveston, by illness, and did not arrive at Boston, until seven months after the departure of the vessel.

Under these circumstances, the owners are liable for the wrongful discharge of the libellant, by the master, and also for the direct and necessary consequences resulting therefrom, one of which was the loss of the libellant's clothes,—see Hutchinson v. Coombs [Case No. 6,955],—though they were not converted by the master to his own use, but were left exposed, until they were destroyed. As to the measure of damages to which the libellant is entitled, for being wrongfully left at Galveston, the rule has sometimes been stated to be wages up to the return of the vessel, and expenses, deducting therefrom any wages earned by the party in the meantime; and, in other cases, that wages and expenses should be allowed up to the time of the libellant's return, he using due diligence, and deducting wages earned during that time. But there are cases in which neither of these rules will give the true measure of indemnity. And, consequently, the court will look at all the circumstances of the case, in fixing the amount of damages. In the present case, the libellant will be entitled to wages during the time he was necessarily absent, his expenses, including his passage home, and the value of his clothes. Decree accordingly, $235, and costs.

See Sheffield v. Page [Case No. 12,743].

Case No. 6,887.

HUNT v. DANFORTH.

[2 Curt. 592.] [1]

Circuit Court, D. Rhode Island. June Term, 1856.

BILL IN EQUITY — ADEQUATE REMEDY AT LAW — SEPARATE CASE OF A MARRIED WOMAN—COVENANT RUNNING WITH LAND—INSOLVENCY.

1. The provision in the judiciary act (1 Stat. 82) § 16, that a suit in equity shall not be sustained when there is a plain, adequate, and complete remedy at law, is only declaratory of what would otherwise be held in equity. A feme covert has not such a remedy at law to recover money held to her separate use.

[Cited in Re Sabin, Case No. 12,195.]

[Cited in Shepley v. Atlantic & St. L. R. R. Co., 55 Me. 404.]

2. An assignment of all the right, title, and interest of the lessee, conveys his right to compensation for new erections on the land, covenanted by the lease to be paid for by the lessor; for such a covenant runs with the land.

[Cited in Ecke v. Fetzer, 65 Wis. 62, 26 N. W. 266.]

3. A representation of insolvency does not deprive a citizen of another state of the right to bring a suit against the administrator in a court of the United States, and the presentation to the commissioners, and the adjudication of a claim of which they have not jurisdiction, is not a bar.

[Cited in Demeritt v. Exchange Bank, Case No. 3,780; Green v. Collins, Id. 5,755; Edwards v. Hill, 8 C. C. A. 233, 59 Fed. 725.]

4. In Rhode Island, commissioners of deceased insolvents have not jurisdiction of merely equitable claims.

This was a bill in equity, which came on to be heard on a demurrer. The substance of the stating part of the bill was as follows:—

"Mary Hunt, of the city of Worcester, in the county of Worcester, in the commonwealth of Massachusetts, a citizen of the state of Massachusetts, wife of Stephen W. Hunt, of said Worcester, by her next friend, John W. Wetherell, of the city and county of Worcester, in the commonwealth of Massachusetts, a citizen of the state of Massachusetts, her husband, Stephen W. Hunt, joining her therein, he being of said county and commonwealth, a citizen of said state of Massachusetts, brings this, her bill, against Walter R. Danforth, of the city and county of Providence, and state of Rhode Island, and a citizen of the state of Rhode Island, &c., executor of the last will and testament of Burrington Anthony, deceased, late of said city and county of Providence and state of Rhode Island, &c., late a citizen of the state of Rhode Island, &c. And thereupon your oratrix, as aforesaid, complains and says, that on the 21st day of March, A. D. 1840, she being then a resident of Oxford, in the county of Worcester aforesaid, and being then sole and unmarried, being the widow of Benjamin T. Town, entered into a certain indenture of three parts, in contemplation of marriage with Stephen W. Hunt, then of Providence, aforesaid. Your oratrix being the party of the first part, said Stephen being the party of the second part, and Ira M. Barton, of said Worcester, being the party of the third part. Whereby it was agreed under their respective hands and seals, that said Mary and Stephen should, during their intermarriage, each hold their respective estates with all the interest, rents, and profit therefrom accruing, separate and apart from the other. That by said indenture your oratrix gave, granted, sold, and conveyed unto said Barton, the party of the third part, and

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

to his successors in said trust, certain property (as by said instrument will more fully appear, a copy of which, marked 'A,' is hereto annexed and made part of this bill, the original of which will be produced here in court when required) to the sole and separate use of your oratrix, her heirs and assigns for ever in trust, among other things that he or they shall, during the intermarriage of the said Mary, convey, pay over, and disburse the same for her use.

"And your oratrix further says, that on the twenty-second day of March, A. D. 1840, she was legally joined in marriage to the said Stephen W. Hunt, at Thompson, in the state of Connecticut, and that she has ever remained and now is his wife.

"And your oratrix further says, that upon the settlement of her deceased father's estate, the said Barton, by virtue of the provisions of said indenture, received large sums of money as the distributive share of your oratrix therein; and at the request of your oratrix said Barton did pay over to her the sum of $600, on the 8th day of February, 1841, and on the 10th day of the same month the further sum of $403.45, and various other sums at various other times, which she received as her own separate estate and held and appropriated as such; that thereafter, namely, on or about the sixteenth day of November, 1841, she loaned to Nahum Sibley, then of Oxford, in the state of Massachusetts, the sum of $800, and thereafter, as security for the repayment to her of said sum received from said Sibley in her own name and as her sole property, a deed of a certain estate in said Providence with a claim of defeasance therein; and said Stephen, under his hand and seal on the back of said deed declared that said sum of $800 was paid by your oratrix out of her sole and separate estate, and covenanted that said deed should be held by her as her sole and separate estate in her individual right and capacity, all which will more fully appear by reference to the original of said deed and covenant, which your oratrix stands ready here to produce. A copy of which, marked 'B,' is hereto annexed and made a part of this bill of complaint.

"And your oratrix further says, that on the 14th day of October, 1837, an agreement of lease was made and entered into between James Fenner, of Providence, of the one part, and Lyman Cady, and said Stephen, both of said Providence, of the other part, whereby the said James hired, leased, and to farm let, for and during the term of ten years from and after the first day of October, 1837, to the said Lyman and Stephen, the lot of land on North Main street, in said Providence, covered by the old tavern house and as occupied by said Lyman, with certain reservations, additions, and conditions, as by the copy of said lease hereto annexed and made part of this bill, marked 'C,' will more fully appear. That among other things agreed therein, it was agreed that if said Lyman and Stephen, or their assigns, should erect any house or building for the express use of the hotel or tavern on said premises, that the same may be removed at their own expense and cost at the end of said lease, or the same may be valued by arbitration as therein provided, and that the said James may either buy said barn or building at such valuation, or allow the same to be removed at his option. That the parties to said agreement, under their hands and seals, bound themselves, their heirs, &c., to the faithful performance of the agreements therein contained.

"And your oratrix further says, that thereafter, and before the first day of April, 1843, the parties of the second part to said lease did erect at their own expense certain buildings upon said leased property, for the express use of the hotel or tavern on said premises, which said buildings were of great value, namely, of the value of $800.

"And your oratrix further says, that on the 7th day of March, 1838, said Lyman, by his deed of that date, under his hand and seal, a copy of which is hereto annexed, marked 'D,' and made part of this bill, for the considerations therein mentioned, conveyed, assigned, sold, set over, and delivered to said Stephen all the interest he, said Lyman, had in and to said lease from James Fenner, hereinbefore described, and one undivided half part of the buildings erected upon the leased premises under the conditions of said lease, to be held by him, the said Hunt, his heirs and assigns for ever, as by reference thereto will more fully appear. That said deed last named contained a claim of defeasance, and that the condition therein named never happened, and that the property rights and interests of said Lyman in and to said lease afterwards vested absolutely in the said Hunt before the first day of April, 1843.

"And your oratrix further says, that on the 1st day of April, 1843, she conveyed to Stephen Crary and Addison Livermore, both of said Providence, by her deed of that date, her said husband joining her therein, under their hands and seals, all her right and title in and to the property conveyed by Nahum Sibley to her, as hereinbefore described, for the considerations therein named, the said Crary and Livermore paying to her said husband the sum of $800 therefor or releasing her said husband from the debt, or a portion thereof, owed by him to them for certain moneys advanced on articles furnished by them to him for the hotel or tavern kept by him upon said leased premises, as by the said deed will more fully appear, a copy of which is hereto annexed, marked 'E,' and made part of this bill. That the said Stephen, in consideration thereof, and for other valuable considerations there given by your orator to him, executed under his hand

and seal a deed of trust to Burrington Anthony, then of said Providence, on the 1st day of April, 1843, whereby said Stephen granted, assigned, transferred, and set over to said Anthony, his heirs and assigns, the said lease from said James, which was at and before that date vested in said Stephen and all said Stephen's right, title, interest, claim, or demand therein in trust, for the sole use and benefit of your orator, her heirs and assigns, it being stated in said deed that your orator having transferred certain property standing in her name for the purpose of paying certain claims due from said Stephen to individual creditors, was the true consideration of said transfer, as will more fully appear by said deed when produced, a copy whereof is hereto annexed, marked 'F,' and made a part of this bill.

"And your oratrix further says, that the said Anthony accepted of said trust, took possession of the property therein conveyed in his capacity of trustee of your oratrix; that he managed said property, and paid over to her the rents and profits thereof, until the expiration of said lease.

"And your oratrix further says, that the said James Fenner, died intestate, in Providence aforesaid, on the —— day of ——, 184–, that upon due application to the municipal court of said Providence, exercising probate jurisdiction therein, Samuel Dexter, of Providence, was appointed administrator on the estate of said James; that after the expiration of said lease, in pursuance of its provisions, arbitrators were duly appointed to estimate the value of the buildings erected on said premises, as contemplated by said lease; that said arbitrators affixed a value to said buildings, and the said Dexter, in his said capacity, as administrator, elected to purchase the same. That said Dexter, on or about the 21st day of April, 1848, paid to said Anthony the sum of nine hundred and thirty dollars and fifty cents, or about said sum therefor, which said Anthony, in said capacity of trustee for your oratrix, under the aforesaid deed of trust, received for the sole use and benefit of your oratrix; and the said Anthony, by his deed, bearing date the eighth day of April, 1848, bargained, sold, set over, and delivered to the heirs, or some of them, of the said James Fenner, the property named in said deed, being a part of said trust property as by the said deed when produced, will more fully appear, and which the complainant stands ready to produce in court when required, a copy of which is hereto annexed, (G,) and made part of this bill.

"And your oratrix further says, that the said Anthony neglected and refused, in breach of his trust aforesaid, to pay to her, or to any one, for her account, the said moneys, with the interest thereon accruing, but withheld the same, from your oratrix, unlawfully, and against equity and good conscience until his death. That said Anthony died in said Providence, on the —— day of ——, 1853. That he left a last will and testament, which was duly proved in the proper court, that Walter R. Danforth, of said Providence, the respondent, was named in said will the executor thereof, and as such, was duly qualified to act, and gave bond according to law. That said respondent, represented to the municipal court of said city, that the estate of said Anthony was insolvent, whereupon commissioners were appointed, according to law, to receive, hear, and determine, on the claims against said estate. That the claim of your said oratrix was presented to said commissioners, and by them rejected; that your oratrix gave notice, as by law required, of her determination to have her claim determined at common law, and brought and prosecuted her action at law therefor, at the June term of this circuit court, 1855, and the said executor has neglected and refused, in breach of his said trust, to pay to her the moneys which have come to his hands, or passed under his control, in pursuance of said deed of trust of April 1st, 1843, with the interest accruing thereon, though often requested, and which he ought to do, all which actings, doings, pretences, and refusals tend to her manifest injury and loss in the premises, and are contrary to equity and good conscience."

The substance of the instruments annexed to the bill being correctly set out, it is not necessary to repeat any of them, save the lease, and assignment thereof, the terms of which are material.

"Lease.—James Fenner to Cady and Hunt.

"This agreement of lease made and entered into by and between James Fenner, Esq., of the one part, and Lyman Cady and Stephen W. Hunt, of the other part, witnesseth, that said James, for and in consideration of the rents, agreements, and covenants hereinafter contained, hath, and by these presents, doth hire, lease, and to farm let for and during the term of ten years from and after the first day of October instant, to them the said Lyman and Stephen, their heirs and assigns, the lot of land on North Main street in said Providence, covered by the old tavern house, and as occupied by said Lyman, reserving from said lease, all the shop or cellar part under said old tavern, excepting so much as is contained in the following lines, namely, (here follows a description of the land.) And the said Lyman and Stephen, promise and agree, that they will at their own cost and expense, take down and remove the old building now on said lot and thoroughly lay a new foundation of stone, laid in lime mortar, of sufficient strength and durability to bear three stories of brick above the basement or cellar ceiling, and, also, to lay a drain of stone or brick of proper dimensions and connect the same with the public

drain; and, also, at their own cost and expense, to erect an entirely new building three stories high above the basement ceiling of the same length of the old house, but two feet wider; the first story to be of brick, nine feet in the clear between joints, with walls eleven inches thick, to be laid in lime mortar, the other two stories to be of wood. Also, to build a kitchen north of the house and adjoining it, not to be extended further west than the south-east corner of the building now occupied by Oliver Mason, as a shoe store, to build and erect in said kitchen the fixtures and apparatus as represented in a certain plan or drawing furnished by Clapp and Warren, and now in possession of said James, to complete the piazza and all the rooms and apartments in strict conformity with said plan or drawing, of prime materials, in a good workmanlike manner, under the direction of E. J. Mallett, Esq., for and in behalf of said James; the flight of steps from the street up the piazza to be of hammered granite or freestone. And the said Lyman and Stephen promise and agree, at their own cost and expense, to keep all the above described and other leased buildings on the premises specified, in good order during the continuance of this lease, and when this lease shall cease, or expire, to surrender up quiet and peaceable possession of the same to the said James, his heirs or assigns, in as good order and condition as when the same were furnished, the ordinary wear and tear of time only excepted. And said Lyman and Stephen are to set up no demand or claim for any part or parcel of the fixtures, buildings, or improvements on said premises, but the whole is to revert to the said James and his assigns, in same manner as if erected by him or them. It is however understood and agreed, that if said Lyman and Stephen or their assigns, should erect any house or building for the express use of the hotel or tavern on said premises, that the same may be removed at their own expense and cost, at the end of this lease, or the same may be valued by arbitrators, one by one party to this instrument, and one by the other party, and they two shall select a third, and said James may either buy said barn or building at such valuation, or allow the same to be removed at his option. And if said Lyman and Stephen shall fail to complete the work described, in conformity with the plan and drawing above referred to, then so much of the work as may be done or executed, shall revert to the said James, and become his property without any cost or charge, and as damages, said Lyman and Stephen promise and agree to pay to said James or his assigns any sum of money which may be necessary to fully complete the work as above specified. And it is further agreed and understood, (and this lease is made and executed on this express condition,) that if at any time before the expiration of the ten years aforesaid, the said James or his assigns shall desire to sell the premises above described, or to lease the whole of the estate, or a greater portion than is contained in this lease, so as to deprive the lessees of the privilege contained herein before mentioned, then, and in that case this lease to cease and determine, and said Lyman and Stephen or their assigns are to surrender quiet and peaceable possession of the premises to the said James or his assigns, he or they first paying therefor such value or sum of money as may be adjudged right and fair, by arbitrators chosen in same manner and form as above recited, said value to be assessed, (not on the cost, but) on the actual value of the improvements, &c., at the time the said James or assigns may reënter and possess the same, and it is further agreed and understood that any partial damage by fire or otherwise to said buildings, shall be repaired by said Lyman and Stephen at their own cost, but if the damage shall be so great, as in the opinion of said James or his assigns, that the buildings are unworthy of repair, then this lease to cease and determine; no privilege of light is to be claimed by the lessees on the north side of the new building, and the space north may be improved or otherwise occupied at the pleasure of said James or his assigns. Now, in consideration of the aforesaid lease and the premises described, the said Lyman and Stephen jointly and severally for themselves, their heirs and assigns, agree and promise well and truly to pay in specie or its equivalent, to the said James or his assigns, an annual rent of eight hundred dollars for the first six years, and of one thousand dollars for the last four years, in equal quarterly payments, commencing on the first day of October, inst. and payable on the first day of October, January, April, and July, in each and every year during the continuance of this lease, and also to allow and secure all the manure which shall be made on the premises, to him the said James, or his assigns, and by him or them to be carted away or removed at their convenience; and the said James may re-enter and take possession of all the premises herein above described, and hold and keep them as his own without any cost or charge; and this lease shall cease and determine if the said Lyman and Stephen or their assigns shall neglect or refuse to pay the rents above mentioned, in the sums and at the times, and in the manner specified, or shall otherwise fail to do and perform the covenant and agreements specified and recited. To all of which we mutually agree, binding ourselves, our heirs, executors, administrators, and assigns; and in testimony of the same, we hereunto have affixed our hands and seals,

this 14th day of October, eighteen hundred and thirty-seven. James Fenner. (L. S.) Lyman Cady. (L. S.) Stephen W. Hunt. (L. S.)

"In presence of A. V. Dike. Thomas White."

"Trust Deed.—S. W. Hunt to B. Anthony.

"Know all men by these presents, that I, Stephen W. Hunt, of the city and county of Providence, in consideration of the sum of eight hundred dollars, to me paid by Burrington Anthony, of said Providence, the receipt whereof is hereby acknowledged, do hereby grant, assign, transfer, and make over to the said Burrington Anthony his heirs and assigns, the within lease, and all my right title, interest claim, and demand therein subject to the payment of the ground-rent upon which said buildings stand, to have and to hold the same in as ample a manner as I, the said Stephen W. Hunt, might hold and enjoy, by virtue of said lease, and not otherwise, in trust for the sole use and benefit of my wife Mary Hunt, her heirs and assigns; the said Mary Hunt, having transferred certain property standing in her name for the purpose of paying certain claims due from me to individual creditors, is the true consideration of this transfer. In witness whereof, I have hereunto set my hand and seal, this 1st day of Apirl, A. D., 1843. Stephen W. Hunt. (L. S.)"

CURTIS, Circuit Justice. Mrs. Mary Hunt, by her next friend, her husband also joining, brings this bill, against the executor of Burrington Anthony, to enforce the execution of a trust expressly declared by the latter in his lifetime in her favor for her sole use. The bill is demurred to; and the first ground taken in support of the demurrer is, that as the bill shows that a liquidated sum of money is due from the estate of the testator, the remedy is exclusively at law by an action for money had and received in the joint names of the husband and wife.

The provision of the 16th section of the judiciary act of 1789 (1 Stat. 82), that suits in equity shall not be sustained when there is a plain, adequate, and complete remedy at the common law, is merely declaratory, and made no change in equitable remedies; to bar which, the remedy at law must be as efficient to secure all the equitable rights of the complainant, as that in equity. Boyce v. Grundy, 3 Pet. [28 U. S.] 210. The right of a feme covert to receive and enjoy a sum of money to her separate use, cannot be deemed sufficiently protected by a suit at the common law in the joint names of her husband and herself. Such a suit reduces the chose in action to his possession, not to hers. And so far from its being the only remedy for the recovery of money due to the wife under a trust for her sole use, I apprehend a court of equity would enjoin the husband, on the application of the wife, from prosecuting such a suit, if he were to commence one. Moreover, this is the case of an express trust; and though the bill avers that a particular sum was obtained by the trustee from the sale of the trust property, yet an account must be taken of the proceeds of the sale, and of any allowances claimed for the trustee by his executor.

The next objection is, that the assignment to Anthony in trust for the complainant, did not convey the right of the lessee to the buildings, or to be paid for them by the landlord, under the special contract contained in the lease. I am of opinion it transferred all the rights of the lessees, and among others, the right now in question. The covenant of the lessor to purchase the building at a valuation, or allow it to be removed, being a covenant which touched the thing demised, namely, the messuage and land, and affected its mode of occupation, was a covenant which ran with the land. It is not necessary that the particular subject of the covenant should be in esse, to cause it to run with the land. In Bally v. Wells, Wilm. 344, Lord Chief Justice Wilmot says of such covenants, if they relate to a thing not "in esse," but yet the thing to be done be upon the land demised, as to build a new house, or wall, the assignees, if named, are bound by the covenants. So a covenant to apply insurance money to rebuild, runs with the land. Vernon v. Smith, 5 Barn. & Ald. 1. And the rules laid down in Spencer's Case, 5 Coke, 17, lead to the same result. The right to the benefit of this covenant of the lessor, therefore, passed to the assignee by the assignment of the lease, and the money received by virtue of the covenant was received by the assignee in trust for this complainant.

The remaining objection grows out of the fact that the estate of Burrington Anthony has been represented insolvent by the executor, to the probate court of the state, and that Mrs. Hunt, the complainant, through her attorney, presented this claim to the commissioners, appointed to receive and report upon claims against the estate, and it was rejected by them. It was rightly conceded at the bar, that the mere fact that an estate has been represented insolvent, does not prevent citizens of other states from coming into this court to establish their claims. No state law can, proprio vigore, deprive this court of jurisdiction conferred by the constitution and laws of the United States. Suydam v. Broadnax, 14 Pet. [39 U. S.] 67, is in point; and has been affirmed by a decision made by the supreme court at the last term.

But it is insisted that the jurisdiction of the commissioners was concurrent with that sought for in this case; and the complainant having voluntarily submitted to that jurisdiction and had a decision against her,

is barred. The statute of Rhode Island (P. L. 253, etc.), after providing for the appointment of commissioners to receive and examine all claims of creditors, further says, (section 5,) that notwithstanding the report of the commissioners, any creditor whose claim is wholly or in part rejected, may have the same determined at common law, in case he shall give notice thereof in writing in the clerk of probate's office, within twenty days after such report shall be received, and bring and prosecute his action as soon as may be. The 7th section provides, that "When a claim shall be settled by referees, or in the course of the common law as aforesaid, execution shall not issue," &c. It thus appears, either that the only claims which could be determined by the commissioners were such as could be tried according to the course of the common law, or that their determination of all equitable claims was to be final, and no further proceeding could be had thereon before any tribunal at the instance of the claimant. It is extremely improbable that the latter was intended by the legislature. No valid reason is perceived why the claimant of an equitable right should be concluded by the report of the commissioners, when all legal rights are expressly allowed to be prosecuted before the ordinary judicial tribunals, as if no report had been made thereon. And this improbability is greatly strengthened by the sixth section, which enacts that, "In case the executor or administrator shall be dissatisfied with any creditor's claim allowed by the commission, and shall give notice thereof in the clerk of probate's office, and also to the creditor within twenty days as aforesaid, such claim shall by the court of probate, be stricken out of the commissioner's report." It can hardly be supposed, that a creditor whose equitable claim had been disallowed, was not to have power to object and prosecute further, while the administrator or executor had power to object if it was allowed, and thus annul the report in his favor; that a report, final and conclusive, upon one party should be of no avail against the simple objection of the other party. But further, suppose an equitable claim having been allowed and stricken out on the objection of the administrator; how is the creditor to proceed? The act has provided only for the trial of claims before the courts, in the course of the common law. This appears not only from the fifth section, which grants to the creditor only a right so to have his claim determined, but also from the seventh section, which regulates what is to be done when the amount of the claim shall have been ascertained; and which confirms its provisions to "claims settled in the course of the common law." So that if the commissioners have jurisdiction to decide on merely equitable claims, their report against the claimant binds him; but their report in his favor may be annulled by the objection of the administrator; and as such a claim cannot be prosecuted according to the course of the common law, it is finally defeated by that objection. No one can suppose such is the law of Rhode Island, and the only alternative is to hold, that of merely equitable claims the commissioners have no jurisdiction.

Though at first view, this conclusion may seem to present an anomaly, in the system for the distribution of estates of persons deceased insolvent, on further consideration, it will be found not of much practical importance; because a court of equity, in which alone the claims under consideration can be prosecuted, can so mould its decrees as to prevent any disturbance of the rights of other creditors, and to protect executors and administrators from exposure to injustice. I believe it to be true, also, that at the time this system was framed, merely equitable claims not cognizable at the common law, were but little considered in the legislation of the state, and that it should not excite surprise that in this matter no special provision was made for them. I am not aware that the supreme court of Rhode Island has ever considered this question. I should have been much relieved to find that learned court had done so. In Connecticut, it was held in Brown v. Slater, 16 Conn. 192, that commissioners on insolvent estates have the powers of courts of equity as well as of courts of law. But the statutes conferring their power differed materially from those of Rhode Island.

Having come to the conclusion that the commissioners had not jurisdiction over a claim which cannot be prosecuted according to the course of the common law, and as this claim by a married woman in her own name, for an account of property held by a trustee for her separate use could not be thus prosecuted, it follows that the presentation of this claim by her, and its disallowance by the commissioners, cannot affect her right to go into a court of equity for relief. If any authority be necessary in support of this last position it may be found in Varick v. Edwards, 1 Hoff. Ch. 412, where the vice chancellor has carefully examined the cases. His decision, that a judgment of a court of common law, upon a claim which is exclusively of equitable cognizance, does not bar relief in equity, is supported both by authority and principle.

My opinion is, that the complainant has not submitted to a jurisdiction which could act on her claim; and that the case stands, as if it had not been presented to the commissioners. The demurrer is overruled; and the defendant must answer.

[See Case No. 6,888.]

Case No. 6,888.

HUNT v. DANFORTH.

[Brunner, Col. Cas. 678; [1] 22 Law Rep. 74.]

Circuit Court, D. Rhode Island. June Term, 1857.

DEED OF TRUST AND MORTGAGE DISTINGUISHED—TRUSTEE ESTOPPED TO DENY VALIDITY OF TRUST—EQUITY—ABATEMENT—PENDENCY OF ACTION AT LAW AS.

1. An absolute deed by a husband to a trustee, in trust for his wife, in consideration of a sum advanced out of her separate estate, will not be deemed a mortgage by reason of the property exceeding in value the amount advanced.

2. A trustee cannot attack the validity of the deed under which he has gone into possession unless he clearly show that he has been deceived into taking a title, which without knowledge or laches on his part really belonged partly or wholly to himself.

3. Where there is not concurrent jurisdiction, the pendency of an action at law cannot defeat a suit in equity.

This case [by Mary Hunt against Walter R. Danforth, executor], which was previously before the court on a demurrer to the bill [Case No. 6,887], now came on to be heard on the pleadings and proofs. The bill and exhibits are printed in the former report of the case. The defenses set up by the answer were: 1. That the only valuable consideration for the conveyance from Hunt to Anthony, in trust for the complainant, was the separate estate of the complainant, of the value of about eight hundred dollars, appropriated to the use of Hunt; and that the conveyance to Anthony was made solely for the purpose of securing the re-payment to the complainant of that sum. In support of this allegation, the answer alleges that when the said conveyance was made, Hunt was insolvent, and immediately after the execution thereof, made to Anthony an assignment in the following terms: "Know all men by these presents: That I, Stephen W. Hunt, of the city and county of Providence, state of Rhode Island, for and in consideration of the sum of one dollar, to me in hand paid, and in consideration of the trusts hereinafter mentioned, by Burrington Anthony, of said Providence, do hereby assign, sell, convey, set over, and deliver unto him, the said Burrington Anthony, his heirs and assigns, all my debts, dues, and demands of every kind, name and nature, consisting of notes, book accounts, choses in action, and judgments of court, and boxes containing goods, and one one-horse sleigh, also one share in the City Hotel. Hereby constituting him, the said Burrington Anthony, my lawful attorney, with power irrevocable, to sell, transfer, assign, set over, and deliver, and to collect all and every of said property in his own name, and to make compromises and due acquittances and discharges for the same, and to collect and apply the proceeds thereof to and for the following uses and purposes, and in the order hereinafter named, viz: First, to pay and discharge all the expenses accruing in the execution of this assignment, including a reasonable compensation to said trustee. Secondly, to pay all debts due from me to Burrington Anthony, either by note, book accounts, money borrowed, or as indorser. Thirdly, after paying and discharging all the aforesaid trusts, to pay all debts due from me to my creditors, ratably, if insufficient to pay the whole of said last-mentioned class of debts. And I, the said Burrington Anthony, for and in consideration of the aforesaid trusts, do hereby covenant to and with the said Stephen W. Hunt, well and truly to do and perform all things on my part to be done and performed, according to the true intent and meaning of these presents. In witness whereof, we have hereunto set our hands and seals this third day of April, in the year 1843. Stephen W. Hunt. (L. S.) Burrington Anthony. (L. S.) Signed, sealed, and delivered in presence of Nathaniel Searle." That Hunt immediately afterwards took the benefit of the insolvent law of Rhode Island. And that, consequently, save as a security for the repayment of the said sum of eight hundred dollars, the conveyance, under which the complainant claims, is wholly void as against the creditors of Hunt; and that Anthony, in his lifetime, paid to the complainant, from the rents and profits of the trust property, enough to cancel that sum. The answer insists that whatever Anthony received from the property conveyed to him, beyond that sum, he received as assignee for the benefit of creditors, and not as trustee for the complainant; and further, that Anthony was himself a creditor of Hunt, and entitled in that capacity to retain under the assignment to him for the benefit of creditors, all he has received and not paid to the complainant from the property in question. 2. The answer alleges that the complainant has commenced a suit at common law, which is still pending. 3. It sets up the six years' statute of limitations as a bar to an account.

Joseph S. Pitman and Mr. Bradley, for complainant.

Mr. Jenckes, contra.

CURTIS, Circuit Justice. The conveyance from Hunt to Anthony, in trust for the sole and separate use of the complainant, is shown to have been made in consideration of the appropriation to the use of Hunt, of a mortgage upon which the sum of eight hundred dollars and some interest was due, and which was the separate estate of the complainant. The conveyance from Hunt to Anthony, on its face, is absolute. There is no witness who says it was intended as a mortgage. The property was leasehold, subject to a very considerable ground rent. The lessor had the right to refuse to take and

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

pay for the buildings which the lessees had erected on the premises; and it is not averred in the answer, nor shown in evidence, that the salable value of the lease at the time of the conveyance to Anthony, in trust, much exceeded the sum of eight hundred dollars. Nor was any ground upon which the court could pronounce this a mortgage suggested at the hearing, save that to hold it an absolute conveyance would be to impute to Hunt an intention to convey to his wife property which ought to belong to his creditors. But even if this suggestion were supported by evidence that Hunt then knew the salable value of the leasehold interest much exceeded the sum which his wife had advanced for him from her separate estate, and that his wife also was cognizant of that fact, it would be a violent assumption to make, in the absence of all other evidence, that they could not have intended an absolute conveyance. Although justly some part of the property should have gone to creditors, there is no impossibility, certainly, that Hunt may have designed that it should all belong to his wife. He has said so by the deed, and there is nothing to control what he has so said. I cannot, therefore, declare this to be a mortgage, upon the footing of the actual intention of the parties to have it one. It is equally clear that the defendant, as Anthony's representative, cannot be allowed to attack the trust deed as fraudulent as against Anthony and other creditors. If a trustee can ever be permitted, for his own profit, to deny the validity of the conveyance in trust under which he has gone into possession, it can only be where he clearly shows he has been deceived into taking a title which, without his knowledge or any laches on his part, really belonged partly or wholly to himself. But there is no pretense of any such case here. There is nothing tending to show a fraud on creditors, of which Anthony is alleged in the answer to have been ignorant, or of which the proofs tend to show he was ignorant, when he went into possession under this deed. If the actual salable value of the property had been shown to have exceeded the consideration, there is no more reason for holding Anthony ignorant of that fact than either of the other parties. And this is the only fact upon which a case of fraud on creditors can be based. The answer does not allege what the value was, nor that Anthony was ignorant of it. If a fraudulent intent existed, it is as consistent with the answer that Anthony concurred therein, as it is that Mrs. Hunt, the complainant, concurred therein. Nor can any rights be claimed for Anthony, as assignee, for the benefit of creditors; for the property thus assigned to him did not include what had just before been conveyed to him by the trust deed under which Mrs. Hunt claims in this case.

In respect to the defense that a suit at law had been brought, and is still pending, it is difficult to perceive how such a defense can ever defeat a suit in equity, save in cases of concurrent jurisdiction. If the subject-matter of the suit is such that a court of law, under its common law powers, can afford a plain, adequate, and complete remedy, a court of equity has no jurisdiction, and it is not material whether a court of law has or has not been resorted to. If a court of law cannot afford such a remedy, equity will not fail to afford one because the complainant has made an attempt elsewhere, which must be either wholly or partly ineffectual. There is a class of cases over which equity has an ancient and established jurisdiction, but which, by an enlargement of the equitable powers of courts of law, by statute or otherwise, has been brought within their cognizance. Whether a plea of a prior suit pending in a court of law, in such a case, would defeat a suit in equity, it is not necessary here to determine. This suit, by a married woman, to enforce an express trust for her sole and separate benefit, is one in which the remedy afforded by a court of law is far from being the same as is obtainable in equity; as has been held in this case, when it was before the court on a demurrer to the bill. The bar of the statute of limitations cannot be allowed. It is a case of express trust, never so disclaimed by the trustee as to cause the bar to begin to run. Taylor v. Benham, 5 How. [46 U. S.] 233. The cause must be referred to a master to take an account.

[See Case No. 6,887.]

Case No. 6,889.

HUNT v. ENNIS et al.

[2 Mason, 244.] [1]

Circuit Court, D. Rhode Island. June Term, 1821.

POWER COUPLED WITH AN INTEREST — WHETHER REVOCABLE — NAKED POWER — RELIEF IN EQUITY FOR MISTAKE.

1. A power coupled with an interest does not expire with the death of the person creating it.

[Cited in Davis v. Lane, 10 N. H. 158.]

2. A naked power does not necessarily expire with the death of the person creating it. It may necessarily be such as can be exercised only after the death of such party. As a power to an executor to sell lands to pay debts.

3. A naked power, which expires with the death of the party creating it, is such as requires the power to be executed in the name and as the act of the grantor, and not of the grantee. As a power of attorney to execute an instrument, or do other acts in the name of the grantor.

4. A power of attorney given as collateral security for a debt is irrevocable by the grantor; but it dies with the grantee. It is not in the sense of the law a power coupled with an interest.

[Cited in U. S. v. Cutts, Case No. 14,912.]

[Cited in Wassell v. Reardon, 11 Ark. 712; Smith v. Tufts, 5 N. H. 458; Davis v. Lane, 10 N. H. 160.]

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

5. Where an agreement is made to lend money, and take collateral security on property, and by mistake a power of attorney only is taken, and the party dies, equity will relieve the creditor, and enforce the original agreement against the administrators, where the estate is insolvent.

This is a bill in equity [by Clement S. Hunt against William Ennis and others, administrators of Louis Rousmaniere] set down for a hearing upon demurrer. The bill charges, that the plaintiff, on the 11th of January, 1820, agreed to lend to Louis Rousmaniere, (the respondent's intestate) the sum of $1,450, upon a proposal of the intestate to give the plaintiff as security for re-payment, a bill of sale of the intestate's interest in the brig Marcus, then on a voyage at sea, which sum the plaintiff accordingly lent to the intestate, and took two notes of the intestate, dated the 11th of January, 1820, for the same sum; and for collateral security, the intestate executed on the 13th of the same month a power of attorney, authorizing the plaintiff to make and execute a bill of sale of his three-fourths of the said brig, then on a voyage at sea, to himself or to any other person he should think proper; and in case of the loss of said vessel, or of her freight, to collect for his use all monies to become due on a certain policy of insurance on the said vessel and freight, with a proviso, reciting, that the power was given for collateral security for the payment of the same notes, one of which was payable in 90 days, and the other in four months from date, that if said notes should be duly paid, the power should cease and be surrendered, and the policy be returned, and if otherwise, then the plaintiff was to pay the amount thereof and all expenses out of said property, and to restore the residue to the intestate. The bill farther charges, that on the 21st of March, 1820, the plaintiff agreed to lend to the intestate the farther sum of $700, he agreeing to give as security therefor, his interest in the schooner Industry, then at sea. That the plaintiff accordingly lent the intestate that sum, and took his note therefor, dated on the same day, and payable in 90 days from date, and that the intestate on the 21st of the same month, executed a power of attorney of the same import as to his interest, viz. three-fourths of the schooner Industry, and as to the last note, as the preceding letter of attorney. All of which notes and powers of attorney, are made part of the bill. The bill farther charges, that the intestate died on the 6th of May, 1820, greatly insolvent, all the said notes being unpaid, except the sum of $200, which was paid on one of the first notes in April preceding, it being the only note then due. That the plaintiff immediately on the death of the intestate gave notice of his powers of attorney to the administrators, and claimed and took possession of the intestate's interest in the schooner Industry, which was then arrived in port: and that afterwards on the arrival of the brig Nereus at Newport he claimed and took possession of the intestate's interest in that vessel. The bill farther charges, that the administrators having refused to pay him the said notes, he advertised the intestate's interest in said vessels for sale, by virtue of the powers aforesaid, for the purpose of paying these notes; that the administrators forbade the sale, and refused to join in any way to enable the plaintiff to avail himself of his security on said vessels. And the prayer of the bill is, that the administrators may be decreed to join in a sale of the said vessels, or to sell them, and pay the said notes out of the proceeds, and for other relief. The administrators demurred to the bill, for want of equity; and upon the argument,

Mr. Searle and B. Hazard, for plaintiffs, contended, that a power coupled with an interest did not expire upon the death of the party granting it; and cited to this point, 1 Johns. Cas. 1, and the authorities there cited: that the court would enforce the execution of imperfect agreements (Sugd. Powers, 481; 2 Ves. Jr. 151; 1 Proff. Wills, 444; 3 Proff. Wills, 91, 322); that an agreement for a mortgage, and an advance of money created a specific lien against creditors (1 Atk. 148; 3 Ves. 582); that a deposit of title deeds, or securities, not negotiable, created a lien in equity ([Manderville v. Welch] 5 Wheat. [18 U. S.] 284; 3 Brown, Ch. 237); that the court would look to the substantial part of the contract, and consider that done, which ought to be done (Newl. Cont. 13, 42; 2 Ves. Jr. 601, 606); that a trust might be raised on an executory agreement for a valuable consideration (1 Johns. Ch. 337; 6 Ves. 662); that a court of equity would establish an imperfect lien or defective guarantee.

Hunter & Randolph, for defendants, e contra.

STORY, Circuit Justice. The first question is, whether the letters of attorney in this case are powers coupled with an interest, or only personal authorities, which expired with the intestate. If the former, they undoubtedly survived, and may be now executed by the plaintiff, for nothing is better settled, than that powers coupled with an interest, are not limited for their execution to the life of the author. I observe, that in the bill these letters are described as irrevocable powers of attorney; and though not so expressed in terms on the face of the papers, they may justly be so considered with reference to the intestate. Lord Kenyon has laid down the doctrine with great correctness. "There is," says he, "a difference in cases of powers; in general they are revocable from their nature; but there are exceptions. Where a power of attorney is part of a security for money, there it is not revocable. Where a power of attorney was made to levy a fine as part of a security, it was held not to be revocable. The princi-

ple is applicable to every case, where a power of attorney is necessary to effectuate any security; such is not revocable." Walsh v. Whitcomb, 2 Esp. 565. But whether it be irrevocable upon its face, or by necessary construction of law, still a power of attorney expires by the death of the party. This is laid down in Littleton (section 66): "If a man maketh a deed of feoffment to another and a letter of attorney to one to deliver seisin by force of the same deed, yet if livery of seisin be not executed in the life of him, which made the deed, this availeth nothing." Lord Coke in his commentary (Co. Litt. 52b; and see Shipman v. Thompson, Willes, 103, 104, note) confirms the same doctrine; for, says he, albeit the warrant of attorney be indefinite, without any limitation of time, yet the law prescribeth the time, as Littleton here saith, "in the life of him that made the deed; but the death not only of the feoffor, but of the feoffee also, is a countermand in law of the letter of attorney, and the deed itself is become of none effect, because in this case nothing doth pass before livery of seisin." There cannot be a doubt, that upon the principles already stated, the power of attorney in the case here put was irrevocable by the party. It was a part of the title or security of the feoffee. The very point was decided in Wynne v. Thomas, Willes, 565, and better authority could not be. In that case, there was a warrant of attorney to suffer a recovery for certain uses; the recovery was suffered; but the tenant, making the warrant, died before the recovery was actually had. The argument was, that the recovery was good notwithstanding this occurrence, because these warrants of attorney were in their nature irrevocable. Lord Chief Justice Willes said, whether the warrant was revocable or not by the party during her life time, it was certainly revoked by her death, for her attorney could not appear for her and in her stead after she was dead.

Nothing can be clearer, than that the instruments now before the court are mere powers of attorney. They do not purport on their face to be assignments of property, or conditional grants. The language is: I (the grantor) "have constituted and appointed, and do hereby constitute and appoint (the plaintiff) my lawful attorney in my name, for the sole use of him (the plaintiff) to make and execute a regular bill of sale," &c. Now in whose name must such a bill of sale be executed? Clearly by the very terms of the instrument in the name of Rousmaniere, for in no other way could his interest be conveyed, for the plaintiff had no title in the property itself. If so plain a point required authority, we have it in Combes' Case, 9 Coke, 76, where it was resolved, that when one has authority as attorney to do an act, he ought to do it in his name who gives the authority and cannot do it in his own name, nor as his proper act, but in the name and as the act of him, who gives the authority. Now, how was it possible in this case, after the death of Rousmaniere, to make a bill of sale in his name, or as his act? The power of attorney, as such, was gone and extinct by the death of the party, though it was not revocable by him in his life time. But it is said, that this was a power coupled with an interest, because upon the face of the instruments the power is said to be given "as collateral security" for payment of the notes. The power may well be a naked power, and yet be given as collateral security. It is true, in such a case, it may not be effectual, if the party die; but the same thing may happen, if the property passes to a bona fide purchaser without notice before the execution of the power in the life time of the party. If a naked power be given as collateral security, all the title given by it beyond its ordinary reach is, that thereby it becomes irrevocable by the party; but it may nevertheless become extinct by operation of law. Suppose a person becomes insane after the execution of an irrevocable power of attorney, will a conveyance, executed in his name, during his insanity, be a valid act? I do not understand the terms, "a power coupled with an interest," exactly in the same broad sense, as they seem to be understood in the argument at the bar. The case of Bergen v. Bennett, 1 Caines, Cas. 1, cited at the bar, is certainly good law, and it will illustrate the distinction between naked powers and powers coupled with an interest. There the party mortgaged an estate as collateral security, and gave authority to the grantee to sell the estate absolutely. And the court held, that this was a power coupled with an interest, and that the grantee might well sell the estate, notwithstanding the death of the grantor. But if he did sell, in whose name was the deed to be made? Plainly not in the name of the grantor, for he was dead; but in the name of the grantee, as his own act, in virtue of his power, and as having an interest in the estate conveyed. But suppose instead of a mortgage of the estate, there had been a mere power of attorney authorizing the party to sell the land, and apply the proceeds to the payment of the debt, for which such power was given as collateral security, there the power would not be coupled with any estate in the land; but would be a mere naked power to sell, and could not be executed after the death of the grantor of the power. There is a difference between a power coupled with an interest in the property itself, and a mere interest or benefit in the execution of a power. If a man authorize one as his attorney to sell his ship, and apply the proceeds to the payment of a debt due to him, the latter may have an interest, that the power should be executed; but the power is not coupled with any interest in the thing conveyed. It would be otherwise in case of a conditional assignment of the ship to one as collateral security with a power to make an absolute sale. Mr. Jus-

tice Kent lays down the distinction in very exact terms in the case of Bergen v. Bennett. He says, "a power simply collateral and without interest, or a naked power, is, when, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor hath, by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land." A power, too, may be a naked power, and yet may be executed, nay, by its very terms must be executed, after the death of the party creating it. A power given by a testator in his will to his executors to sell his estate for payment of debts is a naked power; and it can only be executed after the death of the testator; and such execution will then be good, because the act may be done in the name of the executors, and not as the act of the testator. But a devise of the land itself to the executors to sell for a like purpose is a power coupled with an interest, for they have an interest or title in the land itself. Co. Litt. 113a, Hargrave's note 2. When, therefore, it is said, that a naked power is extinguished by the death of the person creating it, the language is meant to be confined to those cases, in which, as in the case now before the court, the power is to be executed in the name and as the act of the grantor, and not of the grantee. It is not applied to naked powers generally; but only to naked powers of attorney. A power of attorney to deliver livery of seisin after the decease of the feoffor is for this reason void. 1 Co. Litt. 52b. In my judgment, this was not a power coupled with an interest in the sense of the law. It was a naked power, and, as such, by its own terms could be executed only in the name of Rousmaniere, and therefore became extinct by his death. If the right of the plaintiff stand then wholly upon this foundation, it is radically defective, and there is no ground for relief in equity.

But it is said, and truly said, that a court of equity will relieve, where instruments have been imperfectly drawn, or by mistake or accident the parties have failed in executing their agreements. This is an old head of equity, and if the intention of the parties here was, as is almost irresistibly forced upon us by the circumstances, to give a permanent collateral security on the vessels, and by mistake they have executed instruments, that have failed of that effect, there cannot be a doubt, that it is the duty of the court to relieve the plaintiff, and to compel the administrators to join in a sale of the vessels for the purpose of paying the debts due to the plaintiff. If a lien on these vessels was originally stipulated, or a legal interest, equity will now compel the administrators to put the party in the same situation, as if such lien or interest had been perfected. Vide Burn v. Burn, 3 Ves. 573. I ought in justice to add, that the administrators in this case, have no wish to obstruct the plaintiff's relief. They wish only to be safe in their conduct; and have given every just facility to the plaintiff's claim. The bill, as to this last point, contains no allegation of mistake, or that the agreement was originally intended to embrace a permanent lien or interest; or that the powers of attorney were imperfectly drawn, or essential clauses omitted by mistake. Upon the face, therefore, of this bill, I should be obliged to hold the demurrer good; though as the plaintiff can amend his bill, if the facts will help him, the best way will be to have the demurrer withdrawn, and the plaintiff have leave to amend his bill, and try its efficacy in the shape, which I have intimated.

[See Cases Nos. 6,897 and 6,898.]

HUNT (FISKE v.). See Case No. 4,831.

HUNT (HAMMOND v.). See Case No. 6,003.

Case No. 6,890.

HUNT v. HOLMES et al.

[16 N. B. R. (1878) 101.] [1]

District Court, D. Massachusetts.

SET-OFF — DEBTS BOUGHT ON A SPECULATION — KNOWLEDGE OF SUSPENSION—COMPOSITION WITH BANKRUPT DEBTOR.

1. A court of equity will not aid a debtor to a bankrupt's estate to set off debts bought upon a speculation of the probable dividends against the debt he owes the estate.

2. Knowledge that a merchant has suspended payment generally includes a constructive knowledge of each particular suspension.

3. A creditor who receives a composition from his bankrupt debtor with full knowledge of all facts is not entitled afterwards to require a set-off to be enforced by a court of equity which he had opportunity to assert at the time the composition was made.

4. The courts of law in Massachusetts have authority to adjust credits.

This bill was filed by W. P. Hunt against [E. O.] Holmes & Blanchard, alleging that he holds their notes to the amount of eighteen thousand dollars and over; that Holmes & Blanchard brought an action against him in the supreme judicial court for Suffolk county for breach of contract; that he denied all liability, and defended the action; that, before the cause was tried, the defendants in this suit, plaintiffs in the action, became bankrupt, and made a statute composition with their creditors in March, 1876, by which they were to pay forty per cent. in six, ten, fourteen, and eighteen months, and have tendered the plaintiff and have left with him, though he refused the tender, money and notes amounting to forty per cent. of his debt against them; that afterwards, in September, 1876, a verdict was recovered against him by said Holmes & Blanchard for twelve

[1] [Reprinted by permission.]

thousand dollars, in the action of contract, and that the court have overruled his exceptions; that it was the right of the plaintiff to have a set-off in that action, or in the composition proceedings, but the bankrupts intend to levy the judgment in full; and the bill prays that they may be enjoined from doing this, and that the account may be stated, and the balance only be allowed or paid. There was an oral hearing on the motion for an injunction, in which the evidence tended to show that Holmes & Blanchard failed in October, 1875; that an informal meeting of their creditors was called, and a committee was appointed, who at an adjourned meeting recommended a compromise at forty per cent.; that some creditors objecting, an involuntary petition in bankruptcy was filed against Holmes & Blanchard, December 27, 1875; that they offered a composition of forty per cent., part in cash and part in notes, indorsed by a solvent merchant, and a resolution to accept it was duly passed; that the plaintiff, Hunt, acting for a company of which he was the agent, opposed the order to record the resolutions, and when the order was made, applied to the circuit court to set it aside, but it was confirmed in that court, May 27, 1876, and Hunt received the money and indorsed notes for forty per cent. of his debt of eighteen thousand dollars. The debt which he held had been bought after Holmes & Blanchard had stopped payment, as he and the sellers well knew, but whether before the petition in bankruptcy, or before a known act of bankruptcy, and whether with a view to use them in set-off or otherwise affect the proceedings in bankruptcy, was controverted.

R. D. Smith, for plaintiff.
E. Morwin, for defendants.

LOWELL, District Judge. The injunction must be refused. 1. The set-off is not one which a court of equity will interfere to enforce. Section 6 of the statute of 1874 (18 Stat. 179), amending the law of bankruptcy, forbids a set-off of debts bought after the act of bankruptcy upon which the adjudication shall be made and with a view to such set-off. This has been understood to mean that a debtor, having notice or knowledge of an act of bankruptcy committed by his creditor, shall not afterwards buy up debts against the creditor, with a view to set them off in case adjudication of bankruptcy follows the act. Before this amendment there was a serious difference of opinion in the courts upon the question whether a debt bought after a known insolvency and before actual bankruptcy could be set off. Congress certainly seems by the amendment to say, by a necessary implication, that debts bought after insolvency may be so set off, unless they are bought after an act of bankruptcy, and after the very act which is the foundation of the decree and with a view to such set-off. The act of bankruptcy charged against Holmes & Blanchard was the suspension for forty days of a note, payable October 6, 1875. The plaintiff bought notes amounting to eighteen thousand dollars, with knowledge of the failure of Holmes & Blanchard, and for the same price which they had offered in composition, except that interest began earlier; but some of the notes were bought within the forty days; and the plaintiff testified that he had no intention of setting the notes against the debt or cause of action upon which he was sued and to which he believed he had a perfect defense on the merits. Knowledge of a general suspension includes, I think, constructive knowledge of each suspension, because the whole includes its parts, and as it is only a general suspension that is an act of bankruptcy, the particular note or notes mentioned in the petition for adjudication are to be taken as samples or indications of the general fact of which the plaintiff had notice. Whether notice of an incomplete act of bankruptcy is enough, may be a question; and whether "a view to such set-off" means an actual intent at the time of purchase. However these questions may be answered, a court of equity ought not to interfere by injunction to enforce a set-off when the debt has been bought after insolvency on a speculation as to the probable dividend. The decisions to which I have before referred, which denied the right of set-off in such cases, though they may not conform to the present state of the statute, are grounded in a clear and strong equity which cannot be disregarded when the discretionary action of the court is invoked.

2. The plaintiff has waived any set-off he may have had. The composition was offered, and was litigated with this plaintiff, though he acted in a representative capacity; the notes which he held were supposed to belong to the bankers from whom he had bought them. He gave no notice that he was the true creditor; made no attempt to have the accounts adjusted; when the composition was finally passed, he received his proportionate part. He says in his bill that he refused the tender, but there was no evidence of a refusal. The law is that one who proves a debt in full, with knowledge of all facts, waives any set-off he may have. Stammers v. Elliott, 3 Ch. App. 195; Brown v. Farmers' Bank, 6 Bush, 198. In composition, creditors are not bound to attend the meetings, and prove their debts, and vote for or against the resolutions, unless they choose to do so, but when there are disputed accounts and maters to be liquidated and adjusted, I do not know that it is more the duty of the debtor than of the creditor to move the court for a settlement. Here it was at the election of the plaintiff to take his dividend on the notes which he had bought and of the purchase of which he had never notified Holmes & Blanchard, so that, in fact, he alone had the opportunity to apply for the set-off. When he

took his dividend he waived his claim of set-off, and there is no evidence that he received the money or indorsed notes under protest, or by mistake, or under any other circumstances which would entitle him to a rehearing or readjustment.

3. The remedy at law is adequate. It was not uncommon in early times for the court of chancery or bankruptcy to grant an injunction until a set-off was adjusted; but the courts of law in which an action is pending have now full jurisdiction of the subject. It was said that the statute in Massachusetts does not permit a set-off of debts bought after an action is begun; but the bankrupt law is binding on the courts of Massachusetts, and if it be true, as I do not doubt it to be, that when a plaintiff has become bankrupt, the defendant may, upon some proper terms, bring into court whatever set-off the broad and liberal doctrine of mutual credit admits, then the courts of law of the state are as competent, and, for aught that appears, as ready to afford relief as those of equity or bankruptcy. I certainly should not assume the contrary until the experiment had been tried. Motion for injunction denied.

Case No. 6,891.

HUNT v. HOWE.

[1 McA. Pat. Cas. 366.]

Circuit Court, District of Columbia. Feb., 1855.

JURISDICTION OF COMMISSIONER OF PATENTS — QUESTION OF ABANDONMENT—PUBLIC USE.

[1. The jurisdiction of the commissioner under the act of March 3, 1839 (5 Stat. 353) extends (section 7) to the question of abandonment, and he has full authority to examine and adjudicate thereon, and, by section 12, to compel the attendance of witnesses for that purpose; for the right there given to make regulations in respect to the taking of evidence includes the right of compulsion.]

[2. A "public use" such as will bar the issuance of a patent is a use in public. It does not mean a general adoption by the public, but a public, as distinguished from a secret, use. No patent can, therefore, issue where it appears that other persons have constructed machines on substantially the same principles as that of the applicant, and used them publicly for years before he made his application.]

[3. An absolute sale of all the inventor's interest for a valuable consideration, and the public exhibition by the purchaser of a machine embodying the invention many years before the filing of the application, is conclusive evidence of a public use with the consent of the inventor; and he cannot again acquire a right to a patent by a repurchase of the invention.]

[This was an appeal by Walter Hunt from a decision against him by the commissioner of patents in an interference proceeding between said Hunt and Elias J. Howe, Jr., in respect to the invention of a sewing machine.]

W. P. N. Fitzgerald, for appellant.

Joel Giles, for appellee.

MORSELL, Circuit Judge. The issue tried and decided by the commissioner was upon the proofs and evidence of the respective parties produced before him and on the arguments of the counsel for the parties. The matter of controversy was an interference declared between said Walter Hunt's invention, above stated, and the patented invention on the same subject of said Elias Howe, Jr. On consideration of the case, the commissioner was of opinion, and so decided, that said Hunt was not entitled to a patent, and the interference was accordingly dissolved. In stating the grounds of his opinion, he says that "in 1846 Howe obtained a patent for a sewing machine, upon which there have since been many improvements by others. Hunt now claims priority to all these, upon the ground that he invented the sewing machine, substantially as described in his specification, previous to the invention by Howe. He proves that in 1834 or 1835 he contrived a machine by which he actually effected his purpose of sewing cloth with considerable success." Upon a careful consideration of the testimony, the commissioner says: "I am disposed to think that he had then carried his invention to the point of patentability." He proceeds to state his reasons for thinking so; after which he says: "The question then arises, whether anything has since transpired to deprive him of this right. It is contended by the counsel that an interference having been declared by the office, nothing remains but the naked question of priority; that the office cannot go backwards and take up the question of patentability. This is not my understanding of the law. The substantial question to be decided is whether Hunt is entitled to a patent. If for any cause he is found not to be so, that ends the investigation. If this discovery is made at any time before the patent is issued, it will not be too late to withhold it. The proof that there was an earlier inventor than either Hunt or Howe (though showing that the latter was no more entitled to a patent than the former) would dissolve the interference, as it would show that Hunt was entitled to nothing. And if for any other cause the testimony should show that Hunt was not entitled to a patent, it would be a useless waste of time to proceed further with the investigation. Nor can I concur in the opinion that the commissioner of patents has no power to decide upon questions of abandonment. The patent office should, if possible, make such decisions as will be sustained by the courts. It is true there are some powers exercised by the courts which the office has no authority to exert, but I do not understand the examination of the subject of abandonment to be necessarily, in all cases, of this number." The commissioner then proceeds to state the instances which properly belong to the court, and his construction of the seventh section of the act of 1836 [5 Stat. 119], and particularly as a cause for refusing a patent, that the invention has been in public use or on sale with the applicant's consent or allow-

ance prior to the application. If such a fact is found to exist, he says the commissioner is forbidden to grant the patent. He notices the modification of the rule made by the seventh section of the act of 1839 [5 Stat. 353], with its exception on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent. To all which matters he says the commissioner is by law directed to inquire. The commissioner does not think the patent can be withheld on the ground of abandonment strictly. Mere lapse of time does not evince that positive abandonment of which the office can take notice; it is not an abandonment growing out of public sale or use. Again: "But when we regard the sale to Arrowsmith with reference to the second branch of the qualification contained in the seventh section of the act of 1839, it seems fatal to the claims of Hunt. He made a sale of his whole invention, securing a valuable consideration in return, and allowed some seventeen years to elapse before any application was made for a patent either by himself or his assignee. This seems to bring the case within the range of the prohibition of the act of 1836, as modified by the act of 1839. This amounts to giving his consent that the invention should be publicly sold and used. Hunt, by his sale to Arrowsmith, gave his consent that any person or all the world might use the invention; therefore, it was in public use or on sale with the consent of the inventor and present applicant."

In the appeal from this decision there were six reasons filed. It is supposed the first, second, and fourth will present all the material points necessary to the decision of the case, which has been submitted upon the commissioner's decision and the respective arguments in writing of the counsel for the respective parties. The first reason is "because the said commissioner in arriving at his said decision decided that in cases of interference he had jurisdiction, and actually exercised jurisdiction over the question of abandonment or dedication to the public use. Second. Because the honorable commissioner in arriving at said decision decided that the sale by Hunt of his invention, (as distinguished from the sale of a practical machine or machines embracing said invention, and for practical use for the purpose,) and with the intention of procuring a patent therefor for the benefit of the grantee or assignee, was such a sale as is contemplated in the seventh section of the statute of 1836 and the seventh section of the statute of 1839; and being more than two years before application for letters-patent, is an absolute bar to the grant thereof. Fourth. Because the honorable commissioner in arriving at his said decision decided that a sale by said Hunt of his said invention to Arrowsmith was tantamount to giving his consent that any person or all the world might use the same."

The first point to be considered is the question of the commissioner's jurisdiction to try or determine the objection on the ground of abandonment as exercised by him in this case. The substance of the argument is that the jurisdiction given is a limited jurisdiction, and to be confined to the matters limited in that branch of the seventh section of the act of congress of 1836, chapter 19 (so far as relates to this subject), which begins with the words "and if on any such examination it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application; if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor. But whenever on such examination it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented, or discovered, or patented, or described in any publication in this or in any foreign country as aforesaid, or that the description * * * he shall notify the applicant thereof." The argument is that the statute nowhere gives such a power expressly, and that it ought not to be inferred, because it depends on the testimony of witnesses who could not be compelled to attend and testify; that the questions submitted to him are not questions in pais. There are two classes of clauses in the statute—the one as to the validity of a patent, the other directing the commissioner in relation to his duties and defining his powers. This question of jurisdiction depending upon a proper construction of statutes, the common and settled rule must be resorted to, that all statutes and parts of statutes in pari materia are to be taken together in construction. The commissioner of patents is now vested with the whole and only original initiatory jurisdiction that exists up to the granting and delivering of the patent. By the act of 1836, just alluded to, a mixed jurisdiction, partly appellate and partly original, was vested in a board of examiners, to be composed of three disinterested persons, to whom the applicant might appeal. The statute says said board shall be furnished with a certificate in writing of the opinion and decision of the commissioner, stating the particular grounds of his objection and the part or parts of the invention which he considers as not entitled to be patented. And the said board shall give reasonable notice to the applicant, as well as to the commissioner, of the time and place of their meeting, that they may have

an opportunity of furnishing them with such facts and evidence as they may deem necessary to a just decision, who, if they deemed proper, might reverse the decision of the commissioner. When this board became dissolved its original power and jurisdiction became vested in the commissioner of patents, and its appellate jurisdiction in the chief justice of the District of Columbia. It is true that the commissioner's jurisdiction is a limited one, but it is equally true that it is to be understood, not only from what is expressly stated, but from what ought necessarily to be inferred, and is as absolute within the proper legal limits as a tribunal of general jurisdiction would be.

It is argued that the power ought not to be inferred in the present instance, because it is dangerous, and because the presumption is repelled by the terms in the same paragraph beginning with "but," &c. This position I do not think correct. This will appear from considering that the monopoly is not a matter of common right, but purely of statutory grant. All the conditions and prerequisites must be complied with before any power can exist in the commissioner to issue and deliver a patent. The negative terms respecting the invention—"and not at the time of his application for a patent in public use or on sale with his (the inventor's) consent or allowance"—stand in the same category with the requisites of the applicant, being a person or persons having discovered or invented a new and useful art, machine, or composition of matter, or any new and useful improvements on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent, &c., a written description of his invention, drawings, and models,—then, in the language of the statute, "on due proceeding had, may grant a patent therefor." Who is to judge of the existence of these prerequisites and priority of invention? No other person than the commissioner is mentioned, who is to do the same according to a due course of proceeding had by him. The object of the seventh section seems to be intended to point out the course of proceeding to be pursued by the commissioner for the purpose of ascertaining by examination as to the novelty and utility of the invention as alleged, and as appears already from a recital of the clause, the allegation that "the said invention had not been in public use or on sale with the applicant's consent or allowance prior to the application" is repeated and expressly submitted to his examination. How could he do this without possessing full and adequate jurisdiction for the purpose, according to the nature of the inquiry? The object of the last part of the section appears to be (on refusal to grant the patent) to direct a proceeding whereby the applicant would be allowed under the particular circumstances stated to withdraw or modify his specification. If he persisted in the latter, to give him the benefit of an appeal to a board of examiners. This construction is necessary, in order to make one part of the section consistent with the other.

It is urged in the argument that the commissioner has no power in a trial of this description to compel the attendance of witnesses, and that it is a subject for a jury. With respect to the first part of the objection, it may be answered that by the act of 3d March, 1839 (section 12), the commissioner has the power to make all such regulations in respect of the taking of evidence to be used in contested cases before him as may be just and reasonable. If it should appear, therefore, that this is one of that class, it will follow that the right to regulate will include the right to compel. As to the latter part of the objection, that does by no means follow, because in a court of law where, if a suit for infringement should be brought on an issue of this kind, it would be proper to submit the contested facts to a jury, especially where the intent was essential to the result. For there the rule is peculiar to a tribunal constructed as a court of law is; but suppose the suit to be such as to be brought in a court of chancery, in which court there is no jury, that court would certainly not be deprived of jurisdiction for that reason; neither ought the commissioner. The proceeding in this case was had under the eighth section of the act of 1836, which declares that whenever an application shall be made for a patent which in the opinion of the commissioner would interfere, &c., and the commissioner's decision, as before stated, was given upon the facts appearing on the trial. I cannot perceive any sufficient reason upon which the objections to the jurisdiction can be sustained.

The subsequent reasons of appeal are, substantially, that admitting the jurisdiction, yet there was no sufficient evidence of a statutory bar to the appellant's title to the grant of letters-patent as declared by the commissioner. The facts on which this point of the decision rests are, that in the year 1834 or 1835 Walter Hunt, the appellant, invented the sewing machine in question, presenting the features covered by the claim upon which he now applies for letters-patent, and at that time constructed an experimental working machine, upon which successful experiments were repeatedly made, and which invention was then perfected so far forth as to have entitled said Hunt to letters-patent if he had then applied therefor; that not long after the completion of the invention said Hunt sold one half thereof for a valuable consideration to Arrowsmith, and soon after, for a like valuable consideration, sold to said Arrowsmith the other half absolutely and without any reservation. On the part of the appellant, the facts are further stated to be that circumstances were adverse. Those engaged in the sewing busi-

ness were adverse to the introduction of sewing machines, and nothing could be done with the invention as a source of profit without a sufficient capital to go into the manufacture and use of the machine; and this Arrowsmith had not at his command.

Such was the case in the condition of affairs until in 1846 E. Howe, Jr., obtained letters-patent for a sewing machine involving the features claimed by Hunt, and now in dispute. Hunt himself states that there were two or more machines made. In 1853 Hunt repurchased said invention and procured an application for letters therefor to be filed in the patent office. In the years 1834–'35 one of the machines alluded to, after the purchase by Arrowsmith, and whilst he continued the sole owner of said invention, was repeatedly exhibited and worked in public both in New York and in Baltimore. The same was freely exposed to others who were brought to examine it, and no particular means were adopted to keep it secret. Arrowsmith sold back the invention, as just stated, to Hunt for $150. The old machine itself he sold to Mr. Clark, of the firm of J. M. Singer & Co., for $100. The proof in the case also shows that machines constructed substantially upon the principles of Hunt's invention were made and publicly used by Howe and many others more than two years before the application for a patent by the appellant. It may have been observed that the commissioner makes his decision to depend mainly upon the construction of the seventh section of the act of 1836; that the invention has been in public use or on sale with the applicant's consent or allowance prior to the application, and not within the modification of the rule made by the seventh section of the act of 1839, the last paragraph of which is that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." It was held that the sale of the invention to Arrowsmith amounted to consent on the part of the inventor that all the world might freely use and sell the thing. The position taken in the argument of the counsel for the appellant is that there is no proof that the invention or machine was ever in public use with the consent of Hunt, the inventor, nor of Arrowsmith; but that, on the contrary, it is clear that nothing of the kind ever occurred, but both the use for two years and the consent are mere legal fictions, not sustained by facts—mere presumptions, constructive uses, and constructive assent; that there was no such intention on the part of Hunt; that the assignment was made under the authority of the fourth section of the act of 1793 [1 Stat. 318]; and that the assignee would be entitled to the beneficiary interest in a patent to be issued in the name of Hunt. This is true; "and the assignee having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor both as to right and responsibility."

No effect which can be given to this argument will show the case to be such as to derive support from the rule laid down in the seventh section of the act of 1839, the object of which provision was that where the invention had before the patent been used under a license or grant of the patentee, that license or grant, being a purchase or sale or use with the consent of the patentee, such purchaser, &c., should be protected; and that a sale or prior use from or under the inventor, and with his consent and knowledge, should not invalidate a subsequent patent to be granted to such inventor, provided it were not more than two years from the time of the application therefor. This is an exception, and was intended to relieve the patentee from the effect of the former laws and their construction by the courts. But the acts or omissions urged as a bar to the title of the inventor occurred many more than two years before the application, and must therefore be governed by the former laws and their construction by the courts. The sixth section of the act of 1836 requires that the invention should be new—"not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale with his consent or allowance as the inventor or discoverer." These are the conditions prescribed, and they must be complied with; for, as before said, the monopoly is not of common right, but dependent upon the grant of the public. The undertaking on the one part is in consideration of a valuable invention, to be given up for the benefit of the public by the inventor, on a reasonable term of the exclusive use of the fruits of the invention to be secured to him. His faith is pledged that it is a thing not known before; that there has been no unnecessary delay in the application for a patent; that it has not been unnecessarily exposed to public view; that the manufacture, machine, or invention has not been made and sold, or offered for sale to others, or permitted or suffered, without opposition, if known; otherwise a fraud would be practiced by the inventor on the public, and by such means he would get, instead of a term of fourteen years, a greatly more extended term. These principles, I think, are clearly established. I think it necessary to state some passages from the decision of the court in the case of Shaw v. Cooper, 7 Pet. [32 U. S.] 319 to 322: "The patent law was designed for the public benefit as well as for the benefit of inventors. For a valuable invention the public, on the inventor's complying with certain conditions, gives him for a limited period the

profits arising from the sale of the thing invented." Again: "A strict construction of the act as it regards the public use of an invention before it is patented is not only required by its letter and spirit, but also by sound policy. A term of fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor. But if he may delay an application for his patent at pleasure, although his new invention be carried into public use, he may extend the period beyond what the law intended to give him. * * * The doctrine of presumed acquiescence, where the public use is known or might be known to the inventor, is the only safe rule which can be adopted on this subject."

And now as to the public use. The substance of the facts has already been stated. A public use as meant by the statute is a use in public. It need not be generally adopted by the public. Public is not equivalent to general, but distinguished from secret use—used in a public manner. What constitutes proof of it and of consent and allowance of the applicant for a patent? In the same case of Shaw v. Cooper the rule is laid down to be that a knowledge of such public use or sale by others, without objection on the part of the inventor (or assignee), will go far towards raising the presumption of an acquiescence, and in some cases will be a sufficient proof of it. The question in such cases is as to his consent. And if knowledge of the use of his invention by others is brought home to him, and no exclusive right has been asserted by him against that use, his silence will furnish very strong evidence that he has waived his right. If the evidence shows a long acquiescence or a very general use, it will be conclusive. No particular lapse of time is necessary to be shown after knowledge and acquiescence are established.

The principles settled by the aforegoing cases I think are applicable to the instances in which those persons, who constructed machines upon substantially the same principles with those of Hunt, used them publicly for years before Hunt's application, and within the knowledge of him and his assignee, or of which they might have had knowledge. But the evidence of the sale by Hunt to Arrowsmith for a valuable and profitable consideration, and by Arrowsmith for a like valuable consideration to Edward Clark, of the firm of Singer & Co., of what remained of the machine undestroyed by the fire, and the public exhibition of the machine by Arrowsmith in Baltimore and New York, as appears from the evidence in the case, are facts still more conclusive. The construction put upon the sale to Arrowsmith, as to its effect, and the intent that no permission was given that it should be publicly used, I think is not correct. The sale and transfer was an absolute one, without reservation, by which all right thereto or use thereof became vested in Arrowsmith and entirely out of the control of Hunt; and it was therefore wholly immaterial what might have been the secret intent of Hunt; nor could it at the time of the application for the patent be brought within the saving provision of the act of 1839 before alluded to. And if thus barred of his title, according to the principles of law no repurchase could enable him to resume the right. To show the legal correctness of these positions, in Shaw v. Cooper, 7 Pet. [32 U. S.] 292, in the opinion of the court, it is said by public use is meant use in public; that is to say, if the inventor himself makes and sells the thing to be used by others, or it is made by one other person only, with his knowledge and without objection, before his application for a patent; a fortiori, if he suffers it to get into general use. At page 323: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever without an immediate assertion of his right he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right." Curtis, page 347: "As our law stood before the year 1839, if the inventor sold to any one who might choose to buy, although it was only a single specimen of his invention, and sold for profit on it as an invention, such a sale would be a 'public use,' and the unlimited nature of the object with which a knowledge of the invention was imparted would prevent him from resuming his exclusive right by a subsequent patent." Wood v. Zimmer, 1 Holt, N. P. 60. In Pennock v. Dialogue, 2 Pet. [27 U. S.] 1: "The use here referred to has always been understood to be a public use, and not a private or surreptitious use in fraud of the inventor," but a public use by his consent, by a sale by himself, or by others with his acquiescence, by which he abandons his right or disables himself from complying with the law—it is deemed a fraud in law to take out a patent after such use.

I have now given to the points submitted to me in this case the fullest and most careful consideration in my power. And for the reasons already stated, I am of opinion that Hunt, the appellant, was barred of his title to receive a patent for his invention aforesaid, and that the decision of the commissioner in the case ought to be affirmed.

Case No. 6,892.

HUNT et ux. v. INNIS et al.

[2 Woods, 103.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

RE-ESTABLISHMENT OF A BURNT MORTGAGE — DECREE—EFFECT THEREOF— RECITAL—AS AN ADMISSION.

1. The records in the recorder's office of the parish of Rapides having been destroyed by fire,

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

an act of the legislature was passed providing for re-establishing said records by proceedings before the district judge of the parish. *Held*, that the inscription, in the proper office, of a decree of said judge re-establishing a mortgage, the record of which had been burned, had the same effect as a reinscription of said mortgage.

2. A consent decree made in a case brought to enjoin the enforcement of a mortgage, by which the mortgage was recognized, the rate of interest increased, and the time for the payment of the debt secured thereby extended, and which declared that "this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same," did not have the effect of extinguishing the mortgage, nor was the mortgage merged in the decree.

3. A notarial act executed by the parties holding the legal title to a piece of real estate which recited the execution and recording of a mortgage thereon, and the destruction of the mortgage record by fire, recited the re-establishment thereof according to law, admitted a specified sum to be due on said mortgage, which sum the parties by the notarial act agreed to pay in installments, is itself a mortgage, and its inscription is effectual under the law of Louisiana to preserve its lien for ten years.

[In equity. Bill by Samuel B. Hunt and wife against Elizabeth B. Innis and others.] Submitted for final decree upon the pleadings and evidence.

Wm. Grant, for complainants.

Thos. Allen Clarke and Thos. L. Bayne, for defendants.

WOODS, Circuit Judge. This was a bill to foreclose a mortgage executed on the 17th day of October, 1842, on a plantation in Rapides parish, to secure the sum of $20,000 to be paid in ten equal annual installments, beginning on the first day of January, 1843. The mortgage was duly inscribed in the office of the recorder of mortgages for the parish of Rapides, on the day of its date. In 1851, the mortgagors commenced a suit against the mortgagees, in the Rapides district court, for some relief against a proceeding, by way of seizure and sale, instituted by the mortgagees. In that case a consent order was made, by which it was decreed that the injunction granted in the case be dissolved, and that in lieu of damages on the injunction bond, the defendants recover of the obligors in the bond, the sum of $1,000; that the mortgage debt due Hunt and wife, as set forth in the order of seizure and sale obtained by them, and the execution whereof had been enjoined in the case, should bear interest at the rate of eight per cent. per annum from June 2, 1861, the date of the injunction, until payment, instead of five per cent., as allowed in the order of seizure; but the plaintiffs in injunction, Elizabeth B. and John Innis, were to be allowed time for the payment of the mortgage debt and interest as follows, to wit: in five equal annual installments of $1,853 each, the first payable on the first day of January, 1853; and it was declared "that this decree is not to operate a novation of the original mortgage to Hunt and wife, on which the said order of seizure was obtained, or in any manner affect the validity of the same." This proceeding and decree, which included a copy of the mortgage, was recorded in the office of the recorder of mortgages on December 5, 1851, and also on April 17, 1861. In the year 1864, the court house of the parish of Rapides was burned, with the records of the recorder's office, including the original record of this mortgage, and of the decree above mentioned. On February 28, 1866, an act of the legislature of Louisiana was approved which provided for supplying the loss of the records destroyed in the said fire, by proceedings to be instituted before the district judge of the parish, and by his judgment and decree. [Laws La. 1866, p. 80.] The seventh section of this act declared "that the recording in the proper book of the office of the parish recorder, of a copy of the judgment rendered under the provisions of this act, establishing any deed, bond, mortgage, judgment, or other writing, shall have the same force and effect as the recording of the original deed, bond, mortgage, judgment, or other writing which was destroyed." Pursuant to this statute, a proceeding was instituted before the judge of the district court for the parish of Rapides, to establish the said mortgage, and the said consent decree of 1851, and on June 22, 1866, a decree was rendered by said judge recognizing, establishing, and confirming the mortgage of 1842, the decree of 1851, and the reinscription of said mortgage and judgment made in the recorder's office in 1861, and declaring that they have the same force and effect as when stipulated, granted, confirmed and reinscribed. The mortgage and judgment so established were recorded in the office of the parish recorder of mortgages on July 1, 1866.

The controversy in the case is between the mortgagees named in the mortgage of 1842, the complainants, and certain defendants, who have obtained judgments against the mortgagors, which were recorded in the office of the recorder of mortgages for the parish of Rapides, on the 12th of March, 1868. These judgment creditors have answered and have filed a cross-bill in which they claim that their recorded judgments are the first lien upon the property, and that in fact the complainants have no lien whatever, either as against the mortgagors or any one else. They base this claim on two grounds:

1. That admitting the reinscription of the mortgage of complainants in 1861, it has never since that year been reinscribed, and as the ten years allowed for reinscription expired in 1871, under the jurisprudence of this state, the mortgage has become of no effect even as against the mortgagors, and of course is invalid as against any one else. The claim is that the record of the proceedings and decree of the district court of the parish of Rapides, which contains a copy of the mortgage and the decree of 1851, and the order of the court establishing the same, does not avail as a reinscription. I think this

claim is untenable. The district court for the parish of Rapides re-established the mortgage in haec verba, and this decree, containing an accurate copy of the mortgage as found by that court, was in September, 1866, recorded in the office of the recorder of mortgages for the parish of Rapides. Now the claim is that the decree of the court and this registration of its decree only put the parties in the same position as if there had been no destruction of the records by fire; that the ten years within which the reinscription had to be made commenced to run in 1861, and this term was not interrupted by the registration of the copy of the mortgage and decree of the court establishing it in 1866. But it seems to me that section 7 of the act to establish the burnt records already quoted does give effect to the record of a re-established deed, bond, mortgage, judgment, or other writing, as of a reinscription. It says that the recording in the proper office of any of the documents named shall have the same force and effect as the recording of the original. The recording of the original mortgage would give it effect for ten years. So if we give force to the words of this statute, the recording of the established copy has the same effect. In my judgment, the registration of an established copy would accomplish all the purposes of a reinscription of a mortgage. The object of a reinscription is to give notice to all, that the mortgage debt is not yet paid and that the mortgagee insists on his lien upon the mortgaged premises. This reinscription must be made every ten years. Now does not the registration of a re-established mortgage, under the act of February 28, 1866, give notice that the mortgage is not paid and that the mortgagee insists upon his lien? It seems to me that the registration of the re-established deed is a compliance with the letter as well as spirit of the registration law of this state. The law does not require a vain and useless thing to be done. A mortgagee can reinscribe his mortgage as often as he pleases; every year if he so elects. Now what end could be subserved by requiring this mortgagee, in case he desired to reinscribe his mortgage on the day when he had the re-established record recorded, to have the same record again recorded in the same book, in the same office, and on the same day? Yet if he had done that, I infer that the defendants could not claim that such reinscription was not good for ten years. In my judgment, two reinscriptions on the same day and upon the same record book are unnecessary and one has all the effect of two. I hold therefore that the complainants have not lost their lien from any failure to reinscribe.

The defendants insist,

2. That the mortgage of complainants was merged in the judgment rendered in 1851, and that unless this judgment was revived within ten years, it became void and of no effect; that no revivor ever took place, and that consequently the lien of the judgment is lost, and that in fact the judgment itself is invalid. This claim is based on the idea that the mortgage was merged in the judgment. But a reference to the decree of the court shows that this was not so. This judgment, which was in fact only a compromise between the parties entered of record, simply extended the time for the payment of the mortgage debt, and increased the rate of interest which the debt was to bear. It then explicitly declares, that this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same. This language is entirely inconsistent with the idea of a merger of the mortgage in the decree. No suit could be maintained on this decree without setting out the original mortgage. In my judgment, the mortgage remained in full force and effect notwithstanding this decree, and no revivor of the decree was necessary. The mortgage of itself preserved the lien. But it seems to me that a complete answer to the claim of defendants, that they have the first lien upon the mortgaged premises, is found in a fact yet to be stated. This is, that on the 11th day of September, 1866, Eliza B. Innis, C. A. Innis, Cornelius Innis and John Innis, the parties then holding the legal title to the mortgaged premises, with the consent and concurrence of the mortgagee, executed in due form a notarial act in which they recited the execution of the original mortgage, described with precision the mortgaged premises, recited the destruction of the record of the mortgage by fire in 1864, and the establishment of the record thereof by the district judge of Rapides parish, as hereinbefore set forth, admitted the balance due on said mortgage to be $13,336.28, with interest at eight per cent. per annum, and agreed to pay said sum in installments as in said act set forth. This act does not profess to convey the mortgaged property, but to be a confirmation of the conveyance by the mortgage of 1842. It seems to me, that to all intents and purposes, this act is itself a mortgage, and as it was recorded in the proper office on September 13, 1866, it is still in full force and effect.

Case No. 6,893.

HUNT et al. v. JACKSON.

[5 Blatchf. 349; [1] 6 Am. Law Reg. (N. S.) 169.]

Circuit Court, S. D. New York. Aug. 9, 1866.

BANKRUPTCY—FOREIGN ASSIGNEE—RIGHT TO SUE.

1. The rule in the courts of the state of New York is, that while the right of a foreign assignee in bankruptcy, as respects the assets of the bankrupt, must yield to the claims of creditors of the bankrupt seeking the aid of those courts, such foreign assignee may, as the representative of the bankrupt, sue to collect the

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

assets of the bankrupt, to the same extent as the bankrupt could have sued if no bankruptcy had taken place.

[Cited in Cuykendall v. Miles, 10 Fed. 343.]

[Cited in Re Waite, 99 N. Y. 448, 2 N. E. 440.]

2. Such rule was applied by this court, in a suit brought therein by a foreign assignee in bankruptcy, to collect an asset of the bankrupt's estate.

This was a demurrer to a bill in equity. The plaintiffs [Frederick Hunt and others] were aliens, and assignees in bankruptcy, under the laws of Great Britain, of one Golding, an insolvent merchant of London. The defendant [Abraham J. Jackson] was a citizen of the state of New York, residing in the city of New York. The material allegations of the bill were, that the bankrupt, Golding, before his bankruptcy, carried on business as a merchant in London; that, on the 21st of April, 1864, he consigned to the defendant, a merchant in New York, an invoice of diamonds, of the value of £1,227.12.6, for sale on commission; that the diamonds duly came into the defendant's possession, at New York; that, on the 8th of August, 1864, at London, Golding was, in the court of bankruptcy, duly adjudicated a bankrupt; that, on the 30th of the same month, the plaintiffs were appointed creditors' assignees, whereby the bankrupt's estate became vested in them; that, on the same day, one Henry Honey, of London, was, at a meeting of the creditors, appointed manager, to collect and wind up the estate of the bankrupt; that, on the 1st of September, 1864, Honey wrote to the defendant, on behalf of the plaintiffs, requesting him to remit the proceeds of the diamonds sold, and return those unsold; that, on the 30th of September, 1864, the defendant wrote to Honey, in reply, that all the diamonds remained unsold, and that he would return them as Honey might direct, on receiving the amount of his outlay and expenses, amounting, as he said, to £264.14.4½; that no account of such outlay and expenses was rendered; and that the plaintiffs had repeatedly requested an account, but the defendant had omitted to render it. The prayer of the bill was, for an account and discovery of the expenses, and that, upon payment to the defendant of such a sum as might be found to be justly due to him for expenses, &c., on account of the diamonds, he might be ordered to surrender them to the plaintiffs. The ground of the demurrer was, in substance, that the plaintiffs, as assignees under a foreign bankrupt law, had no legal capacity to institute and maintain the suit.

Christopher C. Langdell and Edward B. Merrill, for plaintiffs.

Aaron J. Vanderpoel and Edmon Blankman, for defendant.

SHIPMAN, District Judge. The right of foreign assignees in bankruptcy to maintain suits in the courts of this country, and the extent of that right, if any exists, have been repeatedly and elaborately discussed, both by elementary writers and in judicial opinions. Great diversities of views have been expressed, and different results reached in different cases. No advantage would be gained by a rehearsal of these discussions here. In nearly all of the cases where the rights of the foreign assignees have been contested, there has been a conflict between their alleged rights and the claims of other parties, citizens or residents of our own country, or aliens, pursuing remedies in our own courts, against the assets of the bankrupt. But, in the language of Mr. Justice Story, in his Conflict of Laws (section 420): "In most of these cases in which assignments under foreign bankrupt laws have been denied to give a title against attaching creditors, it has been distinctly admitted, that assignees might maintain suits in our courts under such assignments, for the property of the bankrupt. This is avowed, in the most unequivocal manner, in the leading cases in Pennsylvania and New York, already cited, and it is silently admitted in those of Massachusetts." This statement of the law is cited and concurred in by Ruggles, C. J., in Hoyt v. Thompson, 1 Seld. [5 N. Y.] 320, 19 N. Y. 207, decided by the New York court of appeals, in 1851; and Paige, J., in an opinion delivered in the same case, remarks: "Where neither the rights of domestic creditors, or of foreign creditors proceeding against the property under our laws, are involved, the foreign assignee may be permitted to sue in our courts, for the benefit of all the creditors, on principles of national comity, without a surrender of the principle, that a foreign statutory assignment does not operate a transfer of property in this state." The result of the cases was accurately stated by Mr. Justice Story, and citations might be multiplied from judicial opinions which, while they deny the right of the foreign assignee where it conflicts with the claims of creditors seeking the aid of our own courts, almost invariably concede his capacity to sue as the representative of the bankrupt, to the same extent as the latter could have sued if no bankruptcy had taken place. This, as already shown, was evidently the judgment of the New York court of appeals when the case of Hoyt v. Thompson was decided.

The only doubt which has been raised as to the correctness of this view of the law, so far as I know, has originated from the remarks of the judges in the cases of Mosselman v. Caen, 34 Barb. 66, and Willitts v. Waite, 25 N. Y. 577. But the former case was disposed of on another ground. The latter followed Hoyt v. Thompson, and, as an authority, goes no farther than that case. See Judge Allen's opinion, page 587. It is true, that the same judge (page 586), after stating that, "the rule as settled in this state

and in the United States, is that, in cases of assignment by operation of law, the assignees are in the same situation as the bankrupt himself, in regard to foreign debts," and that "they take subject to every equity and subject to the remedies provided by the law of the foreign country where the debt is due and the property is situated," adds: "The reasoning of our courts would, doubtless, carry the rule further, and prohibit assignees under foreign bankrupt laws from suing in our courts." The rule has never been carried to this point, by the courts of New York, in any decision where the precise question was necessarily involved. I certainly shall not lead the way in that direction, and should hesitate somewhat before I followed. The demurrer is overruled, with costs.

HUNT (MONTFORD v.). See Case No. 9,725.

Case No. 6,894.

HUNT v. OLIVER et al.

[3 Chi. Leg. News, 123.]

Circuit Court, E. D. Michigan. Jan. 10, 1871.

TESTIMONY IN EQUITY — ENLARGEMENT OF TIME FOR TAKING — NOTICE TO OPPOSITE PARTY—DEMURRER TO CROSS-BILL — STAY OF PROCEEDINGS IN ORIGINAL CASE.

[1. No enlargement of the time for taking testimony in equity before the master can be made unless notice of the application be given to the opposite party.]

[2. A demurrer to a cross-bill having been sustained, the motion of defendant to stay proceedings under the original bill will be denied.]

On motions of defendant Oliver as follows: First, to vacate an order extending time to take testimony, and referring it to a commissioner to take proofs and to compute amount due upon the bond and mortgage, and to set aside the report of John J. Speed, commissioner, made in pursuance of said order. Second, to stay proceedings in the cause until final determination of the matters in controversy upon the cross-bill filed therein.

A. Russell, for the motions.

D. B. & H. M. Duffield, contra.

LONGYEAR, District Judge. In this case the bill was filed to obtain the foreclosure of a mortgage executed by the defendants, David D. Oliver, and his wife Sarah Ann Oliver, to secure the payment of $35,000 and interest according to the condition of a bond executed by said David D. Oliver. The defendants David D. and Sarah Ann Oliver, appeared and put in their answer, admitting the execution and delivery of the bond and mortgage, but setting up certain facts and circumstances tending to show payment and satisfaction, in part at least, of the mortgage debt. Exceptions to the answer, for impertinence, were filed, and the same were referred to a master under the rules. The master's report upon the exceptions was made, and filed in due time, overruling the exceptions in part and sustaining them in part, and the report became absolute under rule 83. Replication to the answer was filed, and the cause was thus placed at issue, under rule 66, on the 19th day of November, 1869. No testimony was taken, or further proceedings had in the cause until the 12th day of July, 1870, when the order, which is the subject of the present motion, was entered, extending the time to take testimony two months, and referring it to John J. Speed, one of the masters of this court, as examiner, to take proofs in the cause, and to compute the amount due upon the bond and mortgage. The master's report under said order was filed August 22, 1870. Defendant's counsel appeared before the master and objected to the proceedings, but did nothing further upon the reference. No exceptions were taken to the master's report, and it therefore became confirmed by operation of rule 83, and cannot now be attacked unless the order under which it was made was invalid. We will, therefore, direct our attention to the order. By rule 69, it is provided that "three months and no more shall be allowed for taking of testimony after the cause is at issue, unless the court, or judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such a period shall be allowed to be read at the hearing." This of course, implies notice to the opposite party of the application to obtain an enlargement of the time, and a hearing by the court. In other words it must be brought on and heard the same as any other special motion. This does not appear to have been done in the present instance, but the order appears to have been entered as of course, without any notice, cause shown, or hearing had. Again, rule 67 provides the manner of taking testimony in equity causes. It provides first for issuing commissions, filing of interrogatories and cross-interrogatories for the examination of witnesses, and second, by an amendment made by the supreme court in 1861, for the taking of testimony orally, as follows: "Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court," etc. This does not seem to have been complied with. Therefore, the order of July 12th, 1870, and the examination had under it, are absolutely void for non-conformity to the rules of this court above cited, and of course the report and all proceedings had under such order are void. It makes no difference that the bonds and mortgage are admitted by the answer. Other matters are set up by the

answer affecting the amount due upon the mortgage debt, upon which issue was taken, and the rules cited apply equally to all cases in which an issue has been formed. The motion to vacate the order of July 12th, 1870, and to set aside the report of John J. Speed, examiner, made under it, is granted. Second, the demurrer to the cross-bill filed in this cause having been sustained, the motion by defendants to stay proceedings in this cause is denied.

[See 109 U. S. 177, 3 Sup. Ct. 114, and 118 U. S. 211, 6 Sup. Ct. 1083, for other proceedings.]

Case No. 6,895.

HUNT v. POOKE.

[1 Abb. U. S. 556.] [1]

Circuit Court, D. Rhode Island. April Term, 1870.

PRACTICE—GRANTING NEW TRIAL.

1. A circuit court has power to set aside a verdict upon the ground that it is against the weight of evidence.

2. The power to set aside a verdict as against the weight of evidence should only be exercised where the court can clearly see that the jury have acted under some mistake or from some improper motive; where there has been some mistrial apparent to every impartial mind without labored examination; or where the jury have plainly departed from some rule of law, or made unwarranted deductions from the evidence.

[Cited in Fuller v. Fletcher, 6 Fed. 129.]

Motion for a new trial.

B. N. & S. S. Lapham, for the motion.

A. Payne and John F. Tobey, opposed.

KNOWLES, District Judge. The jury, in the case of Hunt, Tillinghast, and others against Pooke and Steere, returned a verdict against the defendants for the sum of two hundred and twenty-nine thousand four hundred and forty-two dollars and ninety cents; and a motion is now pressed by them that it be set aside, because, as alleged, against the evidence, or the weight of evidence.

Under federal laws, and the practice of federal courts, motions like this are addressed to the discretion of the presiding judge, or, in case of his decease or inability, to the discretion of his successor or associate. It is assumed that his notes of the testimony sufficiently represent the evidence upon which the verdict was based; and whenever from any cause these are not available, a report of the testimony, satisfactory to the court, must be prepared, as best it can, before the motion can be heard. In this case the jury trial took place in my presence, and the report of the evidence, as counsel presented it, is consistent in all essentials with both my notes and my recollections.

It is a noticeable fact, apparent on merely a glance at text-books and the leading reports of the state and federal courts, that although this ground for a new trial is very frequently assigned, it is rarely insisted upon at a hearing of the motion; and also, that whenever it is insisted upon, whether as a single ground, or as one of a series, it is rarely, very rarely sustained by a court. Nor is this the only prominent fact which the authorities, so to style them, avouch. Another is, that almost without exception, whenever a court is urged to grant a new trial upon this ground, its reasonings (if it deign to reason) betray a consciousness that, after all is said that pertinently can be in support of the right of a court to overrule a jury's finding upon the evidence legally submitted to them, there yet remains a serious doubt as to its power in this regard. But as I find this point res adjudicata in this circuit, and no question upon it is raised at the bar, I abstain from inquiry or remark concerning it. Suffice it to say, that in the opinion of Justice Daniels, in Mitchell v. Harmony, 13 How. [54 U. S.] 138, will be found arguments and suggestions bearing upon this point, to which, in my view, a satisfactory answer is yet a desideratum. Mr. Calhoun was wont to maintain that the recognition of a right on the part of a state to nullify a law of the federal government, was practically an invaluable safeguard against oppressive legislation on the part of the federal government; and so may it be argued that a recognition of a right in the court to set aside a jury's verdict, because against the weight of evidence, is, to some extent, a preventive of hasty and inconsiderate findings in the jury room.

Assuming, as I am warranted in doing, that my right and power to set aside the verdict in this case is unquestionable, it is still but courteous and prudent to inquire by what rules and principles my predecessors in office in this circuit have been guided in like cases. That such rules and principles are binding as precedents, in the technical sense, cannot be contended; for when a question is addressed to the discretion of a judge, what another judge, in the exercise of his discretion, may have done, can be regarded but as data for argument, not as a ground of assertion and demand. What, then, has been the ruling of the eminent jurists who, as circuit judges, have heretofore administered justice in this district?

I. Justice Story, in Alsop v. Commercial Ins. Co. [Case No. 262], says: "The next exception is that the verdict is against evidence, or at least against the weight of evidence. . . . In considering questions of this nature, I confess myself among those judges who are very reluctant to intermeddle with the verdicts of juries in mere matters of fact. . . . There was a time when courts were disposed to go to an extravagant length on this subject, and to set

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

aside the verdict of a jury merely because, in the opinion of the court, the weight of evidence was on the other side. This was, indeed, substituting the court for the jury in trying the credibility of testimony and the weight of evidence. For one, I am not disposed to proceed far upon this dangerous ground; and in matters of fact I hold it to be my duty to abstain from interfering with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see that they have acted under some mistake, or from some improper motive, bias, or feeling. I adopt the language of Lord Ellenborough (see Moore & S. 192): 'The question before us is not whether the verdict given in this case is such as we should ourselves have given, but whether, having been given by a jury, to whom the whole case was fully left in point of fact, and to whom the law upon the subject was distinctly stated, it ought to be set aside, upon the grounds of the argument now suggested to us,—namely, that they have drawn an erroneous conclusion.' "

II. Justice Woodbury, in Fearing v. De Wolf [Case No. 4,711], says: "It has been adjudicated that though in the exercise of this discretion a verdict may be set aside even when there is evidence on both sides, yet, to set aside a verdict because against the supposed weight of the evidence, it must be clearly and palpably against it. One illustration given as to this is when the evidence is all one way, except trifling or impeached matter, and the verdict is the other way. So it may be set aside if the evidence was all on one side in its tendency, no less than origin; and in this and the last case was apparently sufficient. Or when it is so strong for one side that the court did not deem it necessary to charge the jury, and the verdict was for the other side; or when the judge stops the defendant from putting in evidence, because there is so little for the plaintiff, and the jury find the other way. Circumstances like these show at once that there has been a mistrial. But if the mistrial or misfinding is not thus decidedly and manifestly wrong, standing out in bold relief, and clear to almost every impartial mind, and without a labored examination and comparison, the court must refuse to interfere." And for this conclusion, Justice Woodbury proceeds to assign reasons, exhaustive of the subject.

III. Justice Curtis, in Wilkinson v. Greeley [Case No. 17,671], says: "I hold it to be my duty not to interfere with the verdict of a jury as being against the evidence, unless I can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive, in rendering their verdict." And again, in Palmer v. Fiske [Id. 10,691], he says: "Now what I have to determine upon this motion, is, not whether I should have found this verdict, but whether I can clearly see that the jury must have fallen into some important mistake in computing the damages, or must have departed from some rule of law, or have made deductions from the evidence, which are plainly not warranted by it."

Of the views of Justice Clifford, we have a very significant intimation in Wightman v. Providence [Case No. 17,630], in these words: "In the second place, it is insisted that the verdict is against the evidence introduced to the jury. Such motions (for a new trial) are frequently made and seldom sustained, and it is quite certain in the present case that the motion is without merit." And in Bray v. Hartshorn [Id. 1,820], the same learned justice says: "New trial is also asked upon the ground that the verdict of the jury is against the evidence, and the question is presented in some two or three forms. One or two observations upon this point will be sufficient. When evidence is given on both sides, and the verdict of the jury is satisfactory to the court, the parties must not expect an extended argument from the court in disposing of the motion for a new trial. Cases of real doubt, or when the court is dissatisfied with the verdict, of course are not included in this remark. In view of the explanations given and of the whole case, I am of opinion that there was no error of law at the trial, and no reason for disturbing the verdict of the jury. The motion for a new trial is accordingly overruled."

As I have already intimated, I cannot regard the opinions of even these distinguished jurists as controlling or limiting my judicial action. My own judgment is to dictate my decision upon the question submitted to me. Still, as I find in them a rule or rules of proceeding, to which, in my view, no tenable objection can be suggested, I shall, in disposing of this motion, keep within the lines of these opinions.

Are then the defendants entitled to a new trial, for the reason assigned,—having regard to the settled practice in this circuit, as shown by these extracts from the opinions of Justice Story and his successors? To the question, my answer can be but in the negative; nor does it seem to me necessary or expedient, in vindication of this finding, to recapitulate or to discuss in detail the evidence submitted or the points raised.

The jury, with the exception of two members only, were the same before whom but a few weeks previously had been tried a cause between, as it were, the same parties, in the trial of which much—in fact the greater part—of this evidence was submitted. That they fully understood the evidence must be presumed, for it was put before them not hurriedly, but deliberately, and was explained and commented upon, both in the opening and close by the defendant's coun-

sel without stint or check. Indeed, in this regard the case is without a parallel within my experience. Ordinarily it is deemed an objection to a jury, as a whole, that in a trial of some cause, already disposed of, they have heard the testimony which is necessarily to be submitted in the case called for trial; and had either party at the trial asked that another jury, strangers to the facts and parties, be impanneled, he might reasonably have anticipated that his motion would have prevailed. But so it happened, that the parties were content (each objecting to one individual only) to submit the cause to the same jury to whom the replevin case had been submitted; and, therefore, from neither can properly now be heard any imputation of bias or prepossession on the part of the jurors or any of them. That the jury were, therefore, more familiar with the facts in combination, and in detail, than is usual, and of course better qualified to deduce correct conclusions from them, as suggested or pressed by the counsel respectively, are self-evident propositions.

Furthermore, as will be recollected, the law of the case, as embodied in the charge of the court, was made known to the counsel and jury, while the defendant's counsel was closing, and accordingly the counsel's arguments were framed, and the facts classified, compared, and commented upon with especial reference to the law, as assented to by both parties. The charge of the court, substantially embodying only the rules of law thus assented to, certainly did not mislead or confuse the jury, as charges, unhappily, sometimes do; and was, so far as appeared, satisfactory to both parties. The jury patiently heard all the evidence, and the elaborate arguments of counsel, and seemingly listened with due respect and attention to the court's charge—and then rendered their verdict. The parties had been fully heard through able counsel of their own choosing. They elected to submit their differences to the award of twelve men, impanneled as a jury, and with that, for aught that has been shown, they are bound to be content. I can see no legal ground for overruling or setting it aside. To do this, under the circumstances of the case, distinguished as it is from causes in general in the particulars to which I have referred, would be, in my view, to adjudge the jury to have been most pitiably wanting in barely ordinary intelligence and sagacity.

In the argument of this motion, it has been urged with great force, as it was at the trial, that the entries upon the plaintiffs' books, and the accounts rendered by them, conclusively show a payment, or settlement of the plaintiffs' account against the defendant firm; and it is contended, seemingly with confidence, that inasmuch as the jury failed to adopt this conclusion, their verdict should be held to have been against the evidence. That this was very significant as well as very pertinent evidence, abstractly considered, cannot be questioned; and that it should be relied on, by counsel, as of great weight, is no matter of wonder. But it is to be kept in mind that neither did the defendant's counsel in his argument to the jury contend, nor did the court charge, that this evidence was conclusive. On the contrary, the jury were instructed by the court, adopting the views of the antagonizing counsel, as expressed in their arguments, that the evidence in question was but portions of the facts entitled to consideration, and that it was not in itself conclusive evidence of an agreement, or even of an intent, on the plaintiffs' part, to release or exonerate their debtor, Pooke. In what degree that evidence tended to show such an intent or agreement, the jury were told they were to determine upon all the facts in proof. Whether or not the plaintiffs were for any reason estopped from denying that Pooke had been released by them, is a question which at the trial was not propounded to the court. Then it would not have been impertinent; and if then propounded, would, of course, have been answered. In the trial of this motion, it is obviously an irrelevant inquiry.

Of my views of duty and policy, as regards instructions to juries, the counsel and parties in this case, not to say the bar and the public generally, are already apprised. My views as regards the setting aside of verdicts, I deem it not amiss, in this connection, to state in as few words as may be.

The right and power of a federal judge in the exercise of his discretion to set aside a jury's verdict, and to grant a new trial upon terms such as he sees fit to impose, is, in view of the best authorities, not to be questioned. Whether a trial by jury in our day, the court claiming a right in its discretion to instruct the jury upon the weight as well as the relevancy of evidence, and a power in its discretion to set aside a verdict for any cause, is, in fact, the trial by jury, of the olden time of Coke and his cotemporaries,—and in eulogiums upon which so much of breath and printers' ink has been wasted by the orators and writers of Anglo-Saxondom of yesterday and of a century preceding,—is a question which I willingly refrain from raising in this connection. The power to set aside a verdict is claimed and exercised, and its value and necessity, as an agency in the prevention and correction of wrong, and the furtherance of justice and right, I fully appreciate. So long as to a chance selected jury we submit our differences and disputes, touching all our highest interests,—life, property, reputation,—it is the dictate of common sense that somewhere shall reside a power to correct the errors of ignorance, recklessness, and incapacity, and defeat the machinations of malice and fraud. For what is a jury? Nothing less nor more than (in the words of another) "a body of men, drawn by hazard from the community at

large; taken forcibly from their private affairs, and without the practiced powers of analysis, of memory, and of judgment, which alone could enable them to detect fallacies, to unravel the tangled web of deceit, and resist the persuasions of eloquence—especially when compelled to a hurried unanimity, in cases where the wisest are compelled to doubt."

Such the jury, the necessity of a right and power to supervise, and, if need be, modify their findings, is apparent. But not less apparent is it, that, if a jury trial is to be anything better or more than a glittering sham, this power to set aside verdicts as against the evidence must be exercised only on rare occasions. Evidently such was the view of the eminent jurists whose opinions I have quoted, as establishing the rule of law, or rather the practice, within this circuit, my concurrence in which I have already signified.

The right of the court to instruct a jury in matters of law, is believed to be everywhere conceded; and we know that no court entitled to respect ever hesitates to set aside a verdict when it is shown that its instructions have been ignored or contemned. The right of the jury to determine questions of fact is equally well established; and it is undeniably as obligatory upon a court to respect a right of the jury, as to demand from the jury respect for its rights. The boundary line between the provinces of the court and jury, originally, centuries ago, clearly enough defined and seldom overleaped, is now not easily found. In the day of Sir Edward Coke, the maxim of the law was: "And as with respect to the questions of law, the jury must not respond, but only the judges; so (or in like manner or under like restriction) the judges must not respond to questions of fact, but only the jury,"—a maxim which evidently teaches that the jury and court, within their respective spheres of duty, are alike independent each of the other, and with which the practices of to-day are manifestly inconsistent. But it is of the law of to-day alone, that the occasion requires me to treat. Under this law, a federal judge, exercising a discretion without limit, may, in his charges, mold a jury's determination (in the words of Blackstone), "by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder;" and may also, if he see fit, set aside the verdicts which successive juries may render, until one satisfactory to him shall be returned. "Ita lex scripta est." For a modification of it, if desired, the power of the federal legislature must be invoked. In this district, so far as appears, this discretion has invariably been wisely, and, therefore, blamelessly exercised. It is but reasonable and magnanimous to hope and trust that neither through ignorance, indolence, wantonness, or perverseness, will that discretion in the future be abused.

It was, in my view, no abuse of that discretion, when the Pennsylvania jurist, on the return of a verdict by a jury, on the instant exclaimed: "Mr. Clerk! Enter an order that that verdict be set aside. I wish it to be understood that in my court it requires a verdict from thirteen to rob a banking corporation." Nor was it, in my view, any abuse of that discretion on the part of Justice Curtis, when, at Newport, a motion for a new trial on the ground that the verdict was against the evidence, being handed him by a very able and very pertinacious member of the Rhode Island bar, he, without a moment's hesitation, said: "You can file your motion, Mr. C., but I overrule it now and at once—for I heard that case tried, and am satisfied with the verdict." The motion for a new trial is overruled.

Judgment on the verdict for two hundred thirty-one thousand five hundred and eighty-four dollars and thirty-six cents for plaintiffs.

Case No. 6,896.

HUNT et al. v. POOKE et al.

[5 N. B. R. (1872) 161.] [1]

District Court, D. Rhode Island.

BANKRUPTCY — DECEASE OF A PARTNER PRIOR TO ADJUDICATION—FORMER ADJUDICATION OF ONE OF THE PARTNERS—IMPRISONMENT OF BANKRUPT —PETITION SIGNED BY ATTORNEY.

1. The decease of one partner prior to any adjudication upon the question of bankruptcy, is not legal cause for dismissing the petition.

2. A firm may be declared bankrupts, although one of its members may have already been adjudicated on a creditor's petition.

[See note at end of case.]

3. Where it is proved that the bankrupt has been imprisoned but seven days exclusive of the first day, this of itself is not sufficient to support an adjudication of bankruptcy.

4. For the purposes of petitioning, a partnership is to be held to subsist so long as there are outstanding debts against the firm or assets undistributed belonging to it.

[See note at end of case.]

5. If neither the petition nor the deposition of the act of bankruptcy are signed by the petitioner, the defect is fatal.

[See note at end of case.]

In bankruptcy.

Tobey, Payne & Jenckes, for petitioners.

B. N. & S. S. Lapham, for respondents.

KNOWLES, District Judge. The petition in this case was filed on the fifteenth of September, eighteen hundred and seventy, and process thereon ordered returnable October fifth, eighteen hundred and seventy. The petitioners named are Seth B. Hunt, Philip Til-

[1] [Reprinted by permission.]

linghast and Robert W. Aborn, of the city of New York, who represent that they are creditors of William Pooke and Anthony Steere, late partners as Pooke & Steere; and that said Pooke & Steere have committed an act of bankruptcy, namely: have been actually imprisoned for more than seven days on a civil action for a sum exceeding one hundred dollars. The petition is subscribed, "Hunt, Tillinghast & Co., petitioners, by Philip Tillinghast, Jr., special attorney." The oath or verification of this petition, though written "I, Philip Tillinghast, Jr., special attorney of the petitioners above named," etc., is subscribed similarly to the petition, as also is the deposition to the act of bankruptcy, although the deposition is drawn as that of Philip Tillinghast, Jr., of the city of New York, testifying simply as a witness. The deposition as to the petitioning creditors' claim, filed with their petition, was by the said Philip Tillinghast, Jr., and subscribed as above stated. On the fifth of October the respondents appeared by counsel, denying their bankruptcy, and waiving their right to a jury trial, whereupon the case was continued for hearing at a day future. On the fourteenth of October, one of the respondents, Steere, deceased, and on the suggestion of his death the case was further continued, to await an appointment of an administrator. On the appointment of Thomas E. Steere to that office, he was active to appear and assume the defence of the suit; and accordingly on the first of March, eighteen hundred and seventy-one, he entered an appearance and filed his motion in writing, that the said suit be abated and dismissed, because of the death of the said Anthony Steere. Neither party being prepared for a hearing on that day, the case was continued without special assignment until the seventh of June, when, by agreement, it was called for hearing before the court.

As the counsel for the petitioners was proceeding to state the case, as one of simply a denial of the act of bankruptcy, the court reminded the parties that a motion to dismiss upon some ground unknown to the court had been filed, and if that was not waived, to that must attention first be given. A conference between counsel then ensued, in the course of which it appeared that the respondents proposed raising many points of defence, other than that specified in their written motion, they contending, among other grounds, that there was "no case here—nothing to try." The result of the conference, as understood by the court was, that the respondents withdrew their specific motion to dismiss the petition, agreeing that under the general issue (so to speak), all imaginable defences were to be open to the respondents. In accordance with the arrangement, the opening on the part of the petitioners was but brief. Assuming and averring that the petition and all the accompanying papers were in due form, so far as they knew or had reason to believe, they maintained that a bare recital of the facts, as agreed upon by the parties, was alone necessary to show that a decree of bankruptcy should be entered against the respondents. What could be, or was to be submitted in opposition to this view, they had not as yet been apprised, and should not presume to anticipate. Concerning the facts—actual occurrences—the parties were not at variance, thus: The respondents, Pooke & Steere, once copartners, were on the forenoon of the eighth day of September, eighteen hundred and seventy, committed to the Providence county jail, as joint debtors, upon an execution issuing from the United States circuit court, for the sum of one hundred and eighty-seven thousand dollars and upwards, in favor of Hunt, Tillinghast & Company. That said Pooke, on the same day, gave bond as a prisoner for the jail limits, and to remain a true prisoner, and left the jail building; while said Steere, not giving such bond, remained in the jail building as a prisoner, until between ten and twelve o'clock a. m., September fifteenth, when said both Pooke and himself were discharged from their commitments, upon certificates from the proper officers that they had severally and respectively taken the poor debtor's oath, pursuant to the laws of Rhode Island and of the United States.

In view of these facts, it being also conceded that the petition in bankruptcy was filed before (by an hour or two), the taking of the oath by the respondents, the petitioners contended that the act of bankruptcy charged, (actual imprisonment for more than seven days), was fully proven, and there rested their case.

On behalf of the defence, several points were presented. One of them being, that the decease of Anthony Steere prior to any adjudication upon the question of bankruptcy, was legal cause for a dismissal of the petition as against both Steere and Pooke; and in regard to it, it seems sufficient to say, I must overrule it as untenable, in view of the provisions of the twelfth section of the bankrupt law [of 1867 (14 Stat. 522)].

A second point was, that the said Pooke had already been, as long ago as May twenty-sixth, eighteen hundred and sixty-nine, declared a bankrupt on a creditor's petition; to which it seems a sufficient answer, that the proceeding of eighteen hundred and sixty-nine, was against said Pooke as an individual, without reference or allusion to any co-partnership then or theretofore existing between him and the said Steere, or any other person, while the pending petition is against him and Steere, as "late partners as Pooke & Steere," constituting a co-partnership or firm. An individual, it is obvious, may be hopelessly insolvent, while the firm of which he is a member is beyond question

able to pay all its liabilities on demand, and vice versa.

The third point of defence was one of greater nicety, as it involved the question stated in brief, whether an imprisonment commencing on the forenoon of the eighth of September, eighteen hundred and seventy, and terminating before noon on the fifteenth of that month, was actual imprisonment for more than seven days within the meaning of the thirty-ninth section of the bankrupt act?

The only act of bankruptcy charged, as above stated, was such imprisonment; and this, it was contended on behalf of the respondents, was not shown by the agreed facts. That the parties were imprisoned on the eighth of September and on the seven succeeding days was conceded, and this, argued the petitioners, was an imprisonment of more than seven days. On the contrary, argued the respondents, firstly, the statute prescribes expressly, that in computing periods of days, the first day is to be excluded; and secondly, under certain circumstances, days are to be decreed to be consecutive periods of twenty-four hours, irrespective of sunrisings or sunsets; and in this case the parties were in prison but seven of such periods at the most. And as bearing upon the second point the court's attention was directed by the respondents to many authorities. The pertinence and cogency of these, it seems not necessary to consider here, inasmuch as I am constrained to hold that the proper rule of computation is found in the forty-eighth section of the statute, thus expressed: "In all cases in which any particular number of days is prescribed by the act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day." Adopting this as the rule of computation, it is manifest that the respondents were not imprisoned more than seven days, and that the act of bankruptcy charged is not proven. The defendants were in prison, that is, in close jail, or upon the jail limits under bond, "actually imprisoned," in legal contemplation as I hold, six entire days and portions of two other days (the first and eighth), seven days only—if the first day be excluded in conformity with the statute rule as above quoted—not eight days as contended by the petitioners. Upon this point, my judgment must be in favor of the respondents. The business men of the community are required to keep in view the provisions of the bankrupt law, and those provisions, it is to be assumed, are framed and phrased with reference to the needs and capacity of that class. When, therefore, the law expressly says, as in the passage quoted, that when a particular number of days is named "for any purpose," the same shall be reckoned, "exclusive of the first day." The real question, in my judgment is, how would this be understood by readers in general? The obvious meaning, should, I think, be adopted as the legal meaning, at least until some sufficient reason be assigned for a ruling to the contrary. For such a reason I have sought, as yet without success.

Another point of defence was, that inasmuch as the said Pooke was adjudged a bankrupt in August, eighteen hundred and sixty-nine, the co-partnership between him and said Steere was then and thereby dissolved, and therefore they not being copartners at the date of the filing of the petition in this case, being in fact styled therein as "late partners," the petition would be dismissed.

This point, it must be granted, appears to be well taken, so long as we consider only the letter of the law. In view, however, of the exposition of the statute in this particular, to which my attention has been directed, especially that of Judge Lowell in Re Williams [Case No. 17,703], I hold the better law to be, that for the purposes of petitioning, a partnership is to be held to subsist, so long as there are outstanding debts against a firm, or assets undistributed belonging to the firm. By Judge Blatchford in Re Hartough [Id. 6,164], and in other cases, I am aware it has been held that only when there is in existence joint property undistributed, as well as outstanding liabilities, can a petition against a dissolved copartnership be maintained. Still, in view of the reasonings of the learned judge first named, I must concur with him, and overrule this point of the defence. That there are outstanding debts against the firm of Pooke & Steere is in proof, and whether or not there are assets undistributed, neither party at the hearing deemed it material to inquire.

Yet another point of defence was raised by the defendant, and that of more interest and importance than either of those hereinbefore considered. This was, that inasmuch as neither the petition nor the deposition of the act of bankruptcy was signed or sworn to by any one of the petitioners, but by a third person, assuming to be a "special attorney," the petition cannot be entertained; and in support of this objection the language of the act, and the forms of petitions, oaths and depositions prescribed by the supreme court, and the established usage in this district, are cited and referred to. This objection I must regard as well-founded—nay, insuperable. The reply to it on the part of the complainant, is not equal to the exigency.

It is said this point has been settled by adjudication against the defendant in other districts, whereas, so far as I can learn, the point presented has never before been raised. The district court of Maryland in Re Moore

v. Harley [Case No. 9,764], held that an omission on the part of the petitioner to subscribe the affidavit to a creditor's petition, the petition itself being regularly subscribed and sworn to, was a fatal defect, "inasmuch as the forms prescribed by the supreme court required that the affidavit, as well as the petition, should be subscribed by the petitioners; the court holding, also, that the defect was incurable, since the petition was not a petition in propria forma, such as could be amended." This case, which is, I repeat, the only one brought to my notice as bearing on the point in question, supports, rather than antagonizes with, the objection under consideration.

It is said, again, that the bankrupt act does not, by its terms, require that the petition be verified by the oath of the petitioner, or be subscribed by the petitioner himself. This is true; but it also is true that the supreme court deemed it wise, in the exercise of the powers conferred upon them, to prescribe forms of proceedings to which parties are bound to conform as scrupulously as to the provisions of the act itself. That the petition, oaths and affidavits in this case are in conformity with those forms, is not pretended. And yet again it is said that the defect complained of should have been brought to the notice of the court and the petitioners at an earlier day, by a plea in abatement as it were, and that the omission or neglect of the defendants to do this, is, in legal effect, a waiver of all objection to irregularities of the kind under consideration. In this view of the learned counsel I am unable to concur, because, to say nothing of other satisfactory reasons, I understood that under the agreement of the parties made in the presence of the court on the day of hearing, the defendants were at liberty to assume whatever ground of defence they should deem fitting. It is true, no formal motion to dismiss the petition for substantial, incurable defects apparent on the record, was made by the respondents, but I cannot but hold that such a motion would have been in order on the moving of the hearing, entitled to immediate consideration, whatever the state of the pleadings, and of course cannot but hold that the objection is reasonably urged. It results, therefore, that for reason of incurable defects or irregularity in the petition and its accompanying affidavit, as well as for insufficient proof of the act of bankruptcy charged, the petition must be dismissed.

[NOTE. As long as there are undistributed partnership assets and partnership debts or liabilities, a firm may be adjudicated bankrupt. In re Gorham, Case No. 5,624. The adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm which is partly composed of the same persons. In re Jewett, Id. 7,306. A petition can be signed and verified by an attorney or agent. In re Raynor, Id. 11,597. The non-residence of his principal should, however, be directly alleged. In re Hadley, Id. 5,894.]

Case No. 6,897.

HUNT v. ROUSMANIER.

[3 Mason, 294.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1823.[2]

EQUITY—ENFORCEMENT OF LIEN—MISTAKE OF LAW—RELIEF—INSOLVENT ESTATE.

1. A court of equity will not enforce an agreement for a lien or security for a debt, where the lien or security has failed by a mistake of law, against the general creditors of an insolvent estate.

[Cited in United States v. Cutts, Case No. 14,912.]

[See note at end of case.]

2. Nor will it direct a new security to be given, where an old one, chosen by the parties, has from a mistake of law become a nullity.

[Cited in Leavitt v. Palmer, 3 N. Y. 29, 39.]

3. Query, how far a court of equity will decree upon the proof by a single witness, where the answer puts the matter in issue, although only by a declaration of ignorance, &c., by administrators.

[Cited in Carpenter v. Providence Washington Ins. Co., 4 How. (45 U. S.) 218.]

After the decision of this cause [Case No. 6,898] an appeal was taken by the plaintiff [Clement S. Hunt] to the supreme court, and upon argument, the decree was reversed, and the cause sent back with liberty for the defendants [Louis Rousmanier's administrators] to withdraw their demurrer and to answer the bill. 8 Wheat. [21 U. S.] 174. The demurrer was accordingly withdrawn and an answer filed, upon which the parties were at issue, and the cause was set down for a hearing upon the whole evidence, and was argued shortly by the same counsel as were engaged at the former arguments.

The answer stated as follows: "These defendants," &c., "say, that they admit the loans of money mentioned in the complainant's bill, as evidenced by the promissory notes annexed to said bill, were made by the complainant to the said Rousmanier when in full life; that the said Rousmanier died on the 6th of May, 1820, leaving said notes unpaid, except as to the sum of $200 paid on the 11th of April, 1820. These defendants admit, that the two powers of attorney in the complainant's bill mentioned were duly executed. But they deny that the said Hunt took possession of the said vessels in said bill mentioned, to wit: the brig Nereus and schooner Industry. The attempt to do this was resisted by the defendants, as they believed themselves bound to refuse him the possession, and when the complainant advertised the said Rousmanier's interest in said vessels, and threatened to sell in the name of the defendants as administrators, these defendants forbade the sale. These defendants further answer and say, that, as to any agreement between the

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

[2] [Affirmed in 1 Pet. (26 U. S.) 1.]

said complainant and the said Rousmanier, that the complainants should have specific security other than the said powers of attorney, on said vessels for said loans, they are entirely ignorant thereof, and are totally uninformed of the belief or intention of the said Rousmanier, as to the effect and efficiency of the said powers of attorney, otherwise than by the wording and import of the powers themselves. And the defendants, further answering, say, that they have heard and believe it to be true, that the complainant had, before the loan in said bill mentioned, agreed and engaged with the said Rousmanier to take a concern in a voyage in one of said Rousmanier's vessels, and that he, the complainant, on account of increasing doubts being entertained of said Rousmanier's credit and standing, and from advice of friends, declined being so concerned. That upon said Rousmanier's complaints and remonstrances on this account, and his representations, that it would disappoint and defeat the intended voyage, the cargo for which he had already ordered or purchased, the said complainant declared to the said Rousmanier, that no person should have just cause to complain of him for any breach of engagement; and, although he would not take the concern in the voyage, if the money would be of use to him the said Rousmanier, he, the complainant, would advance it on security, which offer said Rousmanier, accepted, and on his part offered to give the said complainant a bill of sale of the vessel, taking from said complainant a memorandum expressing the purpose for which said bill of sale was made, making it defeasible upon payment of the money loaned, which offer, on reflection, he the said complainant declined, assigning as a reason therefor, that he was unwilling his name should appear upon the ship's papers, which would subject him to trouble and to responsibility for the disbursements and supplies of the vessel, and perhaps to loss, by breach of revenue laws, or otherwise, and he preferred, and took, upon advice of counsel, the power of attorney to sell. And the said complainant, as these defendants have heard and believed, acted upon the same reason, motives, and advice, both as to the loan, of January 11th, and that of March 21st,—the one secured by the power of attorney to sell the brig Nereus, the other by the power to sell the Industry. And these defendants, further answering, say, that a clear bill of sale of said Rousmanier's interest in the brig Nereus, drawn in his own handwriting, conveying that interest to one William Bateman, was found by the defendants among the papers of the said Rousmanier, which bill of sale was dated the day before his death, and, as these defendants have heard and believe, was to have been executed and delivered on the evening of that day, which was prevented only by the necessity of said Bateman's speedy return to his family, living out of town, he agreeing to receive said bill of sale the next day. And these defendants, further answering, say, that the interest of the said Rousmanier in the Industry was sold by these defendants for less than said complainant demanded, for the security of which the power of attorney was taken, to sell his interest in that vessel. The defendants not being able to obtain more than $582.50, and subject to a commission of 2½ per cent. These powers of attorney state him to be the owner of three fourths of the Industry, whereas he was owner of but one half. These defendants, further answering, say, that the estate of the said Rousmanier is greatly insolvent, and had been so for a considerable time before his death; that they fully believe that the said Rousmanier must have been conscious of his insolvency, and of their personal knowledge say, that he exerted himself in various rash and criminal modes to keep up his credit, and repel the suspicions of his insolvency. And they fully believe, that he never intended to make an actual open sale of said vessels to said complainant, as such a transfer of this, the greater part of his visible property, would, as these defendants believe, have entirely destroyed his credit and stopt his business. These defendants, further answering, say, that the complainant has exhibited and proved his demand, as by his bill of complaint set forth, before the commissioners of insolvency, duly appointed upon the estate of the said Rousmanier, and his dividend thereon declared, or to be declared, these defendants are ready to pay according to law. And these defendants, further answering, say, that they deemed it their duty as administrators to submit the demand of the said complainant for full payment of his demand aforesaid on the full value of said vessels, or the proceeds of their sale, and his asserted right to take and sell said vessels for his own benefit, to the opinion of counsel learned in the law, and thereupon they have been instructed and advised, that the powers of attorney aforesaid expired with the life of the author; that the said Hunt had no right by virtue thereof to take and sell said vessels, but they, as administrators, were bound to consider them as general assets in their hands, available for the creditors generally, and discharged of any lien in favour of said complainant, pretended to exist after the death of said Rousmanier. Therefore these defendants submit to the court, that they ought not to comply with the complainant's demand, but they are desirous to act in this matter under the directions and indemnity of this honourable court, without that," &c. &c.

The only evidence was contained in the two following depositions:

Deposition of Benjamin Hazard (counsel-

lor) swears, that the original power of attorney from Rousmanier to Hunt, dated the 13th of January, 1820, a copy of which is now shown to deponent as annexed to said Hunt's bill in equity against Rousmanier's administrators, was drawn by the deponent: that on the day said power was executed, said Rousmanier and Hunt came to deponent's office, and said Rousmanier then stated, that said Hunt had loaned or agreed to loan him, said Rousmanier, a sum of money upon security to be given by said Rousmanier on his interest in the brig Nereus: that he was desirous the said security should be as ample and available to said Hunt as it could be made: that he wished and was ready to give a bill of sale of the property or a mortgage on it, or any other security which said Hunt might prefer. This deponent further states, that both parties said to him, that they had called to request him to draw the writings and to get his opinion as to the kind of instrument, which would give the most perfect security to said Hunt: that this deponent then told said parties, that a bill of sale or a mortgage would be good security, but that an irrevocable power of attorney, such as was afterwards executed by said Rousmanier, would be as effectual and good security, as an absolute bill of sale or a mortgage, and would prevent the necessity of changing the said vessel's papers, and of said Hunt's taking possession of said vessel immediately upon her arrival from sea: that both said parties then requested this deponent to draw such an instrument as in his opinion would most effectually and fully secure said Hunt, and while this deponent was drawing said power of attorney, and after it was drawn and read to them, the said parties, said Hunt several times asked said deponent, if he was quite certain, that said power would be as safe and available to him, as a bill of sale or a mortgage; and that said power was then executed in consequence of the repeated assurances of this deponent, that it would be as extensive and perfect security, as an absolute bill of sale.—And deponent further states, that, from his knowledge of said Rousmanier, and of the situation he then was in, and from the earnest declarations and offers of said Rousmanier, he is, and then was, confident, that said Rousmanier would readily have given to said Hunt an absolute bill of sale of said property, or any other security that said Hunt would have asked; and from his knowledge of said Hunt, and his caution and declaration on that occasion, this deponent is equally confident, that said Hunt would not have accepted said power of attorney, had he not considered it as extensive and perfect security in all respects, as an absolute bill of sale. And this deponent further declares, that it was the understanding meaning, and agreement of both said parties, that said Rousmanier's interest in said vessel should be, and was, absolutely pledged to said Hunt, and that he said Hunt should have, and did have, a specific lien and security thereon for the money loaned by him to said Rousmanier as full and complete and extensive, as if an absolute bill of sale thereof was given. Deponent further states, that before the execution of the second power of attorney, a copy of which is also annexed to said Hunt's bill, he the said Hunt again called upon him and told him, that he was about loaning a further sum of money to said Rousmanier, and asked, if deponent still remained in the same opinion he had before expressed, as to the validity and extent of security by power of attorney; to which deponent replied, that he still considered such a power to be equal in all respects to a bill of sale or a mortgage. Deponent is strongly impressed with the belief, that said Rousmanier called with said Hunt at the time last mentioned, and that he repeated the same offers which were made by him on the former occasion; but of this fact his recollection is not sufficiently distinct and clear to enable him to declare positively.

William Merchant deposes, that after the decease of Rousmanier, he was in the counting room of Rhodes, one of the administrators, &c., in company with said Hunt and Rhodes; in conversation between them, Hunt said that he had been induced by some representations made by said Rousmanier of his voyages, to engage in an enterprise in one of his vessels; that afterwards, in consequence of information received, he had altered his mind, and informed said Rousmanier thereof, who complained, and said, that in consequence of said Hunt's assurances, he, the said Rousmanier, had made purchases for the voyage, and incurred responsibilities; that he, the said Hunt, had replied to said Rousmanier, that no person should have cause to complain of him, the said Hunt, for any breach of, or non-compliance with, his promises, and that if the money would be of service to him, the said Rousmanier, he, the said Hunt, would let him have it, or loan it to him; that accordingly an agreement was made, by which said Hunt was to let Rousmanier have a sum of money, and said Rousmanier was to give him a bill of sale of a certain vessel, but that afterwards he, the said Hunt, reflected, that if he took a bill of sale, he would have to take out papers at the custom house in his own name, be subject to give bonds for the vessel, and perhaps made liable for breaches of law committed by him; that he, the said Hunt, consulted with Mr. Hazard upon the subject, who told him he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that import, which was accordingly done.

STORY, Circuit Justice. There is no longer any question, that the powers of attorney in this case, though irrevocable by the party in his lifetime, were revoked by his death, and that as instruments creating any lien or security for the debts due to the plaintiff, or any authority to sell, they are functi officio, and completely extinguished. This was clearly settled by the supreme court upon the appeal; and the very elaborate opinion of the chief justice, on that occasion, treats them as naked powers, containing no words of conveyance, and importing no assignment, and as having in the event totally failed in their object of subjecting the interest of Rousmanier in the vessels to the payment of the money advanced by the plaintiff on the credit of the vessels. 8 Wheat. [21 U. S.] 201, 202, 207. It must be taken then, that there is no lien now subsisting upon the vessels, either at law or in equity, which the court is called upon to enforce. The original bill, indeed, does not itself attempt to assert any lien as existing on the vessels by any direct allegation. It proceeds merely upon the ground, that the powers of attorney are subsisting securities, unextinguished and unextinguishable in their efficacy, and in virtue thereof it asks, that a sale of the vessel may be decreed, and the plaintiff paid the amount of his debts out of the proceeds. That ground is completely removed by the decision of the supreme court. The amended bill does not change this aspect of the case. It asserts no distinct agreement for a lien beyond what the powers of attorney actually created; but puts the relief upon the ground, that the parties acted under a mistake of the law, and for this cause it seeks to have a remedy in rem administered in equity in the same manner, as if the law had been, as the parties supposed it. So the bill was understood by the supreme court. The language of the chief justice is, that upon the amended bill, "it appears to the court to be a case, in which the notes, and powers of attorney, are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel this power was selected and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe, an execution of it, as a mortgage would have been." 8 Wheat. [21 U. S.] 209. This language is too unequivocal to be misunderstood; and it is therefore an undoubted construction of the original and amended bill, that neither of them asserts an existing lien, which the law can recognize; or an agreement, which has not been punctually executed according to the choice and intention of the parties. The plaintiff's whole case now proceeds upon the notion, that the security selected by the parties has unintentionally failed of effect, and that there is a title to relief, not on account of an existing lien, or an omission to fulfill the agreement, but of a mistake of law, which has rendered the security taken a nullity. It is an attempt to substitute a new security in lieu of that, which has, unexpectedly to the parties, become extinct.

I think it necessary to present this view of the bill in a distinct shape, for the plaintiff can recover only secundum allegata et probata. The first consideration is, whether the case is made out in point of fact; the second, which I consider left entirely open by the supreme court, is, whether, upon the whole circumstances, the plaintiff is entitled in point of law to a priority or lien to be created in his favour against the general creditors in a case of insolvency. As to the facts, the testimony of the learned gentleman, under whose advice the parties acted, is direct to the matter of the bill, as I understand the import of the bill. I do not doubt, that he has stated the transactions with entire accuracy. But as he is a single witness in a case, where the answer puts in issue, though in a qualified manner, some of the material facts, if the cause rested solely on his testimony, I do not know, that it would, in a court of equity, be held absolutely sufficient for a decree. The testimony on the other side does however confirm it, as far as it goes. Construing the whole evidence together, it certainly does not establish an agreement for a lien or security different from that taken, but it tallies with the substance of the bill, and shows, that the powers of attorney were the chosen security, and a complete and intentional execution of the agreement. There is some difference in point of fact, as to the predicament of the case in respect to the two powers of attorney. It appears, that the first was given after the loan was actually made, the note being dated on the 11th, and the power executed on the 13th of January. But the second loan does not appear to have been made until after the execution of the second power on the 21st of March; and of course the precedent transactions could be, as to this, considered in no other light, than as mere proposals or negotiations for a loan on such security, as the plaintiff should choose to require. I think too, that the plaintiff's own evidence shows, that as to the second loan, the plaintiff made it upon the faith of the security so taken, and not upon any general agreement for an absolute lien de facto. If this posture of the facts ought to create a difference in point of law, in respect to the plaintiff's rights under the different agreements and powers, the defendants are entitled to the benefit. My opinion however will proceed upon a ground equally applicable to both.

Assuming then the bill to be established in its material facts by the proofs, how stands the plaintiff's case in point of law?

It is material to state, (and I repeat it,) that the question is not, whether a court of equity ought to enforce a subsisting lien; nor whether a court of equity ought to carry into effect an agreement for a lien, which has not been executed at all, or imperfectly executed, by the parties. The bill states no such case. So the supreme court considered it. The language of the court is, the money was advanced, the notes were given, and this letter of attorney was, on advice of counsel, executed and received, as the collateral security, which Hunt required. The letter of attorney is as much an execution of that part of the agreement, which stipulated a collateral security, as the notes are an execution of that part which stipulated, that the note should be given. 8 Wheat. [21 U. S.] 210. The real question now is, whether a court of equity ought "to direct a new security of a different character to be given, or direct that to be done, which the parties supposed would have been effected by the instrument agreed on between them." Id. The point formerly considered by the supreme court was, whether a court of equity could so do. In other words, whether it could give relief for a mistake of law, or only of facts. This is not a controversy between the original parties, where a subsisting security is sought to be enforced against the property, or against the person of the debtor, the property having been withdrawn by a bonâ fide sale, or otherwise, from the reach of the creditor. It is not a suit against the representatives of a solvent estate; nor against the assignees of a bankrupt, who are in law held liable to the same equities, as the bankrupt himself would be. Whatever may be the remedies in equity in such cases, (with which I meddle not) they do not necessarily govern the present. The court is dealing with a case of irretrievable insolvency, where all the bonâ fide creditors seek to enforce their just and equitable claims. In such a case the general rule is, that equality is equity. The original security is gone and extinguished by death. The plaintiff seeks to revive it, or rather to create a new permanent security in the property, where he has now none. Where is the equity, on which to found such a claim of priority or preference? Suppose no security had been given, and the plaintiff now sought by bill to enforce a lien on these vessels upon the footing of a contract for a lien, which by the death of Rousmanier was unexecuted. Would a court of equity now enforce it against other creditors in a case of insolvency? What preference has a contract for a lien in point of equity over a contract to pay a debt? If both are simple, unsealed contracts, there seems no reason, why non-performance of the one should be followed with different consequences from non-performance of the other. Securities actually given, often turn out unproductive; but does that furnish a ground for creating a new one against other meritorious creditors? But the plaintiff's case is not so strong as that put. The agreement here was fully executed, and the required security given. It is gone; and the plaintiff asks to have relief against the creditors, because the party mistook the law, and imagined he had a security, which would endure notwithstanding the death of Rousmanier. He did not choose to take a bill of sale or a mortgage, because he feared a responsibility would be thereby incurred to third persons. He now claims, that the court should in effect give him what he rejected; that it should make him an assignee, or mortgagee, when he chose only to have a power to become the one or the other.

There is no case within my knowledge, where such relief has been granted against creditors of an insolvent estate, under circumstances like the present. The case of Mitchell v. Eades, Finch, Prec. 125, appears to me strongly the other way. There, the letter of attorney, which was to receive wages, was irrevocable, and the party, to whom it was given, was a creditor, which circumstance demonstrates (as I think), that it was given as security for the debt. The debtor died, and administration was granted to a third person, and the creditor brought a bill to have payment out of the wages. The court refused it against the rest of the creditors, and ordered the administrator to pay the debts according to the course of law, that is, to distribute the assets without any priority to the plaintiff. See same case, 2 Vern. 391; 1 Eq. Cas. Abr. 45. The case of Lepard v. Vernon, 2 Ves. & B. 51, recognizes the authority of Mitchell v. Eades, and proceeds upon similar principles. There, the testator executed a letter of attorney to Down & Co., who were the bankers of Goodacre & Buzzard, the latter being his creditors, to receive certain sums due him from the board of ordinance. There was parol evidence, that the letter of attorney was given to enable the bankers to apply the money to the payment of the debt of Goodacre & Buzzard. Down & Co. received sums under the power of attorney after the testator's death; and one of his executors made an assignment thereof to Goodacre & Buzzard, and gave them also a warrant of attorney to confess judgment against the goods of the testator. Two bills were brought, one by the other executors for an account, the other by Goodacre & Buzzard to enforce the priority of payment under their assignment, and the letter of attorney to Down & Co. Sir William Grant (the master of the rolls) said that the power of attorney was a common power, not accompanying any assignment of the debt, nor making part of any security given to the bankers; that though there was parol evidence, that the testator had declared it was to enable them to apply the money to the debt due to Goodacre & Buzzard; yet that

was not enough to operate as an appropriation of the money, or to prevent it from becoming part of the testator's effects. He therefore decreed against the bill of Goodacre & Buzzard, and ordered the money to be paid to the executors on their bill. Here, the learned judge absolutely refused to create a lien against the general creditors, where there had not been any assignment, although the intention of the parties was admitted, that the money should be applied to the payment of the debt.

When this cause was formerly before the court, the difficulty of maintaining the bill, as against creditors of an insolvent estate, did not so fully strike me in the light here presented, as it now does. Farther reflection on the subject has brought my mind to the conclusion, that if a mistake of law is to be corrected, or a parol agreement for a lien to be enforced against the party, it is not to be against other innocent creditors, standing upon equally meritorious considerations, and who, for aught we know, may have trusted to the ostensible, unincumbered ownership of Rousmanier in these very vessels for their security. My opinion proceeds upon these grounds; first, that the plaintiff has now no lien or specific security upon these vessels; secondly, that he has no equity to have such lien or security created against the other creditors of an insolvent estate. If an antecedent parol agreement had been set up in the bill for a general and absolute lien, I should have thought, that under all the circumstances of this case, where it was not admitted by the answer, it could not be established in equity upon the testimony of a single witness however respectable. Bill dismissed.

Decree. This cause came on to be heard upon the bill, answer and other pleadings, exhibits, and depositions in the case, and was argued by counsel. On consideration whereof, it is ordered, adjudged, and decreed by the court, that the plaintiff is entitled to no specific lien or security upon either of the vessels mentioned in the plaintiff's bill, and has no equity to be relieved in respect thereof, and that his bill be dismissed with costs to the defendants, without prejudice to his right to come in and receive a dividend of the said Rousmanier's estate, in common with the other creditors of the said estate.

[NOTE. An appeal was then taken by the plaintiff to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Washington, who said that equity may relieve against a plain mistake arising from ignorance of law. But where parties, upon deliberation and advice, reject one kind of security, and agree upon another, under a misapprehension of the law governing the nature of the security chosen, a court of equity will not interfere. Much less will it do so when there are other creditors of an insolvent estate, whose equity is equal to that of the appellant. 1 Pet. (26 U. S.) 1. See, also, Cases Nos. 6,889 and 6,898.]

Case No. 6,898.

HUNT v. ROUSMANIERE.

[2 Mason, 342.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1821.[2]

BILL IN EQUITY—AMENDMENT—MISTAKE OF LAW—RELIEF.

1. A court of equity may allow an amendment of a bill after deciding against the bill and allowing a demurrer on argument.

2. If a party takes a security for money, which is merely personal, instead of taking a mortgage on property, under a mistake of law, by all parties, that the former was as safe as the latter, a court of equity will not relieve the party, who took such security, and substitute for it a lien or mortgage on the property.

[Cited in Leavitt v. Palmer, 3 N. Y. 29.]

[See note at end of case.]

Leave having been granted to amend the bill under the intimation of the court at the last term, the plaintiff [Clement S. Hunt] now filed an amendment to the bill. The amendment in substance stated, that on the day when the first letter of attorney was executed, and before its execution, the plaintiff and [Louis] Rousmaniere called upon counsel for advice, as to the most effectual mode of giving security to the plaintiff upon the vessel; that Rousmaniere then proposed to give a mortgage of the vessel with a power to sell, or an absolute bill of sale, taking back from the plaintiff a memorandum expressing the purpose for which the bill of sale was executed. But the parties were then advised by counsel, that a power of attorney, such as that, which was afterwards executed, would be as effectual and good security as a mortgage or bill of sale, and would prevent the necessity of changing the ship's papers at the custom-house, and of the plaintiff's taking immediate possession of the vessel upon her arrival from sea; and further, that upon the execution of the second letter of attorney, Rousmaniere again expressed his willingness to give any other security upon the schooner Industry, either by mortgage or bill of sale, if, in the opinion of counsel, such mode of security would be safer that such power of attorney; and that Rousmaniere executed both powers with the belief and intention, that they should give the plaintiff as full and perfect security as he could have by mortgage or bills of sale of the property; and the plaintiff so received them. To the bill so amended, the defendants renewed their demurrer, and the cause was set down for a hearing upon the demurrer, and argued at this time.

Hunter & Randolph, for respondents.

The learned and satisfactory decision of the honourable court upon the first bill settles the question, as to the nature and effect of the powers of attorney referred to in

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

[2] [Reversed in 8 Wheat. (21 U. S.) 174.]

that bill. They are decreed to be ineffectual either in law or equity for the purposes alleged. They died with their author. And the administrators, defendants in this case, are now compelled to regard Mr. Hunt as a mere creditor, as meritorious and as unfortunate as others, but not more so. He has no lien on the specific property referred to in the powers of attorney, and as administrators of an estate, admitted to be desperately insolvent, the respondents have but one duty to perform, viz. to be honest trustees to all the creditors, to resist all preferences, or priorities unsanctioned by law, and to set up for the general creditors all the guards and defences, which the law furnishes for their protection.

1st. The allowance of the amendment was the spontaneous act of the court, unsolicited by the plaintiffs, and unopposed by the defendants, only because the decision prevented opposition. But as this is but an interlocutory decree upon an incidental matter, now entirely in the power of the court to affirm or reverse, and a matter, that perhaps cannot be taken up to a higher court, it is with great deference submitted to the honourable court, that this allowance of an amendment, if upon reconsideration it be not sustainable, should be now rescinded, or, as is the course in chancery, the amended bill be permitted to be withdrawn from the file. The counsel for the defendants understood the law to be, that where a bill on demurrer is dismissed for want of equity on the merits of the case as stated, leave to amend the bill will not be granted. Lyon v. Tallmadge (decided by Chancellor Kent) 1 Johns. Ch. 184, 185; 2 P. Wms. 401; Id. 390.

But, 2d. The plaintiffs have not made the amendment the court expected or required. His honor in substance stated, that if through error, mistake, or accident, the complainant had been disappointed of the kind of security or transfer, the parties had intended, and this could be shown by facts, that he should not hesitate to let him in to take his chance for relief on an amended bill. Now the amended bill refers neither to accident. error, or mistake, or to any facts tending to prove their existence; it excludes and negatives the supposition of accident, error, or mistake. The whole matter was done upon advice, with the assistance of counsel learned in the law. The security, that the complainant ultimately received, was that which he preferred. He could then have taken that kind of security he seems now to desire. He had, undoubtedly, his own private and powerful inducements for the choice he made; all previous verbal negotiations and conferences were merged in the plain written security, viz. the powers of attorney. They were the most convenient for both parties; and so far was either party from being surprised or mistaken, that what was done appears as the judicious result of mutual and advised deliberation. Neither party contemplated or had reference to the death of the other. It may be admitted, that it is the death of Rousmaniere alone, which has frustrated Hunt's expectation of indemnity; but where an event happens, without default on the other side, although expectation may be frustrated, though it may be grounded on the true intent of parties, equity will not give relief. 1 Ves. Sr. 98, 99; 2 Atk. 251.

3d. It is conceived by the defendants' counsel, that a review of all the leading cases, in which relief has been given by a court in chancery, would not furnish one in any degree analogous to the present, even if it could be admitted, that any mistake had taken place. In the case of Graves v. Boston Marine Ins. Co. the complainants grounded themselves upon the allegation, that their case was but the common one of a mistake in using inapt words to express the meaning of the parties (2 Cranch [6 U. S.] 430, and the cases there cited). White v. Nutts, 1 P. Wms. 61. The proof, as to the intention of one of the parties in that case, was perfectly satisfactory; and as to the other, it pressed so heavily on the court, that they acknowledged there were doubts and difficulties in the case. But they decided against relief in this unquestionably hard case; they shrunk from the peril of conforming a written instrument to the alleged intention of the party plaintiff upon a claim not asserted, until an event made it his interest so to do. In a case between the original parties, unaffected by death or insolvency, where no new and third party sought mere equality of condition, the court appear to have acted upon the principle, that they had before them a written instrument not in itself doubtful, and they repelled the recourse to parol testimony, or extraneous circumstances to create a doubt where the instrument itself was clear and explicit. It is admitted, that courts of equity have frequently in a variety of instances interfered on the ground of a mistake, or misconception of the parties. Coop. Eq. Pl. p. 141, and the cases there cited; 1 Ves. Sr. 456; 7 Brown, Parl. Cas. 204; 3 Atk. 388; 1 Brown, Ch. 358. But the amended bill, it must be repeated, puts an end to all doubt, negatives every notion of mistake, or misconception, and avers, that the instrument adopted, was so adopted in consequence of the advised and enlightened election of the present complainant. The complainant rejected a mortgage or bill of sale, though he might have obtained either; and the amended bill sets up this very rejection as a ground of relief, and refers to parol negotiations extinguished and discharged by the subsequent writing. Parkhurst v. Van Cortlandt, 1 Johns. Ch. 282. A mistake must be clearly and strongly proved, before the court can correct a deed or writing. Souverbye v. Arden, Id. 252. Equity will not interpose, if the fact was from its nature doubtful, or equally un-

known to both parties (1 Brown, Ch. 158); nor if the alleged mistake was the mistake of all the parties (2 Atk. 592; Malden v. Menill, Id. 8; 3 P. Wms. 127, in notes; 2 Atk. 203). A fortiori, where upon the statement of the party it appears, that, what was done, was no mistake or misconception in either party. It will not do to say it was the mistake of counsel. In the case of Pullen v. Ready, 2 Atk. 587, Lord Hardwicke in substance says, if parties act with counsel, the parties shall be supposed to be acquainted with the consequence of law, and that nothing is more mischievous, than to decree relief for an alleged mistake in a matter, in which, if there was any mistake, it was that of all the parties, and no one is more under an imposition than the other. See Lyon v. Richmond, 2 Johns. Ch. 60. The same counsel by the amended bill adheres, in fact, to his first opinion. That opinion was, that the powers of attorney were irrevocable, coupled with an interest, operating as effectually as a transfer and sale of the specific property, and giving a right and power to the attorney to take and sell, in spite of the death of the constituent. Upon this ground the original bill is framed. This opinion the decision of the court proves to be mistaken; and it is not easily conceivable, how the reassertion of the same opinion in the amended bill, and that is all it contains, can entitle the complainant to the relief denied him on his original bill. Hunt trusted to the life of Rousmaniere for his security; that to which he trusted having failed, he is now entitled to as much as the general creditors, and to no more. It may likewise not be improper to suggest, that in cases of the kind, that the plaintiff would be willing to make this, though it may be competent for a defendant to shew a mistake, as matter of defence, and for the purpose of rebutting the plaintiff's equity, that a plaintiff in similar circumstances cannot do so. See opinion of Lord Redesdale in Clinan v. Cooke, 1 Schoales & L. 22, 33, 38, 39, and the cases there cited. The doctrine of the cases under the statute of fraud applies a fortiori, for by the common law an attorney must be made by deed. Co. Litt. 48; 2 Rolle, Abr. 8; 1 Bac. Abr. tit. "Authority," p. 518.

Searle & Hazard, for plaintiffs.

It does not appear by the record, that any decision has ever been had on the original bill. There is no entry or minute intimating, that any decree has ever been rendered, or even an argument delivered in the case. We know as counsel, that the honourable court expressed an opinion against the sufficiency of the bill, but, that opinion, or any decree founded upon it, was never filed, or ordered to be filed. The only entry upon record is, an order to amend, to which it does not appear, that there was any opposition. But, if at any time, there was any solidity in the objection of the learned counsel for the defendants, it surely comes too late. The bill has been amended without objection, and a demurrer filed to the amended bill, and it is now quite too late, it is presumed, to insist upon any irregularity in this respect. But the objection, at any time, would have been unfounded. After argument upon demurrer, and before judgment is entered upon record, the courts of law and equity may, in their discretion, and often do, permit amendments, when the justice of the case requires it. Mitf. Eq. Pl. 260; Tippet v. May, 1 Bos. & P. 411; Ramchander v. Hammond, 2 Johns. 200. And the authority cited by the defendants, from 5 Johns. Ch. 184, 185, admits the principle; and the reason, why the chancellor refused the motion to amend in that case, was, not, that it could not legally be allowed, but because the plaintiff, upon his own statement, had no merits, and could not by an amendment make his case any better.

The counsel for the defendant also insist, that the bill has not been amended conformably to the views of the court and, that the amended bill is no more than a reassertion of the sufficiency of the power of attorney, upon which they say the whole case is placed. They seem to insist, that the bill should admit explicitly the invalidity of the power, and that the plaintiff resorts exclusively to the parol contract for relief. But we did not understand the court as intimating any idea of the kind, or, that it was necessary expressly to admit any defect in the power.

The court was understood by us to express an opinion, that the power upon its face was not sufficient to create a lien or specific security or charge upon the vessel in question, and, that there were not facts enough stated in the bill from which they could legally infer such to have been the agreement and intention of the parties. And the bill was ordered to be amended, in order to bring upon the record the whole facts; and if upon the whole facts, a specific lien was created, the party should have the benefit of it, although the power itself was insufficient. The power was a part of the transaction, and a fact in the case, and ought certainly to have been stated. The whole facts are now displayed on the record, and it is believed in apt and legal form; and the entire contract distinctly stated. And if, upon the whole, it appears, that a specific lien was contracted for by the plaintiff, and promised by Rousmaniere, and that the loan was made on the faith of that lien, it is presumed the court will not permit the defendants to deprive the plaintiff of the kind of security he contracted for; merely because the kind of writing he received was defective. The bill asks for such relief as the nature of the case can afford. If the court are of opinion, that the plaintiff is entitled to relief, either on the ground of the power alone, or upon the power connected with the other proof, or upon the

parol contract alone, and exclusive of the power, the bill is so framed as to sustain a decree upon either ground. The whole case is displayed on the record and upon its broad ground, and equity can administer relief in any specific form, which its merits may require.

The bill as amended states, it is submitted, distinctly and explicitly the contract entered into by the parties, and the full and actual performance of it by the plaintiff. To the bill there is a demurrer, which clearly admits all the facts and allegations properly charged; the bill is admitted to be true, and the only question is, whether upon the whole case the plaintiff is upon principles of equity, entitled to relief. Mitf. Eq. Pl. 14, 172. But the hardship upon the general creditors is assigned as a reason, why specific relief should not be granted; and it is alleged, that the plaintiff is not for that reason entitled to the benefit he seeks. But is this the fact? From any thing, that appears in the case, the other creditors trusted to Rousmaniere's personal responsibility, and to his general funds, to be resorted to by ordinary course of law. They made no contract for specific security, and granted no loan upon the faith of it. But it is apparent, that the plaintiff would not trust to the personal responsibility of Rousmaniere, or his general funds, and Rousmaniere knew it. He trusted him on the faith of specific security. And the general creditors can experience no injury, nor have they cause to complain of hardship in relation to this negotiation, for they are benefited in the loan by an increase of the general funds to the full amount to which the plaintiff claims security.

It is also suggested by the defendants' counsel, that the plaintiff's expectation of indemnity was exclusively connected with Rousmaniere's life, and that this resort to equity is an after-thought arising from his unexpected death. We are at a loss to discover any pretence for such a suggestion. It is perfectly clear, that both parties intended a specific security, and both believed the power abundantly sufficient for the purpose. And in point of law the power as to specific lien, is, it is presumed, as valid now as in Rousmaniere's lifetime, for, it is submitted, as a well settled principle of equity, (with perhaps very few exceptions, of which the case in question is not one) that when the party is holden to a specific execution of a contract, his representatives are equally holden. If the power is now defective in securing a lien, it was equally so in his life time. No legal or equitable right is in this respect lost by Rousmaniere's death. And surely every circumstance of the case evinces most clearly that the loan was never made upon the score of personal friendship, or personal honor. 2 Madd. 112; 1 Schoales & L. 272; 17 Ves. 489; 1 Madd. 41; 4 Bl. Comm. 472; 1 Anstr. 14.

The defendants' counsel assume as a fundamental principle, that the plaintiff is never permitted to show, by parol proof, a mistake or misapprehension in a written contract, the execution of which he seeks to enforce; and, that the rule, which admits mistakes, &c. in written instruments, to be corrected by parol evidence, is exclusively confined to the defendants, against whom the written instrument is enforced. It is true, that Lord Redesdale in the case of Clinan v. Cooke, 1 Schoales & L. 22, seems to be of that opinion; and in two or three other cases the same doctrine has been advanced, and relief refused upon that ground. But the case of Clinan v. Cooke, and it is believed, all the other cases, in which that doctrine has been established, were cases within the statute of frauds, and nearly all of them related to an interest in lands. And in all such cases parol proof, when offered to vary or materially affect a written contract, has been received with great circumspection and reserve. But the case at bar does not range within either of those classes of cases.

The counsel for the plaintiff, however, contend, that the rule stated by the defendants' counsel, is not founded in principle, that the rule of admitting parol proof to shew mistakes in writing is open alike to both parties. And in almost all the cases, where the plaintiff has failed when seeking the aid of parol proof, it was not because the rule was against him, but because his proof of mistake, &c. was not satisfactory. The case referred to [Graves v. Boston Marine Ins. Co.] 2 Cranch [6 U. S.] 419, is of this description. The court in that case adopted the principle we contend for, and would have undoubtedly afforded the plaintiff the relief he claimed, had he been able to have proved the mistake he alleged in the policy. The same principle is adopted in Getman v. Beardsley, 2 Johns. Ch. 274; Lyman v. United Ins. Co., Id. 630. And it is extremely difficult to perceive the reason or justice of the rule's not extending equally to both parties. If a mistake has happened injurious to a party, what matters it to justice, whether he be plaintiff or defendant? Are not both parties equally the objects of protection and regard? What becomes of even-handed justice, which it is said delights to dwell in courts of equity, if in dispensing her decrees, she extends to one party a rule of such vast importance, which she denies to the other? If the parties have fairly, and for a valuable consideration, made an explicit, distinct contract, in reducing which to writing, a mistake has happened, either by omission or otherwise, or by a misapprehension of the legal import and effect of the instrument, shall not either party equally have the benefit of rectifying the mistake? Where the plaintiff has fully and actually executed his part of the contract, and calls upon the defendant in equity to execute his part of it, can he be repelled by so preposterous a doctrine, that there is a mistake in the written instrument, which

absolves him in equity from the obligation of his contract? In some instances, perhaps, the plaintiff may have an imperfect remedy at law, but in many he might have none. And in some, though he had a remedy, it might, as in the present case, be a fruitless one, owing to the total insolvency of the delinquent. It is confidently submitted, that the rule as contended for by the defendants, is not to be found amongst the acknowledged doctrines of equity, but has been judicially repudiated from her courts. And if any doubts ever were entertained upon the subject, they are all dissipated by the learned decision of Chancellor Kent, in the case of Gillespie v. Moon, 2 Johns. Ch. 585, in which all the authorities are revised, and by which it is clearly established, that the relief is coextensive with the mischief, and, that equity grants to the injured party, whether plaintiff or defendant, the benefit of the rule.

But another objection is raised to our relief. It is stated, that when the fact from its nature is doubtful, or equally unknown to both parties, equity will not interpose. To this position, when correctly applied, there is no objection. The rule, it is apprehended, is this, that when the information, or means of information, touching a doubtful fact, is equally in the possession of both parties, and they choose to make a speculating agreement about the subject matter, to which that fact relates, they shall be bound by it, though the ultimate result may be essentially different from the expectations of either party. But the principle has no kind of relation to the case at bar. Here was no doubtful or disputed fact; the loan, its amount and terms, the interest of Rousmaniere in the vessels, his agreement to mortgage, or pledge that interest, were at the time, and still are, all clear undoubted facts. There is no doubt about any fact, on which the contract was predicated. There is none now, and the difficulty is not about the facts of the agreement, but about its execution by the defendants.

It is also said, that the plaintiff mistook his law in making his contract, and that equity never relieves against mistakes in the law. And it is probably correct, that when the parties with a full knowledge of the facts enter into a contract, they are not relieved, though under a mistake as to the law. But here was no mistake of the law in making this contract. The law was completely understood in relation to all the facts, on which this contract was founded. The parties knew the loan, its terms, &c.; that Rousmaniere owned the vessels, and that he had a right by law to pledge them for security, and that by agreement he did pledge them. The mistake is, not in the facts, nor the law, nor in the contract, but in the remedy upon the contract. They believed the power of attorney was a legal mean to secure the agreed lien, and in this consists the mistake. There is, therefore, a complete legal contract, but by mistake the mode adopted for its execution is defective at law; and to supply that defect resort is had to this honourable court. The admission of parol evidence is objected to, on the ground, that all previous negotiations are extinguished and discharged by the writing. The position is undoubtedly correct in the sense, in which courts of equity and law apply it. Its legal and just import we understand to be this, that when the parties have definitively concluded a contract, all previous terms, propositions, and negotiations concerning it are discharged and extinguished; and this is equally true, whether the contract is in writing, or parol only. It does not follow, however, that the contract is extinguished, but the contrary. The contract clearly exists, and is supposed by all the authorities to exist, but is not to be affected by the negotiations of the parties, which preceded its final completion. And the error of the counsel seems to be, in not distinguishing between the contract itself, and these previous negotiations, which may have led to it. But if we correctly understand the import of the argument, the absurdity is placed still farther. It seems to be contended, that the contract is merged and extinguished in the writing. This surely has no foundation in principle or reason; for, if reducing the contract to writing is an extinguishment of it, the writing is a sort of felo de se, and is fatally destructive of the very thing it was intended to preserve. The rule is, we apprehend, that the parol evidence (not the contract) is merged in the writing. But the contract exists independently of the written evidence, although it is to be proved by that evidence, and by that only, unless a mistake of some kind is satisfactorily proved to exist in relation to it. And in the case at bar, there is not the color of pretence for saying, the power extinguished or merged the contract. The power looks to something future to be done by virtue of it, and pursuant to the contract, and was intended not as the contract, but as a mean, by which a future act was to be done in fulfilment of it by one of the parties. And it cannot be pretended that the parties meant, that the power should embrace the whole agreement between them on both sides. The agreement is not, and was not intended to be set out. The loan, the terms, the negotiable notes, all exist independently of the power, and are binding engagements. The power was intended as a mean in the hands of the plaintiff, to coerce Rousmaniere to the fulfilment of his agreement and at most intended as evidence of part of the contract only. And further, this principle is in conflict with the admission of the defendants' counsel in another part of the argument, and with the whole current of authorities, which establish the admissibility of parol proof to correct errors in the instrument; for if the parol contract is extinguished by the writing, and that alone is the very contract, all idea of mistake is utterly and necessarily excluded. The writing in that case

would be the original, and to admit parol proof would be, not to correct, but to alter, the original. And perhaps it may be even doubted, whether the power is the legal direct written evidence of any part of the contract. If A. sells his ship to B., and gives him a power of attorney to take possession of her, it can hardly be considered, that this power is the direct written evidence of the contract, of which the books speak, when treating on the subject. It is a power growing out of the contract, and given to aid its execution. The undisputed execution of the power is evidence of its being a voluntary act, and by inference proves it was agreed to be given, but is not the direct evidence of the contract itself. There is a difference between a contract to perform a particular thing, and the performance of that thing. Here the contract was for a lien on Rousmaniere's vessels by power of attorney or other instrument, and to secure that lien the power was given; and it is evidence of an after act intended to be done under the contract, rather than direct evidence of the contract itself. And the great difficulty upon the original bill was, it is presumed, that the power was too bald, and was no evidence of the contract for a lien; and that even connecting with it the other allegations there stated in the bill, enough did not appear to support a lien, or any agreement for one.

Another ground seems to be assumed in relation to this part of the case equally untenable. Although it seems to be admitted, that there was originally a contract for a lien by mortgage, bill of sale, or some other mode; yet it is insisted, that the power of attorney, when adopted, operated as an extinguishment, or at least as a waiver, of all other security; and the power, when received, reduced and narrowed down to that identical instrument the original contract for a lien in the same manner, and with like effect, as if the original legal contract was for that identical specific instrument, and nothing more. But this singular assumption is supported by nothing but the ingenuity of the learned counsel, and profound as that is, it cannot clothe with the garb of speciousness, so preposterous a proposition. The contract was for a legal and valid security on the vessels, and the parties by adopting this power did not change, nor mean to change, the contract, but to execute it in part. It was a mode, and the parties believed a good and sufficient mode, of securing the lien pursuant to the contract. It has now proved insufficient of itself. The contract, however, remains the same as at first, a contract for security, and wholly unexecuted. And if the instrument adopted by the parties is defective from error in its form or provisions, it clearly entitles the injured party to the interposition of the court.

The learned counsel for the defendants admit, that in some cases mistakes in a written instrument may be corrected by parol evidence. But they insist, that the present is not a case of this description, that here is no mistake, that the power contains the very language the parties intended it should contain, and that to grant relief would be in opposition to all the authorities. But it is confidently submitted, that the counsel have mistaken the rule upon this subject. From the tenor of their argument it seems they contend, that no relief can be granted, unless something is omitted, which was expressly agreed to be inserted, or something inserted more than was agreed to be; that the errors to be corrected are such as have occurred in omissions or additions in drawing the instrument, but not to errors in its legal import and effect; that if the language is used, which the parties intended, no relief can be had, although that language does not contain the legal intentions of the parties. But in principle, there is no foundation for this distinction, and is not, we apprehend, sustained by a single solitary adjudged case. If too much is inserted, or something is omitted in the instrument, it may be corrected by parol, because it does not contain the meaning and intention of the parties. And if every word and no more is inserted, which the parties designed to have inserted, and yet if those words do not embrace and import the meaning and intention of the parties, it is as clear a mistake and misconception, as the other, and the contract is as effectually defeated by the mistake in the one instance as the other. The true foundation of the principle for the admission of parol evidence is, that the instrument does not speak the legal, though it may the verbal, language of the parties; it does not speak the legal import of their contract as they intended it should. And whenever the intention of the parties will be defeated by a defect in the instrument, that defect may be proved and corrected by parol, whether it arises from omission or addition, or from the insufficient and inapt language and terms of the instrument. When it is satisfactorily proved by parol, that there is a mistake in the instrument as to its provisions, or a misconception of its legal import and effect, so that the intentions of the parties will in either instance be defeated, it is clearly a case of equity cognizance, and undoubtedly a subject of equitable relief. 2 Freem. 246, 281; Newl. Cont. 348, 349; 3 Ves. 399; 1 Johns. Ch. 607; 1 Ves. Sr. 317, 456; 1 Brown, Ch. 341; 1 P. Wms. 277, 334; 2 Vern. 564; 2 Atk. 203; 2 Eq. Cas. Abr. 16; Sugd. Vend. 481; 3 Atk. 388; 2 Ves. Jr. 151; 1 Ch. R. 78; 2 Vent. 367; 1 Vern. 37. Suppose a complete contract is made for the sale of an estate, and the full consideration is paid, and a deed satisfactory to the parties is drawn, and one which they both believe would pass the title, but it has no seal, and no title passes, will not equity on the bill of the grantee, order the deed executed anew, or the old

one sealed? Suppose the deed to be drawn exactly as the parties expected, but to contain no proper or apt words to pass a fee, will not the court correct the mistake or misconception? Suppose a release should be given, which the parties believed would pass the title, but the releasee being out of possession, and having no pre-existing interests in the premises, by the technical rules of the common law the release is a mere nullity, and the releasee takes nothing under it; will not the court correct this error? Suppose the contract is for the sale of an estate with warranty, but in drawing the deed there is no covenant of seisin. The grantor executes, and the grantee receives it from a belief of its sufficiency in all respects. When the error is discovered, is there a doubt, but that equity will order it corrected? Suppose an agreement is made for the sale of a registered vessel, warranted American, and to be conveyed as such with all the privileges of an American bottom, and the register is omitted in the bill of sale; the title to the vessel passes, but she is denationalized. Will not the court order the execution of a new bill of sale, with the insertion of the register? In all these instances the parties had the instruments drawn to their satisfaction and believed them to be sufficient. They are in the very language and terms the parties agreed to, but are defective in legal operation, and do not execute the intentions of the parties.

There is another ground, upon which the plaintiff is entitled to the benefit of his lien. The contract has on his part been fully performed, and although no writing had been made, he is entitled to the performance of it by the other party. Part performance has been considered as obviating the necessity of written proof, and gives to the performing party the benefit of specific relief against his negligent and faithless adversary. In several cases arising under the statute of frauds, and touching interest in land, it has been questioned, whether the payment of a small part of the consideration money would take a case out of the statute, as amounting to part performance. But in all or nearly all those cases, the payment was of what is called earnest money, to bind the bargain. The payment is rather in nature of a penalty or forfeiture, to induce the payer to a punctual performance, and is not in the nature of a substantial, beneficial payment of part of the consideration money. But even if the principle, that part payment does not exempt the case from the provisions of the statute, be correct, yet it is apprehended, that the principle does not extend to a case, where the contract stated in the bill is distinctly admitted, and where the full consideration has already been advanced and paid. Whenever the party has completely and fully executed his part of the contract, whether by payment of money, or other acts, the rule in equity is, we apprehend, almost universal, to coerce the other party to a specific execution of the contract on his part. Newl. Cont. 181; 1 Ves. Sr. 82; 7 Ves. 341; 3 Atk. 1; 2 Ch. Cas. 135; 4 Ves. 720, 722; 1 Vern. 363; 3 Ch. R. 16; Toth. 67; Roberts. Frauds, 154; 1 P. Wms. 282, 277; 1 Madd. 301; 2 Eq. Cas. Abr. 48. Upon the whole, it is submitted to the court on the part of the complainant, that a contract for security on the vessels mentioned in the bill is fully admitted; that the contract is distinct and explicit in its terms, perfect and legal in its nature, and founded on a valuable consideration actually advanced and paid by the complainant; and, that by the soundest doctrines and rules in equity, he is entitled to the benefit of that security, and to a decree enforcing the execution of the contract, according to the manifest intention of the parties.

Hunter & Randolph, in reply.

The ingenious argument of the plaintiff's counsel has not produced conviction in our minds, nor in the least abated our confidence in the validity of our defence. Its logical merit upon its assumed facts is not denied, and the question it raises, is copiously illustrated and subtilely supported. But after all, it exhibits but a vigorous effort unduly to amplify equitable jurisdiction, and extend an unwarrantable relief in cases of mistake and misconception, in cases where they actually exist. But we intend no departure from our original ground, and we repeat, that the case under consideration is one, that presents no mistake or misconception. Fraud is not suggested; and it is admitted there is no mistake, either of omission or addition. It is clear, that the parties intended not an ordinary sale or assignment of the vessels in question; yet the plaintiff seeks to have the same effect produced by his powers of attorney, as if a conveyance by grant, bill of sale, or mortgage, had been effected. He contends against his own preference. He asks for that now, which he had offered him, and which he rejected. In the cases that have arisen upon the redeemability of annuities, where the parties, by innocent and mutual error, left out of the deed a provision for redemption, under an idea, that if inserted, it would make the transaction usurious, (there being no charge of fraud in the omission) the court would not admit parol evidence; they could see no mistake. Lord Eldon says, the court were desired to do, not what the parties intended, but something contrary thereto. They desired to be put in the same situation, as if they had been better informed, and had a contrary intention. Marquis of Townshend v. Stangroom, 6 Ves. Jr. 328, 332. It is admitted, that Hunt's security was to be by power of attorney, and why should the court now turn it into a bill of sale, or mortgage, or any security equivalent to these, but more efficient than the powers, and

different from them. Phil. Ev. 451; 1 Brown, Ch. 92; 6 Ves. 332; 2 Brown, Ch. 219; 3 Brown, Ch. 168. This is at best an attempt to explain an agreement, which is inadmissible. Pym v. Blackburn, 3 Ves. 34. It is submitted, that there is a clear analogy between the present case, and those referred to. These cases deprive the respondents' counsel of the honour of inventive ingenuity in framing a new rule of equity, and exonerate them from the opprobrium of advancing as law, what is unfounded in principle, and unsustained by authority.

2. But admitting the existence of a mistake, can the plaintiff claim on that account relief. On this point, the counsel for the plaintiff take sanctuary in the case of Gillespie v. Moon, 2 Johns. Ch. 598. That case was, undoubtedly, correctly determined; but it is humbly submitted, whether it does not present a case of fraud, rather than of mistake; and would it not have been as fortunate, as wise, (having reference to the importance of uniformity of decision) if the learned chancellor had acted upon his expressed doubt, and his first and best impression, and turned that case upon the fraudulent intention and suppression of the truth so obvious in the conduct of the respondent, rather than on the ground of mistake and misconception. The respondent in that case knew from the beginning, that he received, or might receive, by the language of the deed, what the grantor never intended to give; it was a mistake in one, and taking advantage of that mistake was a fraud in the other; a fraud of the meanest nature, properly cognizable under the moral jurisdiction of a court of chancery, and obnoxious to its severest rebuke. It is evident, that the learned chancellor has taken in that case a fearless stride as to doctrine, and has passed by, rather than overthrown, the difficulties, that opposed his progress. He asserts, that the mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence. We contend, that it does not appear in any previous case, that the plaintiff has been allowed to give parol evidence varying a written agreement, on the ground of mistake. Phil. Ev. p. 454. It is admitted by Chancellor Kent, that such proof was rejected by the master of the rolls in Woollam v. Hearn, 7 Ves. 216, and again in Higginson v. Clowes, 15 Ves. 516, and in the case of Clinan v. Cooke, 1 Schoales & L. 39, determined by Lord Redesdale.

"Non nostrum inter vos tantas componere lites."

We do not even intend to set up on the ground of authority, the two great chancery characters of England against the chancellor of New York; but the reasoning, both of the English master of the rolls, and the lord chancellor of Ireland, remain not only unrefuted, but untouched.

The case of Woollam v. Hearn, was determined on great consideration, and is referred to by the best writer on the law of evidence, as placing the doctrine of the courts of equity on this subject in a very distinct and clear point of view. Phil. Ev. p. 455. We are, therefore, not conscious of obtruding a dangerous novelty upon the court, when we assert the difference of right and condition, as to the plaintiff and defendant; of evidence offered for the different purpose of resisting a decree, and that offered for obtaining it. We believe this difference exists in the code of every civilized nation. "Favorabiliores rei, potius quam actores, habentur;" this and other similar maxims are of universal prevalence and uncontradicted reception, and equally applicable in concerns civil and criminal. Both parties are the object of equal protection, but to make that protection equal, a certain position and condition is assigned to the defendant. He is so placed as to be able to resist lawless attack. Bestowing the same rights is not always bestowing equal rights. The law seeks for actual, not nominal, reciprocity. The relative condition of the parties enters into the account. "Even handed justice" first corrects the balance by making the proper allowances, before she weighs the merits of the cause. Looking to the statute of frauds, or to the pre-existing rule of the common law, (a fortiori applicable in the instance of a power of attorney, which cannot exist without deed) we must conclude, that in a case, like this at bar, the defendants are not to be charged, unless they have agreed to be so by writing, and if there is a writing, it excludes the reference to what might have been the previous talk or negotiation. There is a writing or deed produced, which it was pretended did so charge them; and that writing upon its own strength, without the suggestion of mistake or insufficiency, was the foundation of the original bill. It has been decreed, that the writing does not charge them, and here the case ought to end. Having chosen to begin his pursuit on the writing exclusively, and in perfect confidence of its validity as to his attempted purpose, is it competent to the plaintiff by an amendment of his bill, to resort to verbal negotiations, introductory of the final settlement and consummate act between the parties, in which all negotiations were merged beyond the power of revival? Is not this attempt unprecedented, dangerous in the extreme, and subjecting administrators and representatives to the power of a plaintiff, without any possible means of detecting his wrongful statements, or protecting the property they hold in trust for legal distribution.

The court cannot proceed as if the powers of attorney never existed, or as if they were annihilated; they make a fact inherent in the case, and inseparable from it. They cannot raise an equity dehors the deed, because they cannot obliterate the fact of its

existence, and its being the whole foundation of the plaintiff's claim. As to the general contract, we admit it exists; the loan was made; the notes, as undisputed evidence of it, ought to be, and will be, legally paid. The privileged mode of payment, which the plaintiff aspires to, cannot be assented to by the administrators, because it was given by an authority, which ceased with the life of its author, and by consequence is not binding on them. It is unnecessary to remark on the impolicy of permit ting a transaction of this kind, so contrary to what ought to be the openness of commercial dealing, and to the entire spirit of the commercial law, which requires publicity in all transfers of property, and possession to accompany a grant, and admits control of the possessor to prove the ownership. Secret letters of attorney granting a power to sell, especially in the case of vessels, without a delivery, without a change of papers, without notice to the government, or to the mercantile public, it is obvious, are fraught with dangerous consequences, and could hardly be supported as against creditors, though the life of the constituent still sustained their existence and efficacy. But to support them after they are expired, and to find from the fact of their having existed merely and in their own invalidity an apology, first to overthrow them, and on that overthrow to erect a firmer fabric of obligation out of the previous verbal negotiations of the party, is a course abhorrent to all the maxims of security and protection inculcated by law. Administrators must necessarily be ignorant of the private verbal communications of the parties, and they are left defenceless and liable to impositions, which can neither be detected nor repelled.

The case of Haynes v. Hare, determined by Lord Loughborough, 1 H. Bl. 664, is, as to many of its facts, and all its legal points, similar to the one now under consideration. The court there said: "It is not necessary to cite any case to prove the proposition, that parol evidence of a parol communication between the parties ought not to be received to add a term, not inferred in the specific agreement, which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have finally signed and sealed was finally settled. It would destroy all trust, it would destroy all security, and lay it open, unless the parties are completely bound by what they have signed and sealed. There is nothing so dangerous as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the disclosure of the attorney, in a matter in which he could meet with no contradiction." See likewise Poole v. Cabanes. 8 Term R. 328.

This present case is therefore submitted without further argument, or the unnecessary recapitulation of the points raised, under confidence, that our first view of it was proper and correct, and that the ingenious suggestions of the plaintiff's counsel, though honourable to them, are not hurtful to us; and this confidence is the more confirmed by the consideration, that our arguments are addressed to a member of that high court, which has taken its stand, as to one of the principal questions discussed, on the side of Loughborough, of Redesdale, and Grant, and have frequently expressed a warm and clear opinion against the admissibility of parol testimony, and their regret at the dangerous relaxation of the rule of its exclusion. See U. S. v. Kendall [Case No. 15,518].

STORY, Circuit Justice. This cause has been again argued upon the amended bill, and now stands for judgment. Some doubt has been thrown out in argument, as to the authority of the court to allow an amendment of the bill, after the cause had been decided in favour of the demurrer. I should be sorry, that any doubt of the propriety of such a practice should prevail in any case, where the court should be of opinion, that it was called for by the real merits and justice of the case. If there were a stubborn rule of practice against it, it might induce one to pause. But I know of no such rule; and as far as cases go, they only shew, that the court will exercise its discretion cautiously on applications of this nature. The authority of the court upon general principles seems unquestionable; and if it needed support, it falls within the express language of the judicial act of 1789, c. 20, § 32 [1 Stat. 91], which declares, that the courts of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the courts respectively shall in their discretion and by their rules prescribe."

The substance of the bill remains untouched by the amendment; and the only material fact now added, is, that the parties executed the powers of attorney in the case, under the advice of counsel, that they were as good security as a bill of sale, or mortgage of the property. Here, then, there was no mistake as to the intention of the parties; they did not execute one instrument supposing it to be another; they did not execute a power of attorney, supposing it to be a mortgage or a bill of sale. The papers are exactly what the parties intended; and they expressly waived the execution of any other or farther security. There was, then, no mistake in fact, nor in intention. The only mistake was a mistake in law, in supposing, that a defeasible security was indefeasible, and a letter of attorney irrevocable by the party was perpetual in its obligatory force, and irrevocable in point of law. The question, then, comes shortly to this, whether the court can grant relief in equity, where a security becomes ineffectual, not by the fraud of the parties, or by acci-

dent, or because it is not what it was intended to be, but because the parties have innocently mistaken the law. No case has been cited at the argument, which supports such a doctrine; and the existence of such a case is not to be presumed. It would, I imagine, be a new head in equity, that, because the security chosen by the party turned out in the event to be ineffectual without fraud, therefore a court of equity would substitute a new security, and give the party the same benefit as he might have had, if he had been more vigilant, or had been better instructed in the law. The cases, where relief has been granted upon the ground of mistake, are in general upon mistake as to facts, or where the instrument is not, what the parties in point of fact intended. Bishop v. Church, 2 Ves. Sr. 100; Id. 371; Thomas v. Frazer, 3 Ves. 399; Burn v. Burn, Id. 573; Gray v. Chiswell, 9 Ves. 118, 125; Underhill v. Horwood, 10 Ves. 209, 227, 228; Devaynes v. Noble (Sleech's Case) 1 Mer. 539, 564; Sumner v. Powell, 2 Mer. 30, 36; Ramsbottom v. Gosden, 1 Ves. & B. 165; Jalabert v. Duke of Chandos, 1 Eden, 372; Henkle v. Royal Exchange Assur. Co., 1 Ves. Sr. 317. Lord Eldon in Underhill v. Horwood (10 Ves. 209, 227) said: "I know both in causes, and in bankruptcy, where there is a joint bond, the court has sometimes inferred from the nature of the condition and the transaction, that it was made joint by mistake. But that turns upon this, that the instrument, though joint only, was intended to be both joint and several, and therefore the court will make it what it was intended to be. But I never understood, that though upon the ground of mistake this court would reform the instrument, therefore it would hold, that the instrument has a different effect from that, which belongs to it at law." Lord Thurlow in Irnham v. Child (1 Brown, Ch. 92) refused to add a new term to an agreement upon the ground, that it was omitted intentionally upon a mistake of the law; and the master of the rolls adhered to that in a subsequent determination. Lord Portmore v. Morris, 2 Brown, Ch. 219. Lord Eldon in the Marquis of Townshend v. Stangroom (6 Ves. 328, 332) said: "Lord Irnham v. Child went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, (of an annuity) because they were all of one mind, that it would be usurious; and they desired the court, not to do what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put into the same situation, as if they had been better informed, and consequently had a contrary intention." This language is strongly applicable to the case before the court. Here the parties did not intend to execute a mortgage, for that was waived; but the plaintiff took just such a security as he thought sufficient, upon his own notion of the law; and he now in effect asks the court to give him the same rights, as if he elected a mortgage. Mr. Chancellor Kent has pointedly stated the doctrine, that "courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle, which is safe and practicable in the common intercourse of mankind." Lyon v. Richmond, 2 Johns. Ch. 51, 60.

In every view which I have been able to take of this case, I can perceive no ground for the interference of a court of equity. Here was no mistake in the execution of the instruments. They expressed exactly, what the parties intended they should express. The security was the choice of the plaintiff. In the event it has turned out unproductive; but this is his misfortune, and affords no ground to give him a preference over other creditors. I am of opinion, that the demurrer is well taken, and that the bill ought to be dismissed. Bill dismissed with costs.

[NOTE. An appeal was then taken by the plaintiff to the supreme court, where the decree was reversed in an opinion by Mr. Chief Justice Marshall, who said: "We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." The case, however, being one in which creditors were concerned, the court, instead of giving a final decree for the plaintiff, directed the cause to be remanded so that defendants might withdraw their demurrer and file an answer. As to what is meant by "a power coupled with an interest," it was held that the interest, which will protect a power after the death of the person creating it is one in the thing itself, and not in that which is produced by the exercise of the power. 8 Wheat. (21 U. S.) 174. See, also, Cases Nos. 6,889 and 6,897.]

Case No. 6,899.

HUNT v. SMITH.

[3 Cranch, C. C. 432.] [1]

Circuit Court, District of Columbia. May Term, 1829.

VENDOR AND PURCHASER—LIABILITY OF VENDOR FOR TAXES ASSESSED AFTER CONVEYANCE.

A vendor of a city lot in August, is not liable to the vendee for taxes for that year, not assessed until November, and not payable until the first of January following.

The plaintiff [H. Hunt] purchased city lots of the defendant [R. Smith] in August, 1827, and afterwards was obliged to pay the city taxes for the year 1827. These taxes were not assessed until November, 1827, and were not payable until the 1st of January, 1828. This suit was brought to recover the amount of those taxes from the defendant, the vendor; but

THE COURT (THRUSTON, Circuit Judge, absent,) decided that he was not liable. Nonpros.

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

Case No. 6,900.

HUNT v. UNITED STATES.

[1 Gall. 32.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

BOND OF SURETY—EFFECT OF JUDGMENT AGAINST CO-OBLIGOR—DELAY IN DEMANDING PAYMENT—DISCHARGE OF SURETY.

In debt on a joint and several bond given for duties, it is no objection in a several action against one of the obligors, that a co-obligor has been taken in execution on a judgment on the same bond, and discharged under the act of congress of June 6, 1798, c. 66 [4 Folwell's Laws, 121; 1 Stat. 561, c. 49]. A surety upon a bond is not discharged by a mere delay to demand payment after it becomes due, unaccompanied by fraud or an express agreement with the principal to allow the delay. And quaere how far such delay by agreement is a good bar in favor of a surety at law. Quaere, also, if a party can, as to the obligee, aver himself a surety, unless his character appear on the face of the bond.

[Cited in Locke v. Postmaster General, Case No. 8,441; U. S. v. Sturges, Id. 16,414; Bank of Mt. Pleasant v. Sprigg, Id. 891; Hagood v. Blythe, 37 Fed. 250.]

[Cited in Townsend v. Riddle, 2 N. H. 449, 451, 452; Davis v. Huggins, 3 N. H. 231; Grafton Bank v. Kent, 4 N. H. 223; Curan v. Colbert, 3 Ga. 239; Bank of Steubenville v. Carrol, 5 Ohio, 215; Cope v. Smith, 8 Serg. & R. 112; Hunt v. Bridgham, 19 Mass. 584; Baker v. Briggs, 25 Mass. 125.]

[Error to the district court of the United States for the district of Massachusetts.]

Mr. Selfridge, for plaintiff in error.

G. Blake, for the United States.

STORY, Circuit Justice. This is a writ of error to the district court of Massachusetts district. The original action was on a bond for the payment of duties, in which one J. B. Frazier and one Ephraim Wilcox and the plaintiff in error [Augustus Hunt], on the 11th of November, 1807, became jointly and severally bound to the United States in the penal sum of $2,000, conditioned to pay on or before the 11th day of August, 1808, the duties of certain goods, which were ascertained to the amount of $576. The plaintiff in error, after oyer of the bond, pleaded in bar in the court below, that on the first day of January, 1810, a suit was commenced on the bond against Frazier, and judgment recovered in that suit for $576, upon which judgment execution issued, and Frazier, on the 10th day of May, 1811, was arrested and committed to prison; and that afterwards, on the 15th of June, 1811, Frazier was freely and voluntarily released and discharged therefrom by the United States, in conformity and according to the provisions of the act of June 6, 1798, c. 66 [4 Folwell's Laws, 121; 1 Stat. 561, c. 49], without the consent and against the will of the plaintiff in error. To this plea there was a general demurrer and joinder, on which the court below gave judgment for the United States.

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

The points relied on by the counsel for the plaintiff in error are, 1. That by the act of March 2, 1799, c. 128, § 65 (4 Laws [by Folwell] 386 [1 Stat. 676, c. 22]), the collectors of the customs are required immediately and without delay, as soon as bonds for duties become due and are not paid, to cause prosecutions to be commenced therefor. That no suit was commenced against Frazier until the 1st of January, 1810, which was more than sixteen months after the bond became due; by which negligence the sureties were injured, and so in effect are discharged by operation of law.

On examining the pleadings, I do not find that it directly appears, that the plaintiff in error stands in the character of a surety. It is not so stated in the bond nor in the plea, and can only be gathered by inference from the condition of the bond, where the goods are stated to be "entered by Frazier as imported in the brig Pallas." But by the act of March 2, 1799, c. 128, § 36 [4 Folwell's Laws, 340; 1 Stat. 655, c. 22], an entry may be made by an owner, consignee, part owner or agent, of any imported goods; and it cannot be inferred that Wilcox and the plaintiff in error were not jointly connected with Frazier in this transaction. Certainly so material a fact ought to have been directly averred, though perhaps it may be very doubtful, whether a court of law could decide upon such an averment, where it did not appear to be true on the face of the bond. People v. Jansen, 7 Johns. 332; Rees v. Berrington, 2 Ves. Jr. 540, 544. But even if this objection were removed, the main difficulty would remain. In chancery it has been certainly held, that where the obligee, without communication with the surety, takes notes from the principal, and gives further time, the surety is discharged. Rees v. Berrington, 2 Ves. Jr. 540; Skip v. Huey, 3 Atk. 91. So if, without such payment, the obligee on the bond becoming due, without notice to the surety, contract to give further time to the obligor. Nisbet v. Smith, 2 Brown, Ch. 579. How far the same principles will avail the party in a court of law, has been a subject of much discussion of late years. In Peel v. Tatlock, 1 Bos. & P. 419, where the defendant had made a guaranty for the good conduct of a clerk, it seems to have been thought that a fraudulent concealment of a default of the clerk, for a considerable length of time, would have discharged the guarantor at law. But in no case, that I can find, has the mere delay to require payment, without any contract for this purpose, been held to vary the responsibility of the sureties. In Trent Nav. Co. v. Harley, 10 East, 34, where the only question was, whether the laches of the obligee in not calling upon the principal so soon as he might have done, if the accounts had been properly examined from time to time, was an estoppel at law against the sureties, Lord Ellenborough said, he knew of no such es-

toppel at law, whatever remedy there might be in equity.[2] In People v. Jansen, 7 Johns. 332, the court expressly held, that in the ordinary case of a bond with sureties, the obligee is under no positive injunction, or legal obligation, to watch over the conduct of the principal debtor, and in case of failure of punctual payment, to adopt measures calculated to relieve the surety; and further, that mere delay in calling upon the principal was not a discharge of the surety either at law or in equity. It is true, that in that case, which was a case of the bond of a public officer (in respect to the settlement of whose accounts from time to time there were many statutory provisions) the court held the sureties discharged at law: but it was on the express ground of those provisions, and also of the gross laches in the superintending officers, after full knowledge of the default, and when it appeared, that the sureties must thereby have to sustain the whole loss, in case of a recovery; whereas, if there had been due diligence, none would have been sustained.[3]

In the present case, it does not appear, that the sureties are worse off in consequence of the delay, and the court cannot certainly intend it. If it were true, it ought to have been set out in the pleadings. But I do not conceive, that the doctrine of the last case can in any shape affect the present case. The act of March 2, 1799, c. 128, § 65 [1 Stat. 676, c. 22], is merely directory to the collectors, who may perhaps, in case of a loss by their omission, become themselves liable for the debt. The mandate applies equally to the sueing of all the parties to the bond, and the neglect to sue one cannot operate to discharge another, any more than the same neglect would operate to discharge the first party. I adopt it as a sound principle, that mere delay, unaccompanied with fraud, or a settled agreement with the principal for that purpose, does not discharge the responsibility of the surety.

2. In the second place, it has been argued, that the discharge of Frazier from imprisonment was a complete discharge of the debt; and this, having been done without the consent of the plaintiff in error, has completely exonerated him. It has been said by the attorney for the United States, that however that may be, as to joint obligations, it cannot apply to those which are joint and several. And Kyd, Bills, 116, which cites Hayling v. Mullhall, 2 W. Bl. 1235, has been cited in support of the argument. But that authority does not apply, because there the contract was not joint, but there were several independent contracts on a bill of exchange; and the decision of the court was, that the actual taking of a man in execution, and afterwards discharging him, is no satisfaction as to any of the antecedent parties on a bill of exchange. But it is most clear and undoubted law, that a release to one of several obligors, who are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all. 2 Rolle, Abr. 412, (G) pl. 4, 5; Clayton v. Kynaston, 2 Salk. 574; Comyn, Dig. "Pleader" (W 2) 30; Co. Litt. 232, and note 144; 2 Saund. 48; Rowley v. Stoddard, 7 Johns. 207. So also it is settled, that a discharge of one debtor taken on a joint execution is a complete discharge of both. Clarke v. Clement, 6 Term R. 525. Nay, if a debtor, once taken on execution, be discharged from arrest on an agreement to pay at a future day, or to yield himself up again on the execution, he cannot be again taken in execution, but is completely discharged. Vigers v. Aldrich, 4 Burrows, 2482; Jaques v. Withy, 1 Term R. 557; Tanner v. Hague, 7 Term R. 420; Blackburn v. Stupart, 2 East, 243. Now the ground, on which all those cases proceed, is, that the plaintiff can have but one satisfaction; and he is considered as receiving a satisfaction in law by having his debtor once in custody in execution. Yelv. (Metcalf's Ed.) 68a, note. At first view these cases would seem to govern the present; and if it cannot be distinguished by the operation of the act of June 6, 1798, c. 66, 4 Laws [by Folwell] 121 [1 Stat. 561, c. 49], the bar must be supported. By that act (which was made long before the bond in this suit was given), it is provided that notwithstanding such discharge, the judgment shall remain good and sufficient in law, and may be satisfied out of any estate, which may then or at any time afterwards belong to the debtor.

At the argument, I was struck with the consideration, that this act would not bind the surety, but leave him to the ordinary operation of the common law. But on further reflection I am of a different opinion. The sole ground, upon which a co-obligor is discharged, is, that the debt or judgment has been once satisfied. When the law has declared, that a particular act shall not be deemed a satisfaction of the debt or judgment, it would seem to follow, that it cannot be pleaded, as a discharge of any party to such debt or judgment. The cases of Nadin v. Wardle, 5 East, 147, and McLean v. Whiting, 8 Johns. 339, seem to me evidently to rest on this general foundation. I have come to this result not without some

[2] In Davey v. Prendergrass, 5 Barn. & Ald. 187, it was decided that giving time to the principal by agreement was no discharge at law to the surety. See People v. Jansen, 7 Johns. 332; Rathbone v. Warren, 10 Johns. 587; Pain v. Packard, 13 Johns. 174; People v. Berner, Id. 383; Fulton v. Matthews, 15 Johns. 433; Powell v. Waters, 17 Johns. 176; King v. Baldwin, Id. 384; 2 Johns. Ch. 534; Barnard v. Norton, Kirby, 193; Deming v. Norton, Id. 397; Graham v. Goudy, Add. 55; Ludlow v. Simond, 2 Caines, Cas. 1; Burn v. Poaug, 3 Desaus. Eq. 604; 3 Yeates, 360; Ellis, Dr. & Cr. c. 8.

[3] Giving time to his debtor, and how far it affects sureties, see Moore v. Bowmaker, 6 Taunt. 379, 2 Marsh. (Eng.) 81, 392; Orme v. Young, 1 Holt, N. P. 84; Dunn v. Slee, Id. 399; Boultbee v. Stubbs, 18 Ves. 20; 2 Johns. Ch. 554.

hesitation; and it is certainly a perilous proceeding to discharge the principal debtor without the assent of his surety. I give no opinion, how the law would have been, if it had appeared, that, upon the discharge, the United States had taken any security pursuant to the act of June 6, 1798, c. 66 [1 Stat. 561, c. 49]. Judgment affirmed with costs.

See, also, as to the first point, Comth v. Boynton, 4 Dall. [4 U. S.] 282.

HUNT (UNITED STATES v.). See Case No. 15,423.

Case No. 6,901.

HUNT v. WOODWARD.

[2 Cin. Law Bul. (1877) 71.]

Circuit Court, S. D. Ohio.

JUDGMENT OF ANOTHER STATE — ACTION UPON — CONCLUSIVENESS—SERVICE OF PROCESS—EVIDENCE.

1. In an action upon a judgment of another state, the recital in the record that the defendant was served with process, is not conclusive and does not estop the defendant from showing that he was not served with process and that the court acquired no jurisdiction over him.

2. In such case the record is prima facie evidence that the service was made, and this rule is not changed by the fact that the question of service is put in issue by the answer of the defendant, and the burden rests upon him to overcome the recital by competent evidence.

This action is brought upon a judgment rendered by the circuit court of Caldwell county, Missouri, in favor of the plaintiff [James F. Hunt] against the defendant [Samuel B. Woodward]. Among other defences set up in the answer, is, "that the defendant had no notice of the pendency of the suit; that he was not served with a summons; that he did not enter his appearance therein, and that the court had no jurisdiction over him." To this defence a general replication is filed. Upon the trial the plaintiff offered in evidence a duly authenticated copy of the record of the proceedings and judgment upon which the suit was brought. The defendant was examined as a witness, and testified that he had no notice of the suit, and was never served with process in the cause. The plaintiff offered in rebuttal proof tending to show that defendant was, in fact, served with process.

S. F. Thompson, for plaintiff.
General Ward, for defendant.

SWING, District Judge. Whatever doubt and diversity of opinion may exist, as to the effect of the judgment of a court of general jurisdiction upon the question of the jurisdiction of the court, so far as the supreme court of the United States is concerned, it is now definitely settled that such judgments are conclusive upon that question, but that the jurisdiction of the court pronouncing them may be inquired into, and the facts necessary to confer jurisdiction may be contradicted, and this, though the record of such judgment recites the facts which conferred the jurisdiction. Galpin v. Page, 18 Wall. [85 U. S.] 355; Thompson v. Whitman [Id. 457]; Knowles v. Gaslight & Coke Co., 19 Wall. [86 U. S.] 60. The defendant may, therefore, show in contradiction of the record that no service in fact was made upon him.

The record offered in evidence shows that the plaintiff brought suit against one Lewis C. Woodward in the circuit court of Caldwell county, Missouri; that, upon proper showing under the laws of Missouri, a writ of attachment and summons issued therein, commanding the officer to summon, in said cause as garnishee, the defendant herein, Samuel B. Woodward. The record shows affirmatively that the writ was served by the sheriff of said county upon Samuel B. Woodward as garnishee by reading; it shows further that the court found Samuel B. Woodward, garnishee though legally summoned, made default, and judgment was rendered against him by default, and an inquiry of damages was awarded, and that afterward such proceedings were had in the cause by which judgment was rendered against Samuel B. Woodward for the amount alleged in the petition. The record recites the fact that the defendant was served with process, and this must be taken as prima facie evidence that such service was made. Authorities, supra; 2 Greenl. Ev. 119; 2 Am. Lead. Cas. 644, 646; Cheever v. Wilson, 9 Wall. [76 U. S.] 123.

The fact that the question of service is put in issue by the answer of the defendant, does not change the character of the record as establishing prima facie the fact that such service was made, but the burden is upon the defendant to overcome this proof by evidence which shows that he was not served as recited in the record. If the testimony satisfies the jury that the recital of service in the record is not true, and that no service was made upon the defendant, their verdict will be for the defendant; but if such service was made, then their verdict will be for the plaintiff.

Case No. 6,902.

In re HUNTER.

[3 McLean, 297.] [1]

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

BANKRUPTCY—APPLICATION—DEMAND FOR JURY TRIAL.

A demand for a trial by jury, where an application for the benefit of the bankrupt law [of 1841 (5 Stat. 440)], is dismissed, must be made at the term in which the decision is made.

[In the matter of Thomas Hunter, a bankrupt.]

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

OPINION OF THE COURT. This was an application for the benefit of the bankrupt law, to the district court. The application was dismissed. Twenty-nine days after this dismissal, the applicant demanded a jury. On the above demand the cause was heard and continued under advisement; and at the next term the question was certified by the district court to this court, "whether a trial by jury can be allowed to the applicant aforesaid on his demand by attorney, twenty-nine days after the refusal and record thereof, of his discharge as aforesaid." In the fourth section of the bankrupt law, it is provided, that "if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court," &c. After the expiration of ten days, an appeal is not allowed; and it would seem to be reasonable that a demand for a trial by jury should be made, at the term in which the decision is made against the application. An appeal is made by entering in the district court, or with the clerk thereof, upon record, the prayer for an appeal. Now when the petition is dismissed there is a final determination of the cause, and after the adjournment of the court, no means are provided by which the cause can be reinstated and opened for a jury trial. As well might it be argued that an appeal could be taken after the lapse of the ten days allowed, as that a jury trial could be demanded after the adjournment of the court. It is true, there is no express limitation to this application, as there is to an appeal. But there is a necessary limitation to the term at which the decision of the court was entered. This decision may be certified to the district court.

Case No. 6,903.

In re HUNTER.

[18 N. B. R. 504.] [1]

District Court, W. D. Tennessee. Dec., 1878.

BANKRUPTCY—PUBLIC SALE—PUBLICATION OF NOTICE.

It is imperative under the statute that notices of all public sales shall be published for three consecutive weeks, whether the assignee or other officer proceeds under the power given him by the statute or under a special order of the court, and there is no power in the court or judge to change this requirement.

[In bankruptcy. In the matter of Mrs. M. C. Hunter.]

To Hon. E. S. Hammond, Judge of Said Court: Your petitioner respectfully represents that he was elected assignee of the above estate, just prior to the yellow fever. The assets, consisting of millinery, did not come into his hands until the fourteenth day of August, when there was no sale for them; the same have been boxed and stored for several months. The petitioner has earnestly, but unsuccessfully, endeavored for a few days to secure a favorable offer for said stock without success, it being unseasonable and unsalable; and he is satisfied, after a thorough examination of the stock, and having had it examined by persons acquainted with its value, that the said stock ought to be sold at public auction. Petitioner has rented a very cheap and well-located small store-room, where the said stock is being opened; and as he has no authority to sell at public auction without giving three weeks' notice by advertisement, he respectfully asks for an order of sale, authorizing him to sell at auction on the sixteenth day of December, 1878, to save the expense of rent and other expenses that will amount to more than the value of the goods. O. Wooldridge, Assignee.

Memphis, Tenn., December 10th, 1878.

HAMMOND, District Judge. Section 4 of the act of June 22, 1874, c. 390 (18 Stat. 178); Bump (10th Ed.) p. 367,—enacts that "all notices of public sales under this act by any assignee, or officer of the court, shall be published once a week for three consecutive weeks, in the newspaper or newspapers, to be designated by the judge, which in his opinion shall be best calculated to give general notice of the sale." While the court has power under this section to supervise the sales made, and to direct a private sale if necessary, it has no power to change the character of notice prescribed for a public sale. It is imperative under the statute that notice shall be given for three consecutive weeks, in a newspaper or newspapers, designated by the judge, of all public sales, whether the assignee, or other officer, proceeds under the power given him by the statute or under a special order of the court. There is no power in the judge or court to change this requirement of the statute. The foregoing application is therefore denied.

[1] [Reprinted by permission.]

Case No. 6,904.

The HUNTER.

[1 Ware (249), 251.] [1]

District Court, D. Maine. Feb. Term, 1833.

BOTTOMRY BOND—COLLATERAL SECURITY—INTEREST.

1. A bottomry bond, entered into by the master of a vessel, is not rendered void by his drawing a bill of exchange on his owners for the same sum for which the bond was given.

[Cited in The Eureka, Case No. 4,547.]

2. A bill of exchange, in such a case, is not an independent security payable at all events. It is collateral to the bond, and is subject to the

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

same contingencies, and a discharge of one security is a discharge of both.

[Cited in Maitland v. The Atlantic, Case No. 8,980; Greely v. Smith, Id. 5,750.]

3. When a merchant advances money towards repairing a vessel, on the personal credit of the owner, he cannot, after it is expended, demand the security of a bottomry bond, with maritime interest.

[Cited in Greely v. Smith, Case No. 5,750.]

4. Quere, whether a bond in such case, though void as a bottomry bond carrying maritime interest, may be a valid security for the principal sum advanced, with land interest.

5. A bottomry bond may be held by a court of admiralty good for a part and bad for a part.

[Cited in Maitland v. The Atlantic, Case No. 8,980; Greely v. Smith, Id. 5,750.]

6. So a court of admiralty has authority to moderate the maritime interest when it is manifestly exorbitant.

[Cited in The Clotilda, Case No. 2,903.]

7. A libellant may unite in one libel an allegation founded on the hypothecation implied by the law for money advanced for repairs, with an allegation on a bottomry bond given for the same consideration.

[Cited in Clark v. Laidlaw, 4 Rob. (La.) 345.]

This was a libel on a bottomry bond given by Leavitt, acting as master of the brig Hunter, for advances made for repairing her and fitting her for sea. The material facts are, that in May, 1829, Houdlette, the claimant, purchased the brig at Gustavia, in the Island of St. Barts. At the time of the purchase, she was in a condition requiring considerable repairs. Before he had left the place he engaged some work to be done upon her, and procured some materials. When he left, he put Leavitt, who was at Gustavia in another vessel of Houdlette's, as second mate, in charge of the vessel, to superintend the repairs, and directed him to call on Bailey, the libellant, for such advances as should be wanted, which Bailey agreed to make. Houdlette then returned to Bath, intending to send out Capt. Theobald to take the vessel home. The witnesses examined at Gustavia state that if Theobald did not arrive in season, Bailey was directed by Houdlette to put in Leavitt as master, and send the vessel to Bath. Leavitt contradicts this statement. The conflicting testimony of the witnesses on this point is not easily reconciled but upon the supposition that the matter was left with a loose and somewhat indefinite understanding between the parties. Mr. Harrison, the American consul, whose deposition was taken in the case, states that in the event mentioned of the non-arrival of Theobald, Bailey was authorized to put in Leavitt as master, for the purpose of navigating the vessel home; and Theobald not arriving, this was accordingly done, and the consul indorsed his name on the register, as master. Leavitt then gave the bond to Bailey on which the libel is founded, and at the same time drew a bill on the owners for the same sum.

Mr. Mitchell, for libellant.

Mr. Shepley, for claimant.

WARE, District Judge. Several objections are made to the validity of this bond. In the first place, it is contended that Leavitt was not appointed master by any competent authority, and that he could not, therefore, bind the vessel, under any circumstances, by a bottomry bond. The evidence on this point is not free from difficulty. Mr. Harrison, the American consul, says that Houdlette, on leaving Gustavia, gave orders that if Captain Theobald, whom he intended to send out to take the command of the vessel, did not arrive in season, Leavitt should be put in as master for the purpose of navigating her home. The witness, however, does not mention the means he had of knowing this fact. It may perhaps be presumed that he had it from Houdlette himself, but as the fact is controverted, it would have been more satisfactory if he had stated how he came to the knowledge of it. It would then be more easy to determine the degree of authority which might be justly attached to his testimony. There is no intrinsic improbability in his statement. If Mr. Houdlette had determined, on his return, to send out a master to take the command of the vessel, it was natural, and it would seem prudent, to leave a discretionary authority with his agent at Gustavia to provide for the contingency of the master's not arriving, who should be dispatched from this country. At the same time, if his intention was, in such a case, that Leavitt should take the command, we should naturally expect that he would have been informed of the arrangement. But if Leavitt is to be believed, no such arrangement was made known to him; on the contrary, he says that Houdlette's orders to him were, that after superintending certain repairs of the vessel, he should either wait the arrival of Theobald, or take passage home in some other vessel, and that he had actually engaged his passage home when he was called on by Bailey to take the command of the vessel. But it is to be remarked that two witnesses, examined at Gustavia, state in their depositions that Leavitt told them that he was directed to take the brig home, provided Theobald did not arrive in season. This is not, indeed, admissible as evidence of the principal fact, but it may go to raise some doubts as to the reliance which may be placed on the accuracy of this witness's recollection upon the subject.

But supposing the objection of the want of authority in Leavitt to bind the owners by such an instrument overcome, it is contended that the bond is void because a bill of exchange was drawn by Leavitt, acting as master, on the owners, for the same sum. In the case of The Augusta, 1 Dod. 283, Lord Stowell considered that the taking of a bill of exchange by the holder of a bottomry bond was a strong circumstance to show that the advances were made on the personal credit of the owners, and not on the

credit of the vessel, and he held the bond void for the amount of the bill and good for the advances made after the bill was drawn. But in this case there were other circumstances which went strongly to show that, at the time when the first advances were made, the creditor looked only to the personal responsibility of the owners. He did not, however, intimate an opinion that the simple fact of taking a bill of exchange, as a security in addition to the bond, would, of itself, vitiate the bond. And in the cases of The Jane, 1 Dod. 466, and The Nelson, 1 Hagg. Adm. 179, in both of which bills of exchange were drawn by the master, he treated them as merely collateral to the bond, which, if paid, discharge the bond, but which do not affect its validity. "It is," says he, "the usual practice to draw bills of exchange; there is no inconsistency in taking this collateral security, nor has it ever been held to exclude the bond nor diminish its solidity. It is an erroneous view taken of bills drawn under such circumstances, which would hold them to be independent securities, payable at all events. It is indeed true, that the owners are generally bound to honor the bills drawn by the master for the necessities of the ship. But when a bill is drawn, and a bottomry bond taken, with maritime interest, for the same sum, the bill must share the fate of the bond. Until the vessel arrives in safety at the end of her voyage, the loan is at the risk of the lender, and if she is lost, nothing is due upon the bill more than upon the bond. This risk belongs to the essence of loans made on maritime interest. Emerigon, Contrats à la Grosse, c. 1, § 3. When a bill is therefore drawn, and a bottomry bond given for the same consideration, the owner is not bound to honor the bill, at least not before the safe arrival of the vessel, and the end of the risk. For it does not appear that any thing will ever be due until the happening of the event on which the bond becomes payable, and then the payment of one security extinguishes both.

It is objected that the master has no authority to take up money on bottomry, except in the progress of a voyage, and to enable him to complete an enterprise already begun. If the objection were well founded, it would not be applicable to the present case, because here the advances were made at the request of the owners. But it is not admitted that the authority of the master is confined to such narrow limits as was supposed at the argument. The authority of the master to charge the owners by this contract, is confined to cases of strict necessity, such as usually occur in the progress of a voyage, and are occasioned by unforeseen accidents and disasters. But suppose a voyage is broken up in a foreign port, and a new one is undertaken; if the master is authorized to commence a new voyage the principle will apply with the same reason to such a case as to one that occurs in the progress of a voyage. The true principle seems to be, that when the master is authorized to employ a vessel in a particular way or in any particular enterprise, and he is obliged to raise money to comply with his orders, he may take it on bottomry, if he cannot obtain it on any other terms. And so it was decided in the case of Crawford v. The William Penn [Case No. 3,373].

But there is another objection which is conclusive against the validity of this instrument as a bottomry bond, carrying maritime interest. It is, that the advances were originally made on the personal credit of the owner. Before Houdlette left Gustavia, Bailey agreed with him to make the necessary advances for repairing the vessel. It is not pretended that there was any thing said at this time about a bottomry bond, and there is not the slightest evidence that any such security was contemplated by either party. There is not only an entire absence of any evidence of that kind, but the testimony directly negatives any such idea. Mr. Harrison states in his answer to the fourth interrogatory, "that the advances were not made by Bailey on account of any pecuniary advantage that would immediately arise therefrom, but from the circumstance of having many friends at Bath, who had favored him with their business, and he felt it his duty to make an exertion, though straitened for means, to get the vessel away, fearing that a reluctance to do so would injure him in their opinion. It is true that, at the time the Hunter was ready for sea, he had partly determined to detain her, in consequence of Houdlette's not complying with his engagement to reimburse his advances, but on the representation of his friends here, as well as myself, whom Leavitt earnestly solicited to use my good offices with Mr. Bailey, he consented to her departure."

It is evident from this testimony that the money was originally advanced on the personal credit of the owner, and the taking of a bottomry bond was an after-thought which arose from some delay of Houdlette, in not remitting the pay so early as was expected. But if a merchant advances money on the personal credit of the owners, he is not at liberty, after it is expended, to turn round and demand bottomry security with maritime interest. If he had intended to have insisted on this, he should have required it in the first instance. An opportunity would then have been given to the borrower to have tried his credit and to have obtained it on less onerous terms. The case of The Hero, 2 Dod. 139, is nearly parallel to the present. In that case, the advances were made before any thing was said of a bottomry bond, and after the ship was cleared out and ready to sail, the creditor interposed and refused to let her depart unless the master would secure the advances by a bottomry bond. The bond was

pronounced bad. The case of The Augusta, 1 Dod. 287, was decided upon the same principle, and the principle has been repeatedly affirmed by the courts of this country. Liebert v. The Emperor [Case No. 8,340]; Sloan v. The A. E. I. [Id. 12,946]; Rucher v. Conyngham [Id. 12,106]; The Aurora, 1 Wheat. [14 U. S.] 96.

Upon the authority of these cases, it is quite clear that, as a bottomry bond, carrying maritime interest, the instrument cannot be supported. But though there is a fatal objection to the instrument as a bond securing maritime interest, it is not perhaps quite certain that the creditor can have no remedy upon it in a court of admiralty, for the principal sum advanced, with land interest. This court, proceeding upon principles of general equity, and not being restrained by the rigid principles of the common law, holds that such a bond may be good for a part and bad for a part. The bond will not be rejected in toto because it is given for a consideration which, in part, the law will not sanction, but it will separate that part which is tainted with illegality, and hold it a good and valid security for the residue. This is a well-established principle of the jurisprudence of the admiralty. The Aurora, 1 Wheat. [14 U. S.] 96; The Packet [Case No. 10,654]; The Tartar, 1 Hagg. Adm. 13, 14; The Nelson, Id. 176; The Gratitudine, 3 C. Rob. Adm. 271. The court has also the power to moderate the maritime interest, when it is manifestly exorbitant, and it is apparent that an undue advantage has been taken of the necessities of the master, though this will be done with great caution. The Packet [supra]; The Zodiac, 1 Hagg. Adm. 326; La Ysabel, 1 Dod. 277.

If the court has authority to separate the good from the bad, and to reduce the maritime premium when an oppressive advantage has been taken of the necessities of the borrower, is it quite certain that it may not, in the exercise of its equitable powers, render judgment, in a case like the present, for the principal sum advanced, with land interest? For so much, the justice of the claim cannot be questioned, and if the bond had been originally taken for that sum, upon what ground could its validity have been controverted? Abb. Shipp. (Am. Ed.) p. 125, note 2. The advances being made in a foreign country, for repairing and refitting the ship, constitute a privileged debt against the vessel. She became hypothecated for the debt by operation of law, and if the creditor had taken no security he might either have seized her for the debt before she sailed, or have followed her to Bath and proceeded against her on the implied hypothecation, and enforced his lien to the exclusion of the general creditors of the owner. Why may not this bond be a valid security for that sum? The case of Rucher v. Conyngham [Case No. 12,106], seems to lead to this conclusion. The court held, in that case, the bond to be bad, but that the amount of the repairs, if properly proved, must be charged against the defendant. The state of the pleadings does not appear in the report, and it cannot be seen whether there was an allegation in the libel founded upon the consideration for which the bond was given, distinct from that upon the instrument itself. I can see no objection to uniting in the same libel such an allegation with that founded upon the bond. The causes of action are both of the same nature, one being on the express hypothecation of the parties, and the other on that implied by the law, and the course of proceeding is the same. If the libel contained such an allegation, I should feel no difficulty, upon proper proof, in rendering judgment for the libellant for the sums actually advanced, with land interest, nor have I any doubt, if the purposes of justice require it, of the authority of the court to allow, on the motion of counsel, the libel to be amended, in this stage of the proceedings to that effect.

After this opinion was delivered, the libel was amended by filing a new allegation, and a decree was rendered for the libellant, by consent, for six hundred dollars.

HUNTER, The. See Case No. 10,326.

HUNTER (ALLEN v.). See Case No. 225.

HUNTER (BOWIE v.). See Case No. 1,731.

HUNTER (COOK v.). See Case No. 3,161.

HUNTER (COURTNEY v.). See Case No. 3,285.

HUNTER (FOY v.). See Cases Nos. 5,017–5,019.

HUNTER (FRASER v.). See Case No. 5,063.

Case No. 6,905.

HUNTER v. The HANNAH.

[Bee, 154.] [1]

District Court, D. South Carolina. June, 1800.

CARGO—SURRENDER TO WAR VESSEL—COMPENSATION.

Compensation due for money surrendered to prevent the capture or burning of a vessel and her cargo.

BEE, District Judge. This suit is instituted by Thomas Hunter, to recover the sum of 950 dollars shipped on board the Hannah, and for which a bill of lading was signed at Tortola, on the 7th of May last, by Killeran, the master. The bill of lading specifies that the said 950 dollars were shipped by John Collins, and consigned to the actor in this cause. From the pleadings and evidence it appears that, on the 17th of May last, the Hannah was captured by a French privateer, who took on board the captain and crew of the brig, and put her under the charge of a

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

prizemaster. That the captors, after examining the cargo, were particularly anxious to discover if there was money on board. During the search, the prizemaster, who was very busy in it, caused several articles to be taken from the brig, and put into the boat alongside. Some time elapsed before money was discovered; and at length, as appears from the testimony of Mr. Collins, a conversation took place between the prizemaster and Collins, in which the former consented to give up the brig upon receiving a bill for one thousand dollars, made payable in a neutral port. But when it was found that there was money on board, the Frenchman, in a violent passion, reopened all the trunks, ripped up part of the ceiling, and threatened to burn the brig and make prisoners of her crew, unless they discovered where this money was concealed. This is partly confirmed by the evidence of Blake, who says, the men were ordered on board the privateer, and had their clothes with them. The mate, too, says that all the men were taken out. After some time, the captain of the privateer went on board the prize, carrying with him Killeran, her captain. That he found there fuel prepared in the cabin by the French sailors, who said they would set fire to the brig, unless the money was given up. This induced Killeran to deliver it to the prizemaster, who returned the articles that had been put into the boat, and suffered the vessel to proceed on her voyage. Much time was taken up in an endeavour to ascertain to whom the money belonged; whether to Hunter or Collins. It was also suggested that a leaf of the log-book containing the original entries had been torn out, and other entries substituted. As to the first point, the bill of lading is, in my opinion, conclusive; and the evidence of the mate satisfies me respecting the other. No higher evidence could be offered under the respective circumstances.

The only question necessary for investigation is, whether the delivery of this money was the inducement with the captors to discharge the brig, and permit her to proceed on her voyage: and whether, if the money had not been produced, they would have burnt their prize, or carried her into port. It was admitted on both sides, that whenever the sacrifice of part of a cargo produces the safety of the remainder, and of the vessel, contribution must be made by the property saved, as a just compensation for what is lost. How does this law apply to the circumstances of this case?. There has been great contrariety of evidence, and it has been well set forth by the advocates on both sides. It will be necessary for me to state such facts as appear to me to have been proved, and I must draw my inferences accordingly. It is in proof: (1) That 950 dollars were shipped on board this brig, at a freight of one per cent. (2) That the brig was captured on the high seas by a French privateer, by which, according to their present mode of proceeding, she might have been carried into port and condemned. (3) That the vessel and cargo were worth upwards of nine thousand dollars, exclusively of this specie. (4) That, upon producing this specie, the captured vessel was suffered to proceed on her voyage. I cannot, therefore, doubt that the money occasioned the safety of the vessel, and of the remainder of the cargo. Whether they would have burnt the brig may be questioned; but they certainly would have carried her into port; and when once there, it is not probable they would have given up the whole, except the money.

In the present case, the captain discovered and delivered up the money so anxiously sought for. He declares, in his answer, that when he returned on board his vessel, from the privateer, he found the Frenchmen prepared with fuel in the cabin, to burn the brig. In consequence of their threats he discovered, and gave up the specie; and this in presence of Collins, the shipper. Collins swears that he and the captain had previously conversed together, and that he acquiesced in the surrender of the money, because the captain promised the reimbursement of it as soon as they should arrive in Charleston. All this appears probable and natural. Captain Killeran does, indeed, afterwards declare that he gave up the money as the property of Collins, and not as a ransom of the vessel and cargo. I do not see that this ought to avail. He had no right to deliver a part of his cargo, for which he had signed a bill of lading, except for the purpose of saving the remainder. He does not pretend that Collins consented to his doing so; nor is it probable that Collins would have acquiesced upon any other than the terms he states, viz. reimbursement.

I have carefully considered this case, and am decidedly of opinion that the libellant is entitled to compensation and reimbursement of the 950 dollars, delivered up by him, upon the stipulation set forth; I decree accordingly.

Case No. 6,906.

HUNTER v. HAYS.

[7 Biss. 362.] [1]

Circuit Court, D. Indiana. Feb., 1877.

RENTS OF MORTGAGED PROPERTY.

1. In Indiana the mortgagor of property, being entitled to possession, is entitled to the rents, and if he become a bankrupt his assignee succeeds to the right for the benefit of his unsecured creditors.

2. When mortgaged premises are insufficient to pay a mortgage debt, the mortgagee would be entitled to an order applying the rents to the payment of his debt, but if he makes no demand for the rents, and takes no steps to have the same applied to his debt, the mortgagor can hold them.

[Cited in Teal v. Walker, 111 U. S. 251, 4 Sup. Ct. 425.]

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

[This was a bill in equity by J. Smith Hunter against Silas A. Hays, assignee of George W. Beauchamp.]

S. Claypool, Thomas M. Brown, and J. W. Gordon, for plaintiff.

Dye & Harris and William A. Brown, for defendant.

GRESHAM, District Judge. The plaintiff brought suit in the Putnam circuit court against the bankrupt to foreclose a mortgage on a lot in Greencastle and a stock of goods. Subsequently Hunter and others brought other suits in the same court, which were consolidated with the suit to foreclose. On the 19th of February, 1873, Samuel Woodruff was appointed receiver in the cause and took possession of the mortgaged property.

Before the commencement of any of the suits in the state court, a petition was filed in this court to force Beauchamp into bankruptcy, and on the 25th of August, 1873, while the case was pending in the state court, an order of adjudication was entered. On the 29th of October, 1873, Silas A. Hays, who had been appointed assignee, was admitted to answer in the state court, and on the same day by agreement of all parties the suit was transferred to this court.

The receivership was not disturbed until the 5th day of January, 1874, when the receiver settled with the assignee and delivered to him all the assets, including the real estate. Hunter rented the real estate from the receiver shortly after his appointment, and continued in possession, paying rent to both the receiver and the assignee until some time in 1875, when the mortgaged premises were sold.

The master held the mortgage void so far as it related to the goods; that the mortgage should be foreclosed on the real estate, and that the rents which accrued pending the proceedings to foreclose belonged to the assignee of Beauchamp, the mortgagor, and not to Hunter, the mortgagee. The exceptions to the master's report giving the assignee the rents, seem to be the only real controversy in the case. It was conceded in argument that the real estate was at all times insufficient to pay Hunter's claims, and that the general assets were small compared with the debts proved.

Section 1 of an act of the legislature of the state concerning mortgages, approved May 4, 1852 (2 Davis' Ind. St. 333), declares that, "unless a mortgage specially provides that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same." Under this statute the mortgagee cannot maintain an action against the mortgagor for possession, as he might at common law, nor can he compel the tenants in possession, on notice and demand, to account to him for rents.

Woodruff was appointed receiver by agreement of all the parties for the benefit of whomsoever it might concern. The mortgagee made no demand upon either the receiver or the assignee for the rents, nor did he take any steps to have the rents applied to his debt. The receiver was not appointed at the instance of the mortgagee, and for his individual benefit. I think, on the facts of this case, the mortgagee would have been entitled to an order applying the rents to the payment of his debt. In this state, in the absence of such an order, the mortgagor, being entitled to the possession, is entitled to the rent, and if he becomes a bankrupt his assignee succeeds to this right for the benefit of his unsecured creditors. Until the rents are intercepted and applied to the mortgage debt by an order of court they belong to the mortgagor or his representatives; until then the mortgagee has no right to them. Foster v. Rhodes [Case No. 4,981]; In re Bennett [Id. 1,313]. Exceptions overruled.

Case No 6,907.

HUNTER v. KIBBE et al.

[5 McLean, 279.] [1]

Circuit Court, D. Michigan. June Term, 1851.

BILL OF EXCHANGE—ACCEPTOR—PRESUMPTION OF OWNERSHIP.

The acceptor of a bill, which came into his possession after it had been put in circulation, is presumed to be the owner of the bill, and entitled to recover its proceeds from the drawer.

At law.

Mr. Davidson, for plaintiff.

Emmons & Tams, for defendants.

OPINION OF THE COURT. This action is brought against the drawers of a bill of exchange, for fifteen hundred dollars. The plaintiffs bring the action as acceptors of the bill. On the trial it was objected that the possession of the bill was not sufficient to show the right of the plaintiffs to maintain the action. In 2 Greenl. Ev. § 170, it is said: "Where the action is by an accommodation acceptor, against the drawer, either for money paid, or especially for not indemnifying the plaintiff, in addition to the proof of drawing the bill, and of the absence of the consideration, the plaintiff should prove payment of the bill by himself, or some special damage or liability to costs, by reason of his acceptance." And the case of Pfiel v. Vanbatenberg, 2 Camp. 439, and, also, Bayley, Bills & N. 304–308, are referred to. The acceptance of the bill is prima facie evidence of funds of the drawer in the hands of the acceptor. But in this case the acceptor accepted for the accommodation of the drawers. The bill was negotiated, and has come back to the acceptor. Under these circumstances, we think the possession of the bill is prima

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

facie evidence of the right of the holder to sue. In the case of Dugan v. U. S., 3 Wheat. [16 U. S.] 172, the court say: "After an examination of the cases on this subject, (which cannot, all of them, be reconciled), the court is of opinion, that if any person who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back, from either of such indorsers, whose names he may strike from the bill or not, as he may think proper."

We think the case before us is within the above case. The possession of the bill, under the circumstances, is evidence, prima facie, of the right to sue, and to the contents of the bill. In the same section above cited, Mr. Greenleaf says: "The mere production of the bill by the plaintiff is not sufficient proof that he has paid it, unless he shows, that it was in circulation after it was accepted." The motion to dismiss the suit is overruled.

Case No. 6,908.

HUNTER v. MARLBORO'.

[2 Woodb. & M. 168.] [1]

Circuit Court, D. Massachusetts. Sept., 1846.

TRUSTS — FRAUD UPON CREDITORS — RESULTING TRUST—EVIDENCE—POSSESSION — SPECIFIC PERFORMANCE — LENGTH OF TIME — STATUTE OF FRAUDS—WITNESSES—INHABITANTS OF TOWNS—RE-HEARING—COSTS.

1. Where A. while in prison conveyed to B. his farm worth near $2000, for the consideration of $250, and took the poor debtor's oath, and continued in possession of the farm for many years, till his death, it is prima facie evidence of a trust between A. and B.

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

2. But being a trust to defraud creditors, a court of equity will not lend its aid to enforce such a trust.

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

3. If B., after some years, execute the trust by receiving payment of what he advanced, and conveying the farm to C., at A.'s request and for A.'s benefit, to borrow more money, it is questionable whether the original fraud can be objected to the enforcement of this new trust in C.

4. But if C. gave back to B. a defeasance, rendering the conveyance to C. a mortgage, and C. assigns his interests to D., it must be proved distinctly that C. and D. recognised the estate to be held in trust by them for A., and in such manner as to take it out of the statute of frauds, or it could not be enforced as between them and A.

[Cited in Jewett v. Cunard, Case No. 7,310; Tufts v. Tufts, Id. 14,233.]

5. Long possession by A., receiving interest from him, the sum paid by them being much below the value of the farm, and any writing, such as a receipt or bond recognising A.'s rights as a mortgagor, are competent evidence to show this trust.

6. Where the town purchased the farm with such a trust existing, if all the written evidences of it were given up by A. to be cancelled, and he made a new agreement with the town to provide him other buildings, and let him have a portion of the farm, the former trust is extinguished. And if the town fail to fulfil all the new agreement, the former trust does not remain, but the remedy of A. is at law for damages, or in chancery for a specific performance of such part of the new agreement as remains unfulfilled.

7. It is competent evidence of the new agreement and its contents, to show what the parties said and did on the subject near the time when the statements were made to agents of the other side and not denied; and when the acts are natural and consistent with the idea of such a new agreement.

8. So are such acts evidence of its performance, in part or in full, as the case may be; and if showing only the former, it takes the agreement out of the operation of the statute of frauds, in a court of equity; and the residue of it will be enforced by decreeing a specific performance, if no other obstacle intervenes.

[Cited in Sumner v. Marcy, Case No. 13,609.]

[Cited in Massing v. Ames, 38 Wis. 287.]

9. Length of time constitutes no objection to a specific performance, if not pleaded in the answer, and the condition of the parties and property remains substantially the same in this respect, and the party in default has conducted during the time as if the other party was entitled to have this further performance. Such a conveyance might also be ordered on an injunction to quiet so long a possession, as in a bill of peace.

10. Length of time, pleaded against the enforcement of a trust in real estate, would avail if the trustee has been openly, publicly, and constantly in possession, and denying the trust during twenty years.

11. What evidence takes an agreement as to lands out of the statute of frauds, and what shows a resulting trust, considered.

12. Inhabitants of towns in this state are competent witnesses in actions where the towns are parties; and their confessions when made as individuals, and not in the capacity of agents or officers of the town, are not competent evidence to bind the town.

13. An application for a re-hearing must usually state some reason, which would constitute a good ground for a new trial at common law.

[Cited in Bentley v. Phelps, Case No. 1,332.]

14. If testimony was offered and fully considered as to the value of a farm, but applied in argument to one point, and the court applied it to another, a re-hearing is not proper to argue and consider again the evidence as to the true value.

15. Nor will it be allowed to re-argue the testimony as to the acceptance of a tenement in fulfilment of a contract, when that point was before noticed and discussed, though not as a principal one in the case.

16. Costs in equity go prima facie to the prevailing party, and it is desirable to depart as little as possible from the rules at law on this subject.

[Cited in Hovey v. Stevens, Case No. 6,746.]

17. They will be departed from, however, in strong cases; where costs are not equitable, the

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

party not prevailing on the merits, or on an important point, or on what was known, or ought to have been known, to the opposite party.

[Cited in Hovey v. Stevens, Case No. 6,746.]

This was a bill in chancery, filed May 22, 1842. It averred, that David Hunter, whose heirs the complainant [William Hunter] represented, was on the 30th of October, 1801, seized of a farm in the town of Marlboro', containing about two hundred and sixty acres. That this farm, by various conveyances afterwards, which were detailed, had on the face of them passed to that town in fee, by a deed, dated the 4th of May, 1821, and that said David still remained in the actual possession of the farm during all that period, claiming an interest therein as mortgagor and cestui que trust. Several facts are set out in the bill in detail, to show his interest. The bill then alleged, that it was agreed between said David and the town, in May or June, 1821, that the latter should provide a suitable house and barn on the farm for him, and have set off enough of it for a pauper establishment for the town, not exceeding what the town had paid, in order to obtain their title, and should release the residue to him, and he release their portion to them; and that he, thereupon, allowed the town to take possession of the farm till the business was completed, but under the paramount claim of said David, who remained in his former house till about the 25th of May, 1822. That then, by false promises, he was induced to remove to another house, near said farm, and occupy about nineteen acres of land of little value, which the town had set off to him without his consent, while the whole of the farm was then worth $7000. That the money paid for it by the town did not exceed $1100; that the town has since continued in the occupancy of the residue of the farm, not so set off, taking large profits therefrom, though without the consent of David or his heirs; and that he occupied the part so set off till his death, on the 23d of March, 1824, and his heirs since, without any payment of rent, or deed therefor from the town, and with a continued claim to the title of the whole farm till the town should fulfil their agreement aforesaid, and with several acts of ownership accompanying this, as to the whole done from time to time by said David and his heirs. Next it was averred, that in the year 1832 or 1833, the town proposed to purchase of the heirs of David, their title to the farm, and offered to pay them therefor $1000, and release all interest in the nineteen acres set off to their father; but that this was declined by them. The bill also states, that said David was a man of feeble mind, not well acquainted with business, and easily misled. Several other allegations, introduced into the bill, will be adverted to in the opinion of the court, so far as they may be found material. The complainant having obtained a conveyance from all the other heirs of David, he being one of his sons, is stated to have made a demand upon the town to fulfil the trust existing in favor of his father and heirs, and to account to him for the rents and profits, and receive any balance due, which he has ever been ready to pay; but that the town, under many pretences assigned, refuse to do the same. The complainant, therefore, prays, that the town be made to render an account of their receipts and expenditures concerning the farm, and if a balance be due to the heirs, be ordered to pay it over, and if a balance be due to the town, that on the payment of it by the heirs, the town be directed to convey to the complainant all the farm, free from all incumbrances, and for such other relief as the nature and circumstances of the case may require.

The answer admitted the seisin of David Hunter in 1801, but averred, that his title was derived by deeds from Edward Hunter, his father, the validity of which was then disputed, and reduced the value of said farm in the market in 1821, and has since led to a very expensive suit therefor against the town. The answer then proceeded to admit the various conveyances set out in the bill from 1801 to 1821 inclusive, but denied most of the statements made of any trust in them by mortgage or otherwise in behalf of said David. The answer alleges, in the next place, the execution of releases by David of his interest in said farm, and by his wife of any claim on her part, and sundry other conveyances by him not specified in the bill, with copies of the papers in suits against Joab Stow, one of the grantees of said David, attaching his interest therein after a mortgage thereof, and selling the same on execution to one Stevens, who, in 1821, conveyed his title to the town. Several other matters as to the title and trust, set up in opposition to what appears on the face of the conveyances, are denied and some admitted, which will be referred to in the opinion of the court when found important, and the statute of frauds is pleaded against any trust set up by parol evidence. The answer in relation to any agreement made with David Hunter in 1821, as to allowing him to occupy a part of the house till April, 1822, or till they provided him with another house and barn, admits they made one to that effect, after their purchase of the farm from other persons was completed, but not till then. Nor did they at any time, as they allege, agree to convey to him or his heirs any portion of the farm; and that all arrangements or contracts, verbal or otherwise, between David and their grantors, were surrendered and cancelled soon after their purchase, and peaceable possession of the farm was delivered to the town. They further deny any agreement at the time of the purchase,

or afterwards, to convey to said David a house and barn, and piece of the farm to cultivate; but admit, that, as a gratuity, they subsequently promised to let him occupy such a house and barn and piece of land, separate from the paupers, or the rest of the farm, and fulfilled their promise; and that he settled all demands with them, and about the 10th of May, 1822, peaceably and voluntarily removed to the house aforesaid, and gave up full and exclusive possession of the rest of the farm to the town. They next aver, that the town has since had the exclusive possession and control of the farm, and that David or his heirs have not exercised any acts of occupation except as trespassers; and that for these they have, when known, been prosecuted. They deny, also, any weakness of mind or other incapacity in said David, and any acts of fraud in relation to him, or the purchase of the farm, or any offer in 1832 or 1833 to pay the heirs any thing to release their title thereto, and assert that they now hold and have ever held it free from any trust, equity, or condition whatever, and are not liable to render any account for the income therefrom to the complainant. There were some amendments made to the bill before the case was printed, and a new answer filed thereto, which related chiefly to details as to the conveyances of this farm between 1800 and 1822, and the nature of said David's occupation thereof in 1821, which will be further explained hereafter by the court, so far as found necessary. Another amendment was moved, during the trial, to make a statement in the bill correspond with the records of the town, and various objections to the questions put to different witnesses were raised, and the competency of several objected to, all of which, when relating to matters important to the points decided by the court, will be noticed and disposed of in the course of its opinion. The dates and parties to these conveyances, offered in evidence, so far as material, were as follows, and also of some other papers.

Deeds.—David Hunter to Joab Stow	8 July,	1802.
Joab Stow to Eleazer Bradshaw	28 Aug.	1806.
Bond back to re-convey, on payment of $1066	"	"
Abigail Hunter (wife of D. H.) to E. Bradshaw	"	"
Mary Hunter (sister of D. H.) to El. B.	"	"
Suit—John and Phillip Coombs, executors of E. B. v. D. Hunter, to foreclose B.'s mortgage	2 Nov.	1813.
Deed.—J. & P. Coombs to A. & J. Goodale, and W. Draper	1 Jan.	1814.
Receipt.—W. Draper to D. Hunter, of interest on bond	7 Oct.	1815.
Deed.—J. & A. Goodale and Wm. Draper to town of Marlboro'	4 May,	1821.
D. Stevens to town of Marlboro'	12 May,	1821.
D. & E. and J. & E. A. Hunter, to Wm. Hunter, of their interest as heirs	9 May,	1842.

There was also much evidence in the case concerning the value of the farm in 1821, as well as at this time, and in respect to payments of interest or rent by Hunter between 1806 and 1821, and as to claims set up by him and his heirs to some interest in the whole farm, and contradictory testimony concerning his willingness to remove in the spring of 1822, and uniting in the set-off of the land at that time, and on various other matters, such as the imbecility of his mind, the votes of the town, and the conduct of its agents or committees, and the characters of Joab Stow and D. Stevens, which need not be detailed here, but are adverted to when necessary in the opinion. The hearing of this case commenced in June, 1846, and was finished at the adjourned term in September, 1846.

G. Parker and Bridge, for complainant.

E. R. Hoar and E. Mellen, for respondents.

WOODBURY, Circuit Justice. This is a case of no little intricacy and doubt. The events in dispute occurred long since, some of them near half a century, and most of them over a quarter, and they are naturally obscured by time and death and forgetfulness. They are rendered still more doubtful, by an attempt in most instances of controverted facts to prove what is relied on, by oral testimony rather than by writings or records; and several of the legal questions raised have been rendered the more difficult by founding them on supposed oral agreements between parties, often secret and loose and at variance with the written conveyances. They are thus attempted to be maintained in equity through resulting trusts, or part performances, or some detached recognitions of them in subsequent writings. But I am obliged to take the case as it is presented; and after being elaborately argued on both sides, and considered by the court with care, I shall render that judgment on it which the facts, so far as they can be unravelled, and the law and the equity of the case seem to demand. The conclusions at which I have arrived are such as to render unnecessary any decisive opinion on several of the questions discussed, and many of the objections taken to the testimony. As to others, preliminary to the merits, such as the motion to amend the bill, so as to conform to the record of the town, which was not before the respondents when they answered, it is granted in order not to leave them in a false position. I do this, on that account, though the matter of the

amendment will be of no importance in the view taken by the court, and if it was, the influence of what was stated at first, and has been thus corrected, would have to be weighed as it deserved under all the circumstances.

Another of these preliminary questions is the competency of the inhabitants of the town as witnesses, and the competency of their admissions or statements pertaining to this subject. I consider it to be well settled in New England, ever since it has been divided into townships, endowed with certain specified powers as public political corporations, and holding little property except for public purposes, and the inhabitants of them liable to taxes only for public objects, and the property held by each, being private and independent, rather than in common with the rest, that those inhabitants are competent witnesses in actions where the town is a party. 1 N. H. 273; 5 Conn. 416; 12 Johns. 285; and other cases cited in a note, 1 Greenl. Ev. 208.

Their interest is of so public a character, rather than private, so small in any event in a pecuniary view, and the necessity of the case such to prove transactions occurring in a town by the inhabitants, or not all (23 Pick. 13), that their competency has been very uniformly admitted, leaving their credibility to be weighed under all the circumstances by the jury. Any principle, which would exclude the inhabitants of such public corporations of a political character from being witnesses, would exclude the inhabitants of a county where that is interested, or even the inhabitants of the state in all public prosecutions in the name of the state; a ruling that would be suicidal to the judicial tribunals themselves, and leave them, as well as all individuals within the state, exposed to criminal outrage and destruction, without the means of legal proof for redress or punishment. Where these considerations have not led courts to admit such inhabitants as witnesses, as it seems to me they ought to, without a special statute authorizing it, or when doubts have required declaratory legislation, it has been at times had in favor of their admission, as in Vermont, Massachusetts, Delaware, New Jersey, and Louisiana, as well as now in England by 54 Geo. III. c. 170, and 3 & 4 Vict. c. 25. The difference between official members or officers of a corporation and private members, is as great as that between trustees and cestui que trusts. [Louisville, C. & C. R. Co. v. Letson] 2 How. [43 U. S.] 510, 511, arguendo; City of London v. Wood, 12 Mod. 669. So it is well settled, that citizens of a county or state may be judges in cases where the county and state are a party, whether they be civil or criminal suits. But if the judge is mayor of a city, and the suit is in the name of the mayor and commonalty, perhaps he cannot sit, without a license by statute, as it is trying what really, as well as nominally, is his own cause, as an officer. But if the suit was in the name of the city of London, or of its mayor and commonalty, and the judge was merely a citizen of London, he could sit. Id.

The next question connected with this, in the present cause, is, whether the confessions of such inhabitants are competent evidence to bind the town. This question does not depend on the decision of the former one, and allowing such confessions to bind, when the person making them is not a competent witness, and excluding them when he is, as argued at the bar. Because, unless a person is a party on the record, or an agent to the party, or is the party in interest conducting the suit, his admissions are, as a general rule, not competent in respect to it, whether he be admissible as a witness or not. Here the confessions of the inhabitants are not competent, because, as individuals, they are not parties, the suit being in the name of and for the public corporation (21 Me. 506); nor are the inhabitants the parties in interest as individuals, but are merely liable in a certain contingency to be affected by the result in their public relations and public liabilities. The defendant, as a corporation, may make admissions by its votes and records, which would be competent, and so by its duly authorized agents; but these would be admitted, because confessions of the corporation, either made in its corporate meetings by a vote, or made by its public representatives, selected and authorized by such a vote, and made in that capacity, and not in an individual capacity, as in that of a mere inhabitant of the town. 8 Pick. 127; 1 Metc. (Mass.) 479. Who ever heard that the confessions of a private citizen of the state should bind the state? or of a citizen of a county should bind a county? The English cases on this subject are cited as conflicting with these views. 1 Greenl. Ev. p. 208; 11 East, 586; 1 Maule & S. 636. But they may have been, in some instances, where the confessions of the inhabitants appeared to be of such as were acting in the capacity of agents for the town or parish. Or they may have been in other cases, where the town or parish did not sue as a corporation. But however they may have arisen, the confessions of inhabitants merely as such, are here not competent.

Passing next to the merits of this case, there are a few leading features in it, respecting the early conveyances from D. Hunter, about which little contradictory evidence exists, and which force the mind strongly to one conclusion. The first is, that he was seised of these premises, and in the actual occupation of them in 1801; that the farm was large, consisting of more than two hundred and fifty acres of land, with the usual buildings; that while in prison for a small debt of only $14 and costs, he conveyed the whole to one Joab Stow, for

the consideration of only $250 named in the deed, and without other proof of any debt or payment whatever between them; that he then swore out of jail, taking the poor debtor's oath, and immediately returned to his family, still residing on the farm; and that they continued, uninterruptedly, to occupy the same till the conveyances of it to the town of Marlboro', twenty years afterwards, in A. D. 1821. Without going into the disputed facts in that interval to sustain or rebut the idea of a secret trust in the conveyance to Stow in favor of Hunter, this length of possession by him after that conveyance would alone be strong evidence of its existence, if not sufficient proof to raise a presumption, in the absence of contradictory circumstances, that the secret trust extended to the whole title, and had been afterwards executed by some deed back from Stow to Hunter, and which had since been lost by time or accident. Such being the first general impression, made by that part of the case, the next inquiry is, how do other particular facts tend to strengthen or repel it?

The subsequent mortgage of this farm by Stow to Bradshaw, in August, 1806, to secure $1000, which is among the written evidence bearing on the question, is a fact which on its face tends to rebut the idea of a secret trust, as it would seem to be using the premises for his own benefit by Stow; and the attachment of his equity of redemption afterwards by Stow's creditors, and the sale of it to pay his debts, would tend to strengthen the same position, and to extinguish the trust to Hunter if it had ever existed. More especially would a court be obliged to regard it as extinguished, and not, at any future time, attempt to execute it, on that proof alone, since the trust in Stow, if existing, was a fraudulent one, in order to injure Hunter's creditors, and was in substantial opposition to Hunter's own oath as a poor debtor. See Flagg v. Mann [Case No. 4,847].

A party in a fraud, in fact, cannot come into court and ask the aid of equity or law to help him carry the fraud into effect, or a trust connected with it, which has not already been executed. It is not coming with clean hands, not doing equity before claiming it. It would be to assist a particeps criminis, and help one to do what was contra bonas mores, as well as malum prohibitum, and against public policy. Clapp v. Tirrell, 20 Pick. 247; Kerr v. Lord Dungannon, 1 Con. & L. 335; Munro v. Allaire, 2 Caines, Cas. 183; Saltmarsh v. Beene, 4 Port. (Ala.) 283; 3 Paige, 154; 2 A. K. Marsh. 57; 4 Bibb, 70; 5 Wend. 579; Tufts v. Tufts [Case No. 14,233], and cases there cited.

But the counsel for the complainant view this transaction in a different light. They contend, that the money obtained of Bradshaw was in truth for the benefit of Hunter, in pursuance of the original trust in Stow in Hunter's favor; that the bond of defeasance, given back by Bradshaw to Stow, was really for the benefit of Hunter; that Hunter then in fact settled all Stow's claims on the land; that Bradshaw leased the farm to Hunter rather than Stow for the interest instead of rent, for the same reason and in part execution of Stow's trust; that Hunter and not Stow actually had the money of Bradshaw, and was sued by the Coombses, executors of Bradshaw, as mortgagor, and to foreclose the mortgage, thus furnishing written evidence both of a trust existing and of its execution in part by Stow through Bradshaw; that Hunter procured the Goodales and Draper to redeem the mortgage in conformity with this position of his, and executed a quitclaim deed to them for their further security, which would have been unnecessary except under their idea, that Hunter had an interest in the farm; that the Goodales and Draper gave him some written obligation or bond afterwards, recognising an interest in him, and agreeing on certain terms to convey to him; and that in their hands, if not in Stow's or Bradshaw's, or the Coombses, the trust in favor of Hunter is not only recognised, but by a written declaration, and uncontaminated, as between them, by any original fraud between Hunter and Stow to injure Hunter's creditors by means of the trust between him and Stow.

I must confess, that the inclination of my mind on all this, though impugned in some respects by counter testimony, by obscurities arising from death of witnesses and lost papers, and by some uncertainties in the exact extent of this trust, is to hold, that facts enough are satisfactorily proved, and some of them in writing, so as in conjunction with Hunter's long and undisturbed possession, and the great disparity between the value of the farm and the sum stated to be paid for it in 1801, to show not only a secret trust originally existing between Hunter and Stow, but that it has been executed as between them so as to get rid of the original fraud, and a new one created on a new loan between Hunter and Bradshaw, recognised afterwards by the Coombses, the executors of B., and by the Goodales and Draper, their assignees. In some views the arrangements under Bradshaw and his assigns might be regarded as a continuance of the old trust, and thus tainted by its fraud, and not to be enforced. But in other views, which in my opinion are best sustained by the evidence here, though not entirely free from doubt, the arrangements with Bradshaw grew out of a new loan, were secured by some new conveyances and releases, and the old matter with Stow was intended to be adjusted, and any trust connected with it fully executed by Stow; and a new and honest one created between Bradshaw and Hunter, and continued under B.'s

grantees. Under this aspect the original fraud could not be interposed by B. or those grantees against the enforcement of the new trust. Flagg v. Mann [Case No. 4,847]. It had been perfected, executed, functus officio; and the new trust had a new and valuable consideration from new persons. Because any proceeding after that will not be between the parties to the original trust; nor their privies in estate as connected with it, but between Hunter and the Goodales and Draper after Stow's trust had been executed through Bradshaw, and for a new and additional trust on a new loan by Bradshaw, and consented to by Stow. This was perfected and prolonged by new conveyances from Hunter and others to Bradshaw, and afterwards to the Goodales and Draper, and by new written recognitions of Hunter's interest by the Goodales and Draper, under their new deeds, if not a bond given back to Hunter.

But in inclining to these conclusions, I do it on facts which repel the idea that Hunter's possession for twenty years after his original conveyance to Stow, strong proof as it is in favor of a trust in him, fortified by other circumstances, was of a character, under those circumstances, to raise the presumption of an absolute title in Hunter. For the possession, it turns out, was not hostile or adverse to Bradshaw, or the Coombses, or the Goodales and Draper, but in subordination to their title, as he often took leases from them, and often paid an equivalent for rent. Consequently it was no proof of such an absolute title in Hunter, but rather the reverse. See Bac. Abr. "Leases," (O); Co. Litt. 47 b; 4 Coke, 54 a; Cro. Eliz. 36; White v. Foljambe, 11 Ves. 337; 2 Ves. Jr. 304, 394. But in 1821 an event occurred which changed the whole aspect of the transactions, as well as Hunter's rights and relations to these premises, and made the previous portions of the case of little consequence, except as illustrating some difficulties that grew out of that event. They also render a decisive opinion on the trusts or frauds involved in them, not necessary in the final disposal of this case. I therefore shall not go into the other evidence about them now. In 1821, the Goodales and Draper began to have some difficulties with Hunter, and pressed him for payment of what they had advanced for their interest in the bond, with their expenses. Hunter perceived if he did not make this payment, or obtain some other person to do it, and give him longer indulgence to redeem the land, or if he did not effect some new arrangement beneficial to him, he should be obliged to quit the possession of the farm soon, and derive no further advantage from the trust in his favor on the written bond or stipulation allowing him on certain terms to redeem. Among others, to whom he applied for assistance, under these embarrassments, was the town of Marlboro'. The town, like others, declined to interfere, and did not until a plan was proposed by some of the inhabitants to purchase a farm for their paupers to live on and cultivate, and a committee was appointed to examine different places and prices, and a report made by them in favor of the purchase of Hunter's.

It is to be remembered here, that Hunter's farm was one obtained from his father under circumstances, throwing some doubt over the validity of the title, and which in fact led to a suit against the town after their purchase, involving it in expenses to near $1000 in amount. That, however long had been the possession of David in 1821, it had not been in his own behalf, all the intervening period, setting up an absolute title in himself, nor one against all the world; and though he may not have admitted then the validity of the claims by his father's heirs on all occasions, yet he did it on some, and, after the town purchased, encouraged some of them in their suit. New pretensions, affecting the title, had also sprung up from D. Hunter's deeds to Stow and others, and attachments by Stow's creditors and the validity of the sales under them, and if not good, the interests which would be then outstanding in Stow, and the rights which other creditors of his might acquire by new attachments, were agitated in the neighborhood. A knowledge of much of this situation of things probably helped to render the Goodales and Draper more disinclined to confide longer to their security, and increased Hunter's difficulties in procuring any person to advance to them what they claimed as due, and give Hunter further time and indulgences. A knowledge, also, of Hunter's character, somewhat shiftless and unthrifty, and with little or no means then, or in expectancy, to pay the incumbrances, unless the farm, under all these clouds, could be sold for more, assisted undoubtedly to prevent him from obtaining any money lender to comply with his wishes.

These considerations would operate on the town not to interfere as strongly as on an individual; and much more so when without any spare funds on hand, they must hire money to redeem the land with, and loan it out to Hunter at a like rate of interest, without any profit or gain to themselves, and probably without any legal authority, as a corporation, to borrow and lend money in that way. Consequently the town concluded wisely to do nothing on such an application, and it was not till the project was started soon after to purchase a town farm for paupers, which they were clearly authorized by law to buy, that any proposition appears to have been entertained to interfere in any way, or do any thing respecting his farm. What did they do then, and what could they legally do then? are the next important inquiries. Having ascertained the prices at which the Goodales and Draper

would convey, and those who had purchased Stow's outstanding rights or equity of redemption under an attachment and sale by his creditors, and having obtained a report on the validity of the title thus situated, they concluded, through a committee, to make these purchases of the title, and took deeds accordingly, and borrowed and paid the stipulated prices, falling in all a little short of $1500. But they took no deed from D. Hunter, though there is some parol evidence offered, that one of the committee stated in town-meeting that they had. There is no pretence they agreed to pay him, or did pay him, any particular sum for his claims on the farm in trust, or under his bond with the Goodales and Draper, though the balance of competent evidence is decisive that he made such claims, and that they were probably evidenced by a bond, and that he placed some value on them. It is further manifest, that the farm was then considered by the town to be worth some hundreds of dollars more than they had given to their grantors, though not so much more, as since or now, the wood on it having since risen greatly in value, and the title being settled as to the other heirs of D. Hunter's father, and new buildings and valuable improvements added. It is also clear, that considerable sympathy was felt for Hunter by many of his townsmen; that they were willing to aid him so far as they might legally and safely; that he and some of his family were in danger of becoming chargeable to the town as paupers, if driven from the farm without any compensation for his claims; and that a compensation was talked over between him and some of the committees of the town, appointed to purchase a pauper farm, and another afterwards appointed to provide for him; and that some arrangement at least, if not an agreement, was made as to what should be done for him, which was at first satisfactory to both sides. But here the great difficulty in this view of the case arises. What was the agreement, if one was made? and has it been fulfilled? and if not, is it so proved, under the statute of frauds, that this court can compel its performance?

I am satisfied, on the whole evidence and circumstances, that no agreement was then or afterwards made to continue or carry into effect the trust or mortgage, which had before existed between Draper, the Goodales, and Hunter. Firstly, because all the writings that existed before between those parties, were given up and cancelled; and no new ones of like character were executed or proved to have been agreed to be executed between the town and Hunter. Secondly, because it would have been then, and would be afterwards, suicidal to the whole object of the town in purchasing a pauper farm and making extensive improvements on it, to continue a former trust or mortgage, and buy the farm with an arrangement to let it be taken away from them on the payment of what they had advanced. They might thus not only lose what they had bought with a view to keep permanently for the use of all their paupers, but in the mean time, till redeemed, Hunter would be turned out of possession, and have no place to live on, and no land to cultivate, and would be obliged literally to go into the common poor-house for support. The strongest evidence would be necessary to satisfy a court of such an inconsistent contract. But in order to prevent both of these undesirable results, it was natural to agree to pay him in some other way for claims existing, and for rights recognised and surrendered, and it was natural for him not to relinquish such claims and rights without receiving something in compensation for them. And as the town had no money but what it borrowed, or raised by annual taxes, and as the farm was large, and the price given by the town did not equal its full value, it was better for both parties, and to be expected that they would agree, Hunter should have the rest of the farm, after setting off enough to the town to satisfy them for all they had paid for it, and the cost of providing some new buildings for Hunter. This is the more likely, too, as then land enough would probably be retained by the town for the purpose of a pauper farm. This would also pacify Hunter and his friends, as Hunter seems to have been clamorous and persevering in setting up even to the town a paramount title in the farm over the Goodales and Draper, or any other claimant, as well as insisting by memorials to the town, and articles in the warrants, to have some provision made for himself. It is, also, very questionable, whether in law the town was authorized to make a different arrangement and borrow money, and invest it so as to let it be repaid in a certain event, or if it was a loan, secured by mortgage. It is certain that they took legal advice in the matter, had one lawyer, Mr. Draper, on the committee, and that no evidence on either side, as to what took place between the town and Hunter at the time of the purchase, tends to set up a contract for any permanent arrangement, different from that before indicated, and which alone is described in the bill as having been actually made. The bill seems rather to go for the other object, the mortgage and trust, not because it was then arranged or agreed to, or was likely to be, but because the contract then made has not been fulfilled by the town, and therefore inferring that the old trust and mortgage by the Goodales and Draper had revived. But this last position does not seem to me tenable under the supposed agreement. If the agreement, made by the town, was such as to terminate and extinguish the previous trust in the farm, in which it stood with the Goodales and Draper; and if this agreement is properly proved, so as not to be open to objections coming within the statute of frauds, which is here pleaded by the town,

it must be executed by this court if duly requested in the bill to execute it, unless it appears already to have been substantially performed.

One of the peculiar provinces of this court, sitting in equity, is to enforce the specific performance of contracts as well as of trusts; when such contracts are broken, they are, as a general rule, to be enforced and not rescinded, unless fraud or mistake appear, and they are to be enforced by a specific performance, unless that has become impracticable, and it is a case where damages can be substituted. The difficulty then, in my mind, in relation to some agreement by the town with Hunter, to provide for him a house and land to occupy, is not much as to its existence, but as to some of its provisions in the detail. This arises from the absence of any writing, purporting to be the agreement itself, or a copy of it, and after the lapse of near a quarter of a century to obscure the parol evidence of it. The arrangements to provide for Hunter, as set out in the bill to have been made by contract, are to some extent admitted by the town in its answer. But they are averred to have been not so extensive, or on the same principle, as to the quantity of land to be set off to Hunter, nor made in consequence of a contract between them, but merely as a favor to Hunter, a kindness in conformity to the report of the committee, made Nov. 19, 1821, under an appointment in September previous. The precise differences between these parties, as to the extent and character of the agreement, if one was made, as to his having a separate house and barn and piece of land; are as follows, and are very material. The town insists, that no agreement was made with Hunter, except to let him remain in his former house on the farm for one year, and that in no subsequent arrangement was this agreement extended to any thing else. But they admit, that, in consequence of a subsequent report of a committee, Nov. 19, 1821, on their difficulties with Hunter, just referred to, they voluntarily, and without any contract or obligation on their part, provided for Hunter and his children another house and barn, and set off a part of the farm for them to occupy during the pleasure of the town. On the contrary, the complainant insists, that an agreement was made by the town, through a committee, not only to let David Hunter remain one year in his former house, but a further and separate agreement, that the town was to retain only enough of the whole farm to form a suitable pauper establishment, and pay for the sums of money which had been advanced to obtain the title, and satisfy the expense of providing another house and barn for Hunter, and convey the residue to him. To settle which party is correct as to these differences, is very difficult, not only from the reasons before named, of the lapse of a quarter of a century, and no agreement being found in writing, except one for a year's occupation of the former house on the farm, but from the inability to find any, except one of the reports of the several committees on this subject, made at the date before named.

Under these circumstances, like many others in cases in equity, it is more difficult to settle the facts than the law arising upon them. Without much experience as a juror, I shall attempt from rather meagre and questionable materials, to eviscerate the truth as to this point. In the outset, it is due to frankness to say, that though I have come to a conclusion unfavorable to the town on these differences, yet the only written report of any committee, being that just referred to, tends to sustain the views now taken by the town. I give the whole of it on this point in a note.[2]

It is pretty clear, from this report, that this committee do not recognise any previous contract with Hunter by the town, nor recommend one for the future, but rather a permission to him to occupy a part of the east end of the farm, and to have a suitable provision made for his residence thereon. Nor do the committee speak of any agreement that had been made by any previous committee with Hunter in relation to this subject, except probably the agreement as to his remaining in his former house one year. Yet the town were aware of some arrangements or agreements made by another committee, for they not only voted to accept their report, 19th Nov. 1821, the day it bore date, but "voted to choose a committee of three by ballot to provide a place for David Hunter and family, agreeably to the agreement made with David Hunter by the pauper committee." That was the committee selected nearly a year before to purchase the pauper farm. They also voted, that this committee be authorized to exchange certain town buildings, or exchange them "for another tenement to

2 "The third article referred, is to see if the town will do any thing for the relief of David Hunter or any of his family. Having been made acquainted with the course which said Hunter has pursued, and is still pursuing, your committee feel much at a loss what to say on that subject. But considering that he has parted with his farm imprudently, and for a small consideration, and that the town is now in possession of the same, for several hundred dollars less than it is fairly worth, and also that the easterly part of said farm may be set off for the improvement of said Hunter and family, without material injury to said establishment, your committee have concluded not to visit the iniquities of the father upon the children, but to adopt a more benevolent principle of doing to others as they would wish that others should do unto them; and would therefore recommend to the town to permit said Hunter, with and for the sake of his family, to improve a portion of said farm by himself, and also to make suitable provision for his residence thereon; and that he be permitted to remain where he now is, with his family, (under the agreement made by the town,) until other accommodations be made, provided he does not interfere with, or interrupt the rights of the town, in the management of their establishment."

accommodate said Hunter, or to purchase or build for said Hunter's accommodation, as they may think best for the town, and that the town treasurer be authorized to give a title-deed of whatever said committee may sell." It is certain, then, that one of these votes of the town recognises an agreement with D. Hunter by the pauper committee, "to provide a place for D. Hunter and family," and appoints, by formal ballot, a new committee to execute it. This looks like something different from the agreement for a lease for one year. Their report is not in evidence, and no proof is given of its contents or of the contents of any agreement with Hunter, except that lease and the scattered fragments which have been, and will be alluded to hereafter. From all of these, what probably were its contents? It seems from the next vote, that it related to the procurement of another tenement for Hunter's accommodation, by exchange, purchase, or building; and whether the close of it, as to giving a deed, embraces what might be sold to Hunter, or conveyed to him under the agreement, is doubtful, though the language is broad enough to cover it, provided such was in truth the tenor of the agreement.

By the journal of the committee, it would seem, that an agreement was made, or lease given by them for Hunter to remain there a year, &c., "or until another house is provided for him to go into." It is possible, that the town intended to refer to that agreement, and to the procurement of another house for him before the year expired. But the language in the vote of the town seems to look beyond a house alone, and beyond its use for only a few months, then remaining of the year; and the facts on which was founded the intervening report of the other committee, Nov. 19, 1821, recommending setting off land for Hunter, as well as procuring buildings for him permanently, would seem to furnish sufficient ground for the formation of some new agreement, or the recognition of some old one more comprehensive, but nowhere fully explained in any written document. For the purposes of this inquiry, and under my views of this transaction, it is not material whether the agreement was made, when the town took the deed from the Goodales and Draper; or when D. Hunter, in the fall of 1821, and spring of 1822, made difficulties about his interests and claims, and the town appointed a committee to provide a tenement, &c. for him. At either time, and under either views, there were ample consideration and motive for it, though if the allusion by the town in November to an agreement, as made by the pauper committee, was meant for this, it would lead to an inference, it had been made when the committee bought the title of the Goodales and Draper at Hunter's request and earnest entreaty. If we were in this particular examining the question of a mortgage or not, and of a trust or not, the date of the agreement might be of more consequence; but to fix it with exactness, does not, as before remarked, seem material in the view I am now taking of the transaction. It seems that various other votes by the town followed, and further difficulties with Hunter, and various conferences between him and the committees on several occasions took place, till, on the 6th of May, an adjustment of all accounts and other difficulties appears to have been completed; and either some old or new agreement was carried into effect to a great extent, and which seemed for a time satisfactory. But strange as it may appear, the extent and nature of it, whether sustaining the views of the plaintiff or defendant, is to be gathered more from what the parties then actually did, illustrated by their existing relations to each other and former difficulties, as well as by their subsequent acts, than from any further written reports, or deeds, or any very clear statements of witnesses. They proceeded to purchase a house for Hunter, and set off a tract of land, with his presence and acquiescence, and begun the erection of a barn, which was afterwards completed. Hunter and his family, soon after, removed to their new establishment. But neither the committee nor the town gave any deed to Hunter, and he soon expressed dissatisfaction and complained of their conduct. Over twenty-four years having since elapsed, it is difficult to ascertain with exactness what all the particulars of the final agreement were, and of what he complained, except from the acts of the parties, nearly contemporaneous, and the statements of one side, not then denied by the other. The acts by Hunter in making objections so soon after being present at the setting off, and having quietly removed to the premises, did not probably relate to the quantity of the land, or as not conforming to the contract, in regard to the house and barn. But if it related to the want of a deed of the land, then it was well grounded, supposing that giving a deed was a part of the contract, it being conceded that no deed had been executed. The stronger probability then is, it was on that account.

Again, as to evidence about this, derived from other acts by the town or its agents, some of the inhabitants of the town, if not all of them at the meeting, where one of the committee stated Hunter had made a conveyance to the town, acted in closing the purchase on that fact, as if he had agreed to the sale to the town, and the surrender of his old claims on certain terms, and Hunter would not be expected to give a deed to the town, unless they had agreed to give him something in return, and probably a conveyance of what he was to receive from the town, in consequence of his deed. It is also probable, that the Goodales and Draper conveyed to the town under an expectation that Hunter was to derive some substantial benefit from it by some new agreement, made with him by the purchasing, or, in other

words, the "pauper committee." Manifestly this was their desire, and they acted also by Hunter's request, and for his benefit as well as their own. Again, the committee appointed in September, 1821, reported in November, that the town had paid for the land some hundreds of dollars less than its true value, and hence could afford to deal liberally by him and his children, but unless agreeing to give, and actually giving him and his children a title to these premises, the speculative or contemplated liberality towards them would rest on too great uncertainty, in the mere pleasure or caprice of the town in future, ever to be of much real value, or be likely to prove acceptable to Hunter and his family. This kind of provision for him, without giving him any title, was too much in the form of a mere pauper to correspond with his expectations or claims, and especially is too much so, for gaining full credit, if we look to what has already been specified, and also the doings of the town afterwards in 1833, appointing a committee to settle with his heirs, and some of them proposing to give $1000, which was refused.

These last proceedings are not evidence against the town, as having offered or authorized any particular sum to be given, or to bind them by offers of a compromise. 2 Pick. 290; 4 Pick. 377; 1 Metc. (Mass.) 479. But they are proof, that both parties considered the heirs to have claims against the town unsatisfied, and estimated at a considerable value. Again, another agent, the principal man of the purchasing committee, Cranston, admitted about the time of the removal, that "when he traded with Hunter, he had promised to build him a house;" and again, "we were to build him a house, and set him off a piece of land." Added to all this, in confirmation of the idea of a promise or contract to provide a house and barn for him, and set off a certain quantity of land from the farm, are the circumstances and acts which took place before the conveyances to the town, and which have been heretofore enumerated, and the intimate relations in which Hunter and the town stood towards each other in respect to the purchase. Again, Hunter would not be likely to relinquish his former rights under the Goodales and Draper, without some title to the new house and land, beyond that of a mere tenancy by sufferance or pleasure. Though troubled to get persons to come forward and extend a loan to him longer, one of the committee testifies, he expected to realize something from his farm after paying the outstanding claims.

The position in favor of an agreement, that a deed was to be executed under the contract as finally settled or finally recognised, and as a matter of right, is strengthened by the evidence, that Hunter's statements to this effect, made at or near that time, were communicated to this same Cranston, one of the purchasing committee, and not denied by him. These statements are not admitted as Hunter's declarations, and, as such, binding on the town. In that view, they may not be competent, and are not very trustworthy in and of themselves. 10 Paige, 181; 10 Ves. 517; Dexter v. Arnold [Case No. 3,859]. But as statements of the contract by one party communicated to the agent of the other party, and not denied, they have some force. That communication and neglect or refusal to deny them is an act of the agent, who assisted in the business, which raises some presumption of their truth; though such statements are not competent when made at remote periods, or on other matters. 24 Pick. 38, 39. Again the town, by allowing Hunter and his family to remain there so long, and notwithstanding the quarrels with them on his part, have given countenance to the hypothesis, that such an agreement existed; and though no actual execution of a deed of the premises took place, they have allowed an adverse possession to run on, till a title is contended to have vested in the heirs of Hunter without a deed. Finally, it is not without its influence on my mind in favor of such an agreement having probably been made, because it is the only one which seems to accord with the justice as well as the nature of the case. It recognises some rights in Hunter, which were not fulfilled throughout by the town as bound to corresponding duties, and thus accounts for the dissatisfaction of himself and heirs. But, at the same time, it exacts from the town no severe penalties, as its inhabitants seem to have given to Hunter and his children the long and uninterrupted possession of all to which they should have conveyed the title. I am aware that the complainants deny this, and the grievance of which they chiefly complain in their bill is, that the town did not fulfil its agreement in conveying to Hunter land enough, or, in other words, reserved to themselves more than sufficient to pay them for the sums they had advanced and expended on Hunter's account. But the town certainly proceeded at once, in May, 1822, after the difficulties seemed to be arranged, to procure a house, and repaired it, and built a suitable barn near. It also set off to Hunter, by metes and bounds, from thirty to thirty-five acres of land; and the weight of testimony, though under some contradiction, is, that Hunter was present and consulted as to the division line established, and then made no objection. It is further proved, that Hunter so far accepted of the house and barn and land thus set off, as to remove to them and occupy them during his life, and his heirs since, for near twenty years, or more than that time, before this bill was filed.

All this would be decisive of the case throughout, and show an entire fulfilment of the agreement, had the town executed a release or conveyance to him in fee, of the house, barn, and land so set off, and he made a quit-claim to the town of his interest or claim in respect to the residue. In this

view, it is of little consequence whether the agreement as to the quantity to be set off was as set out in the bill, or as the town might think sufficient, since, whichever it may have been, Hunter would be regarded by the acts before specified, as having accepted the land and buildings as a performance of the agreement in respect to the kind and quantity contemplated. The quantity seems to have been acquiesced in by Hunter till he or his heirs considered the failure of the town to fulfil all their agreement, as an abandonment of all, and then, under that mistaken conclusion, making some claim to the whole farm under the old trust, which had been surrendered and extinguished. Furthermore as to this view, there having been a mutual participation in setting off what has since been occupied, and Hunter having removed to the land without then demanding more, he must in equity be considered as acquiescing in that quantity when it was set off, as a compliance with the agreement with the town. It was a virtual acceptance of it, so far as regards quantity and notice, by uniting in the setting off, and removing from the old buildings and the rest of the farm, and cultivating afterwards only the land so set off.

Finally, how do the probabilities of all the case bear on this hypothesis, that the quantity was then likely to be deemed sufficient with the house and barn, to answer in that respect all which the town had agreed to do, even on the complainant's view of the contract? Some of the witnesses state, that the buildings and lands thus assigned to him were worth $500. Now, if we consider that the town had then paid about $500 in cash for the claims to the whole farm, when nobody could be obtained by Hunter to do as much; that the title was so far in doubt, the town afterwards was obliged to expend near $1000 in its defence; that the farm was then worn out, the buildings poor, and the woodland on it of little importance so soon after the great gale of 1815; it is certain that not so much as $500 could then be obtained by Hunter elsewhere for his interest in the farm, and it is hardly questionable whether $500 in value in land and buildings was not then a fair equivalent for the claims or trust of Hunter, looking to all the circumstances and the positive evidence as to the low actual sales of other farms about that time, which were situated near. As things are now, it would certainly be insufficient. But as they were then I could not say they were so far insufficient as to indicate the want of assent by Hunter, to the quantity and value, as a compliance with the contract in that respect on the part of the town, much less could I say it, considering that he united in making it, and in taking possession of it, whether it was by the agreement to be the exact quantity left, after appraising enough to the town to pay it, or was to be sufficient to satisfy and accommodate Hunter. If he did not unite in the setting off, and occupy the premises under the contract, and as a compliance with the quantity to be set off, why did he unite at all in the setting off? and why did he remove to it? and why did the town desire him to do either, if it was not to go towards the discharge of their obligation to him? Nor was it a temporary arrangement, with a more formal and subsequent appraisal to follow, as there is no such evidence, and a final appraisal could as easily be made then as afterwards, and no reason is assigned for postponing a final agreement on either side to some future time. My conclusions then, are, that the town must be considered, on the balance of all the evidence, as having fulfilled the only contract, which remained in existence for them to fulfil, except conveying a title in fee of the land and buildings then set apart to David Hunter and his heirs. This title, I think, though under some contradictory presumption and evidence, Hunter expected they had agreed to convey, and had a right so to expect, and hence they ought now to convey it to his heirs; and are in default for not having conveyed it before.

If the evidence was more doubtful as to the special agreement by the town to give a title to this land, it ought now to be done after allowing so long a possession. Alexander v. Pendleton, 8 Cranch [12 U. S.] 462. It would be just as if the present was a bill of peace, quia timet; because the plaintiff is in possession, and fears being disturbed. An injunction, if not such a bill, is often proper to prevent future litigation and wrong after so long an acquiescence. Welby v. Duke of Rutland, 2 Brown, Parl. Cas. 39; 1 Atk. 285; 2 Atk. 483; 2 Story, Eq. Jur. §§ 703, 707, 826, 827, 853; 2 Schoales & L. 208; Com. Dig. "Chancery," (D) 13. Though the bill itself does not request any such remedy for such a cause, it asks for all relief proper in the premises, and this can therefore be given, it being appropriate. English v. Foxall, 2 Pet. [27 U. S.] 595; Watts v. Waddle, 6 Pet. [31 U. S.] 389. But one, inappropriate or disconnected, cannot be given. Wilson v. Graham [Case No. 17,804]. The town has not, in its answer, pleaded the statute of limitations, or set up any defence from length of time to such a conveyance, as must be done to make time a bar. Brown v. Jones [Id. 2,017]. But in this particular it has merely denied any contract to give a deed. If they had set up the length of time, the allowance of an exclusive occupation by Hunter and his heirs of these premises so long without interference, would go far to rebut it, and to show the town admitted their title, or at least their right to a title. The town has interposed the length of time against executing the original trusts by Stow or Bradshaw, or the Goodales and Draper.

And the plaintiff, in reply, contends that a trust once clearly established is not affected by the lapse of time, unless repudiated or disavowed openly, and this is brought home to

the cestui que trust, and that the statute runs only from such clear disavowal. Baker v. Whiting [Id. 787]; 17 Ves. 97; Boone v. Chiles, 10 Pet. [35 U. S.] 223; Zeller's Lessee v. Eckert, 4 How. [45 U. S.] 289; Girod's Case, Id. 561; 2 Story, Eq. Jur. § 734; Ang. Lim. 485; 5 Brown, Parl. Cas. 187. But whether since any such disavowal, sufficient time has run to bar any trust here, it is not material to settle, as we have already seen that any trust existing at the time of the purchase by the town in 1821, was not assumed or adopted, but deliberately extinguished or surrendered by Hunter on a new contract made by and with the town. The failure by the town in that and the subsequent year, as well as since, to execute the whole of that new contract, does not, we have before said, revive the old trust, as supposed in the bill, and thus render it necessary to decide on the bar to it by the length of time interposed in the answer. No fraud or mistake are proved in the adjustment of the old trust, so as to re-open it. And a failure to fulfil the terms of that adjustment, instead of avoiding it, merely gives to the other contracting party either a suit at law for damages, or as before explained in equity, a right to have the new agreement carried out in full by a decree of a specific performance of what still remains to be done, and against doing which no bar by length of time is interposed in the answer.

There are some other considerations connected with this case of a more miscellaneous character, yet still important in their bearing, and to which I will now devote a few moments attention. Thus in respect to David Hunter's capacity, about which considerable is said in the bill, answer, and evidence, I do not, in connection with this question or the case generally, think it was such as to impair the validity of any of his contracts; nor such as to justify the town in taking charge of him and his property as an idiot. He was not so imbecile and weak as not to be trusted with making his own contracts. 1 Story, Eq. Jur. § 234–239. But his character might make him more liable than people in general, to confide implicitly in supposed friends, and to be more careless than most people in having his papers in legal form, and in preserving such as were valuable. And in my view, this character of the man rendered him more anxious to fall into the hands of the town, and less mindful of having his engagements with its committees reduced to writing at first, and accounts for some of the looseness apparent on that subject. So all the doctrines may be sound law, which have been agitated as to what is evidence of a trust or mortgage, and what takes such a trust, in respect to real estate, out of the operation of the statute of frauds, if those doctrines are limited in this way. That is, possession by a grantor, being evidence of a mortgage, if continued after a sale, or if interest is paid by him. Finch, Prec. 526; 1 Madd. Ch. Prac. 517. Or inadequacy of consideration being evidence of a considerable weight, when coupled with an application for a loan, to show it was a mortgage. Lewis v. Owen, 1 Ired. Eq. 290; Morris v. Nixon, 1 How. [42 U. S.] 118. Or recognitions of trusts by any independent writings being sufficient to bar the statute of frauds, as to parol agreements, the proof being then in writing, which is all required, though the trust itself may have been otherwise created. Barrell v. Joy, 16 Mass. 221; 10 Law Lib. 81; McCubbin v. Cromwell's Ex'rs, 7 Gill & J. 157; 2 Ves. Jr. 695, 708; 4 Kent, Comm. 305; 1 Johns. Ch. 273. Or part performances being enough to take a parol trust out of the operation of the statute of frauds. 6 Ves. 12; 1 Ves. Jr. 326; 6 Johns. Ch. 111; Jenkins v. Eldridge [Case No. 7,267]. There are doubts on this at law, but not in equity. 1 Pick. 328; 20 Pick. 134; 1 Metc. (Mass.) 483. Or the clear proof being competent of its being a transaction to lend and secure money in the opinion of a court in equity. 1 Story, Comm. § 1020; Strong v. Stewart, 4 Johns. Ch. 167; 1 Ired. Eq. 369; Flagg v. Mann [Case No. 4,847], 1 How. Pr. 358. Though a qualification to this may be proper, such as if this can be so shown or proved without any violation of the statute of frauds, pleaded or relied on against it. 14 Pick. 477; Flint v. Sheldon, 13 Mass. 443. As if a defeasance was omitted by mistake or fraud, or the other circumstances are proved, which have before been alluded to as sufficient. Cholmondeley v. Clinton, 2 Jac. & W. 182; 2 Story, Eq. Jur. § 1013; 4 East, 577, note; 4 Russ. 425. Or payments of the consideration in a grant of land, if made by a third person, being in law sufficient to raise a resulting trust in his favor. Flagg v. Mann [supra]; 1 Sand. Uses & Trusts, 227; 11 Johns. 96; 2 Story, Eq. Jur. § 755; Scoby v. Blanchard, 3 N. H. 176; Pritchard v. Brown, 4 N. H. 401; Sugd. Vend. 416; 10 Ves. 511; 15 Ves. 50; 5 Johns. Ch. 1; 2 Johns. Ch. 405; 1 Johns. Ch. 582; 3 Ves. 707, 712; Smith v. Burnham [Case No. 13,019]. But you cannot prove a resulting trust, by parol, in any other way (2 Johns. Ch. 205; 1 Eden, 515; 4 East, 477), than paying a consideration, or possibly conveying without consideration (20 Pick. 404).

Some of the former trusts, as to Stow, Bradshaw, the Coombses, and the Goodales and Draper, are quite clear from several of these circumstances, as well as a writing or bond by the Goodales and Draper. But here, the transaction between the town and Hunter, which succeeded and was substituted for the others, is proved and sustained under the statute of frauds, by a part performance, having such a contract in his favor, which has before been mentioned, and not a mortgage or trust, resulting or otherwise. It is proved by a part performance, as well as in part by some notes in writing, and on the records of the town. Some of the necessary ingredients are wanting, as between Hunter and the town, to show a trust or mortgage, though

none are as between Hunter and the Goodales and Draper. But none of the necessary ingredients are wanting between Hunter and the town, to take this new contract out of the statute of frauds, as a contract, not a mortgage or trust, but still a contract in respect to some interest in lands. Because it was speedily and deliberately executed in part, and, however at law in some states, as in Massachusetts, a part performance may not be regarded as sufficient to take out of the statute a parol contract as to the interest in lands; yet in equity, where the present case is now pending, no doctrine is better settled than that part performance is sufficient to satisfy the demands of the statute. See cases before cited. If, after so large a part performance as here, of a contract like this, a court of equity were not to require a further and full execution of it, nor remit the complaining party to his original rights under the former trust, it would make the statute of frauds, if resting on that as an excuse, an instrument to work fraud rather than prevent it. Especially is the case supported sufficiently, when to this is added, several votes and records of the town strongly indicative in writing of such an original agreement with Hunter, substantially, as the bill alleges. Length of time, however, is interposed here in a special plea, as a bar to the fulfilment of this contract. Time is not always the essence of a contract, and especially if no change has happened in the value of the property, or situation of the parties, rendering a fulfilment just or proper. Brashier v. Gratz, 6 Wheat. [19 U. S.] 528. Here time has had no effect on the giving of the deed, being all which remains to be performed, except to render it more proper, rather than excusing it.

In fine, I am satisfied, that the view taken by me concerning the agreement, is the only view of the matter which can be sustained by the evidence, and which is competent and legal in this class of cases, so as to permit any relief whatever to the plaintiff. And though this relief is a small one, considering the length of possession, which has been enjoyed, yet it is a relief in conformity with what the contract was and what it required, and what appears already to have been done by the town, and which may at least prevent future litigation as to the title of the premises set off. In short, also, it is a relief which, if given at the time by the town, vesting an absolute title then in David Hunter, to what was set off, would probably have satisfied him, made him in some degree independent, and prevented the long and expensive litigations and heart-burnings since existing between the parties. And it is one, which it is equitable and just to require of the town, when by letting the heirs remain there so long, the town has allowed an expectation to be formed that the title was to be vested in David Hunter and his heirs, and by thus strengthening the idea set up in the bill of their original agreement to convey such a title, the town cannot complain of being now required to carry that agreement into complete effect.

The misfortune in the disposal of this case will probably be, that neither party will obtain what it asks, and thus both be disappointed; and besides this, that the expectation of the parties on both sides are raised so high, and they have litigated their claims so long and with such zeal, they neither of them will be satisfied with moderation and the smallness of the relief granted, but look to the whole or nothing. But if the relief shall go to the extent of the evidence and the law, as well as the justice of the case, the court will be content under the severe labor, which the hearing and investigation have required from it. Some doubts have occurred, whether the bill is in a form, under which a specific performance of this agreement can be decreed, even to this extent, as the specific relief asked for is rather to enforce the idea of a mortgage or trust than this original agreement, as set out. But as the bill asks likewise for any other relief proper in the premises (see Mitf. Eq. Pl. 38, 39); as it deems the existence of this agreement a contract and avers a breach of it; and as the court is satisfied that such an agreement was made, and if made, the answer admits and all the proof corresponds, that it never has been entirely fulfilled; I think it proper to decree, that the town proceed to execute a release of all its interest in the premises in controversy, occupied by David Hunter and his heirs since 1822; and thereupon that the complainant, representing said Hunter's heirs, release to the town his interest in the rest of the farm in conformity to what was originally stipulated. Let a master be appointed to see these conveyances prepared and executed. Costs for the complainant.

After the opinion was delivered in this case, and a decree made, a petition was filed for a re-hearing. It stated no new evidence discovered, nor any supposed mistake in law or fact, but asked for leave to have re-examined and decided the points, whether the land and buildings assigned to David Hunter were so much in value as ought to have been awarded to him, and whether he had ever actually accepted them in satisfaction of the agreement. It was argued that as the relief asked for, and the arguments were not directed mainly to these inquiries, they ought to undergo further consideration and a revision. But the court held, that the grounds assigned were insufficient to justify the grant of a re-hearing. It was not set out, that any new testimony on those points had been discovered since the opinion was pronounced, or could be furnished; or that any thing else had occurred which would justify a new trial in a case at common law. That was one test in such applications, and

a very important one. Doggett v. Emerson [Case No. 3,961]; Emerson v. Davies [Id. 4,437].

The application rested merely on the ground, that the complainant supposed sufficient attention and argument had not already been given to the evidence, concerning the value of the farm, compared with the advances made by the town, and concerning the object of Hunter and the town in having the tract set off and buildings provided by the town for him, and the acceptance thereof, in fulfilment of their contract. It is true, that the counsel for the complainant introduced much evidence in the case, and argued it as to that value, chiefly with a view to the question of a trust or mortgage, to be inferred from the difference in the value of the farm, from the sums advanced by the town; and it is equally true, that the evidence and argument on the other side, as to that value, were devoted chiefly to the same question. But the evidence as to the value and the arguments on it were, in truth, very full, and were much considered by the court; and whether they are applied to the question of a trust, or the fulfilment of a contract to convey to Hunter all beyond a certain value, is immaterial, if nothing new can be added to it, and it has already been commented on and considered deliberately in this connection. In respect to the other question, the acceptance of what was set off to Hunter, as a fulfilment of the contract by the town, the court suggested to counsel, during the hearing, the importance of it, and fully examined the value of the whole premises in 1821, as compared with what the town had paid, in order to see if such acceptance was from that circumstance probable or improbable. After so long a lapse of time, and so great a change in the intrinsic value of the farm, and of the goodness or certainty of the title, it would not be safe to disturb such a transaction for any small difference in opinion now as to value at that time; and it is a controlling fact on this question, admitted by the complainant, as well as proved by the respondents, that Hunter then tried in vain for some time, to procure any person to give so much as the town did by this arrangement. If the farm was then under any circumstance worth more than they advanced in money to others, and set off to Hunter in land and buildings, why did he not succeed in getting more? Why could he not get even as much after repeated trials and considerable delay? This application for a rehearing is, therefore, not granted.

Another question has been raised, since the opinion, as to cost. It has been argued at length on both sides. The complainant claims full costs, while the respondents object to this, and ask, as equitable, a division of the costs or an allowance of none to either party. The rule at law to allow cost to the prevailing party, is, to be sure, not universal even there. But it is prima facie to govern; and unless exceptions are shown, the costs follow the judgment on the merits. If the court have no jurisdiction,—see cases in Burnham v. Rangeley [Case No. 2,177],—or different issues are found for different parties, the general rule yields,—9 Gill & J. 115. So there is one case at law, where, by express statute, a plaintiff is not only deprived of cost, though allowed to have judgment for his debt, and where, though the defendant is found to be indebted to him, the court is authorized, in its discretion, to make him pay costs to the defendant. It is where a creditor sues in this court, and receives less than $500. See Act Sept. 1789; 1 Stat. 183. But I do not see, that this furnishes any analogy to assist us here, as there the loss of cost is imposed as a penalty for suing here, when his debt was not large enough to justify his resorting to this tribunal; and the payment of cost to the defendant, in the discretion of the court, is to punish the plaintiff further, if he has been guilty of bringing in the defendant for a frivolous claim, that could have been more cheaply and appropriately settled in some other court, or has been brought here with an apparent view to vex the defendant with additional expense and inconvenience in defending here, rather than in some state court. But no notice of that kind is manifest, and none could in this case be gratified in this way if it existed, when the defendant is situated so near, and the evidence is taken entirely in depositions.

In equity, the departures from the general rule are more frequent than at law, and extend to several classes of cases. Thus costs, there, may be given to neither party, or some to one and some to the other, or all to one side, as the justice of the whole case may seem to demand. Brinckerhoff v. Lansing, 4 Johns. Ch. 79; Saunders v. Frost, 5 Pick. 272. Some decisions seem even to look to the hardships of the case as one guide. Shaver v. Radley, 4 Johns. Ch. 310. And at one time in England, mere "conscience was applied to fixing the amount so to be paid." 1 Spence, Eq. Jur. 392. Under this rule, the cost was made less, for the "wrongful vexation" by the defendant, "in respect he hath married the defendant's daughter." See a case A. D. 1590; Id. note. This is a looseness in discretion hardly to be tolerated in this age. Any discriminations of a more equitable character are very troublesome, and frequently require a re-consideration and re-argument of almost the whole cause, in order to balance or fix the preponderance of merits beyond the naked decree entered by the court. And this course has proved so embarrassing as to have caused regret with Lord Eldon, that the same rule was not allowed to prevail in equity on this subject as at law. 11 Ves. 458, 462, note; Beames, Costs, 61, 62. So, then, it is settled, that though costs are discretionary in chancery (Bromley v. Holland,

7 Ves. 3; 11 Ves. 462), yet they go to the prevailing party in equity as at law, primâ facie (7 Ves. 3, note; Vancouver v. Bliss, 11 Ves. 462; Saunders v. Frost, 5 Pick. 260; 11 Pick. 446–449; 23 Pick. 508; 1 Hopk. Ch. 344; 2 Banb. Ch. Prac. 321, 322; 2 Madd. Ch. Prac. 554, 555). And though if both parties are in fault, the court may give cost to neither. 5 Pick. 274; Crippen v. Heermance, 9 Paige, 211; 4 Johns. Ch. 79; 2 Madd. Ch. Prac. 554, 555. Yet of two innocent persons, the burthen of cost must fall on him, who undertakes to give a title to another, which he does not give. Edwards v. Harvey, Coop. 40. More especially is this the case if the unsuccessful party knew his obligation or was bound to know it, having made the contract himself, and not a testator or third party doing it. 11 Pick. 446. Though the town here acted by agents, and they often change, and may be capricious in their course, yet the town was bound in this case to fulfil their contracts, and probably knew the whole extent of them. True, it has further been held, that if one fails in the substance of his claim, his costs may be restricted. The Packet [Case No. 10,655]; 1 Paige, 192. Or costs may be given against him. 13 Price, 500. Yet, then, it will not be reasonable to do it, if the other party contested some points, which were material, and to which the evidence and cost are pertinent. 10 Price, 62; 2 J. J. Marsh. 443; 3 A. K. Marsh. 368; 1 Dana, 331; Jac. Ch. 574. Nor if the defendant is in default or wrong, though the sum recovered be small. Smith v. Lloyd, 10 Price, 62.

In the equity courts in this country, the discretion used has been broader than in courts of law; but I think not generally so wide and minute as in England. The inclination should, in my opinion, be to conform to the standard established at law, unless in extreme or strong cases. Hence, when the final and sole decree on the merits is for one party, full costs should usually follow for that party. Here, too, no technical issues were formed, some of which were found for one, and some for the other party, and thus justify costs for each, where prevailing. But the question presented by the bill and answer was a single one, in regard to a failure by the town to perform all its duties and obligations to David Hunter, and a final decree was entered on that alone. It is true that several transactions were necessarily to be considered in deciding, that running through near a quarter of a century, and some different positions were assumed in respect to what particular act or obligation the town was deficient in under its agreement, in 1821. But still the rights of Hunter, first in trust or mortgage, and then as entitled under a specific contract, substituted for the trust or mortgage, were averred in the bill, and sustained by the court; and the only departure from the leading positions of the bill was, that a neglect by the town to fulfil that specific contract did not revive the former trust or mortgage, but merely gave a right to redress by a suit at law, or in chancery by specific performance, rather than an enforcement of the former trust.

The great controversy in the cause was, therefore, sustained by the complainant, an obligation to him by the town not fulfilled. But the quantity and form of redress were, to be sure, not such as he contended for, not so much land or money as he expected, and not by a trust or mortgage, but a specific performance of a contract which had been agreed on. But under these circumstances, I think he is to be considered as the prevailing party in the chief matter of dispute. And here, though the extent and mode of relief are not that which he contended for, he is still the prevailing party in the proceedings, and the only decree in the case is in his favor. The duty on the part of the complainant to release his interest in the rest of the farm, after receiving a deed from the town of what was agreed to be conveyed, is a duty admitted virtually in the bill, and not contested nor decreed by the court, except as being a mere conceded consequence or condition of the town's previous release. Again, though the range of proofs here has been very wide, I do not see that any great branch of evidence or argument in the case has been gone into, which was not pertinent and material to the merits, after the unusual lapse of time since the events happened, and the wide circumstantial evidence obliged to be brought to bear on the case, mostly by parol testimony after so many years. The expenses have undoubtedly been large, as the suit has been long pending, and obliged to be sustained or rebutted by such a long series of facts, and such a broad and general range of inquiry. But they must fall, I think, more equitably, where the judgment on the merits has fallen. The facts have, fortunately for the town, turned out to be such as to exonerate the town from any further important obligation in point of labor or expense, it being only the giving of a deed. Yet it is an obligation involving in principle the whole title of David Hunter and his heirs to all which they were to receive under the contract that has been broken, and which was denied in the answer, and has been resisted in argument. The usual costs, then, are to be allowed to the complainant, and if a difficulty occurs in the taxation, let it be referred to the same master to whom the reference was made concerning the deeds to be executed.

HUNTER (MURDOCK v.). See Case No. 9,941.

HUNTER (PARSONS v.). See Case No. 10,778.

Case No. 6,909.

HUNTER et al. v. ROYAL CANADIAN INS. CO.

[3 Hughes, 234; 7 Reporter, 37; [1] 2 Va. Law J. 695.]

Circuit Court, E. D. Virginia. Nov. 8, 1878.

REMOVAL—TIME FOR FILING OF PETITION—ISSUE.

The mere fact that a cause is ready at a term of a state court for the ex parte execution of a writ of inquiry by the plaintiff after an office judgment, is not equivalent to its being ready for trial on issues joined in the sense of section 3 of the act of congress of March 3, 1875 [18 Stat. 471], relating to the removal of causes, which requires a petition for removal to be filed at the term at which the cause "could be first tried."

[Cited in Chester v. Wellford, Case No. 2,662; Wheeler v. Liverpool, L. & G. Ins. Co., 8 Fed. 198.]

[At law. Suit by Hunter & Tilley against the Royal Canadian Insurance Company.]

W. H. Burroughs, Esq., for plaintiff.

W. H. White, Esq., for defendant.

HUGHES, District Judge. This is an action of covenant on a policy of insurance against fire. The defendant is an alien, resident in Montreal, Canada. Process was sued out of the clerk's office of the corporation court of the city of Norfolk on the 3d January, 1878. Service of it was acknowledged by W. H. White, attorney-at-law, as attorney for the defendant, on the 4th of the same month, in pursuance of Code, c. 36, § 20, p. 336, and under protest. The declaration was filed at the succeeding January rules, commencing on the 7th day of the month; and a common order was then entered against defendant, who was required to appear and plead to issue at the next rule, which began on the 28th January, 1878. At these rules, the office judgment was confirmed, and an inquiry of plaintiff's damages ordered at the then next term. That term began on Monday, the 4th of February, 1878. The defendant made no appearance, and the court ex mero motu entered this order—viz., "For reasons appearing to the court, it is ordered that this cause be continued to the next term." The next term began on the 6th May, 1878. During this term, the defendant appeared by counsel, and made and filed its petition for a removal of the cause into this court. The corporation court of Norfolk refused to grant the motion. 1st. Because the defendant company was, under Virginia legislation, in the judge's opinion, a citizen of Virginia, and, therefore, not entitled to the rights of a non-resident alien; and 2d. Because, in the judge's opinion, the February term of that court was the one at which the cause (in the language of the act of congress of March 3d, 1875, relating to the removal of causes) "could have been first tried." Thereupon the defendant sued out of this court a writ of certiorari to the corporation court of Norfolk, under which the case and the record of it from the state court (or a copy of it) are here. The reasons which actuated the corporation court of Norfolk in refusing the motion of the defendant to remove, are not conclusive with this court. The 5th section of the act of congress of March 3d, 1875, relating to the removal of causes, confers upon this court jurisdiction to determine whether a cause be or be not properly removed; and the 3d section of the same act forbids the state court, after petition is filed, to proceed any further in the suit, whatever may be its opinion on the sufficiency of the petition, and makes all proceedings there, after petition for removal made and filed, null and void; unless, indeed, and until the cause shall be remanded again to that court, after it has been brought by removal here.

It is for this court to determine whether the cause is properly here. And in determining this point in this cause, the only question seems to be, whether the February term of the corporation court of Norfolk was in fact the one at which "the cause could have been first tried?" For I do not think it can be seriously required of a court of the United States, which is a great power, having obligations towards and relations with foreign powers, founded upon treaties and the principles of international law, to hold with any state court, however authoritative, that the citizen of a foreign country, having rights under treaty and the law of nations, is or can be made, by any local law passed in invidiam, a resident citizen of this state, having no rights except in that quasi character, which character, it is natural to suppose, he denies and rejects. I can't obtain my consent to give any serious consideration to such a pretension, and will confine myself to the single inquiry, whether the February term of the corporation court of Norfolk was the one at which this cause "could have been first tried there?"

In the particular case at bar, an office judgment by default was entered against an alien defendant, resident a thousand miles distant, upon whom no personal service had been made, twenty-one days after the filing of the declaration at rules, and twenty-four days after service of process upon an agent in Norfolk, who became agent by courtesy. It was a case in which an inquiry of damages was necessary, and does not fall within the provisions of section 45, c. 167, pp. 1095, 1096, of the Code; but it falls within the next following section, 46, which is in these words: "If a defendant, against whom judgment is entered in the office, before it becomes final, appear and plead to issue, it shall be set aside, unless an order for inquiry of damages has been executed; in which case it shall not be set aside without good cause. Any such issue may be tried at the

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 7 Reporter, 37, contains only a partial report.]

same term, unless the defendant show good cause for a continuance." Section 1, c. 173, p. 1117, of the Code, provides how a docket of all cases shall be made up for any term, and requires the docket to be called, and the cases to be tried or disposed of by the court, at the term, in a certain order.

The corporation court, in the present case, at its February term, of its own motion, "disposed of" it by continuing it, before the execution of the writ of inquiry. The judgment taken in the office could not have become final, except after execution of a writ of inquiry of damages. This writ was not executed, and it could not have been executed, that is to say, the cause could not have been tried, if the defendant had appeared and pleaded to issue, and shown cause for a continuance. Evidently, it was because the cause was not ready for trial, that the court ex mero motu "disposed of" it by a continuance. It was incompetent, as it was impossible, for the court, at that term, to determine whether the cause could have been tried, until after the defendant had appeared, pleaded to issue, and shown cause for a continuance. It is clear to me that the cause was not ready for trial at the February term of the court. The defendant had not appeared, had not pleaded to issue, and had not shown cause for continuance; all of which privileges the law gave him, and on the exercise of which depended the possibility of a trial. The plaintiff did not put the cause in motion by moving for an inquiry of damages, and did not thereby compel the defendant to appear, plead to issue, and by motion for a continuance, test the question of a possible trial at that term of the court. The plaintiff's power to execute a writ of inquiry which is subject to the statutory right of a defendant to appear, plead, and move for a continuance, does not suffice, of itself, to bring the case within the meaning of the words of the act of congress defining the term of the court at which a "cause could be first tried." His right to execute a writ of inquiry at the first term after an office judgment has been confirmed at rules, is too contingent, and may be too easily defeated, especially within a month after the commencement of the suit, and especially by an alien defendant, resident a thousand miles off, for a court to infer or presume with any certainty that the cause "could be first tried" at that term.

Chief Justice Waite seems to me to announce the sound rule of decision on this subject, in Gurney v. Brunswick [Case No. 5,872], when he says: "A cause cannot be tried until in some form an issue has been made up for trial. . . . As soon as the issue is made up the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before or at this term." This language strikes me as eminently judicious. We must consider, not whether the court, or the parties, are ready for trial, but whether the cause itself is ready; and in considering that question, we must know whether the cause is at issue on the pleadings, and is ready for trial with legal certainty, and beyond legal contingency. There was no legal certainty of trial at the February term of the case at bar. The defendant had, by law, the right to appear, to plead to issue, and to show cause for continuance.

Judge Drummond, in Scott v. Clinton & S. R. Co. [Case No. 12,527], said in a similar case to the present: "But in this case, there was not only no issue when the application (for removal) was made, but there was no answer filed by the parties. It does not appear that there had been any such negligence by those who made the application (for removal), in this case, as to deprive them of the right which was clearly given by the act of congress of 1875. . . . Now, the cause cannot be heard until there is an issue; and in this case, therefore, it was not competent for the court to try the case, there being no issue before the court to try. And, therefore, I think that within the meaning of the law, a term had not elapsed during which the cause could have been heard. It is to be regretted, perhaps, that the language of the statute upon this subject is not more precise.

I think I am authorized by these two decisions to construe the language of the act of congress, "the term at which the cause could be first tried," to mean, the term at which the cause shall be first ready for trial on issues joined, and to hold that the mere fact that a cause is ready at a term for the ex parte execution of a writ of inquiry by the plaintiff after office judgment, is not equivalent to its being ready for trial on issued joined.

The case at bar was not at issue at the February term. Considering the distant residence of the alien defendant the court might well, if the plaintiff had gone on and executed his writ of inquiry, have set aside the verdict and awarded a continuance without compelling defendant to plead to issue at that term. But the plaintiff did not do so much as go on and execute his writ of inquiry. Under the provisions of section 46, there was no certainty that he could do so. Under the provisions of that section, even if he had done so, there was no certainty but that his verdict would have been set aside, and the cause continued until the next term, to await the appearance of the defendant, and the making up of the issues in the case for trial. I must, therefore, overrule the plaintiff's motion to remand on these grounds—1st. That the case was not ready for trial upon issues joined at the February term, 1878, of the corporation court of Norfolk. 2d. That there was no legal certainty

that it could have been so made ready by the action of the plaintiff if he had taken action for that purpose. 3d. That the plaintiff took no steps by executing his writ of inquiry to reduce to certainty what was uncertain. And 4th. That the corporation court of its own motion, "disposed of" the case by continuance to the next term, without exception by the plaintiff, apparently, because it was not then ready for trial.

Case No. 6,910.

HUNTER v. ROYAL CANADIAN INS. CO. [See Case No. 6,909.]

HUNTER (SHEIRBURN v.). See Case No. 12,744.

HUNTER (SMITH v.). See Case No. 13,063.

HUNTER (TAVENNER v.). See Case No. 13,767.

HUNTER (UNITED STATES v.). See Case No. 15,428.

HUNTER, The (UNITED STATES v.). See Cases Nos. 15,424–15,427.

HUNTER (WALKER v.). See Case No. 17,072.

HUNTER (WILSON PACKING CO. v.). See Case No. 17,852.

HUNTERS (BRYANT v.). See Case No. 2,068.

HUNTINGDON (MORRIS v.). See Case No. 9,831.

Case No. 6,911.

HUNTINGTON et al. v. CENTRAL PAC. R. CO.

[2 Sawy. 503;[1] 1 Am. Law T. Rep. (N. S.) 94.]

Circuit Court, D. California. Jan. 26, 1874.

TAXATION—RAILROAD EXEMPTION—VOID TAX ASSESSMENT—RAILROADS, HOW TAXED—SEPARATE ASSESSMENTS — TAX DEED PRIMA FACIE EVIDENCE OF TITLE—INJUNCTION A PROPER REMEDY.

1. The Central Pacific Railroad is not exempt from taxation by the state of California, on the ground that it is an instrumentality created in pursuance of acts of congress, and employed by the national government for transportation of the mails, armies of the United States, munitions of war, etc.

2. An assessment of a tax not made in the mode or on the principle prescribed by the statute, is void.

[Cited in Tilton v. Oregon Cent. Military Road Co., Case No. 14,055.]

3. Under the statute of California, a railroad must be taxed as real estate, and the portion situate in each county must be assessed in said county as so much land, like the adjoining lands, without reference to its connections, or the uses to which it is put, and must be assessed at its "cash value," which is "the amount at which the property would be appraised, if taken in payment of a just debt due from a solvent debtor."

4. The land and improvements thereon, must be assessed separately like other real estate, and an assessment not made in the mode and on the principle stated, is void.

5. Under the statute of California, a tax deed is prima facie evidence of the regularity of all proceedings resulting in the deed, and is, therefore, prima facie evidence of title in the grantee. Such a deed executed in pursuance of a void sale, casts a cloud upon the title.

[Cited in Minturn v. Smith, Case No. 9,647.]

[Cited in Arrington v. Liscom, 34 Cal. 366.]

6. A court of equity will enjoin a sale for taxes, when the assessment is void, and the deed given in pursuance of the sale would cast a cloud upon the owner's title.

[Cited in Northern Pac. R. Co. v. Carland, 5 Mont. 146, 3 Pac. 134; Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798.]

[7. Cited in Donohoe v. Mariposa L. & M. Co., Case No. 3,989, to the point that the dismissal of the original bill before a hearing would doubtless carry the cross bill with it as a part of the suit.]

Bill in equity [by Collis P. Huntington and others] to restrain the sale of the Central Pacific Railroad for the taxes levied in the various counties through which the said railroad extends, for state and county purposes for the year 1872–3.

McCullough & Boyd and S. W. Sanderson, for complainants.

Robert Robinson, for Central Pac. R. Co.

J. Love, Atty. Gen., and the several district attorneys for the counties of Santa Clara, Alameda, San Joaquin, Sacramento, Placer and Nevada, for other defendants.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

BY THE COURT (SAWYER, Circuit Judge). There are two grounds upon which the application for an injunction is rested. First, on the ground that the Central Pacific Railroad is an instrumentality constructed in pursuance of acts of congress, and employed by the national government in the exercise of its constitutional powers in providing for the transportation of the mails, the armies of the United States, munitions of war, etc., and as such instrumentality of the general government, exempt from state taxation. Secondly, that the said taxes have not been assessed in the mode, or upon the principles prescribed by the statute, and for that reason the assessment is void.

The first ground has recently been disposed of adversely to the complainants by the supreme court of the United States, in the case of Union Pac. R. Co. v. Peniston (decided at the present term) and it requires no further consideration. 18 Wall [85 U. S.] 5.

As to the second ground; section 3617 of the Political Code of California, defines the term "real estate," as used in the statute for the purposes of taxation, as follows: "First, the term 'real estate' includes—1. The ownership of, claim to, possession of,

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

or the right to the possession of land. * * * 3. Improvements. Second, the term 'improvements,' includes—1. All buildings, structures, fixtures, fences and improvements erected on, upon, or affixed to the land."

The term "real estate," then, includes both the land and the improvements on the land, and the Central Pacific Railroad is real estate made up of both these classes. First, the ownership, etc., or right to the possession of the land upon which the track is laid, location of engine-houses, stations, water tanks, etc.—in other words, the right of way, etc., and, secondly, "Improvements," as engine-houses, station-houses, fences, water-tanks, ties, rails, etc., which are either "buildings. structures, fixtures, fences," or, "improvements erected upon or affixed to the land."

So, also, the interest of the company in the railroad is real estate under the general principles of the law, without reference to the statute, as held after a full discussion of a similar question by the supreme court of California, in North Beach & M. R. Co.'s appeal in Re Widening Kearny St., 32 Cal. 505.

Section 3650 of the Political Code, provides that: "The assessor must prepare an assessment book with appropriate headings, alphabetically arranged, in which must be listed all property within the county, and in which must be specified in separate columns under the appropriate head: 1. The name of the person to whom the property is assessed. 2. Land by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon. 3. City and town lots, naming the city or town, and the number, block—according to the system of numbering in such city or town, and improvements thereon. 4. All personal property, showing the number, kind, amount and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment. 5. The cash value of real estate, other than city or town lots. 6. The cash value of improvements on such real estate. 7. The cash value of city and town lots. 8. The cash value of improvements on city and town lots."

Section 3651 gives the form of the assessment books to be used, ruled into separate columns, one column for each particular specified in the preceding section with the appropriate headings, among which is one column with the heading, "Value of real estate other than city or town lots," and immediately following, another headed, "Value of improvements thereon." There is no special provision of the statute for a different mode of assessing railroads. There is no provision at all for assessing railroads, as railroads. The only provision pointing out any exceptional mode of assessing the property owned by railroad companies relates to the rolling stock, which is as follows, to wit:

"Section 3663. Where the railroad of a railroad corporation lies in several counties, its rolling stock must be apportioned between them, so that a portion thereof may be assessed in each county, and each county's portion must bear to the whole rolling stock the same ratio which the number of miles of the road in such county bears to the whole number of miles of such road lying in this state."

In relation to equalization of assessments by the state board of equalization, section 3693 provides: "'When the property is found to be assessed above or below its full cash value, the board must add to or deduct from. the valuation of: 1. The real estate; 2. Improvements upon such real estate; 3. * * * Such per centum respectively as is sufficient to raise or reduce it to the full cash value."

Under these provisions of the law, railroads must be assessed like any other real estate. They fall clearly within the statutory definition of real estate. The lands and the improvements on them must also be assessed separately, and the land, not being a congressional division or subdivision, must be described by "metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon." Unless so assessed, the state board cannot equalize the assessment in the mode required by section 3693, which must also equalize each separately by adding to or deducting "from the valuation of: 1. The real estate; 2. Improvements upon such real estate." This may be an unsatisfactory way of assessing railroads, but if so, the wisdom of the legislature has so provided—probably on constitutional grounds as to equality and uniformity—and the mode must be pursued, or the assessment will be void. It cannot be said that this was inadvertently done, for railroads were not overlooked, the mode of assessing the rolling stock having been carefully provided for. The bill alleges that the several county assessors, "in making their assessments, did not assess the right of way separately as land consisting of so many acres of such or such a value per acre, nor did they describe it by reference to township, or range, or section, or fractional section, or by metes and bounds, or by other description, except as hereinafter stated, nor did they assess separately the improvements, or iron and ties constituting said super-structure, as improvements of such or such a value, according to the cash value of said ties and iron, nor did they value said lands at their cash value as lands, or as of the same value as other adjoining lands of like

quality. On the contrary, they assessed said right of way and superstructure together, as constituting one thing, and described them as so many miles of railroad of such or such a value per mile, without regard to the width of the right of way."

And further: "That in ascertaining the valuation of said road, said assessors and board of equalization were not governed by the value of the land considered as land, and of the same value as adjoining lands of like quality, nor by the value of ties and iron considered as ties and iron, as new or old, or depreciated in value by use; but, on the contrary, they lumped said lands and superstructure, and considered them as one thing, and ascertained their value by taking into account the franchises of said company and their value. the cost of construction, fills, embankments, tunnels, cuts and snow-sheds, and the fact that said road extended from San José, in the state of California, to Ogden, in the territory of Utah—a distance of about eight hundred and seventy-five miles—and there formed a junction with the Union Pacific, and constitutes a part of a line of railroads extending from the Pacific to the Atlantic Oceans, and the amount of business transacted by said plaintiff on said road, and the profits derived by said plaintiffs therefrom; all of which, as complainants aver, was contrary to the rules prescribed by the statute of said state in such case made and provided."

This is certainly neither literally nor substantially, the mode of assessing prescribed by the statute; and, as the application is heard on the bill alone, the averments of the bill must be taken as true. Besides, the description is defective. It gives so many miles of railroad without regard to the width of the land occupied, or to any specific location. The bill shows that the land occupied varies in width from one hundred to four hundred feet, and that it has a superstructure of ties and iron rails forming a track for cars to run on, depots, stations, etc. The description adopted by the assessor, is no more definite than in Kelsey v. Abbott, 13 Cal. 616, 619, which was held by the supreme court of California to be insufficient, and the assessment consequently void. But we do not find it necessary to determine whether this defect is fatal. The assessment, as equalized by the state board set out in the bill, shows some curious results. The assessment as equalized in San Joaquin county is twice, and in Placer more than three times as much per mile as in Santa Clara and Alameda counties, and that of Placer county, two and one half times as great as in Nevada county. And the value of the rolling stock as equalized, is not apportioned according to the number of miles in each county. But we are not prepared to say that the court could remedy an erroneous or unequal assessment, provided that it is made in the proper mode, upon the proper principle, and in other respects properly made. Doubtless, it could not. This assessment, in our judgment, has more radical defects. It is not made in the way prescribed by the statute. It is not only not formally, but is not even substantially such an assessment as the statute requires. The statute, for some wise reason, it must be presumed, expressly requires that the interest in the land, and the improvements "must" be separately assessed and separately equalized. This has not been done, and these assessments could not be separately equalized, because the board of equalization would have no data in view of the mode of assessment by which it could be determined what part had been assessed to the land, or what to the improvements.

In states where the statutes contain provisions similar to those in this state, defining real estate for the purposes of taxation, and as to the mode and principle of assessing real estate, as in New York, it has been repeatedly held that the railroads are taxable "as real estate in the several towns in which such real estate is to be taxed upon its actual value at the time of the assessment, whether that value is more or less than the original cost thereof;" that "the assessors are simply to ascertain the value of the land, and of the erection of fixtures thereon, irrespective of the consideration whether the road is well or ill-managed, whether it is profitable to the stockholders or otherwise. Such property is to be appraised in the same manner as the adjacent lands of individuals, and without reference to other parts of the railway." Mohawk & H. R. Co. v. Clute, 4 Paige, 395; Albany & S. R. Co. v. Osborn, 12 Barb. 225; Albany & W. S. R. Co. v. Town of Canaan, 16 Barb. 244. See, also, Sangamon & M. R. Co. v. Morgan Co., 14 Ill. 163; Tax Cases, 12 Gill & J. 117. Decisions under different statutes of course have no application.

The statute of New York, under which the decisions cited were made, gives a similar definition of real estate as that cited from the code of California, and provides that "all real and personal estate liable to taxation shall be estimated and assessed by the assessor at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." St. N. Y. (1851) 333. Section 3627 of the Political Code of California is substantially the same. It provides that "all property must be assessed at its full cash value;" and section 3617 provides that "the term 'full cash value,' means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." And the assessor must ascertain "all the property in his county subject to taxation, and must assess such property to the persons who own, claim, have the possession or control thereof."

That is to say, the property in each county must be assessed in that county, without reference to property in any other county, and the value must be estimated at the amount at which that particular land and improvements thereon would be "appraised if taken in payment of a just debt due from a solvent debtor," if taken by itself out of its connections. For it is that portion only that can be taxed and that can be sold, in any given county. In adopting the provisions of the statute of New York, the construction before put upon the statutes by the courts of New York must be presumed to have been contemplated.

The bill alleges that the railroad and its appurtenances were not assessed or equalized upon that principle in any of the counties whose collectors are made parties; but that, on the contrary, they "lumped said lands and superstructure and considered them as one thing, and ascertained their value by taking into account the franchises of said company and their value, the cost of construction, fills, embankments, tunnels, cuts, and snow-sheds, and the fact that said road extends from San José, in the state of California, to Ogden, in the territory of Utah —a distance of about eight hundred and seventy-five miles—and there forms a junction with the Union Pacific, and constitutes a part of a line of railways extending from the Pacific to the Atlantic Ocean, and the amount of business transacted by said plaintiff on said road, and the profits derived by said plaintiff therefrom; all of which, as complainants aver, was contrary to the rules prescribed by the statute of such state in such cases made and provided." If this is so—and, for the purposes of this motion heard upon the bill alone, the allegation must be taken as true—the assessment was made in direct violation of the provisions of the statute.

Upon the hypothesis alleged many elements were considered which the statute does not contemplate. In addition to other improper elements considered, such an assessment would be equivalent to taking the valuation of an undivided part of the whole road extending entirely across two states and a part of a territory, and in principle like the case of Sangamon & M. R. Co. v. Morgan Co., 14 Ill. 163. It would be taking into consideration value given to it by its connection with other property outside of the said counties, and even outside the state in which the assessments were made; or, in other words, assessing the entire road, including property outside of the several counties and state where the assessments were made, and then taking a proportionate part of the whole, corresponding to the number of miles of road situated in the particular county where the assesment is made. If the assessment had been made in the mode, and upon the principle prescribed by the statute without actual fraud, it would, doubtless, be incompetent for the court to inquire into any error of judgment in ascertaining the value, however gross it might be. The law has devolved upon the assessors the sole duty of determining the amount, and upon the boards of equalization the duty and power of equalizing, and their determination is final, provided they act in the mode and upon the principle which the statute requires. But they cannot depart from the mode or the principle prescribed, for when they do this, they act without authority. The court can only inquire as to whether they have pursued the statute. In this case, the allegations of the bill being taken as true, as they must be, as now presented, it is apparent that the assessment has not been made, or equalized in pursuance of the statute, either in the mode of assessment, namely, by assessing the land and improvements separately, or in the principle adopted for ascertaining the value. Section 3650 of the Political Code expressly provides for listing "all personal property, showing the number, kind and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment;" and section 3807 provides that "when land is sold for taxes correctly imposed, as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable." Thus it is provided, that a failure to mention in detail personal property, or to name the true owner of real estate otherwise "correctly" assessed, shall not vitiate the assessment; but we find no saving clause to protect an assessment substantially defective by a failure to assess in the mode, as to assess the land and improvements separately, and upon the principle prescribed by the statute—such defects as now appear to exist in this assessment. The maxim "expressio unius est exclusio alterius" would seem to be peculiarly applicable.

It has often been held by the supreme court of California, and the courts of other states, that taxes and street assessments not assessed in strict accordance with the provisions of the statute are void. The statute confers the power, and it affords the measure of the power. Smith v. Davis, 30 Cal. 537; Kelsey v. Abbott, 13 Cal. 618; Moss v. Shear, 25 Cal. 38; Blatner v. Davis, 32 Cal. 329; Taylor v. Donner, 31 Cal. 482; People v. Sneath, 28 Cal. 615; Falkner v. Hunt, 16 Cal. 167, 172, 173. See, also, Shimmin v. Inman, 26 Me. 228; Willey v. Scoville, 9 Ohio, 43; Blackw. Tax Titles, 176.

In our judgment, the several assessments in question have not been made in accordance with the provisions of the statute in the particulars indicated, and that on those grounds they are void.

But the mere fact alone that the tax levied is void, affords no ground for equitable relief. Are there any other circumstances al-

leged which present a proper case for equitable cognizance? The bill alleges that the several tax collectors, who are defendants, threaten to collect, and will collect the said several taxes by forced sale of the said railroad, fixtures and appurtenances, unless voluntarily paid by said Central Pacific Railroad Company; that they will sell the same and give certificates of sale and deeds to the purchasers, under the laws of the state; that said deeds will be conclusive evidence of the validity of said assessments, and the regularity of the proceedings thereon, and in that event the capital stock of said company, owned by defendant, will become valueless; or, if the said defendant, the Central Pacific Railroad Company, should pay said taxes to prevent said sale, the complainants will be deprived of a proper portion of dividends, etc. The Political Code provides for sales for taxes, and that certificates of sales, and deeds containing certain enumerated recitals, shall be given to the purchasers; and section 3786 provides that the deed so given shall be "primary evidence"—that is to say, prima facie evidence, or "that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." See Civ. Proc. 1833, that: "1. The property was assessed as required by law. 2. The property was equalized as required by law. 3. The taxes were levied in accordance with law. 4. The taxes were not paid. 5. At a proper time and place the property was sold as prescribed by law, and by the proper officer. 6. The property was not redeemed. 7. The person who executed the deed was the proper officer. 8. Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

"And conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." Section 3787. That such a deed would cast a cloud upon the title, if nothing worse, there can be no doubt. It would only be necessary for the plaintiff to produce his deed to show title. It would then devolve upon the defendant to show affirmatively, by evidence dehors the deed, such fatal defects in the assessment as it is admissible to show under the provisions cited, the deed itself being conclusive as to other particulars; and this brings it within the test by which the question is determined whether a deed would be a cloud upon title, established in this state, by the decisions of the supreme court. "The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property in an action of ejectment, brought by the adverse party, founded on the deed, be required to offer evidence to defeat the recovery? If such proof would be necessary the cloud would exist; if no proof would be necessary no shade would be cast by the presence of the deed." Pixley v. Huggins, 15 Cal. 133, 134; Thompson v. Lynch, 29 Cal. 189; Hager v. Shindler, Id. 47; Arrington v. Liscom, 34 Cal. 365.

This test is also recognized by implication by the United States supreme court, in Hannewinkle v. Georgetown, 15 Wall. [82 U. S.] 548. It is only necessary to introduce the deed under the statute to make out a title. It is not necessary to introduce the record of the prior proceedings, which show the invalidity of the assessment. In such cases, the court will interfere by injunction to prevent a cloud being cast upon the title. The court will injoin the casting of a cloud upon a title in cases wherein the cloud itself, when cast, would be removed. Palmer v. Boling, 8 Cal. 388; Fremont v. Boling, 11 Cal. 380; Pixley v. Huggins, 15 Cal. 127; Hibernia S. & L. Soc. v. Ordway, 38 Cal. 681, 682; Shattuck v. Carson, 2 Cal. 588; Guy v. Hermance, 5 Cal. 73; Englund v. Lewis, 25 Cal. 337; Alverson v. Jones, 10 Cal. 9–11; Petit v. Shepherd, 5 Paige, 501. In Dows v. City of Chicago, 11 Wall. [78 U. S.] 112. where a bill was filed by a stockholder of the Union National Bank against the bank and the city, to restrain the collection of a tax levied upon the stock, the complainant alleged only the invalidity of the assessment, without any special circumstances of equitable cognizance. The bill was not sustained expressly on this ground. The bank filed a cross-bill, in which it alleged that a sale of the stock would subject it to a multitude of suits, etc. The court, in deciding the case, say in regard to the cross-bill filed by the bank: "Were it an original bill the jurisdiction of the court might be sustained on that ground. But as a cross-bill it must follow the fate of the original bill." This case is, therefore, authority in favor of the proposition that a bill alleging equitable circumstances of a similar character to those alleged in this bill, in addition to the invalidity of the tax, will be sustained. We think that an act that results in casting a cloud upon the title of real estate is an ordinary ground of equitable relief, and that this bill, in addition to the invalidity of the tax, shows special circumstances sufficient to justify an injunction. Let an injunction issue, restraining proceedings, in pursuance of the prayer of the bill, until further ordered by the court.

HUNTON (GOODRICH v.). See Case No. 5,544.

Case No. 6,912.

The HUNTRESS.

[1 Phila. 122; 7 Leg. Int. 202; 4 Pa. Law J. Rep. 510; 3 Am. Law J. (N. S.) 307.]

District Court, E. D. Pennsylvania. Dec. 9, 1850.[1]

SALVAGE—COMPETENCY OF WITNESSES — WHAT IS SALVAGE SERVICE—COMPENSATION.

[1. A vessel rescued by a British naval vessel, and sent home in charge of an officer, was libeled for salvage; the officer suing for himself, and the British consul joining with him "for all other interests." *Held*, that while it would have been more regular to set forth the names of the other parties interested, or otherwise designate them in the caption, the defect was merely formal, being adequately supplied by the body of the libel.]

[2. A British naval vessel encountered, on the northwest coast of Africa, an American brig flying a signal of distress. The brig's captain was dead, and her mate dying of coast fever; and her crew, being ignorant of navigation, and worn out with fatigue and anxiety, were sailing at random along the coast. An officer was put on board, and the brig conducted to Fernando Po, where medical attention, water, and supplies were furnished by the British vessel. The brig, after being disinfected, was sent home in charge of an officer, with two additional seamen. In spite of the disinfection, the officer was attacked by the fever, and, after much danger and suffering, reached the United States broken in health. *Held*, that the service was in the nature of a salvage service, and entitled to an award of one-fourth the value of the vessel and cargo.]

[3. Where a libel is filed to recover for services which are highly meritorious in their character, a party claiming to be a salvor will be permitted to testify in his own behalf, without determining, by technical refinements, whether the service was strictly a salvage service or not.]

[See The Elizabeth and Jane, Case No. 4,356; The Boston, Id. 1,673; The Henry Ewbank, Id. 6,376.]

[This was a libel for salvage by Charles R. Robson and William Peter against the brig Huntress (John R. Rue, claimant).]

W. B. Reed and G. Harding, for libellants.

Mr. Williams and J. W. Biddle, for respondents.

KANE, District Judge. I have taken up this case out of its order on the calendar, because the transaction it grows out of was one of highly meritorious service, rendered to an American ship by the navy of a foreign power, and I understand that the officer who brought her in is remaining to represent the interests of the sailors. The libel is filed by Charles R. Robson, a lieutenant lately on board of H. B. M.'s ship Gladiator, for himself and William Peter, H. B. M.'s consul at Philadelphia, for all others interested, against the brig Huntress and her cargo, &c., in a cause of salvage, civil and marine. The material allegations which it contains are as follows: (Here the judge repeated the articles of the libel.)

The answer of the claimant, after excepting to the sufficiency of the libel, admits that the Huntress arrived at Philadelphia with Lieutenant Robson on board, as alleged in the libel; declares that her cargo was worth about eleven thousand dollars, and the vessel valued at three thousand six hundred dollars; denies knowledge of the other facts alleged, and calls for proof of them; and sets out a number of new facts, of which the respondent has been informed, which, if proved, would go to reduce the libellant's compensation. I shall consider first the objection which is made to the libel,—that it does not designate, with sufficient certainty, who are the parties on whose behalf the salvage is claimed. The objection is not tenable. One of the parties libellant (Mr. Robson) is himself a direct party in interest, and so represents himself; and the vessel, once brought into the custody of the admiralty upon his libel alone, would be retained here till all other interests had an opportunity of presenting themselves for a hearing against her. Were he the only party before me, and it came to my knowledge, either from the pleadings or the proofs, that other meritorious salvors were by force of circumstances prevented for the time from asserting their right formally against this vessel, I should have no hesitation in impounding in the registry such sum as they appeared entitled to, to await their legal demands. But this is not exactly such a case. The British consul makes himself a party "for all others interested"; and though it would certainly have been more regular to set forth their names, or otherwise designated them in the caption of the libel, yet the defect must be regarded as merely formal, since it is supplied adequately by the rest of the instrument.

The next question of law which I am called on to decide is, whether Mr. Robson can be heard as a witness. It is conceded that the services were meritorious, and that some of them approached closely to the character of salvage services; but it is contended that they do not amount to a salvage, properly so-called, and that the exceptional rule of evidence, which allows a salvor to testify in support of his own interest, cannot therefore be invoked in the case. There is no doubt a considerable part of Mr. Robson's deposition, which, as it goes to matters of hearsay and facts provable aliunde, it is my duty to reject from consideration, whether the case be one of salvage or not. But as to the rest, it matters little, in my judgment, what is the technical description of the service, if it partook so far of the character of a salvage as to imply the same necessity as that on which the rule is founded. How can it further the administration of justice between these parties, that I should refine upon the nomenclature of the law, and then reject the evidence under one artificial head of claim, that I would have accepted under another; the essential reason for my action being identical in the two cases, and having

[1] [Modified in Case No. 11,971.]

just the same bearing and force in each? There was supposed in former times to be a difference between the reward of salvage services and the reward of other services connected with the rescue, protection, and restoration of property. One was paid in the shape of a percentage on the value of the thing saved; the other by a quantum meruit. But this was little more than a nominal distinction; for the percentage in the one case was always measured in a great degree by the merits of the service, and the compensation in the other had more or less of reference to the value of the property. And of late years, even this formal distinction has been disregarded, and the decree of salvage is for a specific sum, as frequently as for a proportion of the value. I do not find from the books, that at any time the compensation for the two descriptions of service was ascertained by reference to differing rules of evidence; and I cannot imagine that it was so; for until the evidence had been received, it must often have been difficult to know whether the case belonged to one or the other category. This inquiry, however, is not necessarily involved in the case before me; for the facts which have the most important bearing on the claim are all of them proved, without reference to Mr. Robson. They are these: The Huntress, an American brig, trading on the northwest coast of Africa, was fallen in with by the Jackall, a steam tender to H. B. M.'s ship Gladiator. The brig had her flag hoisted, union down, the ordinary signal of distress. On boarding her, it was found that she had lost her captain, that the mate was dying with coast fever, and that her crew, entirely ignorant of navigation, were worn out with anxiety and fatigue. They had been sailing for four days at random, sometimes approaching the mainland, and then bearing away again to avoid running ashore, or to escape from piratical looking boats that sought to board them, and they were about to run into what they supposed the river Gaboon, but in fact a small inlet some two hundred miles further north, where they saw what they thought a French brig at anchor. Their vessel was a mere estray upon the ocean, at the mercy of the first finder, unless protected by his sense of justice. They were glad to give up the vessel and themselves into the charge of the commander of the Jackall, who put an officer on board, and conducted them to Fernando Po where the Gladiator was lying. Here everything was done for crew and vessel that hospitality and kindness could do, on the part of the British commodore and his officers. The surgeon came on board to the aid of the mate, but he was already dead. The vessel was supplied with water, medicines, and stores. An anchor was furnished her to replace one she had lost. The property on board was collected, carefully inventoried, and sealed up. Disinfectants were employed to remove or diminish the causes of diseases on board. And with the assent of the second mate, and in accordance with his opinion as to what was best for the owner's interest, it was determined to send her home to the United States. A lieutenant of the royal navy was placed on board to navigate her, and two men to complete her effective complement; three of her surviving company being at the time off duty in consequence of sickness. The coast fever, of which the mate, and probably the captain, also had died, is known to be in a high degree malignant. Notwithstanding the precautions which had been taken to disinfect the Huntress, and though Lieut. Robson, in obedience to the surgeon's directions, kept clear of the cabin as much as possible, sleeping on deck, and going below only to make out his reckonings, he was attacked by this disease a few days after leaving the coast, and struggled with difficulty, and through much danger against its effects until he reached this country. On his arrival here, sixty-nine days after leaving Fernando Po, he was a confirmed and broken-down invalid, so ill that his physicians considered him "unfit to be moved." It manifests a determined energy of character on the part of this gentleman, which is praiseworthy in a high degree, that in shattered and sometimes critical health, and with insubordination on the part of his only officer, the mate, he succeeded in conducting the vessel through so long a voyage safely home to her owner.

The facts which I have recited, and the few remarks I have made on them, present the three leading elements of salvage compensation in their application to the present case,—the value of the property exposed to hazard, the peril to which it was exposed, and the services by which it was saved. There is yet another element to be brought into the computation; but, before discussing it, I will take notice very briefly of one or two suggestions, that find a place in the answer, and have been expanded in the argument upon the evidence:

1. It is said that the Huntress should not have been sent home by Captain Adams, but should have been dispatched along the coast in search of a navigator, under whose directions she might have continued on her voyage. The answer is complete: 1. It does not appear by any means probable that such a navigator could have been found. 2. Had there been one, it would have been most improper to confide property consisting in great part of coin and gold, to a stranger, and transfer to him the personal trust of dealing with it at his discretion. 3. The mate, who, by the death of his superior officers, has become the owner's representative, preferred that the vessel should be sent to the United States.

2. It is said, on the authority of the mate, that the vessel had a consignee at Sierra Leone, to whom she might have been sent,

and that she had besides a consort at the island of St. Thomas, one of whose officers might have brought her home if she had been taken there. But the letter of instructions, found on board the vessel, proves that she had no consignee, and a comparison of dates shows that the vessel referred to had left St. Thomas; besides which, if these facts were otherwise, the opinions expressed by the mate, when he was called into conference with Captain Adams, would have destroyed their effect.

3. It is argued that the salvage was complete when the vessel reached Fernando Po in safety, and that the services of Mr. Robson in conducting her to the United States, were merely those of an ordinary navigator, and to be paid for as such. The evidence is, that there are but three white residents on the island, one of whom is the governor, and another the British consul; and that the mate, after making inquiry by Captain Adams' direction, found that no navigator could be procured there. It is vain to say that the service was complete under these circumstances; but that the lives of the crew were now safe from the hazards of wreck, the vessel might almost as well have been left adrift on the high seas, as abandoned at Fernando Po.

Indeed, as to this, and the other suggestions which I have noticed, I must frankly say, that had the conduct of Captain Adams been in accordance with them, it would have wanted much of the merit which I now ascribe to it. Had he sent the brig on a vague and roundabout hunt for a consignee, —expensive of course, and certainly fruitless,—or had he trusted her, with her cargo, to some navigator enlisted by chance, on a coast rife with piracy, or had he, after securing her safety, left her at Fernando Po, with her crew of half-breeds and negroes, to eat up or spoil upon the property of her owner, or had he even followed the example which was cited from our diplomatic records, and detained her while he could arrange by contract the just value of the services he had rendered, and was about to render, I apprehend that a court of admiralty would have been very reluctant, indeed, to table a large decree in his favor. It is to his praise that what he did was the reverse of all this; it was well judged, liberal spirited, sedulously protective of the interests which misfortune had cast upon him, and justly confiding withal towards the country whose citizens he had relieved or rescued. And this conducts me to the remaining consideration which should have influence on my decree. What obligations were there resting upon these salvors, to do as they have done? Absolutely none but those of human fellowship. They were strangers, subjects of a foreign power, at a great distance from home, armed and cruising for a special object, requiring their full complement of men to man prizes, and meet the ordinary casualties of a sickly climate. It illustrates well the advancing civilization of the age, that alien flags are thus summoned on distant seas to perform offices of brotherhood, and the armament of war is found ministering to the charities of man. The considerations are higher and more noble than any of policy, that prompt us to foster the spirit which these salvors manifested by their conduct. Still, the task of adapting to it a pecuniary compensation is not the easier on that account. It refers itself largely to the judicial discretion. It is impossible to find in an adjudged case circumstances altogether parallel to those of the case before us. The Charlotte Wylie, 2 W. Rob. Adm. 495, which was supposed to resemble it, was that of an English vessel, relieved and sent home by a cruiser of her own nation. Her condition, too, was much less perilous; for she had an officer of her own on board, capable of navigating her, and those who brought her to England did not suffer in health. The Amistad, 15 Pet. [40 U. S.] 518, approaches nearer to our case; but that had some of the features of a military service; there the decree was for one-third. Referring myself particularly to the opinion of the supreme court in Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, and to the remarks of Mr. Justice Washington in deciding Bond v. The Cora [Case No. 1,621], and those of Mr. Justice Story in Tyson v. Prior [Id. 14,319], I think I shall not depart widely from the principles which have governed our courts in cases of civil salvage, if I allow to the salvors one-fourth of the value of the property saved, after deducting the charges against it. These are as follows:

To Captain John Adams, of H. B. M. ship Gladiator, for an anchor, water, stores, &c., put on board at Fernando Po, £20. 3s.		$ 93 34
To Lieut. Charles R. Robson, R. N., for his board here while sick, physician's bills, and passage home, £81.		395 00
To Richard Palmer, one of the seamen detached from the Gladiator, for his wages on the voyage from Fernando Po, £6; for his passage home, £5.		53 68
To Portuguese seaman (not named) who was shipped at Fernando Po, for his wages, £6.		29 30
Making of charges the sum of....		$576 32
Deducting which from the value of the Huntress	$ 3,600 00	
And her cargo.....	11,000 00	
		$14,600 00
Leaves		$14,023 68

One-fourth part of which, amounting to $3,505.92, I award as salvage. And this sum I apply and apportion as follows, viz.: 1. To pay to the proctors and advocates who have acted for the libellants in this court, such sum as may reasonably be due to them for their services. 2. Of the residue, one-third to Lieut. Charles R. Robson, in consideration of his loss of emoluments by

reason of taking charge of the Huntress, and of his meritorious personal services in bringing her, with her cargo and crew, to this port. 3. The remaining two-thirds to Captain John Adams, and the officers and crews of the Gladiator and Jackall, including herein Lieut. Robson,to be distributed according to the regulations and usages of H. B. M.'s naval service. And I direct that the said two-thirds do remain in the registry of this court, until letters of procuration shall be exhibited in due form of law to receive the same, or until further order. And I further decree that the remaining three-fourths of the value of the brig Huntress and her cargo be charged with the taxable costs of this case, and that the residue thereof be paid to the claimant, John R. Rue. Decree accordingly.

[On appeal to the circuit court the decree of the district court was modified, as respects the amount of salvage awarded. See Case No. 11,971.]

Case No. 6,913.

The HUNTRESS.

[2 Spr. 61.] [1]

District Court, D. Massachusetts. Feb., 1863.

COLLISION—ORDERS BY OFFICERS OF INJURED VESSEL.

Where a collision occurred in consequence of the third mate of one of the vessels obeying a direction given at the time by the master of the other vessel, *held*, that the owners of the latter vessel could not sustain a claim for damages.

This was a libel against the bark Huntress, for damages occasioned by a collision with the bark Roscius owned by the libellant and others. The libel alleged that the collision occurred by the carelessness and mismanagement of the Huntress, and through no fault of the Roscius. The answer denied that the Huntress was in fault, but contended that the accident was occasioned by the mismanagement of the Roscius, and especially by reason of an order given by the master of the Roscius to the officer in charge of the deck of the Huntress, and which was obeyed by the Huntress.

R. C. Pitman, for libellant.
W. W. Crapo, for respondents.

SPRAGUE, District Judge. While I have no doubts about the law governing this case, I have had a good deal of difficulty as to the facts. The evidence is very contradictory as to these, and is still more so in respect to matters of opinion and inference. This is not extraordinary, for the evidence necessarily comes from the two vessels, and for that reason is naturally conflicting, and often extremely difficult to reconcile.

There are, however, in this case some facts about which there is no controversy. The collision occurred on whaling ground off the Rio de la Plata; it was in the night about ten or half past ten o'clock; the Roscius was on the port tack and the Huntress on the starboard tack. How close-hauled they were, only appears by the statement of both, that they were close-hauled. If a vessel is making a passage, where time is of consequence, the helmsman is more careful than in the case of whale-ships on cruising grounds. Merchant ships would be more careful about courses than whale-ships.

The officers of both ships were for the most part below. This is usual in the whaling service. In this case both vessels had officers on deck higher than boat-steerers. That the third mate of the Huntress, who had charge of the deck, was not competent, is an inference from the events only; and it appears by the direct testimony, that he was competent, and his competency can be inferred from his position. I think no fault attaches to either vessel from the incompetency of the officers in charge, or from the other officers of either vessel not being on deck at the time. It was not a case of inevitable accident, and the decision must rest on the management of the two vessels. The vessels were not running a race; there was no sort of importance which vessel went ahead or behind; there were no advantages to be derived from positions, as in the case of vessels making passages; there was light enough to see, and the vessels were seen. The collision then must have occurred by mismanagement.

In what did that mismanagement consist? It is contended by the libellant, that the Huntress being on the starboard tack did not keep her course. That is the allegation. On the other hand, the Huntress contends that she was keeping her course, but that an order was given by Captain Howland of the Roscius, which was obeyed by the Huntress, and that obeying this order, and the mismanagement of the Roscius, caused the collision. To this it is replied by the Roscius, that if such was the cause of the collision, the third mate of the Huntress had no right to obey it, but should have followed his own judgment.

I do not think that, if Captain Howland of the Roscius gave a wrong order and it was obeyed, he can say that it should not have been obeyed. The giving of the order was an assurance by Captain Howland to an inferior officer that if his directions were followed, there would be no collision. The owners are responsible for the acts of their master. Therefore, if it shall appear that obeying the order of Captain Howland caused the collision, my opinion is the libellants cannot recover. Let us look at the question of facts. There can be no doubt that the order was given, as it is admitted by the master, that he directed the Hun-

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

tress to put her helm hard down. Was it obeyed? The evidence is contradictory. Every witness of the Roscius says, the Huntress put away before wind and ran into the Roscius, head on. On the other hand, every witness of the Huntress says the Huntress did not put away, but put down her helm and backed her maintopsail, that she then came into the wind, then fell off, lost her headway, and, before gaining it, came in contact with the Roscius. Every witness of the Roscius says the Roscius had her helm put up to avoid collision, her foretopsail aback and her maintopsail shivered, and that the Huntress bore right down to them,—that she must have put up her helm.

Now the court must form an opinion in this case from facts about which there is no controversy. The collision was practicable from either course. The experts make it obvious that the collision might occur in the manner stated by the Huntress, and we know it might occur in the manner stated by the Roscius. In deciding between these two ways, let us look at the mode in which these vessels came together.

We find from the evidence of both parties, that the bow of the Huntress just came in contact with the Roscius' flying jib-boom guy, and then the vessels separated. Then the Huntress struck the cat-head of the Roscius, and they separated again, and next the Huntress struck the forerigging of the Roscius, and swept along, taking away boats, davits, rail, &c., until the Huntress' anchor caught in the Roscius' rigging, holding the two vessels together.

With what force did the Huntress first strike the Roscius? This is important. Both vessels were under short sail. The Huntress had doubled reefed maintopsail, foresail, and foretopmast-staysail. The wind was a good whole-sail breeze. Now, if the theory of the Roscius is correct, the Huntress being on the starboard tack with these sails and the wind, if she had fallen off before the wind, her headway would not have been deadened. Then she must have come into the other vessel with much concussion, and the first contact must have been the heaviest. But, by the evidence, there was no shock at all. There was the mere parting of a guy. The protest confirms this. What next? Captain Howland says his vessel was next struck on the cat-head. But the cat-head was not injured. Hence the blow could not have been severe. The third time there was more damage,—the boats were injured, and the studding-sail booms and the forerigging; according to the evidence, the blow broke the ratlings, which does not indicate a very heavy shock. Now the vessels swung side by side. As the Roscius forged ahead, the Huntress, although she had no headway, would be brought down by the stern of the Roscius, until her anchor caught in the Roscius' rigging, thereby holding the vessels together. How extensive was the damage from this contact? There was no cutting down the Roscius, as might have been supposed from a vessel of the size of the Huntress if coming before the wind; but, on the contrary, they came in contact as though thrown together by the motion of the waves. There is nothing in the collision which indicates the momentum of a vessel propelled by sails.

Was the Roscius under sail? On this point there is some doubt. Taking the testimony of Captain Howland, I think the headway of the Roscius was stopped in a great degree by shivering her mainsail and hauling her headyard aback; but afterwards, bracing forward the headyards, she would get headway, although slow. The Roscius was in motion. If either vessel had headway, it was the Roscius, and, when the Huntress came down drifting towards her, the Roscius may be said to have run into her,—a very gentle motion, and which produced no very great shock.

The opinions of the witnesses of the Roscius, who say that the Huntress was coming down with such violence that they expected the Roscius would be cut down, is not borne out by the event. They mistook the motion of their vessel for that of the Huntress. They simply mean that the two vessels were approaching each other. This erroneous impression is quite natural, considering the darkness of the night. It is very probable all they saw was the light of the Huntress, as the protest states it was a very dark night.

But more than this. In the protest made at St. Helena in 1860 a short time after the accident, it is stated that the Huntress came down and struck the Roscius between the main and fore rigging; but no mention is made of her striking twice before this as is shown by the evidence, showing conclusively that they did not regard the striking of the guy, and then the cat-head, as of much consequence.

I am of opinion, that the Huntress did not come in contact by putting up her helm, but that the collision was produced as contended in the answer, that the order was given and obeyed, and in consequence of it she managed as described by the Huntress' witnesses and experts.

Upon the whole, I am of the opinion that the Huntress was not in fault, and that there would have been no collision but for the order of Captain Howland. The question is involved in difficulties. I have given it great study, but further evidence might show me to be in error.

It has been suggested that the third mate of the Huntress should have called Captain Allen, but suppose he had done so. I do not see how that would have helped it, as the Roscius cannot make the Huntress pay for an injury caused by themselves. Besides this, it is possible that the helmsman

of the Roscius might have made a mistake, and put his helm down instead of up, when he supposed the vessels had passed. The helmsman was not called. Mr. Hunnewell, the mate of the Roscius, says the helm was up; but he could not have known this, he simply believes it to be so. In this case there is a difficulty to be solved, and I select that solution which is the least improbable. The libel is to be dismissed with costs.

Case No. 6,914.

The HUNTRESS.

[2 Ware (Dav. 82) 89; 4 West. Law J. 38; 4 Hunt, Mer. Mag. 83; 24 Am. Jur. 486.] [1]

District Court, D. Maine. Nov. 5, 1840.

COMMON CARRIERS—WRONG DELIVERY—MARITIME JURISDICTION OF ADMIRALTY COURTS—JURISDICTION OF FEDERAL COURTS UNDER THE CONSTITUTION.

1. The owners of a steamboat, employed in carrying passengers and merchandise between port and port, are responsible to shippers of goods, as common carriers.

2. Common carriers must, at their peril, deliver goods which they carry to the right persons, and if they make a wrong delivery, they will be responsible for any loss which may be thereby occasioned.

[Cited in The Drew, 15 Fed. 830.]

3. It is the duty of the owner of goods to have them properly marked, and to present them to the carrier or his servants, to have them entered in their books; and if he neglects to do it, and there is a misdelivery and loss in consequence, without any fault of the carrier, he must bear the loss.

4. But the carrier is not discharged from all responsibility, as to the delivery, by such neglect, but if there is a wrong delivery or a loss through any warrant of reasonable caution on the part of the carrier or his servants, he will be responsible.

5. A contract for the transportation of goods on the high seas, when it becomes a subject of litigation, is a case of maritime jurisdiction, within the meaning of that clause of the third article of the constitution, which extends the judicial powers to "all cases of admiralty and maritime jurisdiction."

[Cited in Gloucester Ins. Co. v. Younger, Case No. 5,487; Marsh v. The Minnie, Id. 9,117.]

6. In that clause, the terms "admiralty" and "maritime" are not synonymous. Each has its appropriate use.

7. In the grant of this jurisdiction, it is to be presumed that the words are used in the sense which they had in this country at the time when the constitution was adopted.

8. Where, in the constitution, technical terms of law or jurisprudence are used, which are common to our own law and to the law of England, if there is a difference of signification in the two countries, the meaning which they have in our own country is to be preferred.

9. The jurisdiction of the admiralty courts in this country, at the time of the Revolution, and for a century before, was more extensive than that of the high court of admiralty in England.

10. It is a rule in the interpretation of all contracts and other instruments, that if there is anything ambiguous in the terms in which they are expressed, they shall be explained by the common use of those terms in the country where they were made.

11. The terms "admiralty" and "maritime" belong to the law of nations, as well as to our own domestic law, especially admiralty. A court of admiralty is a court of the law of nations, and derives, in part, its jurisdiction from that law. The constitution may, therefore, refer to the law of nations for the meaning of these terms, as constituting part of our own law.

12. One of the rules acted upon by the convention, in the grant of powers to the national government, was to make the judicial coextensive with the legislative power. The regulation and government of maritime commerce is given to the legislature, and by taking the word "maritime," in this clause of the constitution, in its usual and natural sense, the judicial power is made coextensive with that of the legislature.

13. The contemporaneous construction of this clause in the constitution, by the Federalist, by congress—by a series of decisions of the supreme court—and by the uniform practice of all the courts of the Union, continued for sixty years, negatives the hypothesis, that the admiralty and maritime jurisdiction, under the constitution, is identical with that of the high court of admiralty in England; and consequently negatives the assumption, that we are to look for the definition of these words of our constitution, to the statute laws of England as they are enforced by her courts.

This was a libel in personam against the owners of the steamboat Huntress, for the loss of a box of goods shipped by the libellant at Boston, to be delivered to him at Portland. The Huntress was regularly employed in running between Boston and Portland, for the transportation of passengers and goods. The libellant shipped on board of her at Boston, on the 30th of June, three boxes to be carried to Portland, and at the same time he took passage in the boat himself. The boxes all arrived safe, were landed, and put into the storehouse on the wharf. Bonney, the libellant, paid the freight, had them put in a hand-cart, and ordered them to be carried to the Elm tavern. He then went to the tavern, leaving the porter to follow him with the boxes. After he had left the wharf, one of the boxes was claimed by a female passenger as part of her baggage. The mate, with one Adams, a passenger who appeared to be traveling in company with the woman who claimed the box, came on shore, and Adams pointed out the box, and they took it from the porter and carried it back on board the boat. On the box being shown to the woman, she pronounced it to be hers, and said that it contained wearing apparel. It was delivered to her, without any examination of the contents, and she being bound to Hallowell, it was carried on board the Thorn, another boat, which took the passengers of the Huntress which were bound to the Kennebec, and with her carried to Hallowell. This box, it is alleged, contained thirty bonnets, one hat, and ten pieces of Florence platt. The mate, then, thinking

[1] [Reported by Edward H. Daveis, Esq. 4 West. Law J. 38, contains only a partial report.]

that there either was some mistake or fraud, took the other two boxes and carried them back to the boat. Bonney, having been informed by the porter that there was some mistake about his goods, returned to the boat to inquire into the difficulty. After some conversation with the clerk, the two boxes which remained were restored to him, and the clerk wrote to the agent at Hallowell, to look after the other box, and Bonney went there in pursuit of it. When he arrived at Hallowell, the agent sent for the woman who had taken the box, and she said it was taken by mistake. She went away, and, on being sent for again, was not to be found, but had left the place, and carried one of the bonnets with her. On inquiry, it was ascertained that she had sold the ten pieces of Florence platt, the hat, and three bonnets. The price for which one of the bonnets was sold, $6.25, was brought to the agent. Twenty-five bonnets remained in the box, most of them in a damaged state. The agent offered to return them to Bonney, but he refused to receive them, unless he was paid for the damage and for the articles missing. The clerk of the boat, who was examined as a witness, stated that it was his custom to stand on the wharf to receive the freight which was offered, and that he entered it all in a book kept for that purpose, except small packages, which were carried into the office; that he had no account of the boxes of Bonney in his book, and had no knowledge of their being in the boat until after she arrived at Portland. A notice was posted up in the boat, that no freight would be received within an hour of the time that the boat is advertised to leave the wharf, and requiring all freight to be intelligibly marked, or it would not be received; but the actual knowledge of this notice was not brought home to the libellant. An advertisement was also published in the Portland papers, but it contained no direction as to receiving, or marking, goods for freight. The clerk stated, that the two boxes detained had no marks upon them by which they could be known, but that Bonney pointed out to him his name written with a pencil upon them, but that the lines were so faint and indistinct as to be nearly illegible, and that if he had seen them in the store-house in Boston, he should have left them as unmarked goods. The mate, who delivered the other box to the female passenger, stated that it had no mark upon it, and stated the circumstances of the delivery of it to the woman somewhat differently from the libellant's witness. These differences are noticed in the opinion of the court.

Mr. Fox, for libellant.

W. P. Fessenden, for respondents.

WARE, District Judge. Upon the facts proved in this case, the libellant claims to recover of the owners of the boat, the value of the merchandise he has lost, as he alleges, through the carelessness and misconduct of their agents. There can be no doubt that the owners of the boat are subject to all the liabilities of common carriers. It is proved that she was regularly employed in running between Portland and Boston, for the conveyance of passengers and merchandise. A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. 2 Kent, Comm. 598; Dwight v. Brewster, 1 Pick. 50. Undertaking, as he does, to carry goods for all persons, he is considered as engaged in a public employment, and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal. Story, Bailm. § 502. The law, for strong reasons of public policy, holds him to a very rigorous responsibility. He is answerable not only for his own acts, but for those of his agents and servants. Among the obligations which common carriers take upon themselves, as resulting from the nature of their employment, is that of delivering the goods, when they are transported to the place of destination, to the proper person. If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner. Golden v. Manning, 3 Wils. 429; Garnett v. Willan, 5 Barn. & Ald. 53. And when the goods are lost or damaged, the onus probandi is upon the carrier, to prove that the loss was occasioned by some cause for which the law will excuse him. Story, Bailm. 529. It is in evidence, that the box in question belonged to the libellant, that a part of its contents has been lost, and that the greater part of what remained has been materially damaged, and the burden of showing that the loss and damage occurred under such circumstances as will exempt the owners from their responsibility, is thrown upon them.

The counsel for the respondent contends, in the first place, that the box had been delivered to Bonney, and that they were therefore discharged from all their liabilities. The facts, as they are stated by the libellant's witnesses, Watts, the keeper of the store-house, and Potter, the porter, are that the three boxes were landed and put into the respondents' store-house; that Bonney employed a porter to carry them to the tavern, and had them put in his cart; that, after he had left the wharf, a claim being made, by by another passenger, of one of the boxes, the mate came on shore with Adams, and they took the box, carried it again on board the boat, and delivered it to the woman who claimed it. Now, if it should be admitted that here was such a delivery as would discharge the owners from all further responsibility, had nothing more been done, although the box had not been actually removed from their store-house, it is quite as clear from

this evidence that the delivery was revoked, not merely as to the box in question, but as to all of them. It is quite impossible to put any other construction upon the act of a mate, in taking all the boxes and replacing them on board the boat, after Bonney had left the wharf, than that it was a revocation of the delivery. The goods were again in the possession of the respondents, by the act of their servants, and all their responsibilities as common carriers re-attached. It was contended at the argument, that the goods having been once delivered, the retaking of them was the private and unauthorized act of the mate, for which the owners are not accountable; and if there is any responsibility, it is only the private and personal responsibility of the mate, or of the mate and Adams. But the mate did not interfere in the business as a stranger; he interposed in his quality, and with the authority of mate, and as a servant of the owners, having a right to retain the goods. It is the appropriate duty of the mate to superintend the loading and unloading of the goods taken on freight. It is true, that if a dispute arises between different persons claiming the same goods, the proper person to decide this dispute is the clerk, because he takes the account of the goods. But if the mate volunteers to decide the dispute, and delivers them to a wrong person, the most that can be said is, that he is acting beyond the line of his proper duty, and may be answerable to his employers; but they are responsible to the owner, for they are as much responsible for the acts of their servants as for their own.

The mate in his deposition, gives a different account of the affair. He says that Adams informed him that a man had taken a wrong box on shore, and he then went ashore, and took and carried it on board the Thorn. Afterwards, he adds, that upon reflection he is satisfied, that Adams went ashore and took the box on board the Thorn, before speaking to him; that he then went on board the Thorn, examined the box and found no mark upon it; that he asked the woman if it was hers, to which she replied that it was, and had wearing apparel in it. Without opening the box to verify her statement, he allowed her, upon her word alone, to retain the box, and she carried it with her to Hallowell. Now, in the first place the testimony of the mate is objected to, as that of an interested witness. He, with Adams having taken the box from the porter and delivered it to a wrong person, without consulting and taking the direction of the clerk, it is argued, is answerable over to his employers for any damage which may be recovered against them, and has therefore a direct interest to prevent a recovery. And if it be conceded that he exculpates himself by his own statement, that is overcome by the plain, direct, and positive testimony of two disinterested witnesses, by whom he is flatly contradicted. My opinion, upon the facts which have been proved is, that if there had been a delivery, it was revoked by the same authority by which it was made, and that the respondents are not for that cause exonerated from their responsibilities as common carriers.

In the second place, it was contended at the argument, that the owners of the boat are not responsible, because no contract of affreightment for the carriage of the goods intervened between the parties, but that they were surreptitiously put on board by the libellant, or by his procurement, without the knowledge of the clerk of the boat, and without being properly marked so that it could be known to whom they belonged. No evidence was offered to show by whom or by what means the goods were brought on board. They were not brought to the notice of the clerk, and were not entered on the freight list. The contract of affreightment, or that for the transportation of goods by a common carrier, like all other contracts, requires for its completion the consent of parties, either express or implied. If goods, says Pothier, are put on board a vessel without the knowledge of the master, there is no contract, and consequently no obligation on one part or the other; and therefore the master, who finds the merchandise in his vessel, may put it ashore, and charge the expense of unlading to the owner. The French legislation has provided for this case by a special article. The master may discharge the goods found on board his vessel, without being made known to him, or he may carry them, and charge the highest freight paid for merchandise of the same quality. Ordonnance de la Marine, liv. 3, tit. 3, art. 7. Valin and Pothier teach us that, if he does not discover them until after he sails, provided the vessel is overloaded, he may discharge them, at an intermediate port, before the end of the voyage, leaving them in the hands of some solvent merchant, and giving the owner notice; but if the vessel is not overcharged, he ought to carry them to the port of destination. 1 Valin, 647; Pothier, Traité de Contrat de Charter Partie, Nos. 10, 12. This obligation does not arise from the contract of the parties, because no contract has intervened, but results from the principles of natural law, the great law of social charity, which commands us on all occasions to promote the well being of others, when it can be done without a sacrifice for ourselves, and not to do an act, though permitted by the positive law, which will be materially injurious to another, without any corresponding benefit to ourselves. The Code de Commerce adopts the morality of Pothier, and confines the right of the master to discharge the goods at the port where they are laden. No. 292, 2 Boul.-P. Dr. Com. p. 373, tit. 2, § 5. If these principles ought to govern in the case of a common freighting vessel, and they are recommended as well by public convenience as by their pure and honorable morality, they apply with much greater force to cases like the present. The boat

was, in the strictest sense of the word, a common carrier, making her trips daily between Portland and Boston. Her goods on freight were owned by a great variety of persons, were brought in small quantities, loaded in a hurry, ordinarily without the formality of a bill of lading, and often, as in this case, accompanied by their owners. The owners of the boat, by the nature of their employment, engaged, and were bound to take the goods of all persons who offered them, without any special contract for that purpose. Holding themselves out generally, as ready to carry freight or passengers, the public have a right to take them at their offer, and they are not at liberty to refuse, without good cause; and those who wish for a passage, or have goods to be transported, need not take the trouble to make a contract beforehand. They understand that the master is bound to allow them a passage, and to carry their merchandise, unless he has some valid excuse, and they go down to the boat prepared to go on board and take their goods with them. Now it appears to me, that if the goods are put on board in the ordinary manner, a contract results from the fact itself. In the present case, the owners of the boat held themselves out as ready to carry freight for all persons generally, and if the libellant had his goods carried to the wharf, and they were taken on board in the usual course of the business, as other goods were, he accepted their offer, and it appears to me that the contract was complete; but if it was not, it was ratified and made perfect by the payment and acceptance of the freight. This was the decision of the Roman law. Whether the goods, says Ulpian, are shipped by a bill of lading or not (for this seems to be the meaning of ei assignatae, translated into modern nautical phraseology), the contract is complete by the simple fact that they are laden on board; the carrier becomes responsible for their safety.[2]

It is true, that if goods are furtively put on board by the owner, and there is an apparent desire to conceal them, a presumption would naturally arise, that the owner intended to defraud the carrier of his compensation for his services. Such conduct might rebut the presumption of an implied contract, and a question might be made whether the acceptance of the freight was a waiver of the wrong, so as to subject the carrier to all the responsibilities which would result from a contract. But that question does not arise in this case, because there is no evidence tending to create any suspicion of that kind, against the libellant. Regularly, without doubt, the clerk of the boat ought to be notified, and, for his own security, the shipper ought to see that his goods are entered on the freight list. But in the hurry and confusion in which the business is often done, it would be a harsh presumption to assume that fraud was intended from this neglect alone. It is certain, also, that the goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if, in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustains a loss, or any inconvenience, he must impute this to his own fault. It is certain, that the box had not such plain, intelligible marks upon it, as would readily point out the owner. He probably thought, as he was in company with his goods, that this was of less importance. But it was a fault on his part, and the natural and necessary consequence of that fault he must bear. But his fault will not excuse the fault of the carriers or their servants. They are not liberated from all care and responsibility, because the shipper has not placed proper marks on his goods. Bonney took, and paid the freight of, the three boxes. They were landed, and he had them delivered to a porter, and ordered them to be carried to his lodgings. Here was abundant proof that he claimed them. But now, after Bonney had left the wharf, in the confidence that his goods would follow him, comes forward another claimant. She gave no better proof of title than Bonney. If the box was not marked for him, neither was it for her. Yet without any examination, without even taking the trouble to open the box, and see whether it contained, as the woman alleged, her wearing apparel, and in the absence of Bonney, who had paid the freight to the mate himself, it was delivered over to her. No one can hesitate to say, upon the simple statement of the facts, that there was, in this, undue precipitancy and a want of due caution on the part of the mate. Nor will any man of ordinary prudence and caution, pretend, that this is the way in which opposing claims to property ought to be settled. The woman passenger had declared what the box contained, if it belonged to her. If Bonney had been sent for, and the question had been asked him, the adverse claims would have been satisfactorily settled on the spot. The delivery to one of the claimants, in the absence of the other, without any further inquiry, was a gross fault on the part of the mate, and as the owners of the boat are responsible for the acts of their servants, it is imputable to them. My opinion, therefore, is, that the owners are liable. And as the respondents refused to make him any compensation for the loss and damage of his goods, he was justified in leaving them upon their hands, and looking to them for their value. Decree for libellant.

NOTE.—In this case the question of jurisdiction was not raised by the counsel, nor adverted to by the court. The competency of the court to pass upon such questions had been, in this district, maintained in several cases in which the same general question

[2] Recipit autem salvum fore, utrum si in navem res missae ei assignatae sunt, an etsi non sint assignatae, hoc tamen ipso quod in navem missae sunt receptae videntur. Dig. 4, 9, 1, § 8.

was involved. Here it had been supposed, that a contract for the transportation of goods on the sea was clearly within the jurisdiction of the court, as a maritime contract. If in the clause in the constitution, repeated in the judiciary act, "all causes of admiralty and maritime jurisdiction," the word "maritime" has any meaning and was not used merely for the purpose of rounding the phrase, it must include such a contract; and we are not gratuitously to suppose that words, in the constitution, were used without meaning. Besides, the service of the seamen is not denied by any to be a maritime service, and as such a proper subject of maritime jurisdiction. This service consists in the transportation of the goods. The ship-owner, as a carrier, performs it by his servants, the master and ship's company. To admit the jurisdiction in one case, and deny it in the other, is to affirm of the same service, that it is and that it is not maritime, or else to affirm that the term maritime, as used in the constitution, is an unmeaning expletive, a supposition so preposterous, not to say indecent to the memory of the illustrious statesmen who framed that instrument, that it is not to be for a moment entertained.[3]

But in the recent case of New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. [47 U. S.] 344, agreeing precisely in its principal features with this case, the question whether the court had jurisdiction over the cause, as one arising on contract or growing out of a maritime service, was raised by counsel, and argued at great length. The libel was sustained, and the jurisdiction of the court vindicated in a very able opinion of Mr. Justice Nelson, on the ground that the contract and the service were maritime, and his opinion had the concurrence of three of the other judges, including the chief justice. Two of the judges concurred in the judgment on the ground of tort, and one denied the jurisdiction altogether. The authority of the court to take jurisdiction in these cases being brought into such grave doubt, it seems not inappropriate to add, as a sequel to the opinion on the merits of this case, a few observations on this subject. If they have no other value, they will serve to show that the jurisdiction, over such cases, has not been taken by the court without some consideration and reflection on the subject.

In these, and in analogous cases, the only question that can be considered as an open one is, whether they come within that clause of the constitution which says, the judicial power of the United States shall extend to "all causes of admiralty and maritime jurisdiction." If they do, then the original cognizance of them is, by the ninth section of the judiciary act, given to the district court. The question then carries us back to the constitution; and if we are to apply, to the interpretation of that, the same rules and principles which courts apply to the interpretation of all other instruments, it is difficult to conceive where the most subtle ingenuity will find a loop to hang a doubt on. No court ever pretended to an authority to strike from a solemn instrument any word that had a plain and sensible meaning in the place where it was found, unless it was repugnant to the tenor of the whole instrument, or plainly and irreconcilably contradictory to some other part of it. Such a decision can stand on no other grounds than the hoc volo, sic jubeo. It must then be conceded, unless this can be made apparent, that the word maritime stands a part of the constitution, either as a significant word, or an unmeaning pleonasm.

I do not now recollect, that it ever has been seriously contended, that such causes can be excluded from the jurisdiction of the courts of the United States, by any interpretation of the words of the constitution, taken by themselves. The argument, that this clause is controlled by the seventh amendment, which secures the right of trial by jury in all suits at common law, where the value in controversy exceeds twenty dollars, has no application to the constitutional grant; because these are not suits at common law; and further, because congress may provide for the intervention of a jury, on the trial of a cause on libel and answer, as well as in a suit according to the forms of the common law. And if the objection has any weight, it applies, with precisely the same force, against the jurisdiction in all cases in equity. Accordingly we find that those who deny the jurisdiction, drop all the ordinary rules of interpretation of written instruments, and resort to matter dehors the constitution, to determine the meaning of this clause. It is contended, that we are not to take the plain and obvious meaning of the words, nor to interpret them by reference to other parts of the same instrument, but that their meaning is to be ascertained by a reference to the usages, jurisprudence and laws of England, usages that never prevailed, and laws that were never in force here.[4] In a word, that

[3] If the word "maritime" is merely exegetical of "admiralty," one word includes the other, and they may be used interchangeably. Admiralty is maritime jurisdiction, and maritime is admiralty jurisdiction, without limitation or exception. But it is well known that the admiralty jurisdiction is twofold, a prize jurisdiction exercised jure belli, extending to all captures in war, as prize, whether on sea or on land; and a civil jurisdiction over causes civil and maritime, springing from a consideration purely maritime. They are so distinct that it has been doubted, in England, whether the judge of the admiralty court can exercise both jurisdictions under one commission. 2 Brown, Civ. & Adm. Law, c. 1, p. 29; Id., c. 6, p. 208; &c.; Lindo v. Rodney, Doug. 613, note. The addition of the word "maritime," in the constitution, closes the door against all doubt or cavil whether both branches of the jurisdiction are granted. See 2 Brown, Civ. & Adm. Law, 210.

[4] For more than a century before the formation of the constitution, that is, from the early part of the reign of Charles II. revenue causes had been heard and tried in the colonies by courts of vice admiralty. How extensively the

the framers of the constitution meant, by the words "all causes of admiralty and maritime jurisdiction," precisely that jurisdiction that was exercised by the high court of admiralty in England. In our jurisprudence, these terms, certainly the former, "admiralty," had always borne a different and a larger signification than that which they had in the jurisprudence of England. The jurisdiction was here more extensive. Not to rely on any debatable point, it is certain that it included revenue seizures on navigable waters, which were never within that of the high court of admiralty, but belonged exclusively to the court of exchequer. Now the assumption is, and it is made without a tittle of proof, unless general argument is to be taken as proof, that the framers of the constitution, silently, and without the slightest notice, referred, for the sense of these words, not to the meaning which they had in our jurisprudence, but to that which they bore in the jurisprudence and laws of England. If the fact be so, we will venture to affirm that it is a fact unique in the history of the world. It may safely be said, that no man, and no other body of men, engaged in framing an organic law for the government of a great nation, ever, silently and without notice of any such intention, referred, for the sense and meaning of any of their words, to the signification which they had in laws and jurisprudence of a foreign nation, especially if these words had a well-known meaning in their own country.

We may here be met by an argument, that the constitution does, in fact, refer to the common law for the definition of words, by the use of technical terms of that law, as "habeas corpus," "trial by jury," etc., without proceeding to define them. But these words were just as familiar in our law, as in that of England. And if, by supposition, there had been any difference in the sense in which they were used in the English statutes and common law, and that in which they were generally used and understood in this country, can there be a doubt which sense is adopted by the constitution? The common law, and of course the sense in which the technical words of that law are used, was never in force in this country, any further than as it was adopted by common consent, or by the colonial legislatures. Beyond this, it was as much a foreign law as that of France or Holland; and for the definition of any technical terms of general law or jurisprudence we may, with just as much propriety, refer to the laws of any other foreign country as to those of England, except so far as the law of England has been adopted and incorporated into our own laws and jurisprudence. And where the same words have a different import in the two countries, that which prevails in our own is most certainly to be preferred.

It is again said, that the extension of the jurisdiction of the vice admiralty courts, in the colonies, to revenue causes, was one of the grievances of which they complained, and which, with others, led to the revolution. From this fact it is argued, that it is to be presumed, that in defining this jurisdiction, the framers of the constitution would adopt that limited jurisdiction which was sought and claimed from the mother country. The answer is, that if the convention had intended to do it, they would have taken care so to express themselves as to leave the subject free from doubt. So far from doing this, they have in the grant of this jurisdiction employed terms that in their ordinary and natural import clearly negative the supposition that the restricted jurisdiction of the high court of admiralty was intended. The fact, of the alleged grievance and of the complaint, is admitted, but the argument draws the wrong inference. On every prin-

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jurisdiction was, in practice, exercised by the courts, as instance courts, cannot probably now be ascertained with certainty. The commissions of the judges prove, that the restraining statutes of Richard II., according to the construction given to them by the common law judges in England, were not in force in the colonies. The following is a copy of one of these commissions to an admiralty judge of the colony of New Hampshire, as quoted by Judge Story (De Lovio v. Boit [Case No. 3,776]). It authorizes him "to take cognizance of, and proceed in all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, inquiries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice-admiralty of our said province, etc., or between any other persons whomsoever had, made, begun or contracted, for any matter, thing, cause or business whatsoever done, or to be done, within our maritime jurisdiction aforesaid, etc., etc.; and moreover in all and singular complaints, contracts, agreements, causes and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks, and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province," etc. In Stoke's History of the Colonies, Judge Story observes, there is a commission similar in its main clauses, which Mr. Stokes says was the usual form of the commissions of the colonial admiralty judges. Story, Const. § 1659, note 1. The jurisdiction exercised in fact, probably varied in different colonies, and in the same colony under different judges. That conferred by the commission extends to all that was ever claimed by the admiralty; and the best evidence of the rightful jurisdiction of the court undoubtedly is, the commission of the judge. Stokes was chief Justice of the royal province of Georgia. His work "On the Constitution of the British Colonies," is referred to and quoted more at large by Mr. Justice Wayne, in his very learned and able opinion in the case of Waring v. Clarke, 5 How. [46 U. S.] 454. Stokes says that all the commissions were alike, and Judge Wayne adds, that "the king's authority to grant these commissions never has been, and cannot be denied."

ciple of sound reasoning, the precisely opposite inference is the just one. The whole matter of the controversy and complaint were fresh in the minds of the convention. They perfectly well knew the enlarged and restricted jurisdiction of the admiralty, and they seem studiously, by adding the word "maritime," to have chosen words that gave the larger instead of such as would give the narrower jurisdiction. Notwithstanding the admitted fact, that the admiralty jurisdiction had been viewed with jealousy and distrust while we were colonies, it does not follow that either the convention or the people would have any hostility to it under the new government. It was probably supposed, that the revenue laws would be more steadily and systematically enforced by the courts than by juries, and this is precisely what would be desired by both the people and the government, by all except the brotherhood of smugglers.[5] While the colonial state remained, the people would naturally feel an objection to leave the decision of revenue causes to the court instead of the jury. The judges were strangers, and sent from abroad. They brought with them all the prejudices and partialities of Englishmen, in favor of their own country and people. and to this was added the bias, which the officers of the crown are always supposed to have, in favor of its prerogatives. Such officers were naturally viewed with jealousy and distrust. But under the constitution, a new order of things arose. The judges were our neighbors and kinsmen, and responsible to our own government. And the people might be willing to trust a larger measure of power to these than they would willingly see exercised by strangers and foreigners. There was no longer any foundation for the jealousy, and it no longer existed.

We have said, that to ascertain the sense in which words are used in the constitution, we are to look to the meaning which they had in our own country, and for the meaning of the technical language of jurisprudence, we are to look to the laws and jurisprudence of our own country, if the words there had acquired a plain and positive meaning.[6] This, perhaps, may require some explanation. The terms, "admiralty" and "maritime," belong to the law of nations, as well as to our own domestic and municipal law. This is peculiarly true, of the former, admiralty. A court of admiralty is a court of the law of nations, and in one branch of its jurisdiction, that of prize, both the law and jurisdiction are derived solely from the law of nations, and on the instance side of the court, in many cases, as when the controversy is between parties of different nations, its rule of decision, whether relating to the law of the case or the jurisdiction of the court, is not always to be taken from the municipal law of either of the parties, but from that general maritime law which governs all on the common highway of nations. It has therefore been supposed by some jurists of great eminence, that, for defining the jurisdiction of the court, that is, for determining the meaning of this clause of the constitution, we are not to look to the jurisprudence of any one people in particular, but to that common and universal law that is acknowledged by all Christian and maritime nations.[7] But, perhaps, in the rule which is

[5] This is the reason given by Judge Chase, why revenue seizures were, by the act of congress, put on the admiralty side of the court. [U. S. v. The Betsy and Charlotte] 4 Cranch [8 U. S.] 446.

[6] It is a universal rule dictated by common sense, for the interpretation of contracts, and equally applicable to all instruments, that if there is anything ambiguous in the terms in which they are expressed, they shall be explained by the common use of those terms in the country where they are made. Poth. Obl. No. 94. Domat. Les Lois Civiles, liv. 1, § 2, No. 11. Semper in stipulationibus et caeteris contractibus id sequimer quod actum est, aut si non pareat quid actum est, erit consequens, ut id sequimer quod in regione in qua actum est frequentatur. Dig. 50, 17, 34.

[7] This was the opinion of Judge Story. De Lovio v. Boit [Case No. 3,776]. In the case of Davis v. The Seneca [Id. 12,670], decided in 1829, Judge Washington says, "As preliminary to the investigation of this question, I not only admit but insist: First, that the judicial power of the United States under the constitution, and the jurisdiction of the district courts under the 9th section of the judiciary act of 1789 [1 Stat. 76], embrace all cases of a maritime nature, whether they be particularly of admiralty cognizance or not. Second, that this jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime law of nations, and are not confined to that of England, or of any other particular maritime nation." It is supposed that the late Chief Justice Marshall fully concurred with Judges Washington and Story on this subject. The jurisdiction of the admiralty in England, before the statutes of Richard II. and Henry IV. and the construction put upon them by the common law courts, it is admitted, was as large as that of courts of admiralty in other maritime nations of Europe. It is certain that these laws did not originally extend to the colonies because the colonies were not then in existence. If they were ever in force here they must have been subsequently adopted. But the commissions from the crown to the vice admiralty judges, show most conclusively that they never were adopted. These confer all that general jurisdiction over maritime causes, that was anciently exercised by the admiralty court of England, and has always been by the admiralty and maritime courts of every other country of Europe. If these laws, with their construction, were in force in this country, then all these commissions were illegal, because a commission from the crown could not abrogate an act of parliament. But it was never pretended that these commissions were illegal. It follows, therefore, whether we refer for the meaning of these terms to the general maritime law of nations, or to the well known and well established laws of our own country, that we are brought to the same conclusion. For the jurisdiction of the admiralty in this country, prior to the adoption of the constitution, I would refer to the opinion of Judge Wayne, in the case of Waring v. Clarke, 5 How. [46 U. S.] 454, 458. In that very learned and able opinion it is conclusively shown, that the admiralty jurisdiction of England was not that exercised and acknowledged in this country. It was here larger, and, by the commission of the judges, as ample as it

stated above, I differ rather in the formula in which it is expressed, than in the substance of the rule itself. The law of nations is not the exclusive law of any particular people. It is the common property and common law of all, and, as such, is part and parcel of our own law. If, then, we recur to this general law for the definition of these terms, in one sense we are not going beyond our own law. Now, in this common law of the sea, we find these words, as understood by every people in the commonwealth of commercial and maritime nations, with the exception of England, to have a more comprehensive sense than that which confines them to the jurisdiction exercised by the high court of admiralty. If no valid reason for limiting the admiralty and maritime jurisdiction of the courts of the United States, by applying to the interpretation of these words the laws of England, is found in the language of the constitution granting it, as little will be found, when we turn our attention either to the general tenor of that instrument, or to other special powers granted by it. In the Federalist, universally admitted to be the best commentary on the constitution that has yet appeared, written principally by two of the members of the convention, who had more agency in giving to it its substance and form than any others, it is said, "If there are any such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number." No. 80. It appears to me, that nothing can be more certain than that this axiom was steadily kept in view by the convention. Now, the power of regulating, that is, the general control over, commerce with foreign nations, and between the states, is granted, by another article of the constitution, to the legislative department. This covers the whole maritime commerce of the country. The grant to the judicial department, of the cognizance of all causes of maritime jurisdiction, makes the judicial coextensive with the legislative power. This is the only way in which we could be assured of having, what is so important to a commercial nation, a uniform maritime law, in all the states of the Union. It is unnecessary to expand the argument. Every mind disciplined by habits of juridical reasoning and experience, which has reflected at all on the mechanism and operations of civil government, will feel the conclusion to be irresistible, if we suppose that the convention felt the value and force of this axiom, as they were felt by the Federalist. That the writers of the Federalist only shared and expressed the common feeling and opinion of the convention, is, I think, proved by their work. The judicial is, by the constitution, made coextensive with the legislative power. It is not essential that this jurisdiction, in maritime causes, be exercised in all cases by the court alone, as is most usual in the admiralty. Congress may provide for the appointment of assessors, as is not unfrequently done by the court itself, from its own inherent authority, or for the intervention of a common jury.

Thus far the subject has been considered as an original question, precisely as it presented itself, sixty years ago, to the first judicial tribunal that had to pass upon it. To us, however, it does not present itself as a naked question of original speculation. It comes prejudged by a contemporaneous construction, and by the uniform and unvarying practice of more than half a century. In looking for the contemporaneous construction of the constitution, our attention is naturally first turned to the Federalist. The eightieth number treats of the extent of the judicial power. In that, Gen. Hamilton says, "It seems hardly to admit of controversy, that the judiciary authority ought to extend to these several descriptions of cases." He enumerates five classes, the fifth of which is, "all those which originate on the high seas, and are of admiralty or maritime jurisdiction." After commenting more at large on the previous classes, he adds: "The fifth point will demand little animadversion. The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes." The commentators on the Code Napoleon habitually refer to the discussions at the tribunate, and in the council of state, on the several articles of the Code, as of high authority in the interpretation of any doubtful or ambiguous language. We have not, for our aid in explaining and opening the sense of any obscure article in our constitution, the benefit of the debates upon it in the convention; but we have what all will admit to be of equal, if not of much higher authority. We have a commentary, deliberately prepared by three of the most accomplished statesmen which this country has yet produced, published immediately after the constitution was made, while all the discussions were fresh in their minds, and before it was adopted by the people. The number quoted was written by Gen. Hamilton, but it is fair to presume that all concurred in the general opinions that were entertained by each. Can any one suppose, when it is said that the judicial power under the constitution extends to all cases that arise on the high seas; when afterwards recurring to the subject, seemingly ex industria, the word "admiralty" is dropped, and the word "maritime" used alone, as descriptive of the constitutional jurisdiction, thus presenting it as the leading and important feature in the clause; I ask, can any man imagine that the Federalist supposed

anciently was in England. From the want of reports, it is impossible to say how extensively the jurisdiction was ordinarily exercised, but it was certainly, in practice, more extensive than in England.

that the cognizance of maritime causes, intended to be given to the courts of the United States, was confined to the narrow and jejune jurisdiction, allowed by Lord Coke and his followers to the admiralty court of England? Were Gen. Hamilton, Chief Justice Jay, and Mr. Madison so ignorant of the common-places of the law of England, as not to know that the admiralty in England, instead of having jurisdiction over all cases that arise on the high seas, was allowed to take cognizance of but a very small number of them?

We have in the judiciary act (Sept. 24, 1789, c. 20 [1 Stat. 76]) a contemporaneous construction of this clause of the constitution, of the highest authority. In apportioning to the several courts the judicial power, the ninth section assigns to the district court "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." [8] If this act is not unconstitutional, it is perfectly decisive of the whole subject. It negatives, beyond the possibility of doubt or controversy, the hypothesis that limits the admiralty and maritime jurisdiction of the courts of the United States, under the constitution, to that allowed by the common law courts of England to the high court of admiralty. Revenue causes were never within the admiralty jurisdiction in England, but always belonged exclusively to the exchequer. But in this country, for more than a century, these causes had been heard and decided by courts of vice admiralty. Congress, therefore, must have considered that the words of the constitution were used, not in the sense which they had in the laws of England, as expounded by Lord Coke, and by the common law courts on writs of prohibition, but in the sense which they bore in the jurisprudence of our own country. This law was made by the first congress that met under the constitution. How many of its members had borne an active part in the convention in framing the constitution, I have not at hand the means of determining. But in one branch, the senate, then consisting of twenty-two senators, six, that is, more than one-fourth of the whole number, had been members of the convention.[9] Was there no one of these, Robert Morris, for instance, who could inform the senate in what sense the words of this clause were understood by the convention? In that senate, also, were Oliver Ellsworth, Rufus King, and Richard Henry Lee. They had not, indeed, been in the convention; but surely such men were not ignorant of the sense in which these words were understood at that time; nor did Chief Justice Ellsworth require long homilies to be read from the horn books of the law, to inform him that revenue seizures were not, by laws of England, civil causes of admiralty jurisdiction. The law passed, and I am not aware that any opposition was made to this part of it. It went into opera-

[8] This act bears internal marks of having been prepared with great care, by men who well understood the state of the law. This clause is a proof of it. In the case of U. S. v. The Vengeance, 3 Dall. [3 U. S.] 297, the court decided that a revenue seizure, made on the water, was a civil cause of admiralty and maritime jurisdiction. Independent of the local law and the usages of this country, it is not properly a cause of admiralty jurisdiction. In the celebrated case of The Columbus, in 1789, Sir James Marriot says, that "the court of admiralty derives no jurisdiction in causes of revenue from the patent of its judge, or from the ancient customary, and inherent jurisdiction of the prerogative of the crown in the person of the lord high admiral." 1 Coll. Jurid. p. 97. As an instance court, it takes cognizance of maritime contracts and torts between party and party, by virtue of its general and inherent power. Its jurisdiction in revenue causes is superinduced by special acts of the legislature, but does not belong to it merely as a maritime court. In this country, revenue causes had so long been the subject of admiralty cognizance, that congress considered them as civil causes of admiralty and maritime jurisdiction, and to preclude any doubt that might arise, carefully added the clause, "including," etc. This is a clear proof that congress considered these words to be used in the sense which they bore in this country, and not in that which they had in England. The act gives exclusive admiralty and maritime jurisdiction to the district court. As a court of the law of nations, as a court of prize, its jurisdiction is, and was intended to be, in every sense, exclusive of that of the state courts. As a maritime, or instance court, its jurisdiction is also exclusive where the remedy can be given only by a court of admiralty. But in cases where the courts of common law have always exercised a concurrent jurisdiction, the jurisdiction is not, and was never intended by the constitution to be, exclusive, though the subject-matter be maritime. To take the familiar case of mariner's wages; if they mean to look to the vessel, and proceed on the maritime hypothecation, they must go to the admiralty; the jurisdiction is exclusive, because the hypothecation cannot be enforced in a suit according to the forms of the common law. But if they proceed in personam against the master or owners, no man ever doubted that the courts of common law have jurisdiction. But here, to preclude the possibility of doubt, congress added the clause saving to suitors a common law remedy where that law could give it. Saving to suitors; undoubtedly to the creditor party, the actor. He has his choice of jurisdiction, and the debtor party must abide that jurisdiction, as in common sense and common right it ought to be; as it in fact is in all other cases of concurrent jurisdiction, between that of common law and equity, as well as between common law and admiralty. The case of The Columbus is quoted by Brown as The Columbia, decided in 1782. The whole case will be found in the first volume of the Collectanea Juridica, a curious, and, in this country, rare collection of law tracts, published in London, in 1791.

[9] William Samuel Johnson, of Connecticut, Robert Morris, of Pennsylvania, George Reed and Richard Bassett, of Delaware, John Blair, of Virginia, Pierce Butler, of South Carolina, and Wm. Few, of Georgia.

tion, and was brought of necessity to the attention of the courts at every session. But for seven years we hear no word of complaint from any district in the Union, of this part of the act. If it was so gross and palpable a violation of the constitution, as it certainly was if the words of this clause are to be measured by the sense which they had in England and not by that which they had in this country, we may well ask, with some feelings of surprise, where, during these seven years, were slumbering the watchmen of our American Israel?

The first case in which the question was raised was that of U. S. v. The Vengeance (1796) 3 Dall. [3 U. S.] 297. The vessel was seized for a violation of an act of congress, of May 22, 1794 [1 Stat. 369], prohibiting, for a limited period, the exportation of arms and ammunition. The vessel was condemned in the district court, and on appeal the decree was reversed by the circuit court, and a decree of restoration pronounced. From the circuit court the case was carried, by writ of error, to the supreme court. On the opening of the case, the court, supposing the attorney-general did not intend to enter into any further discussion, expressed their opinion; but being informed by Lee, the attorney, that on account of the importance of the subject he wished to be heard further, they gave him time. In his argument, he took the ground that this was not a cause of admiralty and maritime jurisdiction, because it was not so in England at the time of the Revolution. After he had closed his argument, the chief justice (Ellsworth) informed the opposite counsel, that the court saw no reason to change the opinion which they had expressed on opening the cause, and that they would dispense with further argument; and the next day pronounced the following judgment: By the Court. "We are perfectly satisfied upon the two points that have been agitated in this cause. In the first place, we think it is a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is simply the offense, and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have commenced at Sandy Hook, which must certainly have been on the water. In the next place, we are unanimously of opinion that it is a civil cause; it is a process of the nature of a libel in rem, and does not, in any degree, touch the person of the offender. In this view of the subject, it follows that no jury was necessary, as it was a civil cause; and the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction." The question was again raised, in the case of U. S. v. The Sally (1805) 2 Cranch [6 U. S.] 406. The same objection was taken, and was again unanimously overruled. In the year 1808, it was again brought up, in the case of U. S. v. The Betsey and Charlotte, 4 Cranch [8 U. S.; 443, a seizure made in the port of Alexandria, under a law for suspending commercial intercourse with certain ports in the island of St. Domingo. The question was again most thoroughly argued against the jurisdiction, by Lee, twelve years after he argued the case of U. S. v. The Vengeance [supra]. In this argument, as is truly said by Judge Nelson, "will be found the ground and substance of all the arguments that have been urged in favor of the limited construction of the admiralty powers under the constitution." [New Jersey Steam Nav. Co. v. Merchants' Bank] 6 How. [47 U. S.] 388. It was contended, with perfect justice, by Mr. Lee, that if this was not a case of admiralty and maritime jurisdiction under the constitution, it could not be made so by congress, and in that case, the law which put such causes on the admiralty side of the court was unconstitutional. The court again, without hearing a reply, unanimously overruled the objection and sustained the jurisdiction. The first and last of these cases were fully and earnestly argued, and with such learning and ability, that, in the opinion of Judge Nelson, those who have followed on the same side have done nothing more than expand the argument and accumulate citations. They abundantly prove, what nobody ever doubted, that in England the jurisdiction of the admiralty has been, since the controversy in which Lord Coke figured, so little to his reputation either as a lawyer or a man, restricted within very narrow limits;[10] but they leave untouched the only question in which we are interested: what is the meaning of these words in the constitution? what was intended by the framers of that instrument? and in what sense they were generally understood by those who adopted it? Mr. Lee contended that they meant precisely that jurisdiction which was exercised by the high court of admiralty in England. This has been repeated by all those who have followed him on that side of the question. Indeed, when the argument for the narrow jurisdiction is reduced to its last analysis, this assumption is the only element on which it rests; an assumption

[10] The state of mind in which Lord Coke went into the controversy on the subject of the admiralty jurisdiction does not deserve the respectable name of prejudice. It was mere willfulness and passion. Brown says that he hated the civil law and everything connected with it. He was undoubtedly a man of an acute and vigorous mind, but it ran in a narrow groove. No man knew better the old law of England in all its ramifications of feudal technicalities and quibbling subtleties; but this was all, except the temporary politics of the day, that he did know. He talks about the gladsome light of jurisprudence, but no one at this day will look for this light in his ponderous volumes of insufferable tediousness, in which all things are jumbled together in a perfect chaos. As a jurist, in the liberal and philosophical sense of the word, Lord Mansfield was as much his superior as light is better than darkness.

which we may be permitted to call, at least, extraordinary, for it amounts to this, that we, half a century after the adoption of the constitution, know better what was intended by those who framed and adopted it, than they knew themselves. The supreme court considered the question so clear of doubt or difficulty, that, without hearing a reply, they unanimously overruled Mr. Lee's objections. And here let it be remembered that three of the judges who concurred in these decisions were members of the convention who framed the constitution,[11] and all had taken a part, more or less active, in the discussions that preceded its adoption. It is difficult to conceive how any contemporaneous construction of a law can have a higher authority. It is now sixty years since this law was passed. During the whole of this time it has been practiced upon, and enforced habitually in every maritime district in the Union. Thousands of cases have been adjudicated, involving millions of property. Great numbers of these cases have been carried by appeal to the supreme court, and have been affirmed with the concurrence of every judge that has had a seat on that bench. If the opinion of those who contend for the English limitation of our admiralty jurisdiction is correct, that is, that our constitution is to be interpreted by the laws of England, every one of these decisions was coram non judice, an absolute nullity and incurably void.

The only real question is on the meaning of this clause of the constitution, all causes of admiralty and maritime jurisdiction; the sense in which these words were understood by those who made, and those who adopted it, for it may well be assumed that both understood the words alike. We have the contemporaneous declarations of every branch of the government, of the legislature which passed the law of Sept. 24, 1789, and of the executive who approved it, a series of deliberate and well-considered decisions of the judiciary, and the quiet assent of the people to an unbroken and unvarying practice continued for more than half a century, all concurring in one point, that the admiralty and maritime jurisdiction, under the constitution, is of larger extent than that of the English court of admiralty, and all repudiating the assumption that we are to look to the laws of England for the definition of these terms in the constitution. If this cannot now be considered as a settled question of American jurisprudence under the great organic law of the government, we may, it seems to me, well say not only that no such question is settled, but that none ever will be or ever can be settled. And if every officer of the United States, who is intrusted with a portion of the constitutional powers of the government, is at liberty to carry those powers into practice as he understands the constitution, without any reference to the opinions of others, or to any settled and long-continued construction, this sacred instrument becomes a piece of wax, to be moulded into every variety of arbitrary and fantastic form that will harmonize with the varying idiosyncrasies of these various officers.

The only object of these observations, is, to vindicate the court in taking cognizance of causes of this description, and not to enumerate all the causes that are embraced by the terms of the constitution; and if a contract for the transportation of goods on the high seas is not a case of maritime jurisdiction, then it seems to me that there is no such case.

[11] These three were Wm. Patterson, James Wilson, and John Blair. Their names appear among those who signed the constitution, and are supposed to be the same persons who were afterwards appointed judges of the supreme court.

HUNTRESS, The (ROBSON v.). See Case No. 11,971.

Case No. 6,915.

The HUNTSVILLE.

[8 Blatchf. 228.] [1]

Circuit Court, S. D. New York. Feb. 11, 1871.

COLLISION—SPEED—CONFUSION OF LIGHTS—STEAMER AND SAILING VESSEL.

1. A steamer saw, over her port bow, the green light of a sailing vessel. She kept on, not slackening her speed, until she saw, for an instant, a red light on the sailing vessel, and then, in immediate apprehension of collision, she ported her helm, without slackening her speed. The mate in charge, in obvious alarm, left his post to call the captain, and, on his return, the green light of the vessel was again in view, and an order to starboard was given. A collision ensued: *Held*, that the steamer was in fault, in not slackening her speed and stopping and reversing.

[Cited in The Jay Gould, 19 Fed. 769.]

2. The sailing vessel was also held in fault, in presenting a confusion of lights to the steamer, from want of proper screens, or from the lights not being in proper position, or from other cause.

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

In admiralty.

William Marvin and Cornelius Van Santvoord, for libellants.

Charles Donohue, for claimants.

WOODRUFF, Circuit Judge. (1) It is impossible to exonerate the steamer from responsibility for the collision with the ship for which this cause is prosecuted. It was the duty of the steamer to keep out of the way of the sailing vessel; and, unless there was some fault on the part of those navigat-

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

ing that vessel, which operated to mislead the steamer or defeat her effort to keep out of the way, the steamer is necessarily liable. The presumption of fault on her part, there being no pretence of inevitable accident, is conclusive. In any view of the subject, the steamer was bound to use vigilance, skill and good seamanship; and, although she was at liberty to choose her own mode of avoiding the ship, always at her own peril if she erred, it is pertinent to inquire whether, in what she did, she exercised proper prudence and care.

According to the testimony of both the mate and the lookout on the steamer, they saw the green light of the ship on the steamer's port-bow some minutes before any change was made in the course of the steamer. The mate correctly inferred that it was on an approaching vessel. Whether he so inferred or not, the indication was decisive, that, if the light was properly set, the vessel so seen was crossing the track of the steamer ahead of her then position, or was coming head on towards the steamer's port-bow. It was, therefore, at that moment, uncertain whether any change in the course of the steamer was necessary or proper. It was certain, that, if the vessel was heading towards the port-bow, or nearly towards the port-bow, of the steamer, there could be no collision, if each vessel kept its course, because the steamer, at her then speed, must pass out of reach of the ship before the latter could reach the course of the steamer; and on the other hand, it was perfectly certain, that, if the green light of the ship, and the green light only, continued to be in view over the port side of the steamer, the proper, and only proper, mode of avoiding her was to starboard the helm and pass under the stern of the ship. If, in the then apparent course of the ship, with her green light alone in view, the steamer made any change, her plain duty was to starboard, and not to port the helm or attempt to cross the bow of the ship. That this is so is fully confirmed by the testimony of the mate himself, and by the act of the captain when he came from his room. The mate's testimony is, that he continued his course until he saw a red light, and then ported. If his testimony is true in this, he acted in recognition of the view above suggested, namely, that, the green light alone being in sight, it might not be necessary to make any change, but, if any change was made, it should be to starboard the helm and go astern of the ship. The act of the captain is still more decisive. Called from his room, he says, he first saw the green light. Acting on the impulse of the moment, but under the guidance of years of experience and presumptive knowledge of what the circumstances required, he instantly orders the helm a-starboard, hard down. This was a most impressive declaration of what the mate should have done in season to avoid collision. How far the mate was excused by seeing the red light, and whether any red light was seen on the ship, will be presently considered. But, assuming that the mate gives an accurate account of the occurrence, he was not without fault. Some attention to the transaction as he describes it, (and as he is corroborated by the lookout, wheelsman and master,) in connection with the time at which what he did was done, will make this apparent. He had seen and was watching the ship's green light, and had not judged any change of course necessary, until the green light, as he says, disappeared and the red light came into view. On the instant, he sprang past the wheelhouse, gave the order to port the helm, went to the captain's room and called him, and returned to his post. All this occupied but a few seconds; and yet, on his return to his post, the green light was in view, and the captain, who was there at almost the same moment, first saw that green light, and it was then too late to make any change to avoid the collision. It is impossible to avoid the conclusion, that, in each of the possible alternative views of the mate's conduct, he was to blame. He had either held his course, with his speed, of nine or ten miles an hour, unabated, until the green light was very near, or, if there remained a reasonable interval, within which he could have starboarded his helm on the return of the green light to his view, he spent that interval in running for the captain, to disclose to him his obvious alarm and apprehension of collision. He acted hastily, on the first glimpse of a red light, the very appearance of which created alarm, and which, though it indicated that porting was the proper movement, continued so short a time in view, that, if he had remained at his post, he must have seen that stopping and reversing were imperatively required.

The sixteenth of the rules of navigation, enacted by congress, is imperative, that a steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, and, if necessary, stop and reverse. This does not mean, that she may wait until the danger is imminent, before she slackens her speed, nor does it mean that she need not slacken her speed, if the risk of collision is caused by some fault in the approaching vessel. Life and property on the seas are cared for, and are intended to be protected, by the law; and, when risk of collision appears, it is the absolute duty of the steamer to slacken her speed, and not to trust exclusively to speculation or hope of avoiding it by other means. Here was danger of collision? Upon all the proofs, I think, there was risk of collision, within the rule, before the mate, according to his own story, saw any red light. It is certain there was risk of collision when he did see the red light, if his account is true. His acts speak a language of unmistakable

meaning. He springs to the wheelhouse, gives his order, and hastens to the captain, to obtain his aid and judgment, thus not only abandoning the chance of avoiding collision, by acting wisely on what might appear visible during the interval, however short, but showing that he was then at least fully awake to the danger. He should have slackened speed, and, as I think, also have stopped and reversed, before he called the captain. At all events, he cannot be excused for continuing at full speed until it was clear both to him and to the captain that collision was inevitable.

Nor can the failure to adopt this precaution be excused by the suggestion, that, porting being apparently best, the chances of escape from danger were greater by proceeding at full speed. That is not shown. The distance of the vessels, when the order to port was given, was such, that slackening speed, and then, if necessary, stopping and reversing, would not only have been in fact effectual, but there was every reason, in the judgment of those on board the steamer as to such distance, to believe that it would be so.

I do not find sufficient evidence that the steamer did not keep a sufficient lookout, so as to discover the ship as soon as the light became visible. I think the proof is to the contrary. But, in the management of the vessel after the ship was seen, in the failure to watch with sufficient closeness, without the interruption of the short interval devoted to the call of the captain, and in the continuance of the speed of the steamer, notwithstanding the risk of collision, the steamer was greatly in fault.

(2.) But, on the other branch of the case, I am not able to acquit the ship of fault. The mate of the steamer is distinct and positive in his statement, that he saw the red light on the ship, and that then, and not till then, he gave the order to port, but for which order the collision, in all probability, would not have happened. The captain confirms this, by the equally explicit testimony, that he saw first the green, and, almost immediately afterwards, the red. The inference from the testimony of both is, that the view of the lights on the ship was not only not constant, nor merely changing, so as to indicate change of relative course or position, but that it was fluctuating, at one moment, green, at another, red, at another, green, and, at still another, both lights, creating, necessarily, confusion and uncertainty. Now, however true it may be, as above suggested, that the action of the mate of the steamer was hasty, and that, had he remained on the post of observation, he would have seen, by the reappearance of the green light, that porting increased the danger, the appearance of the red light was calculated to induce just what he did.

On the trial in the district court, the absence of testimony from the lookout on the steamer was a circumstance of suspicion, and it was inferred as probable, even, that the steamer had no proper lookout, while, in the absence of the testimony of the lookout, the evidence on behalf of the libellants, or, perhaps, the supposed improbability that the ship's red light could be seen, was deemed to overcome the positive testimony of captain and mate that they saw such red light. On the trial in this court, the testimony of the lookout is produced. He has no possible interest in the controversy. He has retired from the sea, and is living in Kansas. He swears that he has not been informed what the claimants seek to prove by him, and has received no instructions, advice or communication to influence his testimony. Under these circumstances, his positive testimony to his being on the lookout, his seeing and reporting the ship as soon as she was visible in the low foggy atmosphere, (confessedly overhanging the Gulf Stream,) and his first seeing the green light of the ship and, very soon after, the red light, are very strongly corroborative of the testimony of the master and mate on the subject. I cannot conclude that these three witnesses have perjured themselves or are all mistaken. Whether the view which they had of the red light is due to the cause insisted upon by the claimants, that the course of the ship was more to the eastward than her witnesses testify, or to the not improbable fact, that the screens did not effectually shield it, or to the other suggestion, insisted upon by counsel in argument, that the red light had been taken down for some purpose and so became visible, I cannot escape the conclusion which these three witnesses establish, that these two lights, a red and a green, were both presented to their eyes; and it is a fact of much significance, when the court is called upon to disbelieve the testimony of three witnesses, that no witness is produced from the ship, who is able to state, of his own knowledge, that the light was in position. In this confusion of lights, presented to the eye of the steamer, she was misled, and, though I think that the appearance of the lights called most strongly upon her officers to slacken speed, they are not solely responsible. The decree herein must direct contribution by each vessel to the loss sustained.

Case No. 6,916.

The HUNTSVILLE.[1]

District Court, E. D. South Carolina. Nov., 1860.

SALVAGE—PUBLIC SERVANTS — ADMIRALTY JURISDICTION—NECESSITY FOR SALVAGE—UNSUCCESSFUL EFFORTS.

[1. Public servants may recover salvage for assistance of great merit, rendered in the line of their regular duty, but in excess of the official requirements thereof.]

[1] [Not previously reported.]

[2. A city fire department may recover salvage for saving a burning ship, brought by permission of the city authorities within the city jurisdiction.]

[Cited in The Cherokee, 31 Fed. 170.]

[3. The mayor of Charleston has power to forbid the coming of a burning ship from sea to the city wharves; also to make her coming conditional upon her paying all the expense of saving her.]

[4. The admiralty jurisdiction extends to a salvage suit by a city fire department for services rendered from the land to a burning vessel brought to the city's wharves.]

[5. The admiralty jurisdiction extends to a salvage suit for services rendered from the land in completion of services rendered by other salvors at sea.]

[6. The federal jurisdiction in admiralty in South Carolina extends to all cases whereof the state admiralty courts, by statute or otherwise, had jurisdiction before the federal constitution was adopted.]

[7. A contract for compensation at all events is no bar to salvage unless it is express, explicit, and clearly proved.]

[Cited in Bowers v. The European, 44 Fed. 488.]

[8. Unsuccessful efforts to save imperiled property are not grounds for an award of salvage.]

[9. A tug which gets a burning vessel afloat, and tows her to a place where other parties put out the fire, renders salvage service, although both sets of salvors deny co-operation.]

[10. A vessel which, by a signal of distress, secures the aid of salvors, will not be heard to say that she could have saved herself without assistance.]

[11. The fact that salvage services were rendered by a steam vessel to a steam vessel is a ground for larger compensation than if both had been sailing vessels.]

[This was a libel for salvage by Ross C. Davis and others, owners of the steamer Nina, and by the Phoenix Fire Engine Company and others, against the steamship Huntsville and cargo.]

MAGRATH, District Judge. The steamship Huntsville in her voyage from Savannah to New York, off Cape Romain, was discovered to be on fire. Her captain determined to make for the nearest port, and her course was changed for Charleston. Signals of distress were set, and the Patapsco, a steamship owned by the same company, was signalled. The steamship followed her to afford such assistance as she could. Between Cape Romain and Bulls the Huntsville took a pilot. The female passengers left her, and, in the pilot boat, were brought to the city of Charleston. Under the charge of the pilot boat, the Huntsville was brought through Maffit's channel, and when she reached the inner buoy, went ashore. It was ebb tide; and under ordinary circumstances it would not have been attempted by the pilot to bring her in at that state of the tide. Her condition, however, was calculated to excite alarm, the smoke then issuing from her, and the pilot advised the captain, and he concurred in the advice, to make the attempt, and trust to the chance of relief by a steamer. Her signal of distress, which had been kept flying from the time her course had been changed, attracted the attention of the revenue cutter William Aiken, Capt. Coste, who sent an officer on board of her, and, having ascertained the cause of her distress, relieved her by taking her passengers, their baggage, and that of the crew, the nautical instruments, and some of the furniture of the steamship, and bringing them and it to the city of Charleston. The libellants Ross C. Davis and others, owners of the steamer Nina, having been released from another engagement, previously made, to tow a vessel to sea, proceeded also to render assistance. Hereafter it will be necessary to examine particularly the evidence which relates to the extent of the service rendered by the Nina. The Huntsville at length floated, and was got off. By the Nina she was towed to Southern wharf in the city of Charleston. Before, however, the Huntsville reached the wharf, certain occurrences had taken place, which principally affect the second libellants. Mr. Caldwell, the consignee of the Huntsville, made an application to the mayor of the city for permission to bring the vessel to one of the wharves. The chief of the fire department had also inquired of the mayor what was his purpose in relation to the vessel. That gentleman considering it unsafe, informed both parties of his intention not to suffer the steamship to come to the city. Upon a second and more urgent application being made to him, he went to the wharf to determine how far he would be justified in recalling the refusal he had given. The location of the Southern wharf, the quarter from which the wind was blowing, the report of an officer whom he had sent to ascertain if there was a probability of the fire being subdued if the steamship was allowed to come to the wharf, the large amount of property at risk, and the understanding that the steamship would be put under the charge of the fire department, and no expense of any kind be incurred by the city, induced him to give his assent to the admission of the steamship to the wharf. She was brought to the wharf. The fire department took charge of her, and subdued the fire.

The first of many questions raised in the case, which I propose to consider, is that which involves the right of the second libellants to maintain in this court, a claim for salvage. If the denial of the right to salvage be the legal consequence of the propositions from which in the argument it was deduced, it cannot be maintained, for these propositions are in themselves undeniably true. The obligation to afford succor to those who may be in distress is incorporated with every code of laws which obtain respect and command obedience in civilized societies. To aid those who may be unfortunate is alike the duty of nations and individuals,

and its obligation is postponed only in cases where it would be productive of injury to those who otherwise are bound to its performance. And this duty is in many cases made more specific in its obligation by being incorporated in the stipulation of treaties by which the claim of those who need succor becomes changed from an imperfect obligation, as it affects others, into a perfect right which may be enforced, and in aid of which the authority of government may be invoked.

The treaties which have been made by the United States with France, Spain, Portugal, and perhaps other nations, all contain provisions which operate to secure by force of positive municipal law, that protection and succor for the unfortunate which the moral law and the law of nations have declared to be proper. At an early period protection was much needed and aid much required in cases of disaster at sea, or of wrecks on the coasts of seas. Piracies and sea robberies are said to have preceded any regular state of commerce, and cruelties on the coasts, in cases of wrecks were the retaliations practiced for the injuries suffered from those who controlled the seas. The right to wrecks, to whomsoever it belonged, whether claimed by the crown or those who held under its grant, was in its enjoyment distinguished by enormities which provoked the reproach that in some places wrecks were considered blessings proper to be prayed for. In the civil law we find the censure justly due to the inhumanity which prevailed in relation to such practices in the refusal of the Roman emperor to enrich his treasury by the calamities of others, and the experience of an English monarch of the suffering which shipwreck entailed upon those who experienced the misfortune is said to have been the occasion at that time of those provisions in the laws of Oleron which recognized the right of those who in such cases had occasion for protection. Moll. De J. Mar. 265. But this protection from that forfeiture which resulted from misfortune, whether it enured to the benefit of the ruler or of those who, without regard to law, enriched themselves at the expense of suffering to others, has never been confounded with the right to salvage,—a right which, conceding to the unfortunate the restoration of that which would have been lost without the assistance of others, and which regards that assistance as suggested by the highest considerations of humanity, yet enforces upon those who have been restored to their property, a proper regard for the services of those who have thus saved for them that which otherwise would have been lost. Martens, Law Nat. 167. And this principle, with the increase of commerce, and the necessity for its application in all cases, has lost such of its attributes as may have existed in connection with individual cases, and is regarded now only in the light of a general law resting upon the broad basis of public policy and of the most comprehensive application. Resting, however, as it did, upon the obligation of individuals to afford succor to the distressed, and suggested, as it is presumed to have been, by higher considerations than the mere desire for gain, that obligation which is now imposed upon those who are saved to those who save is divested of all considerations which apply to the case of a mere contract. And so necessary is it to keep this service strongly and distinctly marked by the considerations which have been applied to it, and so essential is it to the necessities of commerce, that even allegations of improper motives inducing the efforts in salvage cases as valid objections to compensation, if deserved, will not be heeded, unless they have been subsequently carried into practice to the injury of those whose property has been saved. Le Tigre [Case No. 8,281]. It is not, then, because of an indifference to the suffering of others, or a disregard of the obligations of humanity that compensation for salvage service is allowed, but because on the part of the salvor an obligation is recognized to afford aid, and at the same time an obligation is recognized and enforced upon those who have been saved to be mindful of that aid by which they have been relieved.

In France the "Ordonnance de la Marine" in the time of Louis XIV. abolished what was called the "right of wreck," which had existed up to that time, and the provisions of that celebrated code are still preserved. It places the shipwrecked mariner and his goods under the protection of the state, and punishes with death whoever shall rob them. But, upon the principles before referred to, salvage is allowed in all such cases. In Great Britain, under the statutes passed in the reigns of Queen Anne and George II., and various other statutes, minute and wholesome regulations are provided for the protection of persons and property wrecked or stranded, and in such cases provision is also made for the payment of salvage to those by whose efforts such property has been saved. In the United States, by the act of congress 22d December, 1837 [5 Stat. 208], the president of the United States is authorized to cause a suitable number of public vessels to cruise upon the coast in the severe portion of the season to afford aid to distressed navigators. No special provision has been made for salvage, in such cases, but it has been held that such services may, under certain circumstances, entitle the party to salvage compensation. In the case of The Josephine [Case No. 7,546], Judge Nelson, referring to the question, whether the crew of a public vessel of the United States affording relief to a private vessel of the United States according to the instructions of the government could be entitled to salvage, said: "I have no doubt that cases may exist in which they are entitled to salvage compensation, both on prin-

ple and authority. But in such cases something more than the usual peril should be encountered by the officers and crew, and an extraordinary service should be rendered, exceeding the duty imposed upon them by their employment in the public service, and the special instructions of the government upon the subject. * * * Great and extraordinary service and peril in rescuing a vessel and cargo would present a different question, and stand upon different principles and policy. Such acts should of themselves be the subject of reward and encouragement." And this rule is founded, as is the whole doctrine involved in the law of salvage, upon the effect it produces in stimulating individuals to the exercise of that conduct by which the essential interests of humanity are subserved. In alluding to the heavy compensation which rewards services rendered at sea over those which are offered on land, Chief Justice Marshall places the motives of legislators and courts "in a liberal and enlarged policy." The allowance of a very large compensation for those services is intended as an inducement to render them, which it is for the public interests and for the general interests of humanity to hold forth to those who navigate the ocean. Mason v. The Blaireau 2 Cranch. [6 U. S.] 240. And the evidence of a common consent in holding out such rewards is not inconsistent with, but efficient means in developing, the general interests of humanity, as is seen in the continued recognition of this liberal and enlarged policy. With the first efforts which were made to protect those who in person or property suffered from the calamity of shipwreck reasonable compensation in return for the aid which had been given to the suffering was constantly declared. In 27 Edw. III. c. 13, goods saved were charged with a reward called "salvage"; and so in 12 Anne Stat. 2, c. 18, 4 Geo. I. c. 12, and other statutes passed by the British parliaments in relation to this matter. Nor is it in those times only, in their statutes or judgments of courts, that the same principle may be found. In the treaty between Great Britain and Sweden in 1661, between Great Britain and Denmark about the same time, between Great Britain and France in 1713, "a proper premium," "a reasonable reward," and "salvage" indicate the right to compensation established by law given to those who discharged the duties of humanity provided for by the state, and their enjoyment of that right was held consistent with the high purposes which led to its recognition. 2 Laws of the Admiralty, pp. 5, 20. And this consistency of a right to compensation with the discharge of duties involved in regard to humanity is distinctly recognized by the supreme court in U. S. v. The Amistad, 15 Pet. [40 U. S.] 518. The property captured was owned by Spanish subjects, and when taken by the officers of the United States was under the control of negroes, who had risen in mutiny, murdered the captain, and were in quest of a land where they could regain their freedom. The treaty with Spain of 1795 provided that all ships and merchandize rescued out of the hands of pirates or robbers on the high seas shall be brought into some port of either state, and be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor. But the supreme court allowed salvage in the case to the officers and crew of the public vessel of the United States by whom the capture had been made, and held it to be a highly meritorious and useful service, to the proprietors of the ship, and cargo, and such as by the general principles of maritime law, is always deemed a just foundation for salvage.

If fuller illustrations were wanting, they would be found in the precautions adopted by the government of the United States for the protection of those who suffer the perils of shipwreck. The wrecking system on the coast of Florida is essentially connected with a discharge by the government of the United States of its obligations in this respect, and is distinguished by the care with which the discharge of the duty is regarded. The considerations of humanity which prompt the regulations thus made and provide in the discretion of an enlightened judge the control of the reward which shall stimulate the efforts necessary in such cases is but a proof of the consistency which public policy recognizes and establishes between the discharge of this high duty to humanity and the recompense given to those by whose aid that duty is most effectually discharged. From these early periods, when the attention of rulers and lawgivers was excited by the suffering of those who exchanged the horrors of shipwreck for the miseries which befell them on shore, and ample provision was made for protecting persons and property from the rapacity of those who were accustomed to plunder and kill, down to the present time, we find the constant evidence that these duties of assistance and protection devolved upon the subject were reconciled and held consistent with a proper compensation to be given in all cases where the conduct of those who had given aid were deserving of it. Nor can there be any hesitancy in adhering to what must be considered a settled rule of public policy in this respect. And while we hold the obligation, whether considered in relation to nations or individuals, to afford succor to the distressed as of the highest kind, we are forced to regard the compensation given to those by whom that succor was afforded as sanctioned by the same law which prescribes the obligation, and resting for its support upon the same considerations of public policy which make the service rewarded by it a duty to be observed by those upon whom it is enjoined.

The next objection made to the second libellants is that they were in the discharge of a prescribed legal duty, for the performance of

which there is a prescribed legal provision for its discharge, and this, it is alleged, prevents them from making the claim now set up in this court. Such unquestionably would be the consequence resulting from the proposition were it applicable to this case. But the evidence in this case furnishes many circumstances which materially tend to qualify its applicability. And if it were so that it had in this case a direct application, there are also cases of recognized exceptions, which are as positive as the rule itself. The law laid down by Judge Nelson in the case of The Josephine is plain and positive. Although there may be a specific legal duty to the performance of which there is annexed a specific legal compensation, great and extraordinary service and peril place him by whom it is performed or experienced upon a higher position, and are of themselves proper subjects for reward and encouragement. So in the case of Le Tigre [Case No. 8,281], Judge Washington says: If an officer, acting as such, exceeds the limit of his official duty by giving extraordinary assistance to save property, he is entitled to salvage. If this fire had occurred when the Huntsville was lying in one of the docks of the city; if she had been brought to the city by the authority of the mayor, without the addition of any other circumstances,—the law in such cases created for the fire department a plain, positive duty for the performance of which they were legally bound, and upon the performance of which they became entitled to certain compensation from the city of Charleston. But this fire did not occur within the limits of the city of Charleston, and, while outside the limits of this city, no legal duty existed by which the services of the fire department could be demanded. And although the Huntsville was subsequently brought within the limits of the city of Charleston, yet it was under such circumstances as, while they served to impose upon the fire department the duty of assisting to save her, at the same time changed the source of that duty from the laws which governed their organization as part of the police of the city of Charleston to other laws which would have been and were alike applicable to any who, having the same means of saving under their control, were not previously subject to the control of the city, nor governed by laws enacted for the regulation of the fire department.

When the Huntsville reached the city, it was because the mayor of the city had signified his assent to the application made to him for that purpose. He had signified that assent, among other considerations, upon the express condition that the fire department would take under their charge the burning vessel, protect from the danger of conflagration the adjacent property in the city, and surrender all claim to compensation from the city for the services they might render. Excluding for the present other agencies, which were employed in the saving of the Huntsville, the fire department may really be regarded as having obtained permission of the mayor, at their risk to introduce this vessel within the limits of the city in order that she might thus be brought within the reach of those agencies which they possessed, and which they could only use efficiently within those limits, and by the use of which they could contribute to her safety. Exclude the Nina from her connection, and suppose the case of the fire department, under all the circumstances as they appear by the evidence, having chartered a steamer to tow the Huntsville, while on fire, in the harbor of Charleston, to one of these wharves, in order that they might, by the use of their engines and other applications, save her from conflagration, and can there be a doubt that this would be a salvage service? And if it were—which it is not—that they became remitted to their specific legal duties, are not the circumstances connected with her introduction here and safety extraordinary enough to entitle them to salvage even if, as is urged, performing but legal duties, they were entitled to receive also their legal compensation? In the case of Le Tigre the collector had regularly seized a vessel, and by that unlawful seizure she was saved for the owner. Yet Judge Washington considered that sufficient, resulting as it did, in saving the vessel for the owner, to award him compensation for the service.

I have said that the fire department did not, because of the introduction of that vessel under the circumstances of the case, become remitted to their specific legal duties. If they did, they must at the same time have become entitled to specific legal compensation which results from their discharge of those duties. But can it be supposed that their claim could have been maintained against the city, when they had relinquished it, and that relinquishment was one of the motives which induced the mayor to permit the introduction of the Huntsville within the limits of the city? There was, for all the purposes of that occasion, by mutual consent, a suspension of the relations which existed between the fire department and the city. There services, intended for the protection of the citizens of Charleston, were enlisted in behalf of a stranger, and the city of Charleston became of necessity only the place in which those services could be employed. Unconnected as they were for that purpose with the city of Charleston, not called to the discharge of their legal duty by the mayor, but permitted to employ themselves elsewhere; not entitled to compensation from the city, because their services were not to be employed for the benefit of the city,—they are here, for all legal purposes, making their claim in the same manner as if it had been practicable for them to have carried their engines to the place at which the Huntsville was ashore, and then had extinguished the fire. But it is said the mayor was not justified in withholding his permission to bring

the Huntsville within the city of Charleston, and that when he did assent he was not justified in making the exoneration of the city from all claim for compensation a condition annexed to his permission. The first proposition cannot be maintained in law, the second proceeds to a great extent from a great misapprehension of the fact. Such an exercise of power as that referred to, and by which that vessel might have been refused admission to the city, is connected with the preservation and welfare of that community over which the mayor is chosen ruler. It is involved in the general power which is vested in the corporation of the city of Charleston, a municipal corporation, to be regarded as the agent of the legislature for the purposes of government,—White v. City Council of Charleston, 2 Hill (S. C.) 571,—the existence and exercise of which is necessary for the safety of the city, and does not necessarily require an express grant to give it existence or authorize its exercise, because it is an element indispensable in every organized community, and essential to its welfare, to control the admission or introduction of persons or things by which its welfare will be endangered. Nor does it militate with the proper exercise of this authority that it may be indiscreetly, or even improperly, exercised. Such cases would seem to show that an officer was unfit, not that his authority was unwise. And such cases might prove the abuse of the power without presenting an argument against its use. The correction, too, would be found in those proceedings which relieve a particular evil without affecting the basis of self protection upon which every community reposes. Id.

In this particular case it does not appear upon what ground that discretion with the exercise of which the mayor, a representative of the corporation, is clothed, can be challenged. That the danger of fire communicating itself is great, and to prevent it arbitrary measures in the exercise of an honest discretion may be adopted, is seen in the power to destroy private property without the owner having a right to compensation. White v. City Council of Charleston. That this danger is equally great, in its application to shipping is seen in the power which is given to take a burning vessel from her place at the wharf and tow her into the harbor, where the work of destruction may be consummated. Such power is plainly given. But how much greater is this power than that which is exercised in preventing a burning vessel from coming within the limits of the city? In the one case, because of an apprehended danger, a vessel is not allowed to come within the limits of the city; in the other, a vessel within the limits of the city, contributing its quota to the treasury, and receiving therefor a right to all the protection which the city can afford, is deprived of that protection because it cannot be given without danger to the community. If the power in the latter case is admitted to exist, it is not easy to be perceived how it can be denied in the former. And when the power to refuse admission to the limits of the city to a vessel like this is questioned or denied it must be either because of some obligation resting upon the city to admit her, or some right of that vessel to be admitted.

There is an obligation on the city to admit; there is a right in the vessel to be admitted; but the obligation is complete when no injury thereby accrues to the city, and the right is perfect when its enjoyment does not produce injury to the party in regard to whom it is exercised. The law which in a nation, state, or municipality is necessarily most commanding is that which protects its security and maintains its welfare. And no right can be claimed or enjoyed by any one, not even by a member of that nation, state, or municipality, except as subordinate to this great law. And if its own welfare may properly influence a nation, state, or municipality in admitting within its limits that from which it apprehends mischief to itself, who shall determine the existence of the cause of danger or the sufficiency of the apprehension? The law of nations, the local laws of organized communities, and the necessities which give rise to the power of refusal, all unite in placing the power where it only can be placed to accomplish the purpose for which it is intended,—with the community to which admission is sought. And to one or more persons, where, in its exercise, discretion is involved, does each community confide the administration of such authority as may be necessary for the exercise of this power. And this power, so arising, and so to be exercised, must be, at least in cases of emergency, final in its exercise. To it we must apply the maxim, "Stat pro ratione voluntas." A review of its propriety, so far as it applies to a particular case, cannot be given to the community, far less to the stranger affected by it. No one will contend that the community would have a right to overrule the discretion of the mayor refusing permission for the Huntsville to come to the city. No one will contend that the Huntsville would have a right to disregard that refusal, and force her way into the docks of the city. And if she could not, and if, because of such refusal no claim for indemnification could be brought against the mayor or against the city, his discretion, when exercised, and his determination, when expressed, fixed the legal relation of all parties to that vessel. He refused her the protection of the city, and, if not entitled to that protection, there existed no legal duty of the fire department towards her. Their services thenceforth were wholly voluntary. Nor can they be considered otherwise, unless in these proceedings it is assumed that the conduct of the mayor is to be investigated for the purpose of substituting at this time new relations between these parties for such as existed at the time when

the services were rendered, and to which, as they then existed, the Huntsville became bound by submitting to the conditions upon which was rested the permission of which she availed herself.

It is also urged that the permission, when granted, could not be clogged with conditions; that, if her admission to the city was consistent with its safety, there could be no just ground for refusing her permission to come in; and, above all, that the permission could not be withheld unless upon the condition of an exoneration from expense. If it had been so that the permission to enter the city was withheld upon no other ground than that it would subject the city to a large expenditure of money, and if it was therefore made a condition of that permission that this expense should be saved the city, I cannot see in the condition any thing at war with the principle by which it is urged that considerations of humanity gave to the vessel a right to that permission. The claim which that vessel did present was to be allowed the opportunity of being saved, not that the city of Charleston should pay the expense of saving her. It was not the aid of the city treasury she needed; and, if she did need it, the argument derived from considerations of humanity has no application. But it was not because of the expense to the city that might be involved in her admission to the city that the mayor refused his permission. It might very well seem to that officer, somewhat inconsistent, that he whose duty it was to cause a burning vessel in the dock of the city to be towed out should order a burning vessel to be towed in. But it was because of his apprehension of danger to the city that he refused. Nor was his assent given until he had visited the wharf, examined the property which would be exposed, obtained the opinions of the fire department, weighed the urgent representations of the consignee, as to the value of the property in peril, and obtained from a special messenger a report of the probable danger of the flames bursting forth before the fire department could take possession of her. When these things were ascertained, it was proper for him to enquire whether, in addition thereto, the city should be subject to the expenses of the fire department. Had the Huntsville been moored without some such understanding as did take place, then would a fixed legal duty have been devolved upon the fire department, and a fixed legal liability for their compensation would have arisen by the city of Charleston. Nor, under such circumstances, would there have been a legal liability on the Huntsville to reimburse the city of Charleston for its expenditures. But the expenditure of the money of the city was not needed, was not desired by the Huntsville; it only asked the privilege of being admitted to a place at which it might be saved from the fire which threatened her destruction, by all such agencies as she could command. I have no doubt that the mayor had perfect authority to protect the city, by refusing admission to the Huntsville; or, if he admitted her, to protect the city against the expenses which were involved in that admission.

It is next objected that the service performed by the fire department was not in its nature maritime, that it cannot be considered salvage, and therefore is not within the jurisdiction of this court. In that view which I shall hereafter more particularly explain of the services rendered in the case, the objection now made will not be as applicable as it would be under such circumstances as were assumed in the argument as developed by the evidence. I shall at another stage of this case deem it necessary to show that the service rendered in this case was either a joint salvage or that salvage service cannot be claimed by the first libellants unless its completion, without which it cannot be claimed by the first libellants, is directly connected with the services rendered by the fire department. It may be that the fire department could, under certain circumstances, be considered salvors and the first libellants be not so considered, or at least as salvors not entitled to high reward. But in no event could the first salvors be entitled to claim as such unless the fire department be also regarded as joint salvors with them, or the saving accomplished by that department be regarded as the completion of the work commenced by the first libellants. That the service was rendered from the land to a vessel within the admiralty and maritime jurisdiction of the courts of the United States is not sufficient to deprive it of the character of salvage, if the other circumstances necessary to be found in such cases also exist. The Centurion [Case No. 2,554]. If the service has been rendered on the land to goods which are on the land, but which have been saved or brought from the sea, it would undoubtedly be a case of salvage. In cases called "mixed," where the service partly on the tide water and partly on the shore, jurisdiction of such as cases of salvage has been affirmed by the supreme court. U. S. v. Coombs, 12 Pet. [37 U. S.] 72; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. [26 U. S.] 511. That where the service has been performed wholly on the shore, in relation to goods cast ashore from a wreck, it will be regarded as a salvage service, and of it this court will entertain jurisdiction, was held in the case of Stevens v. The Argus [Case No. 13,366]. And that such services are not merely constructive salvage service, but so declared by positive legislative enactment, is seen in the law of the state of South Carolina passed March 16, 1783. The grant of admiralty and maritime jurisdiction in the constitution has been held as exclusive (Const. U. S. art. 3, § 2; Act. Cong. Sept. 24, 1789, c. 20, § 9 [1 Stat. 76]), and, being so, would include among all other subjects of and incidents to that jurisdiction, whatever had

been in the several states or by either of them declared to be within its cognizance. It could only be by thus embracing all things subject to this jurisdiction that one of the chief purposes in making the grant of it exclusive, so that uniformity in the exercise of it could be secured, would be accomplished. If included in the grant of maritime and admiralty jurisdiction, it is a distinct element in that grant to be administered by the courts of the United States for the benefit of the state by which it has been granted. If not included in the grant, it is still a subject of jurisdiction in the state, and the grant of admiralty and maritime jurisdiction under the constitution would not be exclusive. A subject-matter of admiralty and maritime jurisdiction in a state may be included in the exclusive grant of that jurisdiction to the courts of the United States, and be entertained in those courts for the benefit of the people of that state; but it could not be included in the grant, to be merely absorbed in that grant, and not to be exercised in the courts for the purposes of which the grant was made.

If jurisdiction, therefore, of this case rested upon no other ground than that by the law of the state of South Carolina in 1783 it was made a subject for the exercise of admiralty and maritime jurisdiction, and that by the constitution of the United States the state of South Carolina granted an exclusive jurisdiction of all such cases, and that jurisdiction has been given by congress to the courts of the United States, it would be sufficient to maintain the jurisdiction now asked. But it is not necessary for the ascertainment of a right in this court to exercise jurisdiction of this, as a case of salvage, that it should rest upon the ground just stated. It was the continuation and completion of the service commenced by the first libellants, and comes directly within that class of mixed cases, the jurisdiction of which has been declared by the supreme court to be rightfully exercised in these courts. And, if it were not so, that this service is connected with that rendered by the first libellants, but is considered as independent of all others, it would yet be a service rendered from the land to a vessel the locality of which was within the admiralty and maritime jurisdiction given to this court. And if all the agencies employed were on the land, yet, when these were exercised to afford aid to a vessel within that jurisdiction which belongs to this court, there is no principle by which this court can refuse to recognize it. In the Aquila, 1 C. Rob. Adm. 46, Sir Wm. Scott did not refuse to recognize the magistrate as a salvor because the service which he claimed to have rendered to a vessel was rendered by him upon the land, but because it was precisely what he was bound to do; and the case contains a very clear intimation that if the magistrate had done more he would, or might have been rewarded as a salvor. But in relation to this objection the evidence shows that the essential part of the service of the fire department was rendered upon the tide water, and therefore within the jurisdiction of this court. The streams of water by which the Huntsville was submerged and the fire extinguished were directed and controlled by those of the fire department who were on board of the vessel. It was by the engines on the land that the supply of water was afforded to those who were on board of the vessel; but it was by that part of the fire department who were on board of the vessel that the water so supplied was directed and employed in subduing the fire threatening to destroy the vessel and cargo. The witnesses who have been examined testify that the services of the fire department were directed in searching out the fire, in the vessel by cutting holes in her deck, and thus operating directly upon the fire, successfully overcoming it. The power by which the fire was controlled may have been derived from the land as its source, but it was used upon the decks of that vessel. It is not because I have any doubt that services rendered wholly on land may be well considered as salvage cases, but because I connect the services of the fire department with the services of the Nina, and regard the services of the fire department as performed partly on land and partly on tide water that I have referred to the class of mixed cases of salvage, and in which, as I have said, I think this case must be placed.

It is next objected to the claim of the second libellants that there was a contract for compensation with them, and that this is not consistent with a claim for salvage. A claim for compensation for salvage may be lost if there has been a contract for compensation, without regard to the success of the efforts which have been used to save the property. But that contract which will bar a claim for salvage must be express, explicit, and in distinct terms. Marvin, Wreck & Salv. p. 127. Dr. Lushington says it must be a distinct agreement between the parties for a given sum and in explicit terms. 7 Notes of Cas. Adm. & Ecc. 363. "A sort of understanding," says he, "will not bar a claim for salvage." And in the case then before him, in considering the denial of the parties that they understood the service to be in the nature of salvage, he says: "Suppose it was not, we must look to the service itself which was performed." In The Salacia, 2 Hagg. Adm. 265, it was alleged that the party claiming salvage had fixed a certain sum as the compensation, and had made an agreement for that sum. Sir Christopher Robinson said: "It is probable some such conversation may have passed at the beginning of the service, but it might not be known what would be the extent of it, and the court is not in the habit of considering such loose conversations as conclusive of the merits of any case." The chief of the fire department

is positive in his statement that compensation was only to have been claimed if the vessel was saved; and that the amount of that compensation was to be decided by some impartial tribunal. The mayor of the city testifies that the impression which he received from the conversation between the chief of the fire department and Mr. Caldwell, the consignee, was that the fire department would only receive compensation if the vessel was saved.

Mr. Caldwell, whose testimony is relied upon to prove a contract, does not undertake to say that any specific sum was agreed upon. And in regard to payment to the fire department in case they did not save the vessel he says: Nathan (the chief of the fire department) tendered the services of the department. He (Mr. Caldwell) asked, "What terms?" Nathan said they could arrange the terms, or, if they differed, it could be settled. And subsequently, in the course of his evidence, Mr. Caldwell says it did not enter into his mind to consider what the department would have been paid if the ship had been lost; thinks now he would have paid something, if she had been lost. So far from this being evidence of a contract, express, explicit, and in distinct terms, it does not go far enough to make out what Dr. Lushington calls "a sort of understanding." There cannot then be a rule more proper in this case than that laid down in the case referred to "to look to the service itself which was performed." In considering these objections to the claim of the fire department as a salvage service, and in reaching the conclusion that they do not affect its right to be so considered, I have been led at the same time to consider the circumstances which entitle it to be adjudged a salvage service. Such other circumstances as have been suggested in the argument are more applicable to the measure of compensation than the character of the service rendered. They will be considered, hereafter, in that connection.

I have also considered at length the question of the right of the fire department to claim as salvors, because the argument on either side was very ably pressed, and because it was the chief question in the case. If they were not salvors, and the service rendered by the fire department was not connected as salvage service with the Nina, it may be doubtful if the first libellants could maintain their libel in that capacity. And this brings me to consider the case as made by the first libellants, the owners of the steamer Nina. In doing so, I shall first consider the circumstances which determine the character in which they are to be regarded, and then such as affect the measure of compensation. At the time when the Nina afforded aid to the Huntsville, she was exposed to two perils, each distinct from the other. She was ashore, and she was on fire. To be saved it was necessary that she should be floated. By being floated she would be more able to escape the danger of stranding, and being floated without prolonged delay, and being able to reach some place at which the fire raging within might be controlled, were involved all the chances of escape from that peril. Whatever assistance was afforded her by which she was enabled to escape from the place at which she had run ashore, if she was thereby saved, was a salvage service. If that service in so relieving her enabled her to escape the peril of stranding, it became more valuable in proportion to the imminence of that peril. If the escape from the shore enabled her to escape the peril of stranding, and, in addition thereto, enabled her more readily to overcome the additional peril of fire, it becomes of course more valuable in proportion, in which that second peril was imminent. And if, in addition to her extrication from the place at which she was ashore, she was further assisted by being towed to the place at which the peril from fire could be overcome, the service is again made more valuable according to the time gained for the Huntsville by this aid. And it is in these several relations towards the Huntsville that the claim of the owners of the Nina must be considered.

Before, however, I proceed to the examination of the evidence in relation to this part of the case, it is more necessary to determine the relations which the first and second libellants, the owners of the Nina and the fire department bear to each other. There is no principle in regard to salvage more unquestionable than that the claim for salvage can only be allowed when the property that has been exposed to peril is restored in safety to the owner. No matter how daring may be the attempt to save, nor how meritorious the service rendered to the vessel in distress, without success they furnish no claim to reward. The property must be effectually saved. It must be brought into a port of safety, and it must be there in a state capable of being restored to the owner, before the service can be deemed completed. The Henry Ewbank [Case No. 6,376]. If this principle should be applied to the first libellants, they could not claim compensation as salvors. If they did rescue the Huntsville from stranding, and if they did tow her to the city of Charleston, she was still exposed to a greater peril than that from which they had relieved her. All of the witnesses, with one accord, declared the fire to be the greater peril, even when she was ashore. With the lapse of time that peril must have been fearfully increased. And no ingenuity can sustain the position that a vessel in which a fire has been burning for many hours could be considered in that condition as in safety or capable of being restored to the owner as saved. It was contended that when the vessel had been brought to the wharf,

thereupon arose a legal obligation, upon the fire department to save her. Doubtless, if I concurred in that opinion, all which has been urged to sustain the claim of the first libellants as the only salvors would have much more weight. But the evidence has satisfied me that this position is not well taken. But, although the services of the first libellants did not result in placing the vessel in safety, if thereby she was placed in a position in which she could receive that aid, which the first libellants could not afford, and because she was in that position other persons were enabled to render aid, and by that aid she was saved, the first libellants will, in that case, be entitled to claim compensation as salvors. And it is upon this principle that the first libellants must maintain their claim. And this court, regarding the whole service of saving the vessel from both perils with which she was threatened, and having decided the proper compensation for that service, will divide it among the parties according to their several merits. Marvin, Wreck & Salv. 142; The Henry Ewbank [supra]; 3 Hagg. Adm. 156.

It has been urged in behalf of the respondents that where the first and second libellants have denied their co-operation with each other that the court would not by its decree establish a connection which they denied, and that all the consequences, which it is said would follow from this voluntary severance by them, of all relations with each other, should be devolved upon them. But it is not remembered that in cases like this there are considerations presented to the court stronger than any which can be urged in connection with the private claims of individuals. Every case of salvage is to be considered in connection with that public policy which creates the right and regulates the amount of compensation in such case. And each case is determined not only by the circumstances which are found in it, but also by a regard to the general welfare. Hence a second set of salvors who have unnecessarily obtruded themselves upon other salvors, will not be allowed compensation, although they may have rendered service And in like manner, if a salvor who really requires aid shall refuse it when proffered, with the hope thereby of increasing the compensation he shall receive, and if, in consequence of his conduct, the property is not restored to the owner in as good a condition as it would have been if such aid had been accepted, he will not be rewarded as he expected and desired. If in this case, the salvors have discharged their duties in good faith to the vessel, and by their services the vessel has been saved, it is the duty of the court to determine their true relations, and to award proper compensation to them. Their compensation is measured by their services, and is not affected by a difference among themselves as to the value of the services by them respectively rendered. It is natural that among several salvors each should consider his service the most efficient. But these differences are to be settled by the court, and they afford no proper objection by the party who has received the services to that compensation which has been fairly claimed. It is not to be presumed in such a case that they intended to abandon their claim to compensation, nor will the court so regard it. That the perils from which the assistance alleged to have been offered by the first libellants aided the escape of the Huntsville were sufficient to justify these first libellants in claiming to be salvors is too clear to need illustration. What, then, was the value of the services rendered by the Nina in aiding the Huntsville to escape from the peril of the breakwater? The danger consisted in the Huntsville working up to the breakwater. Did the Nina contribute aid to prevent this? Two hawsers were passed from the Huntsville to the Nina, and by the combined aid of the steam of the Nina and the anchor she had out the Huntsville was kept in her position. This was the object to be accomplished. By it the Huntsville was to be kept from working up to the breakwater, and be more easily floated off with the flood tide. Was this accomplished? That it must have been understood as calculated to exercise some control over the Huntsville is obvious from the fact that the captain of the Huntsville and the pilot in charge of her anxiously reminded the captain of the Nina that with all these aids they were still heading on to the breakwater. And if with these counteracting forces the Huntsville did still work on to the breakwater, it is clear that without these her progress to the breakwater must have been much more rapid, and her danger much more impending. It is true that the captain of the Huntsville says that in this the Nina did him no good; and the examination of the witnesses was directed to the point that the anchor of the Huntsville would have afforded all the aid the Nina rendered. But although the captain of the Huntsville thinks the Nina did no good, he evidently disapproved of the cutting of the hawsers, which for a time separated the vessels; and most inconsistent is the idea of a vessel keeping her signal of distress flying when she could relieve herself by carrying out her own anchors. Such pleas are not favored. If the assistance of a salvor is sought (and how is it more distinctly sought than by a signal of distress?) and if his assistance is received (and how is it more absolutely received than in complete obedience to all his directions?) it is not competent for those who have asked and received that assistance to insist that by their own resources they could have saved themselves. I have endeavored to satisfy myself of the precise extent of the agency of the Nina in relieving the Huntsville from her position near

the breakwater. She floated, however, at a moment when it would seem the increase of difficulties produced by the approach of the Keystone State had temporarily diverted the attention of all. But if the evidence does not give to the Nina all the credit for the extrication of the Huntsville, it is equally far from taking away from her a large share of the credit, due to several causes, operating at the same time, in combination with each other, but without any means of determining their relative value in accomplishing that result. Of all the causes thus operating to relieve the Huntsville that connected with the Nina alone was operating voluntarily, and for the purpose of affording relief. After the hawsers had been cut and the Huntsville had passed the breakwater, and the peril of stranding had been avoided, she was taken in tow by the Nina, and assisted by her in reaching the wharf at which she was permitted to come. This, the continuation of the service commenced at the breakwater, deserves to be carefully considered, because if there was at this time assistance offered by the Nina, it was rendered at a time when to the Huntsville it was of the utmost consequence. The escape of the Huntsville from the danger of stranding was at once an escape from a peril, and a necessary means in facilitating her escape from a still more imminent peril with which she was threatened. But, when thus relieved, to be saved, it was necessary that she should be enabled to reach a certain designated wharf before the flames within her would burst forth. Had the report of the officer sent by the mayor been unfavorable, or had the flames burst forth from her before she reached the wharf, the permission of the mayor would have been withdrawn; and for the purposes of this case her destruction would have been inevitable. Nor does it affect this conclusion to suggest that she might have been scuttled and sunk. How far this would have contributed to her restoration to her owners, and, if she could have been restored after this process, at what proportion her value would have been diminished, has not been explained by any testimony, and probably is a matter of which explanation cannot be given. Captain Coste, who gave expression indirectly to his opinion on this subject, certainly considered that to make her safety consist in scuttling would require careful preparation for it. For its success a place had to be selected. It was not a remedy to be adopted or used unless resolved upon and arranged for in many particulars. And when for it no arrangement was made, nor preparation of any kind made, however it may be hereafter regarded in considering it, as a circumstance operating to diminish the compensation to be given to the fire department, in regard to the Nina, and in connection with this part of the service which it is claimed she rendered, it cannot have any influence. The Huntsville then must be considered as confined for her safety to the means she possessed of being able to reach the only wharf, to which she was permitted to come, and at which wharf she could receive the aid of the fire department. And it was not only necessary that she should be able to reach this particular wharf, but that she should reach it with all possible quickness, and before the flames burst forth. The service rendered by the Nina at this time depends upon the conclusion to which we are led by the testimony as to these two points. Did the Nina assist the Huntsville in reaching Southern wharf, and could the Huntsville have reached that wharf without the aid of the Nina? Did the Nina enable the Huntsville, if she could have reached Southern wharf without her aid, to reach that wharf sooner, than if she had been unaided?

Limiting the place of safety to that wharf, at which only the Huntsville was permitted to come, and at which the means of saving under the control of the fire department were to be had, and referring to the evidence for the purpose of ascertaining whether that wharf could have been reached by the Huntsville with no other agencies to assist her but the wind and the tide, it will appear that no witness entertains the opinion of her ability to do so. Some of the witnesses express the opinion that she would have drifted to some other part of the city wharves, but all concur in the opinion that she could not have been managed, so as to be brought with any certainty to the wharf designated for her. But as this wharf was the only wharf at which she could be brought, and the only place at which she could obtain the means of safety, it is alone to be considered in determining the value of the resources it is urged that she possessed, and by which she could reach that place. And if, to enable her to reach this wharf, the aid of the Nina was essential, and that aid she received, that aid must be considered an important service (not of itself insuring safety, but connected with others), which alone could be expected to secure safety for her. Did this aid, so rendered by the Nina, enable the Huntsville to reach Southern wharf sooner than she could have otherwise done? What has been already said serves to show that the aid so rendered was essential to her reaching that wharf, and, if so, the same aid was valuable in the saving of time which it occasioned. The pilot who was in charge of her testifies that the Huntsville could not be steered, and other witnesses have spoken of the difficulty, from this cause, which the Nina had in towing her. It is true that Captain Coste had testified that he did not attach much consequence to the fact that she could not be steered, but the pilot, whose attention to the vessel, and whose experience, combined with his disinterestedness, make him a very reliable

witness, undoubtedly considered it one of the pressing disadvantages under which she labored. The retardation of her course in consequence of her inability to be steered, in his judgment, made her passage to the city twice as long as it would have otherwise been; and that by the aid of the Nina she was enabled to reach the wharf to which she was permitted to come, and by the same aid was expedited in her course, and that in consequence thereof she was enabled to reach a place at which, by the application of other agencies, she was saved from the peril of fire, are conclusions directly established by the evidence. If we consider that without the aid of the Nina the Huntsville could not have reached the city (for the service of no other steamer could be had), and that the delay of another hour in reaching the wharf would have involved the total destruction of the Huntsville, it is not easy to overestimate the importance of that time so gained, or the agency by which in gaining that ultimate safety was secured.

Regarding this, then, as a case of joint salvage, it is now proper to consider the proper amount of compensation, and its division among the salvors. There was not, in any part of the service rendered by either salvors, any immediate risk of life, nor was the property employed in saving the Huntsville exposed to any great risk or danger. But the services were in themselves highly meritorious, and by them a very valuable vessel has been preserved. Without them, I cannot doubt that she would have been wholly consumed. To the voluntary proffer of the services of the fire department in aid of a burning vessel many miles distant from the city, to the influence of that offer upon the mayor in securing his assent to her being brought to the city, and to the efficiency with which the services of that department were rendered, must we refer as a chief part of the efficient causes, which led to the safety of the vessel and cargo. It was said that she could have been scuttled at the wharf, but the location in which she was placed at the dock, under the direction of her captain, makes it extremely improbable that such an attempt could have been made with success. I cannot balance against the aid which was rendered so promptly and efficiently the suggestion of any other proceeding concerning the practicability of which there is no positive evidence, and of the inferiority of which there would seem to be no higher proof than is found in the fact that it did not at any time present itself to captain or pilot who were in charge of the Huntsville as a resource to which they might resort.

Of the value of the property saved the evidence is not as clear as might be desired. I think it may be safely placed, at the time when it was saved, at $60,000, exclusive of the cargo. That the salvage service was in part rendered by a steam vessel and to a steam vessel has always been regarded as justifying a higher rate of compensation than would be given to sailing vessels. And upon this value of the vessel, and such circumstances in the case as are proper to be regarded, I consider the salvors entitled to compensation at the rate of 12 per centum, or an amount equal to $7,200. The rate of compensation is in accordance with the decisions which have been made in this court in cases which may to a certain extent be considered as an authority in this upon the question of the rate of compensation. The Wm. Penn [Case No. 1,965]. In The Delphos [Id. 14,400], a much higher rate of compensation was given. Upon the cargo which was saved, amounting to $19,733, the same rate of compensation will be charged, amounting to $2,367.96. The aggregate compensation will be $9,567.66, and of this amount one-third, or $3,022.65, will be given to the first libellants, owners of the steamer Nina, and such as are entitled to share with them, the proportion of the several parties to be fixed by the decree. Two-thirds or $6,545.30 will be given to the second libellants, composed of the Incorporated Companies of the Fire Department and the persons who by their labor at these engines, are entitled to claim as salvors. Of this sum so awarded, or two-thirds as now stated, another division shall be made into nine parts. One-half of each ninth part shall be paid to each of the incorporated companies owning and employing its engine and appurtenances, the other half of each ninth shall be divided among the several persons members of each of the said companies engaged in working the said engines, so that each member of the several companies shall receive the same compensation. And for the purpose of ascertaining the actual salvors, a reference is now ordered to the commissioner, with directions to enquire and report the actual salvors on board of the Nina; the capacities in which they served; how many white, how many colored; of the colored, how many, if any, were free, how many slaves; and to whom they belonged; in the fire department, the number and names of the actual salvors whose services were given as firemen in extinguishing the fire in the Huntsville. And the commissioner is directed further to report any special matter in relation to the salvors, or any of them. It is further ordered that the said commissioner file his report touching these matters now referred, and thereupon a decree will be entered in conformity with what is now stated, and also for the costs of these proceedings.

[Commissioner Eggleston filed his report in this cause November 6, 1860, and on the following day the court rendered its final decree as follows:]

On hearing the report of the commissioner upon the several matters referred to him under the order of this court, it is now ordered,

adjudged, and decreed: That the respondents pay into the registry of this court the sum of $9,567.96 for the salvage service rendered in this case, and that they do also pay the costs of these proceedings to be taxed by the register. That of the said sum of $9,567.96 the sum of $3,022.65 be allotted to the libellants who are the owners, captain, and crew of the steamer Nina; and of this amount that the register pay to the several parties herein named or their proctors the following sums; that is, to the owners of the Nina, including therein the compensation for the negroes, either owned or hired by them, and comprising the crew of the Nina, $2,500; to Isaac Davis, captain, $400; to W. R. Poyas, engineer, $100; to J. H. Murray, mate, $51.33; to S. S. Herring, watchman, $51.33. That of the said sum, $9,567.96, the sum of $6,545.31 be allotted to the libellants the nine incorporated fire engine companies, and the members of the same specially set forth in the report of the commissioner. Of this sum one-half, or $3,272.65½, be divided into nine equal parts, one of which—that is, the sum of $363.62 5/6—shall be paid to each of the said companies or their proctors. Of the remaining one-half, or $3,272.65½—a division thereof shall be made into 310 equal parts or shares, one of which part or share—that is, the sum of $10.55⅝—shall be paid to each of the parties named in the report of the commissioner or to his proctor.

HUNTSVILLE, The (ROBERTS v.). See Case No. 11,904.

HUNTT (COPE v.). See Case No. 3,206.

HUNTT (WHITNEY v.). See Case No. 17,589.

HUPPENBAUER v. U. S. See Case No. 3,097.

HURD (HALSEY v.). See Cases Nos. 5,966 and 5,967.

Case No. 6,917.

HURD et al v. REEVE et al.

[N. Y. Times, June 2, 1855.]

District Court, S. D. New York. 1855.

COLLISION—STEAMER AND SAILING VESSEL—HOLDING TO COURSE—RECORDING OF BILL OF SALE OF VESSEL—LIABILITY OF GRANTOR.

[1. Where it appears that a collision between a steam vessel and a sail vessel would not have happened if the latter had held her course, and that she changed it without reason, and when not in danger of collision, she will alone be held liable.]

[2. The grantor in a bill of sale of a vessel cannot be prejudiced by the grantee's neglect to record it, and cannot be made personally liable for her negligent navigation after his interest has ceased.]

This libel is filed by [Joseph L. Hurd and others], the owners of the propeller Falcon, against the respondents [Nathan Reeve and others], as owners of the schooner C. Reeve, to recover the damage occasioned to the former by a collision between the two vessels, which happened on Lake Erie on the night of Dec. 2, 1854. The libelants reside in Detroit, and the respondents reside in Newburg, N. Y. The collision occurred about thirty miles from Buffalo, between 10 and 11 o'clock at night. The propeller was bound from Detroit to Buffalo, properly equipped in every respect, and until a moment before the collision was heading east by north half north, the proper course for her. The wind was blowing an eight or nine-knot breeze from the southeast, and the schooner, after leaving Port Colbourne, on the Canada side of the lake, headed southwest until a short time before the collision, when she altered her course a little further to the west. It was a clear moonlight night, and both vessels saw each other when four or five miles apart. When first seen from the propeller, the schooner was a little over her larboard bow, but changed her position until she was four points on the propeller's starboard bow. While both vessels were then pursuing a course which would have carried them clear of each other, the propeller starboarded her helm so as to carry her farther from the schooner, and at about the same time the schooner ported her helm, changed her course six or seven points, and came right into the propeller, striking her on her broadside, and so injuring her that, to save her from sinking, a large portion of her cargo was thrown overboard. And the libelants claim to recover damages to the amount of about $26,000. At the time of the collision the respondents stood as owners of the schooner on the books of the custom house. But on the 9th day of October previous, a bill of sale was executed and delivered by the respondents Powell, Ramsdell & Co., to the respondent Nathan Reeve, conveying to him the half of the schooner owned by them. This bill of sale was not, however, recorded until after the commencement of the suit.

Owen & Bose, Mr. Ganson, and Mr. Newberry, for libelants.

Dunning & Fullerton and A. W. Bull, for respondents.

HELD BY THE COURT (INGERSOLL, District Judge) that it was admitted by all the witnesses who saw the collision that it would not have happened if the schooner had kept her course, and not ported her helm. That when a steam vessel meets a sailing vessel, as in this case, it is the right and duty of the sailing vessel to keep her course, and the duty of the steamer to avoid her, and to act upon the supposition that the sailing vessel will keep her course. [St. John v. Paine] 10 How. [51 U. S.] 583. That the propeller adhered to this rule, but it was violated by the schooner, and without any good reason. That the rule that, where two vessels

meet, each shall pass to the right, is not applicable in this case, for two reasons: First, the two vessels were not on the same line, or nearly so; and, second, the schooner had a privileged course, and was not bound to change it. No maritime rule can be adopted, by which another and a paramount rule will be violated, and the rule of passing to the right, if adopted in this case, would be in violation of the rule laid down in 10 How. That the schooner, therefore, would be liable for the damages occasioned by the collision, and her owners at the time are also liable.

That it was not intended by the act of congress requiring bills of sale to be recorded that the grantor in a bill of sale should be prejudiced because the grantee neglected to have it recorded. A bill of sale is not a complete instrument, and cannot be recorded until after it is delivered, and when delivered it is no longer in the control of the grantor, because an act was not done, which he could not do, or compel to be done. That Powell, Ramsdell & Co. therefore have ceased to have any charge or control over the vessel, or to be interested in her navigation from the time of the delivery of the bill of sale. That the libel must therefore be dismissed, as against them, and the libelants must have a decree against Nathan Reeve alone for their damages, to be ascertained by the usual reference.

Case No. 6,918.

HURD v. WILLIAMS et al.

[4 McLean, 239.] [1]

Circuit Court, D. Michigan. June Term, 1847.

PRACTICE AT LAW—CONTINUANCE—MOTION.

A motion made at one term but not decided at that term, nor continued to the next one, the court will order a continuance nunc pro tunc, but will not require the other party to take up the motion at the term. He had a right to suppose, that as the motion was not continued, it had been abandoned.

[This was an action at law by E. Hurd against Williams and Hunt.]

Mr. Emmons, for plaintiff.

Mr. Davidson, for defendants.

OPINION OF THE COURT. A motion was made at the last term in this case, to set aside a sale on execution. The motion was not continued, and the defendants' counsel objects to taking it up, on that ground. The court directed a continuance to be entered nunc pro tunc, but held that the defendants' counsel was not bound to take up the cause at the present term, as the motion was not continued regularly from the last term. The defendants' counsel had a right to suppose, as the motion was not continued, it had been abandoned.

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

HURD PAPER-BAG CO. (ARKELL v.). See Case No. 532.

Case No. 6,919.

HURLBERT et al. v. PACIFIC INS. CO.

[2 Sumn. 471.] [1]

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

MARINE INSURANCE—AGENT—SET-OFF.

1. The right of set-off is limited, at the common law, to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other.

[Cited in Simpson v. Jennings, 15 Neb. 672, 19 N. W. 473.]

2. Where an insurance was effected by an agent, for the benefit of whom it concerned, and a loss was incurred, and the agent brought an action against the underwriters in his own name, for the benefit of the owners of the ship, *held*, that the underwriters could not set off debts or demands, due from the agent in his own right, against the amount claimed for the loss.

3. A policy of insurance, wherein the underwriters insured Z. Cook, Jr. for E. D. Hurlbert & Co. for whom it concerns, payable to E. D. Hurlbert & Co., contained the following clause; "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted." An action was brought in the name of E. D. Hurlbert & Co., agents, for the benefit of the owners of the ship. *Held*, that the premium note was to be deducted, whether given by the agent or principal, and that the words, "the insured," applied not to the party, who procured the insurance, but to him for whose benefit it was made, as the owners in the present case.

[Cited in Somes v. Equitable Ins. Co., 12 Gray, 534; Trip v. Pacific Ins. Co., 89 Mass. (7 Allen) 231; Union Ins. Co. v. Grant, 68 Me. 230.]

4. Quaere, if the principal, in the policy abovementioned, could, with the consent of the agent, sue at common law in his own name.

[Cited in The Samana Co. v. Hall, 55 Fed. 665.]

5. Quaere, if a broker, who acts under a del credere commission, may be considered as the primary debtor to his principal, and, therefore, to all intents, the insured.

Assumpsit on a policy of insurance, dated the 1st of September, 1836, whereby Z. Cook, Jr. for Elisha D. Hurlbert & Co., for whom it may concern, payable to E. D. Hurlbert & Co. caused to be insured, lost or not lost, $3,000 on the schooner Flora, at sea or in port, for twelve months from the 15th day of September, 1836, at noon, and if at sea, on the expiration of the year, to continue at pro rata premium, until her arrival at her port of destination against the usual perils. The declaration averred a total loss by the perils of the seas within the term aforesaid. The cause came on to be heard upon a statement of facts agreed by the parties, as follows: The plaintiffs are commission merchants, resident in New York; and as agents for their employers, frequently cause insur-

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

ance to be made in Boston by Mr. Z. Cook, Jr., who has general instructions from them to have all policies effected by their orders made "for whom it concerns payable to them." The insurance in this case was so effected by Mr. Cook, by the orders of the plaintiffs, in behalf of the owners of the vessel insured, who reside in Connecticut. The defendants being liable to pay a total loss on this policy, claim the right to deduct from its amount all sums due and payable to them by the plaintiffs, and to have payment or security for the sum of all the premium notes becoming due to them, on which the plaintiffs are promisors. The parties in interest deny the right of the defendants to deduct any but the premium note given for this insurance. A copy of the policy makes part of this statement; the defendants are to have all the benefit they could derive by force of the provisions of the policy, or by an account duly filed in set-off, which is to be considered as done; no statement of interest under this policy was made to the defendants prior to the loss being claimed.

The policy was in the following words: "This policy of insurance witnesseth, that the president and directors of the Pacific Insurance Company in the city of Boston, do by these presents cause Z. Cook Jr. for E. D. Hurlbert & Co., for whom it concerns, payable to E. D. Hurlbert & Co., to be insured, lost or not lost, three thousand dollars on the schooner Flora, (at sea or in port, for twelve months from the fifteenth day of September, 1836, at noon, and if at sea on the expiration of the year, to continue at pro rata premium until her arrival at her port of destination. The assured may cancel this policy after the expiration of six months, or at any time, should the vessel be sold) whereof is master for this present voyage, ——, or whosoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel, or master thereof, is, or shall be named or called: beginning the adventure upon the said schooner as aforesaid, and to continue during the voyage aforesaid, on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed. And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance. Touching the adventures and perils, which the said insurance company are contented to bear, and take upon them in this voyage, they are, of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master (unless the insured be owner of the vessel), and of mariners, and all other losses, and misfortunes, which have, or shall come to the damage of the said schooner, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston: provided, that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel, or freight, unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. And in case of any loss or misfortune, it shall be lawful for the insured, their factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said schooner, or any part thereof, without prejudice to this insurance, to the charges whereof, the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the president and directors aforesaid, are contented, and do hereby bind the capital stock and other common property of the said insurance company, to the insured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this insurance, by the insured, at and after the rate of eight per cent. per annum, to return pro rata premium for time not used. And it is hereby agreed, that if the insured shall have made any other insurance upon the schooner aforesaid, prior in date to this policy, then the said insurance company shall be answerable only, for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance, provided, that no return premium shall be made for any passage, whereon the risk has once commenced. And in case of any insurance upon the said schooner, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said insurance company shall nevertheless be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner, as if no such subsequent insurance

had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company, from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment. It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised: and that the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver or acceptance of an abandonment. It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure, or detention, for, or on account of, illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers. It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured: and in case of a total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew, for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is further agreed, that if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award in writing shall be conclusive and binding on all parties. The company is not liable for wages or provisions, except in general average. In witness whereof, the president of the said Pacific Insurance Company, hath hereunto subscribed his name, and caused the same to be countersigned by their secretary, at their office in Boston, this first day of September, one thousand eight hundred and thirty-six."

F. C. Loring, for plaintiffs.

C. P. Curtis, for defendants.

STORY, Circuit Justice. The only questions arising upon the statement of facts are, 1st. As to the right of set-off of the defendants of the demands, which they hold against the plaintiffs; 2d. As to the right of deduction of the same demands under a particular clause in the policy, which will be presently brought under notice.

In regard to the right of set-off, either at the common law, or under our statute of set-off (Rev. St. c. 96), it appears to me, that upon the circumstances of the present case it is not at all maintainable. However true it may be, that the right of set-off of mutual demands between the parties is founded in natural justice and equity [2] (a proposition, to which I give my full assent), it is very certain, that the common law has not carried this right into full effect; for by that law the right of set-off is limited to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other. The present case is not one of mutual connected debts. In regard to our Revised Statute of set-off, although it has enlarged the doctrines of the common law, there is no clause in it, which reaches, either in its language or its spirit, a case like the present. It is limited, with few exceptions, to mutual debts or demands between the parties to the action; and it contemplates only such mutual debts and demands, as are due in the same right. In the present case, the suit is brought by the plaintiffs, as mere agents for the benefit of the owners of the Flora. They sue in autre droit. The debts or demands sought to be set off, are not the debts or demands due by these owners; but by the plaintiffs in their own right. So that the suit and the set-off are not in the same right. The case of Gordon v. Church, 2 Caines, 299, is also a direct authority against allowing a set-off under such circumstances upon general principles.

Then, as to the second question. The clause in the policy is in the following words. "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted; and all sums coming due, being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment." The whole question as to the construction of this clause, turns upon the point, who is "the insured" within its true intent

[2] See Green v. Farmer, 4 Burrows, 2220, 2221; Briggs v. Richmond, 10 Pick. 391; 2 Story, Eq. Jur. c. 37, §§ 1432–1444.

and meaning; for it is clear, that the debts and demands due from that person, and from him alone, are to be recouped from the amount due on the policy. It has been argued, that, by the insured, must be here intended the party, in whose name the insurance is proved to be made; and who may sue for the loss; and, especially, where he is the party, to whom the amount is to be paid in case of loss, and who, therefore, is exclusively entitled to sue on the policy. In the present case, the policy expressly declares, that in case of loss the amount shall be paid to the plaintiffs; and it is added, that, upon any other construction, even the premium note itself upon this very policy could not be deducted. As to this last suggestion, it appears to me, that no such consequence would follow, as the argument supposes. It seems to me, that the true interpretation of the clause authorizes the deduction of the premium note at all events, by whomsoever it may have been given. But it authorizes no other deduction, except of debts or demands due from the insured. In the ordinary case of a suit brought by the principal, who has procured the policy to be made by an agent in his own name, the premium note cannot, unless under special circumstances, be set off, if it has been given by the agent, binding himself personally; because the suit is brought for the right of the principal, and the premium note is the agent's own debt. The case of De Gaminde v. Pigou, 4 Taunt. 246, seems to have proceeded upon this ground. See, also, Cumming v. Forester, 1 Maule & S. 494, 499; Leeds v. Marine Ins. Co., 6 Wheat. [19 U. S.] 565. The clause was, therefore, probably introduced to entitle the underwriters at law to deduct the premium, whether the suit was brought in the name of the principal or of the agent. See Maanss v. Henderson, 1 East, 335.

It appears to me, that the insured, in the sense of the clause, must mean, not the party, who procures the insurance; but the party, for whose benefit the insurance is made. He, and he only can properly be said to be the insured; for he is ultimately to pay the premium and to have the benefit, if a loss occurs. I do not say, that this, the primary meaning of the words, may not be displaced by showing, that the parties to the contract have used them in a different sense, as the designation of the person, in whose name the policy is made. But the language ought to be very clear in its import, which should lead to such a result. The present policy does not seem to me in any manner to justify it. It is true, that by the terms of the policy the loss is payable to the plaintiffs. But on whose account? Plainly on account of the owners of the Flora, for whose benefit it was made. There is not the slightest evidence in the case, that the plaintiffs have become the owners of the policy; or that they acted under a del credere commission; or even that they have a lien upon the same for any balance of accounts. The probability is, that the money was made payable to them, solely to secure their ordinary commission for the negotiation. The object of making the loss payable to the plaintiffs, is not to change the character of the insurance itself, and to make it an insurance for the agent, and not for the principal; for then the party, having no interest in the property insured, and not the party sustaining the loss, would be entitled to the benefit of the insurance. But the object is, to entitle the agent to sue in his own name for the loss, and to receive it without that right being interfered with by the principal. The principal is still, however, the insured; and the money, when received, is to be accounted for to him. This was the interpretation put upon a similar clause in the case of Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 82. There is great weight also in the argument ab inconvenienti, that otherwise the debts of the agent, though unknown to the principal, might intercept, in the shape of a set-off, the whole indemnity of the principal. Whether, upon a policy thus framed, the principal, with the consent of the agent, might sue at the common law for the loss, as he clearly could, if this clause about the payment were omitted (without any distinction as to the agent's having a del credere commission, or not), it is unnecessary to decide. In a court of equity, there would not be the slightest difficulty; for, if the lien of the agent were discharged, the principal might sue for the loss in his own name, which shows, that he is to be treated as substantially the insured.

Very little light can be thrown on this subject by any references to the English decisions on set-off. Almost all the cases have turned upon the proper construction of their statutes of set-off in cases of mutual debts and mutual credits, either generally, or in cases of bankruptcy.[3] In Grove v. Dubois, 1 Term R. 112, and Bize v. Dickason, Id. 285, the broker acted under a del credere commission, and having paid the losses to his principal, he was allowed to set off these losses against a claim for premiums by the assignees of a bankrupt. Under such circumstances, it may be fair, as between himself and the underwriters, the policy being made in his name, and the amount being paid, to treat him as the owner of the policy. Moody v. Webster, 3 Pick. 424; Koster v. Eason, 2 Maule & S. 112; and Parker v. Beasley, Id. 423, recognize the like right of set off where the brokers are under a del credere commission, or have a lien by reason of acceptances. See, also, Davies v. Wilkinson, 4 Bing. 573. But where there is neither a del credere commission nor a lien, the right of set-off is held not to exist. Parker v. Smith, 16 East, 382, 386. It would, however, be a great mistake to consider Grove v. Dubois, 1

[3] The different statutes will be found in Bab. Set-Off, and Mont. Set-Off.

Term R. 112, from which all the other cases have sprung, an authority to the extent of considering, that where the broker acts under a del credere commission, he is to be considered as the primary debtor to his principal, and therefore, to all intents, the insured. In Baker v. Langhorn, 6 Taunt. 519, and Peele v. Northcote, 7 Taunt. 478, Lord Chief Justice Gibbs repudiated such a notion. See, also, Gall v. Comber, Id. 558. Without going farther into an examination of the English cases on this particular point, resting, as they mainly do, upon the case of Grove v. Dubois, 1 Term R. 112, a case in itself not very satisfactory in its principles, it is sufficient to say, that they furnish no general reasoning applicable to the case before the court. Upon the whole, my opinion is, that there is no right in the defendants to set off or deduct from the amount recoverable on this policy any sums whatsoever due by the plaintiffs to them, except the premium on the policy. Judgment accordingly.

HURLBERT (PAUL v.). See Case No. 10,841.

HURLBUT (HALL v.). See Case No. 5,936.

Case No. 6,919a.

HURLEY et al. v. The CHAMPION.

[12 Betts, D. C. MS. 14.]

District Court, S. D. New York. April 3, 1848.

COLLISION—STEAMER AND SAILING VESSEL.

[A steamboat coming down the East river at night made her turn on the Brooklyn side, and was passing across to her berth on the New York side, when she collided with a sloop running free, close to the New York shore. She knew the maneuver the steamer was making, and by luffing, as directed from the steamer, could have kept clear when too late for the steamer to avoid the collision. The steamer kept a good lookout, and took all the precaution possible. *Held*, that the sloop was alone in fault.]

[This was a libel in rem by John Hurley and William Murray against the steamboat Champion for collision.]

BETTS, District Judge. This is a case of collision in this harbor, between the sloop May, owned by the libellants, and the steamboat Champion. The steamboat in the nighttime arriving from Hartford, made her turn on the Brooklyn side of the river, and was passing across to her berth at the New York wharf. The sloop was running up with a free wind (from S. W.) close in the New York side, and saw the lights of the steamer, and knew she was on her turn, and the berth she was to make. When a steamer is in the act of turning, she has not so ready command of her movements as when under direct head-way. The river was clear in her proper course and direction when the steamer commenced coming round, and the sloop came up to the crossing line of her track afterwards, and was not seen in her then position, until the two vessels were nearly in collision. A quick order was given her from the steamer to luff and the pilot and master who gave the order testify, that she could easily have luffed enough to avoid the steamer. That evidence is corroborated by declarations, proved to have been made by the pilot of the sloop. Subsequently, that he gave the order to luff her, but his order was not obeyed. A good lookout was kept on the steamer, her lights were shown conspicuously, and all the precaution that could be required was observed, unless it is the duty of steamboats in coming into the harbor at such time to bear the whole responsibility and hazard of injuries sustained by other vessels from them.

There is evidently a wide spread misapprehension as to the relative to liabilities of steamboats and privileges of sailing vesels in cases of collision between them. This court has repeatedly declared the rule to be that sailing vessels are bound to employ all reasonable precaution for their own protection, as well as to avoid injury to steamboats, and were no way entitled to rely upon the latter for a guaranty in navigating in the proximity of each other. Tyler v. The South America [Case No. 14,311]; The Neptune [Id. 10,120]. If, then, the evidence fastens no blame upon a steamboat, in omitting proper diligence, or using improper measures, they cannot be chargeable for losses resulting to another vessel, only because it possesses a capacity enabling it, if timely exercised, to take care of such other. The sailing vessel must prove she has been managed in a prudent and skilful manner, so as to interpose no needless impediments in the way of the steamer, and, most of all, that she is not the cause of her own misfortune. [Smith v. Condry] 1 How. [42 U. S.] 29; [Waring v. Clarke] 5 How. [46 U. S.] 502; 2 W. Rob. Adm. 66; 2 Dod. 83; 2 Hagg. Adm. 156; Id. 360. The sloop, in this case was close in under the shadow of the city, in a dark night, and took a course crossing the track of the steamer, and at so small a distance off, that if not seen by the steamer, and avoided by her, a collision would be extremely probable. Laying out of the view the force and bearing of the cases imposing on vessels in port the duty of showing lights in evening to steamboats coming in, &c., I think, the great preponderance of evidence in this case is that the collision occurred through the inattention and mismanagement of those on board the sloop, and not from any fault of the steamer.

A decree must accordingly be entered dismissing the libel, with costs to be taxed.

Case No. 6,920.

HURLEY v. SMITH.

[1 Hask. 308.] [1]

District Court, D. Maine. Oct., 1870.

BANKRUPTCY—FRAUDULENT PREFERENCE — MORTGAGE—BURDEN OF PROOF.

1. A mortgage by a trader, of his entire stock and book accounts, to secure the payment of a loan previously made, is not a transaction in the regular course of business, and is prima facie fraudulent.

2. In such case, the burden rests upon the mortgagee to prove that the mortgage was made in good faith, and not in fraud of the bankrupt act.

3. A mortgage given within four months of his bankruptcy proceedings, by a debtor who was insolvent, to secure a pre-existing debt to a creditor who had reasonable cause to believe his debtor insolvent, and that the same was made in fraud of the bankrupt act [of 1867 (14 Stat. 517)] is void.

4. The testimony of witnesses residing in the neighborhood of the bankrupt, as to his credit and pecuniary standing at the time the mortgage of his stock was given, can have but slight weight to negative the knowledge the mortgagee must necessarily have obtained of the debtor's insolvency, by demanding payment of borrowed money, over due, and which the debtor informed him he could not pay, wherefore he demanded security and received a mortgage of his debtor's entire assets.

In equity. Bill by [James Hurley] the assignee in bankruptcy of Martin N. Feeny, to set aside a mortgage given by the bankrupt to the respondent [Peter Smith] as a fraudulent preference under the bankrupt act. The respondent answered, denying that he had reasonable cause to believe that the bankrupt was insolvent when the mortgage was given, and averred that the same was made in good faith and without fraud. Proofs were taken.

William L. Putnam, for orator.

A. W. Bradbury and Bion Bradbury, for respondent.

FOX, District Judge. Feeny was adjudged bankrupt Dec. 25, 1869, on a petition filed against him by said Hurley, Dec. 6, 1869. Hurley was subsequently elected and qualified as assignee. The bankrupt gave a mortgage Oct. 29, 1869, of his stock in trade and book accounts to the respondent, to secure to him the payment of three notes, one for $250, dated May 2, 1869, one for $300, dated July 2, 1869, and one for $100, dated Sept. 9, 1869, all for money, borrowed of said Smith by said Feeny, and payable on demand with interest. With the exception of his household furniture valued at less than $100, all the property of the bankrupt, being his stock in trade as a merchant tailor, and his book accounts which amounted to only $78, were included in the mortgage, the whole nominally amounting to $1,760.67. At the time he was adjudged bankrupt, he was indebted about $2,900.

The 35th section of the bankrupt act declares, that if the "sale, assignment, transfer or conveyance of the bankrupt is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." It will not be pretended that a mortgage of all of a debtor's estate, to secure an antecedent indebtment for borrowed money, is in the usual ordinary course of his business; on the contrary, it is entirely suicidal and destructive of his credit and standing as a trader, and is the ruin of his business. The burden then is on the respondent to establish that this mortgage was in good faith, and not in fraud of the act, and this he has unsuccessfully endeavored to accomplish.

The bankrupt commenced business in Cherryfield, March 30, 1868, and from his own account without profit. He borrowed of Smith the various sums which were secured by the mortgage. $250 of this amount had been overdue nearly six months, and instead of any payments being made towards it, the liability from time to time was extended. A few days before the mortgage was executed, Smith called on Feeny for payment. Feeny's testimony as to what took place at this interview is as follows: "I told him I could not pay him then, as I did not have the money. I told him that I knew he did not need it, and that I would secure him, so that he could give me time to meet other demands, or words to that effect; that I would secure him on my goods, if he would give me time. Smith wanted to know if I could pay him, and said if I could not he wanted security. He talked it over considerable, and came to the conclusion that he would wait, if I would secure him. When he came in he asked if I was ready for him, or could do any thing for him. I told him no I was not and could not be for some time, and that he must wait, or would have to wait, and that I would secure him on my stock." Smith admits he told Feeny "if he could not pay him he must give him a mortgage."

This testimony establishes the fact, that Smith was a creditor of Feeny for money borrowed at three different times, none of which had been repaid, some of which had been of long standing; that when he called for his money, he was not only refused payment, but was informed that he could not be paid for some time; that he must wait and take security, as Feeny needed his money to pay other liabilities; that in truth, Feeny then had no money and only $78 due him on account; that the only means of raising money was from the sale of the goods to be mortgaged to Smith, the proceeds to be applied to the payment of other liabilities, thus postponing the payment of Smith's claims to some future, indefinite, uncertain period.

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

In Re Gay [Case No. 5,279], it was decided, that a trader may be said to be in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do.

Such was certainly Feeny's condition at the time he gave this mortgage, not only unable to meet the payment of his borrowed money of long standing, but compelled to further postpone its payment until after he had raised money by the sale of his stock, and therewith discharged other demands against him. What could a creditor, for so large an amount, on a claim of such a nature as borrowed money, reasonably suppose, when his debtor declined payment, and informed him that he must wait until he had turned his stock into money and paid other demands from the proceeds, and that he should have security on the stock. Any one of ordinary intelligence from such a response must have believed that his creditor was in straightened circumstances and could not meet his liabilities in the usual ordinary course of his business.

It is shown, not only that Feeny was insolvent at the time of the execution of this mortgage, but also that Smith from what then took place had good reason to know that such was his condition.

Evidence of traders and others, residing at Cherryfield, has been offered by the defendant to establish the credit and pecuniary standing of Feeny at the date of the mortgage. None of the witnesses testify to any knowledge of his actual condition, or of the amount of his assets or liabilities, and their evidence therefore can have but little influence in determining the question as to Smith's knowledge of Feeny's situation, especially when weighed in connection with this statement of Feeny and Smith, as to the knowledge Smith then had on the subject. The 35th section of the bankrupt act declares, that all preference shall be invalid if made within four months before the filing of the petition, by any person being insolvent, the party receiving such security having reasonable cause to believe that such party is insolvent, &c., and that the conveyance is made in fraud of the act.

That this conveyance was in fraud of the act, and so considered by the parties, I think there can be no doubt. The object of the bankrupt law is to provide for an equal distribution of an insolvent's estate, and when to obtain an extension of credit, an insolvent is obliged to give security to a creditor who is aware of his insolvent condition, such security is a fraud on the act, as it defeats the object and purpose of the law. Instead of yielding to the operation of the bankrupt law, and permitting an equal distribution of the estate among the creditors, the property by such a mortgage is placed beyond the reach of the law, and security is given to one creditor in full, in fraud and to the great detriment of all other existing creditors. The bankrupt law will not permit or sanction such proceedings, and all such attempts to obtain a preference must not only prove ineffectual, but if impeached and set aside by the court, will subject the guilty party to the expenses attending chancery proceedings, which are frequently quite onerous. Decree for complainant with costs.

Case No. 6,921.

HURLIKI'S ADMINISTRATOR v. BACON et al.

[1 Cranch, C. C. 340.] [1]

Circuit Court, District of Columbia. July Term, 1806.

PLEADING—PLEA OF BANKRUPTCY—DEMURRER.

1. If there be judgment for one of several defendants, upon a demurrer to his separate plea of bankruptcy, he may be examined as a witness for the other defendants, upon executing a release of his interest in his estate.

2. Parol evidence cannot be given of the understanding of the parties as to the obligation of a written contract.

Assumpsit on an agreement in writing. James Bacon, one of the defendants, having pleaded bankruptcy, the plaintiff [Hurliki's administrator] demurred generally.

THE COURT overruled the demurrer.

Mr. Youngs, for defendants, offered Bacon as a witness.

THE COURT admitted him to be sworn, upon executing a release of all right to a surplus and commission, &c.

THE COURT (FITZHUGH, Circuit Judge, absent) refused to permit parol evidence to be given as to the intention and understanding of the parties as to the obligation of the contract, and that the defendants were not to be personally liable, and were only to pay as they collected money from the subscribers. Three bills of exceptions were taken.

Case No. 6,922.

HURRY v. HURRY'S ASSIGNEES et al.

[2 Wash. C. C. 145.] [2]

Circuit Court, D. Pennsylvania. April Term, 1808.

MARITIME LIEN — CONTRACT IN NATURE OF BOTTOMRY—CHARTER PARTY—POWER OF MASTER.

1. Where a bond has been given in the nature of a bottomry, but the circumstances under which it was executed were not such as to warrant the captain in executing a maritime hypothecation, yet, the captain having had a power of attorney from the owner of the vessel, to borrow money upon the vessel, such a contract, if made

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

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

by the captain, may create a lien on the vessel, in a court of common law.

[Cited in Greely v. Smith, Case No. 5,750; Furniss v. The Magoun, Id. 5,163.]

[Cited in Dunning v. Merchants' Mut. Marine Ins. Co., 57 Me. 112; Warren v. Skolfield, 104 Mass. 506.]

2. The master of a vessel has no power to enter into a charter party in a foreign port, for the purpose of giving the creditor of the owner of the vessel a security for the debt due to him.

3. Where the owners of a vessel have no agent in a foreign port, the master has the power to make a charter party.

[Cited in The Director, 26 Fed. 709.]

Action [by Nicholas Hurry against the assignees of Samuel Hurry and G. W. Lawerswiller] for money had and received. The parties entered into the following agreement, which is filed: "The defendants admit the receipt of the proceeds of the John and Alice, and of the freights of said vessel, under charter party; but these admissions to have no other effect, than to entitle the parties to bring forward, in this form of action, the following questions: First, whether the plaintiff is entitled to the whole, or to any, and what part of the proceeds of the sale of said ship; and, second, whether he is entitled to the whole, or to any, and what part, of the freight arising under the charter party?" The plaintiffs, having failed in the libel which they filed against the John and Alice, in order to subject her to the bottomry bond executed by Whitesides [Case No. 6,923] brought this action to recover the balance of the proceeds of the said ship, which was sold to pay sailors' wages; and the balance, together with the freight earned by her on her last voyage from Liverpool to Philadelphia; which were paid into the hands of the clerk of this court, to await the event of this cause. In addition to the facts stated in the admiralty case, and as explanatory of some of them, it appears, that at the time when the last bottomry bond was given, (the amount of which is sought to be recovered in this action, viz. £1963, 2s. sterling,) Captain Whitesides executed a charter party to the plaintiff, of the ship from Liverpool to Philadelphia, for five hundred pounds sterling; and the freight received by the agent of the plaintiff in Philadelphia, was upwards of seven hundred pounds sterling; which that agent holds, as a stakeholder, between the parties. The power of attorney given by said Hurry to Whitesides on the 28th of May, 1802, previous to his first voyage, empowered him to act concerning the vessel and her freights and to take up and borrow any sum or sums of money, on the same, and to execute bottomry, or hypothecation bonds, on her and her freights; and to execute any other act or deed, for securing payments of such moneys so borrowed. It appears in evidence, that the greatest part of the moneys advanced by the plaintiff, was for the disbursements and outfits of the ship on her different voyages; and that the residue was on account of Samuel Hurry, for premiums of insurances of the ship, commissions, and for purposes of a similar nature. The bottomry bonds were executed by Whitesides in his own name; and the moneys, though not paid into his hands, were yet paid and disbursed by the plaintiffs, on account of the ship owners; and they were so advanced on the ground of Whitesides' authority to borrow.

Chauncey & Hare, for defendants, opposed the claim upon the following grounds: First, that as master, Whitesides had no power to give a bottomry bond for securing the advances made by the plaintiffs, on the principles stated by this court in the libel case; as part owner of the ship, he had not the power of a general partner, to bind the interest of the other part owner by deed. (This was admitted by Mr. Dallas, for plaintiff.) Neither could he bind Samuel Hurry by virtue of the power of attorney: First, because it is executed in his own name, and not in the name of his constituent, reciting his authority. Abb. Shipp. 441; 3 Lev. 140. Second, because if properly executed, the power did not authorize him to take up money, except on bottomry, and of course he could not borrow, except in a case where a good maritime bottomry bond could be given; which this court has decided could not have been given in this case: particularly, he could not give such a bond for securing previous advances, as was done in this case. Third, the power was executed when the first loan was made, and was then functus officio. They contended, that the captain had no power to charter the vessel. Abb. Shipp. 86, 146. Of course, the plaintiff had no right to any part of the freight; but, at all events, he had no right to more than what was received over the five hundred pounds, which he was bound to pay, by the charter party. Upon the merits of the case, they produced an account furnished by the plaintiff, in which all the advances for the John and Alice, for which the bottomry bond was taken, are charged, and then carried to the general account of Samuel Hurry; against whom the balance is brought down to twenty-one pounds some shillings, and this is carried to the account of Hurry and Lawerswiller.

WASHINGTON, Circuit Justice (charging jury). It has been truly stated by the defendants' counsel, and admitted by those of the plaintiff, that the advances made by the plaintiff were not such, nor were they made under such circumstances, as authorized the master to execute a bottomry bond for securing their payment. The only ground upon which it can be supported, is the power of attorney, provided it authorized the acts of the master in this case; if it did, though not good, as a maritime bottomry bond, it may create a lien on the vessel. By this power, the mas-

ter was authorized to borrow any sum or sums of money, and to secure their payment by bottomry or hypothecation bonds on the vessel and freight, or in any other way. This power, certainly, does not confine the authority to cases where a maritime hypothecation only could be given. First, because the words are general as to the power of borrowing, and the nature of the security to be given; and secondly, because if such had been the meaning, the power was unnecessary, since the master possessed it under his general authority of master. But, at the same time, the account stating the items of the sum lent must be examined, and no sums can be allowed, but what are to be considered strictly as money lent and advanced by the plaintiff, either by delivering them to the captain, or laid out by the plaintiff for the use of the vessel, as to which there is no difference. As an instance of the sums not to be allowed, are such as the plaintiff, as agent or consignee of Hurry and Lawerswiller, or of the ship owners, had paid for premiums of insurance on the vessel and cargo, commissions charged, and the like. Nor is it of any consequence, whether these loans or disbursements were made on the first, second, or third voyage; because, though there is a maritime hypothecation, the bottomry bond would not be good, merely to secure antecedent advances; yet, the power in this case being general, and unlimited as to time, and having never been revoked, it was competent to the master to give security on his last voyage, for loans made then, and on former voyages, under the power. It is true that the bottomry bond, not having been executed in the name of Hurry, could not be a foundation on which a suit could be maintained against him. But this action is brought for the sums lent; and the hypothecation bond is evidence, that a security on the vessel was given for such loans, so as to give to the plaintiff a lien on the vessel or her proceeds.

As to the freight, it has been said by the plaintiff's counsel in argument, that the charter party was given by the captain, to secure so much of the debt due from Hurry and Lawerswiller; but no evidence of this has been given. If there had been, only the captain's part could be bound, because he certainly had no authority, merely as master, or under the power of attorney, to enter into such an engagement. But under his general authority, he had a right to charter the vessel, the owners having no agent at Liverpool. The consequence of that is, that the defendants are entitled to receive five hundred pounds sterling, of the money earned by the vessel, and in the hands of the defendants' agent; and the plaintiff, on this account, is only entitled to the residue of the freight.

As to the question, whether the disbursements for which the bottomry bond has been given, have been discharged by the admissions of the plaintiff, in the accounts he has furnished, you are or will be the proper judges, after you have examined the accounts. If these sums are charged in that account, and credited to the amount of the debit, this would certainly be a discharge.

The jury found for the plaintiff, only the difference between the five hundred pounds freight, and the amount actually made by the vessel; and nothing on account of the bottomry bond.

Case No. 6,923.

HURRY v. The JOHN & ALICE.

[1 Wash. C. C. 293.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

MARITIME LIEN—POWER OF MASTER—HYPOTHECATION—CHARACTER OF—CHARTER-PARTY.

1. An instrument, claimed to be an hypothecation of a vessel, is not such, if it was given to the consignee, when he had funds in his hands to secure the advances made by him for the vessel.

2. A consignee, under such circumstances, cannot enter into a maritime contract with the master of the vessel, so as to bind him to pay marine interest.

3. The cargo and freight is subject to the payment of extraordinary demands, for completing the voyage; and the consignee takes these funds cum onere, and under an implied engagement to make the necessary advances.

4. The master, being also owner of the vessel, may give a specific lien on her, for securing advances made for any purpose; but if this is not given by virtue of his authority as master, it will not be a marine hypothecation.

5. The master cannot hypothecate for a pre-existing debt; but only for advances for a purpose necessary to enable him to complete his voyage, made at the time the necessity existed.

[Cited in Greely v. Smith, Case No. 5,750.]

6. A bond executed as an hypothecation, but not upon the principles which govern such securities, cannot be enforced in a court of admiralty; but must be proceeded upon in a court of common law.

[Cited in The Bridgewater, Case No. 1,865.]

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

This ship was owned, one-third by Whitesides, who was also master, and the other two-thirds by Samuel Hurry. The former, previous to his first voyage to England, was authorized, by letter of attorney from Samuel Hurry, to borrow money on his account, and to secure it by a bottomry bond on the vessel. In July 1802, she arrived at Liverpool, when Whitesides obtained from the appellant, Nicholas Hurry, £343 0s. 4d. sterling, for the disbursements of the vessel; and Samuel Hurry being a considerable debtor to the appellant, the master, to secure so much thereof, as well as the above sum of three hundred and forty-

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

three pounds and four pence, gave a bottomry bond, for fifteen hundred pounds sterling, on the vessel. In November, 1802, the ship having performed her homeward voyage to Philadelphia, returned to Liverpool, with a cargo, consigned to the appellant; when he advanced for the disbursements of the vessel, £1195 19s. 8d. but with no security. She returned to Philadelphia, and again arrived at Liverpool, in June, 1803, with a cargo consigned to the appellant; who advanced for her disbursements £424 2s. 8d. and then took a bottomry bond in June, 1803, £1693 2s. sterling, being the amount of the three sums of £343 0s. 4d., £1195 19s. 8d., £424 2s. 8d. He also chartered the vessel back to Philadelphia, and was to pay £500 for freight. On the arrival of the ship in Philadelphia, after the giving the last bond, she was libelled by Nicholas Hurry, in the district court, to enforce the payment of this bond. Answers were put in by Freeman, claiming one-half of the ship, by virtue of a bill of sale, for a valuable consideration, made by Samuel Hurry before his bankruptcy, and dated 2d July, 1803. Also by the assignees of Samuel Hurry, who committed an act of bankruptcy on the 13th July, 1803. The district court dismissed the libel, and there was an appeal to this court.

Mr. Dallas, for appellant, contended, that the sums advanced for the disbursements of the vessel, at the three several periods were for a maritime consideration; that the master had authority, not only as such, but as owner, to hypothecate the ship. That as to jurisdiction, the question depends on the subject matter, not on the locality of the transaction. No objection to this bond, that it was taken by a consignee. He cited 1 East, 6; Park, Ins. 413, 414; 2 Marsh. Ins. 639, 679; 4 C. Rob. Adm. 1, 2; 2 C. Rob. Adm. 192; 4 C. Rob. Adm. 245; 3 C. Rob. Adm. 267; 6 Mod. 13, 14; Vin. Abr. 328, 329; 5 C. Rob. Adm. 112, 221, 224; Minet v. Gibson, 3 Term R. 481; 2 Brown, Civ. & Adm. Law, 71, 196; 2 Term R. 649; 2 Marsh. Ins. 632; 2 Bl. Comm. 457.

Hare & Chauncey, for appellee.

The bond was given for a pre-existing debt, which cannot lay the foundation for a maritime hypothecation. The advances made were for ordinary disbursements, and not for extraordinary necessaries. They were made by a consignee, with funds in his hands, and where a part owner was present. As to the power of attorney, the bond was not given in execution of it. Though Whitesides was a partner, yet he could not bind his co-partner. General partners may bind each other; but not so in special partnerships, like the present. Though the power of Whitesides to hypothecate the ship be admitted, yet he could not give a maritime hypothecation, so as to give jurisdiction to the court of admiralty; because not given by the master, quoad master, in a foreign country, for necessaries furnished; without which he could not complete the voyage. They cited Abb. Shipp. 118; 2 Moll. bk. 2, c. 2, § 11; Hopk. Mar. Ins. 1; 1 Ves. Sr. 155; 1 Ld. Raym. 378; 2 Marsh. Ins. 640; 5 Burrows, 2724; 1 Wils. 103; Abb. Shipp. 60; Hopk. Mar. Ins. 23; 2 Brown, Civ. & Adm. Law, 72; Abb. Shipp. 112, 113; 1 Ld. Raym. 152, 756; .2 Ld. Raym. 805, 982.

WASHINGTON, Circuit Justice. The bond in question, was given on the 7th of July, 1803, by the master, who was also part owner, and having a cargo in the hands of the consignee, for a sum of money composed of £340 0s. 4d. advanced by the appellant, in July, 1802, and secured by a bottomry bond then given, for a sum including this, and so much more as amounted to £1500; of £1195 19s. 8d. advanced by the same person, on a subsequent voyage, in November, 1802, and £424 2s. 8d. advanced when this bond was given. Now this bond has not one feature in it, which can resemble it to a maritime hypothecation. The implied power of a master, as such, to bind the ship of his owner, for advances made in a foreign country, for necessaries furnished, to enable him to complete his voyage, without which it must miscarry; is a provision purely of maritime law; produced by the necessity of such a predicament. The master, being also owner, may give a specific lien on his vessel, without resorting to this law. He does it in virtue of his title as owner; not by force of an authority, connected with the nature of his employment. Viewing Whitesides in his capacity of master only, this bond, as a maritime hypothecation, cannot be supported. First, because it was given to a consignee, with funds in his hands sufficient to secure the advances he was required to make. In this situation, he could not enter into a contract with the agent of the consignee, obliging him to pay marine, instead of common interest, for moneys advanced by him. The cargo, or the freight, where the freight is payable, is subject to the payment of these extraordinary demands, in cases of necessity; and the consignee, by receiving either, takes it cum onere, and under an implied engagement to discharge the expenses, when the outfits of the vessel may require, to enable her to complete her voyage; after this, he cannot expose the owner of the ship, to the payment of exorbitant interest, and take from the master a hypothecation of the vessel. Second; because, as to the sums of £343 0s. 8d. and £1195 19s. 8d. they had not been advanced for any purpose necessary to enable the master to complete the voyage he was about to perform, at the time the necessity existed for making the contract. Where was that pressing necessity, which can alone warrant the exercise of this extraordinary authority, in the master, at the

time this bond was given? Suppose it once to have existed, it had then passed away. These advances may have created a debt to be discharged by the owner; but, on the 7th of July, 1803, it was a pre-existing debt, which the master and part owner, had no power to secure by a marine hypothecation. As to the sum of £424 2s. 8d., I do not discover any one charge in the account, which is not of the most ordinary kind, and would in almost every voyage, become an item in account between the consignee and the owner; and if the former could subject the ship to the payment of marine interest, for such advances, hypothecation bonds would be the constant attendant of every voyage. As to the power of attorney to Whitesides, admit it remained unexecuted, on the 7th of July, 1803, and that Whitesides acted under its authority; it would convert this bottomry bond into a common hypothecation, to be enforced by the same remedy, as would be proper in other cases of mortgages, made by the owner of personal property, in person or by attorney. If the subject matter of the bond was of a maritime nature, that is, for advances made to enable the ship to complete the voyage; and if it were clear of the objections above mentioned, the master might give a maritime hypothecation, without the aid of this special authority; and if it were not of this nature, the special power could not make it such an hypothecation, though it might enable the master to give a security on the ship, to bind it and his owners. Upon the whole, I am of opinion, that the subject matter of the present suit, belongs not to the jurisdiction of the court of admiralty. Sentence affirmed.

NOTE. The master, for advances made for seamen's wages, previous or afterwards, for the necessary repairs and use of the ship during the voyage, may bind his owner personally. Abbott, 86–91. By the maritime law, the master may hypothecate both ship and cargo, for repairs, &c. during the voyage; which arises from his authority as master, and the necessity of the case: but not for repairs done in this country. Id. 95. Not only may the master, under certain circumstances, pledge the ship by bottomry bond; but the owners and part owners may do so, in any case, to the extent of their interests. In the latter case, the lender has not a remedy in the admiralty court against the ship, as he has in the former, where the master gives an hypothecation for necessaries, furnished in a foreign port. Id. §§ 9–101. In the place of the residence of the owner, the master cannot give a bottomry bond, by the maritime law. In a foreign country, he may, for any purpose necessary to the voyage, whether the occasion arise from any extraordinary particular, or from the ordinary course of the adventure, if he cannot otherwise obtain it; and this binds the vessel; but the owner is not personally liable. Id. 101, 102. If the obligee, being unwilling to take upon himself the risk of the voyage, is content not to demand maritime interest; it is competent to the master to pledge the ship, and the personal credit of the owner. In this case, the bond was for payment absolutely, and not on consideration of safe arrival. Id. 102; 1 Ves. Sr. 443. The master may hypothecate, in a foreign country, for necessaries, where he has no owners, nor any goods of theirs, nor of his own, and cannot obtain them by exchange or otherwise. 2 Moll. 126.

[The libellants subsequently brought an action for money had and received for the purpose of recovering the balance of the proceeds of the vessel, which was sold to pay sailors' wages. Case No. 6,922.]

Case No. 6,924.

Ex parte HURST.

[1 Wash. C. C. 186;[1] 4 Dall. 387.]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

ARREST—PRIVILEGE FROM—PARTY TO CAUSE.

1. A party to a cause, depending for trial, is privileged from arrest, during the continuance of the court, at which the trial will take place.

[Cited in Bridges v. Sheldon, 7 Fed. 44.]

[Cited in Re Healey, 53 Vt. 696; Fisk v. Westover (S. D.) 55 N. W. 962.]

2. This privilege extends not only to prevent his arrest, when attending the court, and when coming to, and returning from it, but while he is at his lodgings.

[Cited in Re Kimball, Case No. 7,767; Larned v. Griffin, 12 Fed. 590; Ex parte Schulenburg, 25 Fed. 212.]

Mr. Ingersoll moved, on behalf of Timothy Hurst, to be discharged from arrest under a capias ad satisfaciendum that issued against him from the supreme court of Pennsylvania, executed on him whilst he was attending this court as a suitor and witness. The motion was founded on the affidavit of Hurst; that, in consequence of a letter from his counsel, Mr. Ingersoll, informing him that his suit against Charles Hurst would come on for trial in this court; he left New York, his place of residence, on the 9th of the month, reached Philadelphia on the 11th, and put up at Hardy's tavern, where he was arrested under the execution. That after he arrived, and before the arrest, he was served with a subpoena from this court, commanding his attendance as a witness, in a cause depending to be tried this term.

Mr. Ingersoll supported the affidavit as to the suit, and Mr. Wallace as to the subpoena; but neither were required by the other side to make an affidavit, and it was admitted on the other side, that his attendance on both accounts was bona fide. In support of the motion, Mr. Ingersoll cited Barnes, Notes Cas. 200. An attorney attending his business to execute a writ of inquiry, will be discharged from a ca. sa. 5 Bac. Abr. (last Ed.) 631. A member of parliament, discharged from a ca. sa. 6 Term R. 686. A member of the king's family, discharged from a ca. sa. 5 Bac. Abr. (last Ed.) 617. All persons are protected from arrests within view of the court, or near enough to disturb it. 1 H. Bl. 636. Any persons going to, attending, or returning from court, who went there relative to business in the court, which

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

called for their attendance, are privileged from arrest, and a single judge may discharge. 4 Bac. Abr. 221; 5 Bac. Abr. 623, were also cited. 1 Tidd, Prac. 61, 62, parties to a suit, and witnesses attending court, going to or returning from it, privileged. The party so privileged and arrested, may apply to the court whose protection he asks, or that from which the process on which he was arrested issued, whichever first sits; to be discharged. 2 Strange, 990; Dyer, 60a. Privilege allowed where the party is an executor. [Coxe v. M'Clenachan] 3 Dall. [3 U. S.] 478.

Mr. Rawle, for the creditor, against the motion, contended, generally; that the privilege only extended to the party coming to, attending, or returning from court; but he was not protected when at home; and Hurst must be considered as being at home at his lodgings, where he was arrested. That the cases cited prove no more; and if a contrary doctrine were admitted, that every citizen in Philadelphia, from the time he was served with a subpoena, or who had a cause in court, would, during the whole time, be privileged from arrest. He relied upon [Starret's Case] 1 Dall. [1 U. S.] 356, where it was ruled, at nisi prius, by the chief justice, that the privilege did not protect against a ca. sa. though it did against mesne process. The arrest must not be near the court, or at court. 1 Brownl. & G. 15. To an action of escape from ca. sa. the defendant plead a custom of London to discharge suitors, that the party was arrested going to court, and was discharged by the court, not good on demand, for the reason just mentioned. 2 Ch. Cas. 69. Protection does not extend against arrest in execution. T. Raym. 100; 2 Ld. Raym. 1524; Wood, Inst., 478, 571; Brooke, Abr. 159; same point, 5 Com. Dig. 89. If taken in execution, he shall not be discharged, for then the creditors would be without remedy. If the courts of Pennsylvania should adhere to the decision given as reported in 1 Dall., the sheriff might, if sued for the escape in the state court, be made liable.

BY THE COURT. It is clear from the cases cited that the applicant was privileged from this arrest and that it is our duty to discharge him, that the proceedings of this court may not be impeded, or justice defeated. If the privilege in such a case does not extend to the party at his lodgings, as well as coming to and returning from court; the protection which the law affords him, would be a mere mockery. His lodgings are as much a sanctuary for him as the court house; but when his business is done, he must return, so as not to be guilty of a material deviation. As to the danger to the sheriff, this is merely imaginary. For, though the supreme court should differ from us upon the point, and adhere to the opinion of the chief justice, at nisi prius; yet, after Hurst was discharged by a court, having competent jurisdiction of the case, it would discharge the sheriff, though we should decide incorrectly. It would be a strange situation to place the sheriff in, who, if he refused to obey our order, would be subject to be committed for a contempt, and if he obeyed, should subject himself to an action for an escape.

[The matters in controversy were subsequently referred, by consent of the parties, to arbitrators, and their award was confirmed. Case No. 6,930.]

Case No. 6,925.

In re HURST.

[1 Flip. 462; [1] 13 N. B. R. 455; 8 Chi. Leg. News, 147; 3 Cent. Law J. 78.]

Circuit Court, E. D. Michigan. Jan. 20, 1876.

RECEIPTS FOR MONEY—WHEN BINDING — COMPOSITION—AGREEMENT TO ACCEPT INDORSED NOTES —PAYMENT BY NOTE—DEBTOR NOT DISCHARGED TILL ACTUAL PAYMENT—THE LEARNING ON RECEIPTS.

1. Where a composition was agreed upon under the provisions of the bankrupt act, providing that payment should be made in indorsed promissory notes, it was sustained on the ground that this meant a payment of money under the statute.

2. The words "received in full payment," "received in full satisfaction," or words similar in sense, are not to be construed as meaning absolute satisfaction, when applied to the taking of a note or other security. This is a question of fact and intention to be deduced from all the circumstances.

[Cited in The Theodore Perry, Case No. 13,879.]

3. A resolution of composition will not have the effect of discharging the debtor until the dividend is paid, in fact, to the creditor.

[Cited in Jaffray v. Crane, 50 Wis. 352, 7 N. W. 300; Pupke v. Churchill, 91 Mo. 81, 3 S. W. 831; Harrison v. Gamble, 69 Mich. 107, 36 N. W. 687.]

4. Every instrument must be so construed as to effectuate the presumed intention of all parties. The learning on receipts taken for antecedent debts, and the legal effect of receipts in general, discussed.

[In review of the action of the district court of the United States for the Eastern district of Michigan.]

[In bankruptcy. In the matter of James T. Hurst.] This was a proceeding under the bankrupt act between debtor and creditor, to compromise the former's indebtedness. A "resolution of composition" having been adopted by which the creditors agreed "to accept the sum of twenty cents on the dollar in full satisfaction and discharge, provided the said sum be paid as follows: six-month notes of the debtor indorsed by," etc., "as security," the district court on the motion made an order to record the same. E. K. Roberts & Co., creditors, having re-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

fused to sign the resolution, filed a petition to review the said order on the ground that it did not provide for payment in money.

Julian G. Dickinson, for creditor.
Wm. Jennison, for bankrupt.

EMMONS, Circuit Judge. The only error urged upon this bill of review is that the resolution of composition provides for a payment in indorsed promissory notes, whereas the statute requires it shall be in money. Literally interpreted it is subject to the criticism made. It does provide expressly that the payment shall be made by the delivery of certain indorsed promissory notes. If we can not construe this to mean a payment in money, the "resolution" must be rejected. We think, without any violation of familiar rules of interpretation, we can read this language as importing such payment, notwithstanding its apparent literal meaning to the contrary. The circumstances in which these words are employed, show that the word "payment" is not to be understood in its literal absolute signification.

Did not peculiar circumstances constrain us to put in accessible form the reasons for our ruling, we should not, pressed as we are with other duties, feel obliged to do so. We are informed, however, the legality and effect of these proceedings are questioned in other tribunals; and we assume that the construction which we give them here will be adopted there. In the midst of jury trials, acting also for the district judge, to dispose of a long list of certified admiralty cases, as well as those upon appeal and the whole business of the bankruptcy court, it is impossible for us to do more than simply link together what are mere memoranda from which our oral judgment was delivered. The few moments we can spare from three sittings a day will not enable us to condense these suggestions or avoid considerable repetition. What little we have done could by no possibility have been accomplished had we not received some very exceptional and very efficient aid from the learned counsel of the bankrupt.

Had the resolution come before us in different circumstances, and where, without great injury, we could have caused another to be adopted in its stead, we should have preferred its rejection on account of the impolicy of sanctioning doubtful terms when it is so easy to comply with the provisions of the law. Litigation is naturally created by such ambiguities, and has actually resulted from them in the present instance. It is with great reluctance that we sustain the practice in this case, notwithstanding the many precedents found in the books for construing similar words as we now interpret these. We have much reason to believe that had this point been argued before the district court the proceedings would have been remitted to the creditors, and a new resolution required. We hesitated indeed, whether, owing to the practice in that court, we could listen to the objection at all.

We deem it unnecessary to discuss the doctrines, much less cite adjudications in reference to the interpretation of statutes and contracts generally, where the decisions are so numerous in reference to the very words employed in this resolution and the subject matter with which it deals. They are but illustrations of the familiar general rule on which they rest, that every instrument must be construed to effectuate the presumed intention of the parties. It is so in deeds, wills, personal covenants, and even judgments and statutes. In reference to them all, the same language in numerous instances has been held to bear wholly different meanings, according to the circumstances in which it is employed. The hearing upon this subject is so full and so familiar that its citation and discussion would be quite out of place. We shall do no more than refer to a very small portion of the very great number of English and American judgments which have declared that the words "payments," "in satisfaction of," "in full discharge of," and numerous other similar expressions, when contained in receipts and other instruments in reference to antecedent and liquidated obligations operate to discharge them, or the contrary, just as the circumstances in which they are used indicate intention, and as justice demands. The receipt of a promissory note in payment of an antecedent debt, when a suit is brought by the creditor against his debtor in all the states of the Union where they profess to follow the common law, is held not to discharge the original obligation. This result is declared in various forms of expression. It is sometimes said to be a conditional payment; at others, that the word payment is not to be understood in its technical sense, but is intended only to evidence the amount to be paid. In those states where a different rule is established they concede it to be peculiar. If the same receipt is given in circumstances where it is quite clear that the parties intended to satisfy absolutely an antecedent debt, as where financial adjustments demand that a mortgage should be discharged, a judgment satisfied, a retiring partner who leaves the assets of a firm in the hands of his previous associates, and numerous other instances where the nature of the transaction shows that the actual satisfaction was intended; in all such instances these words "in payment of," or "in satisfaction of," will be ruled to import what they literally mean. In the construction which we give this resolution, holding as we do that it does not mean the delivery of the promissory notes as payment and a discharge of the debtor, we do not approbate the extreme expressions in several of the cases on this subject which hold that there must be an express agreement in terms to

accept a note in satisfaction before it will operate as such. It is mere matter of interpretation in each instance, controlled by the circumstances in which the agreement is made.

1 Smith, Lead. Cas. (7th Am. Ed.) 613, cites a long list of cases and deduces from them the general principle which the author supposes they sustain. After saying that the transfer by a debtor to his creditor of the note of a third person will discharge his obligation, if such is shown to be the intention, and that such intention must appear by the express agreement of the parties, and will not be implied by the mere act of transfer, adds (page 613), that "merely receipting the notes as cash, or giving a receipt in full, or receipting the notes as being payment of the debt, will not alone be sufficient to prove that the notes were taken, not as conditional payment, but as an immediate and absolute discharge." McIntyre v. Kennedy, 29 Pa. St. 448. The check of a third person was delivered to plaintiff in payment of an antecedent debt. It does not appear that a written receipt was given, but the whole case proceeds on the assumption that, in terms, it was delivered in payment. Woodward, J., on a very full review of the English and American cases, approbating the summary which we have quoted from the American edition of Smith's Leading Cases, lays down the general doctrine that there must be either an express agreement to receive in payment, or facts aliunde from which such an understanding is clearly to be implied. M'Lughan v. Bovard, 4 Watts, 308. A draft in this case was received "for the amount then due on the above judgment." Gibson, J., in deciding that it was not a satisfaction of a judgment, on page 315, says: "A note or bill taken in satisfaction of a precedent debt imposes no further duty on the creditor than to use reasonable diligence in obtaining payment or acceptance by presenting it in season, and giving notice of its dishonor to the debtor from whom it was had, if he be a party to it." Tobey v. Barber, 5 Johns. 68. In this case the receipt was very positive in its terms. It read: "Received of Barber $163 on account of within lease, and in full for the second and third quarter's rent." It was held to be sufficient to explain this receipt, and to show that the rent was not paid, by simply proving that it was given for the note of a third person, and that the note was dishonored. Johnson v. Weed, 9 Johns. 309, illustrates with what fullness the courts have held this question to be one of mere construction, in the light of the circumstances in which the language of receipts and other contracts have been written. It is conceded everywhere that where goods are sold and the note of a third person is contemporaneously delivered in exchange, the presumption of law prima facie is that it is absolute satisfaction. In this case, however, a jury having found that the delivery of a note in payment of goods bought at the time was not intended by the parties to be absolute payment, the court refused to set aside the verdict; and see Roget v. Merrit, 2 Caines, 117. In Berry v. Griffin, 10 Md. 27, it was held that a request to charge which implied that as a matter of law the reception of a note in payment of a debt was per se an absolute satisfaction, was erroneous. It might or might not be payment in fact, according to the conditions on which the receipt was given. Perit v. Pittfield, 5 Rawle, 166, was a case where property was delivered "in payment of debt." Although the word payment was used, looking to the nature of the transaction, it was held not to be such. Other parts of the case illustrate the liberality of the interpretation which courts will indulge, in order to carry out what the parties intended.

There is a class of cases which decides that where upon dissolution of a copartnership the paper of one member is taken for the debt of a firm, the same words which would not import payment in other circumstances are construed to do so in these. These judgments will illustrate the principle we have assumed that no form of words will secure the same interpretation in all instances. When the motive is to discharge one of several debtors when the other assumes the control of the assets of the business, language indicating discharge and satisfaction will be interpreted so as to effectuate the presumed intention of the parties. 1 Smith, Lead. Cas. (7th Ed.) pp. 613, 614, refers to a number of these judgments. Van Eps v. Dillaye, 6 Barb. 244, cites and approves 12 Johns. 409, and other cases, which hold that when the paper of one member of a firm is given in payment of a partnership debt, where the other member retires and relies upon the discharge of his obligation, it will be deemed absolute payment. It decides, nevertheless, even in such cases, that where there are facts aliunde showing it was not so intended by the parties, such consequences will not follow, and the verdict of a jury finding there was no payment, was not disturbed. And see Harris v. Lindsay [Case No. 6,124]; Doebling v. Loos, 45 Mo. 150. In an action to enforce a lien it was urged that the account was paid by note. The receipt given was as follows: "Received of Loos $1300 in full of all my demands to date." It being the note of the debtor, the receipt, it was said, was not sufficient evidence to submit it to the jury. Had the circumstances been different, the words might have been differently interpreted. Those before us in reference to this "resolution" are quite as strong as those in 45 Mo. And see Archibald v. Argall, 53 Ill. 309, which held on proper testimony that it was a question of intention for the jury, notwithstanding the form of papers. The following very recent judgments equally sustain the principle of

the cases we have already more particularly noticed: Lear v. Friedlander, 45 Miss. 559; Huse v. McDaniel, 33 Iowa, 406; Jewett v. Pleak, 43 Ind. 368; Matteson v. Ellsworth, 33 Wis. 488.

No state has more fully applied the doctrine than Michigan. It is with much propriety that we adopt one of its rules of interpretation for this resolution—being, as it is, the language of its business men. Gardner v. Gorham, 1 Doug. (Mich.) 507. A note and mortgage were received "in payment for goods." Upon the trial, evidence tending to show it was not intended to receive them in satisfaction, was excluded. In reversing the judgment for this reason the court by Whipple, J., at page 510, after laying down the general rule in the most stringent form, say: "It is applicable alike to a case where the note of the debtor or of a third person is taken." He cites 9 Johns. 310, and Owenson v. Morse, 7 Term. R. 64. Hotchin v. Secor, 8 Mich. 494, also goes upon the ground that it is a mere interpretation of the language used by, and the conduct of, the parties. Dudgeon v. Haggart, 17 Mich. 273, and Burchard v. Frazer, 23 Mich. 228, announce the same principle.

The English doctrine is quite as stringent as the American. In Kearslake v. Morgan, 5 Term R. 513, a note was received "for and account of the debt." Not being paid, and the collateral circumstances failing to show an intention to discharge, it was held that an action could be maintained for the original consideration. This case is cited in Sard v. Rhodes, 1 Mees. & W. 152, with approval, and distinguished, from the facts before the court, where it appeared by plea that the note was received in absolute satisfaction. Griffith v. Grogan, 12 Cal. 317, approves the general principle that a promissory note of a third person is not payment unless so expressly agreed, and says such is the English law, citing the earlier cases on that subject.

The federal cases are equally full to the same point. Maze v. Miller [Case No. 9,362]. A receipt was given "in full for property sold." Upon proof that a payment was made by note of a third person which was unavailable, it was held the receipt was no bar to an action. The language of the instrument was quite as strong as that before us. See, also, Harris v. Lindsay [supra]; Peter v. Beverly, 10 Pet. [35 U. S.] 558, 567. An executor gave his note for a debt due from the estate. In deciding it was no payment, Thompson, J., says, "That in no case is the giving of the note of a third person for pre-existing debt, payment, unless it is expressly so agreed, or is clearly to be inferred from the facts of the transaction." He cites, with approbation, 11 Johns. 513; 14 Johns. 404; Glenn v. Smith, 2 Gill & J. 493; Clopper v. Union Bank, 7 Har. & J. 92, in which written receipts declaring the paper was received in payment, were construed to be conditional payment only.

Glenn v. Smith is one of the leading cases, and perhaps is as fully argued as any in the books. The question was, whether certain endorsed notes constituted payment for the property in question. The receipt given was "for two promissory notes signed by herself and indorsed by Glenn & Co., in payment of the above account." After a very full review of the English and American adjudications down to the day of the judgment, it was held that the word "payment" would be interpreted to mean conditional payment only. The peculiar facts of the case are relied upon to sustain this reading of the instrument.

See, also, Gordon v. Price, 10 Ired. 385; The Chusan [Case No. 2,717]; deciding that the giving of a note was not to be considered as a satisfaction of the cause of action, says such is the law of New York, that of England and so far as he (Justice Story) was informed, of every state in the Union, Massachusetts and Maine excepted. See, also, Kimball v. The Anna Kimball [Id. 7,772]; same case, on error, in 3 Wall. [70 U. S.] 44; Baker v. Draper [Case No. 766]; and Downey v. Hicks, 14 How. [55 U. S.] 240.

In view of the many precedents for construing the words of this resolution in conformity with the requirements of the statute, and holding that they do import a payment in money, we feel confident it is our duty to do so. It is part of a statutory proceeding in which any other meaning is unlawful. If it does not mean this, it is not within the statute at all. It prohibits any other payment but one in money. Predicaments are presented in which that canon of construction is applicable when the instrument is to be saved, if by any possible interpretation it can be. To use the language of another judgment, "it is our duty to approach the line where interpretation ends, and interpolation commences."

There is no danger to creditors, resulting from such a construction. The composition will not be effective to discharge the debtor unless the amount agreed upon is actually paid. See In re Reiman [Case No. 11,675]; In re Hatton, 7 Ch. App. 723; Edwards v. Coombe, L. R. 7 C. P. 519; and the numerous American and English adjudications which hold that in all similar cases deeds of composition, and accord and satisfaction, must be completely executed in order to be operative. The order of the district court to record the "resolution" is affirmed, without costs to either party, as against the other.

Case No. 6,926.

In re HURST.

[2 Flip. 510.] [1]

District Court, M. D. Tennessee. Oct., 1879.

HABEAS CORPUS—KILLING UNDER ORDERS IN TIME OF WAR.

Where a soldier in the regular service during the war of the Rebellion, while acting under the orders of his superior officer, led, or was a member of, a company, which was ordered to fire upon all bushwhackers, and in consequence thereof, one such was killed, and said soldier was afterwards tried for murder, convicted, sentenced and sent to the state prison: *Held*, that the state court had no jurisdiction to try such case, and he was entitled to his discharge, notwithstanding he was already undergoing his sentence.

[Cited in Re Neagle, 39 Fed. 851.]

[Cited in Farmer v. Lewis, 1 Bush, 66.]

Hurst was convicted by the Morgan county circuit court of having murdered one Thomas Staples, a captain in the Confederate army. He was sentenced for fifteen years in the state penitentiary, where he had already served ten months when this application was made. The proof was that at the time the act was committed, February 2, 1865, Hurst was a member of Capt. D. Beaty's company, which was recognized as belonging to the United States army. The company had been ordered to exterminate all bushwhackers, and Staples was regarded as of that class. The company, composed of forty men, came across Staples on the day mentioned. He mounted his horse and attempted to escape. As he passed over a hill the company fired a volley at him. He afterwards died from the wounds received on that occasion.

John P. Murray, for the prisoner urged that, notwithstanding the fact that Hurst had allowed final judgment to be passed upon him, and had gone to the penitentiary,[2] there were good reasons why he should be discharged. The deed, if committed by Hurst, was done in obedience to the command of a superior officer in time of war.

TRIGG, District Judge, said the case was a novel one, inasmuch as it was very rare that one court interfered with the judgment of another after it had gone into effect, and this was the first instance of a decision on the subject in Tennessee. While he might have some doubts on the question, yet he was inclined to decide in favor of liberty under the facts presented, and would therefore order the discharge of the prisoner. He made the following order:

"Miller Hurst.—Ex parte Petition for Habeas Corpus.

"In this case it appears to the court that Miller Hurst is confined in the penitentiary of the state of Tennessee on the charge of murdering Thomas Staples, in Morgan county, Tennessee, in January, 1865, under sentence of the circuit court of Morgan county, Tennessee.

"It appearing to the court that Thomas Staples was a soldier of the army of the Confederate states, and that the petitioner was a soldier of the army of the United States, and that the killing was an act of war done during the war of the Rebellion, under the orders of the president of the United States, in a section of country then under military occupation by the forces of the United States, from which the Confederates had been driven during the war. It appears to the court that the circuit court of Morgan county, Tenn., had no jurisdiction of the offense for which the petitioner is being held; that the killing having been done during the war, under orders as aforesaid, and in a country under military occupation, was not cognizable by the circuit court of Morgan county, Tenn., and the said Miller Hurst is unlawfully restrained of his liberty.

"It is, therefore, ordered that the said Miller Hurst be discharged from said imprisonment and released from custody, and that the petitioner pay the cost of this proceeding; and if not paid, let execution issue, and that a copy of this order be furnished to the warden of the penitentiary."

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] In Tennessee this is the state prison.

Case No. 6,927.

HURST v. DURNELL.

[1 Wash. C. C. 262.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

EJECTMENT IN PENNSYLVANIA — RIGHT OF ENTRY —WARRANT WITHOUT SURVEY—"LIBERTY LANDS"—FIRST PROPRIETOR.

1. The proprietary of Pennsylvania, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia.

2. A warrant without a survey, made under a legally authorized surveyor, does not, by the practice of Pennsylvania, give a right of entry to support an ejectment.

3. The contract for liberty land, between the proprietary and those who entitled themselves to it, by taking up lands in the country, operated severally with each purchaser, and not with the whole, so as to constitute them tenants in common.

4. Those who were entitled to liberty lands, were bound to have them laid off, by surveyors regularly appointed, as in other parts of the then province; the law being the same, as to those lands, as to other lands in Pennsylvania.

5. The proprietary was neither an agent, nor a trustee, for the first purchasers.

The title of [Timothy Hurst], the lessor of the plaintiff, was as follows:—

4th March, 1681. The grant of the govern-

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

ment and soil of Pennsylvania, was made by Charles II. to William Penn, the first.

William Penn, married his first wife in 1672, and had three children, Springett, William; and Laetitia, who married Aubrey. His first wife died in 1696, and afterwards he married again, and had John, Thomas, Richard, Dennis; and Hannah who married Mr. Frame.

Springett and Dennis died in his life time. William Penn died in the year 1718, on the 30th of July.

William, the second, died intestate, in the year 1720, leaving children; Springett, his eldest son, William, and Gulielma, a daughter, who married Charles Fell.

Gulielma died, leaving issue Robert E. Fell, Gulielma Maria Fell, who married Mr. Newcomb; and Mary Margaretta, who married John Baron.

Previous to the first William Penn's coming to America, viz. on the 24th of October 1681; with a view to induce persons to come over and settle upon his lands in Pennsylvania; he agreed with them to lay out a large town in some eligible place, and to give to each person who would take up five hundred acres of land in the country, ten acres in the town. The list, containing the names of the persons with whom this agreement was made, is called, by way of distinction, the list of first purchasers. William Penn came over in 1682; when, it is admitted, that some alteration took place in this first agreement, but the precise terms of it are unknown. The original plan of a city, to contain ten thousand acres, was abandoned; and it was confined to about 1250 acres; and about 16000 acres, adjoining the city, were laid off for the benefit of the first purchasers, in compliance with the first agreement, and was called liberty land.

The name of William, the second, was put down on the list of first purchasers, for 5000 acres; for which a warrant was issued on the 13th September, 1683; and also, one for 200 acres, his proportion of land within the liberties of the city. The former was duly surveyed; the latter was never surveyed, but in the manner hereafter mentioned.

By the will of William, the first, he left certain parts of his private estate, to the children of his first wife; and the government and soil of Pennsylvania, to the children of his second wife.

The two branches differing about the will, an accommodation finally took place, the 23d of September 1731, between the children of William Penn, the second, and his sister Laetitia, the children by the first ventre, and those by the last wife; by which the former surrendered their claim to the government and soil of Pennsylvania; reserving their right to all their private lands, whether derived under specific bequests, in the will of William, the first, or otherwise acquired by them.

By the intestate law of Pennsylvania, at the time of the death of William, the second, his eldest son, Springett, became entitled to one-half of his real estate; William, the third, to one-fourth; and Gulielma to one-fourth. Upon the death of Mrs. Fell, her eldest son, Robert E. Fell, became entitled to one-half of her one-fourth of the estate of William, the second; and his two sisters, to one-fourth each, of that one-fourth. Being thus entitled, Robert E. Fell, in his own right, and as attorney for his sister Gulielma; conveyed to Timothy Hurst, in fee, by deed dated 10th May 1770, all the lands to which he or his sister were entitled, in Pennsylvania, or elsewhere in America. On the 13th of June 1770, the surveyor general and secretary of the land office, having refused to issue a warrant to Timothy Hurst, for surveying the proportion of liberty land, to which he was entitled, in right of Robert E. Fell and his sister, under the warrant for 200 acres, issued to William Penn, the second; the original warrant was put into the hands of Joseph Hall, a surveyor, but not an authorized one; who laid it upon 31 acres on the Delaware, adjoining Vine street and Pegg's run, at that time built upon, as was proved by a witness in the cause.

Wallace, Lewis & Levy, for plaintiff, contended: 1st, upon the evidence, that the land in question was part of the liberty lands, which William Penn, the first, had agreed to appropriate to the use of the first purchasers; and that he had no right to appropriate any part of it to his private use, as would be relied upon in support of the defendant's title. 2d. That William Penn was a trustee for the first purchasers; and therefore, that the act of limitation did not run. They cited 2 Wils. 144.

The ground taken by Ingersoll and Rawle, for defendant, was; 1st, that the land in question, was laid off by the proprietary, for a manor, which he called "his manor of Springettsbury," in the year 1681; and, though no warrant or survey appears, yet the boundaries of it are sufficiently proved by the testimony. 2d. That plaintiff has no title, having only a warrant, without a legal survey. 3d. That the plaintiff is barred by the act of limitation. 4th. Length of time creates a presumption against the title.

The arguments of counsel, and the evidence, are pretty generally noticed in the charge.

WASHINGTON, Circuit Justice. On the 23d of September, 1731, an agreement was made between the younger and elder branches of the Penn family; by which the right of government, and soil of the province of Pennsylvania, was confirmed to the younger branch, and the private rights of the elder branch were confirmed to them. The plaintiff claims under the elder branch, and he founds his title on the warrant to William Penn, the second, for 200 acres of liberty

land; to which he was entitled in virtue of his character as first purchaser. The defendant claims under the younger branch of the family, who became, by the will of the first William Penn, and the subsequent family compact, entitled to all the proprietary rights in this province. The title of the defendant is founded upon the right of the first William Penn, to a certain district of country lying between Vine street, Pegg's run, the Delaware, and so north and west to the Schuylkill; which it is said was appropriated by the proprietary to his own use, as a manor; and consequently that the first purchasers had no right, to lay their warrants upon lands, thus appropriated to the use of the proprietary.

The first great inquiry is, was the land in question laid off by the first proprietary for a manor; or was it laid off and appropriated as liberty land, for the use of the first purchasers? This is a question of fact for the consideration of the jury.

Second. If it was laid off for a manor, had the proprietary a right to appropriate it to his private use? This is a question of law for the court.

1st. To prove that the tract, containing 1840 acres, of which the land in question is a part, was laid off for a manor, the defendant relies upon the following evidence: (1) An account of Mr. Fairman, formerly a surveyor of the proprietaries, dated in 1682; in which he charges the proprietaries "for taking an estimate of a vacancy on both sides of the town, divided from the liberty land; which the proprietary accepted, and afterwards called it the manor of Springettsbury. (2) An old map, supposed to have been made, and by comparison of hands, believed to have been in the handwriting, of Edward Pennington, surveyor general, about the year 1701; in which the manor is laid off, in the manner contended for by the defendant. The boundaries of this manor have lately been laid off, according to adjoining surveys, calling for the manor; and found to correspond with this ancient map. The admission of this map was objected to, but admitted by the court as an old paper which supports, and has gone along with the possession; and though not signed by Edward Pennington, yet from the similarity of the handwriting, with that found in the office of the same person, whilst he was surveyor general, it was supposed by the court to be proper to leave it to the jury, to give to it such weight as the support it may receive from other parts of the evidence, might, in their opinion, entitle it to. (3) As a further corroboration of the manor having been once surveyed, as distinct from the liberties; we find, in the year 1703, a warrant for re-surveying it, as also the liberties. (4) Then follow the lines of all the adjoining surveys, calling for and fixing the boundaries of this manor. Ancient boundaries are frequently established, by the reputation and understanding of the neighbourhood. When no better evidence can be obtained, even the hearsay of old persons, now dead, as to the reputed bounds, is often, and properly, resorted to. The lines of junior patents, calling for those of elder patents, contribute to establish the latter. But upon a question which not only involves the boundaries of this manor, but the right of the proprietary to lay it off; surveys, and grants binding upon the manor, and calling it the property of the proprietary, and this within a few years after it was laid off, are the strongest kind of evidence. It is the testimony of men, who must have been well acquainted with the fact; attesting the truth of it, by acts which leave no room for doubt. We find more than twenty surveys, fixing the lines of the manor, as laid down in the map, said to be Pennington's; and all of them calling it, the manor of Springettsbury—proprietary's, or governor's land. These surveys, grants, and warrants, were made from the year 1684 to 1691. Then come the proceedings of the commissioners of property, in 1691, which fix the boundaries of the manor at the north end of the city, bounding on the Delaware and Pegg's creek. In the sales of Hartzfelter's tract, made by Pegg to Fitzwater, in 1720; from Fitzwater to Stenner, in 1737; from Stenner to Wishart, in 1759; they all call this "Governor's Land in the Northern Liberties." In 1696, upon a division amongst the Swanson family, they attest the same fact. And, in 1736, we find by a petition, called the "Stone Quarry Petition," signed by a great number of persons, amongst whom are some of the first purchasers, the same admission is made. This is the evidence, and proves the existence of the manor, and of its bounds. The proofs are progressive, and are afforded in different ways, from the year 1684 to 1759. On the other side, the plaintiff has produced a great number of surveys, warrants, and grants, extending from the south-west side of the Schuylkill, and surrounding the manor as far north and east as Cohocksink creek; in which the lands they cover are called "liberty lands." Now this evidence does not, in any respect, conflict with, or disprove the fact asserted by the defendant; because the establishment of liberty lands does not disprove the existence of a manor, unless those surveys of liberty lands had been located within the bounds of the manor; which is by no means the case. The defendants prove the existence of a manor, and admit there were liberty lands adjoining Philadelphia, and adjoining also the manor. The jury will therefore say, upon this point, whether, at the distance of one hundred and twenty years, the proofs of the defendant are satisfactory, to establish the lines of this ancient manor.

2d. The next question is, had the proprietary a right to establish this manor? He certainly possessed the right, unless he precluded himself, by the concessions made to the first purchasers. But this was by no means the case. He stipulated to lay off so much land, for the benefit of the first pur-

chasers, adjoining the city; and the warrant to Noble, in 1682, directing him to survey and surround a certain quantity of land adjoining the city of Philadelphia, for the benefit of first purchasers; may well be considered as evidence of this fact. Now the liberty lands do adjoin the city on the west; and as this warrant does not say that it is to adjoin it also on the north, the promise of the proprietary is complied with; although he appropriated to his own use the land at the north end of the city. But whatever was the nature of the last agreement, made with the first purchasers; it was in the power of all the parties concerned, to alter it; and the entire acquiescence of the first purchasers, to the establishment of this manor, ought at this day to be considered as evidence of an agreement, by which the proprietary was permitted to make such an appropriation. Even William Penn, the second, by having never surveyed his warrant for 200 acres, though he was careful enough to survey his warrant for country lands; affords evidence that he had no right to locate it within the manor.

3d. The next question, also a question of law, is, can the plaintiff recover on his warrant and survey? It is agreed by the counsel on both sides, that a warrant, without a survey, does not in this state give a legal right of entry; and it is also agreed as a general rule, that the survey, to be valid, must be made by an authorized surveyor, which has not been done in this case. But it is contended by the plaintiff's counsel, that as soon as the liberty lands were laid off, the legal estate thereto became vested in the first purchasers, as tenants in common; and that either tenant in common, might lay off his part, in severalty, without the aid of an authorized surveyor. If the first part of the position were established, I do not know that the consequence would follow. I should doubt the power of one tenant in common, to carve for himself, and say; that by virtue of such an act, he had appropriated this or that particular spot to his own use, in severalty. But the truth is, that the contract was made, not jointly, but severally, with each first purchaser; and the laying off the liberty lands, was only saying, that within those bounds, each first purchaser might locate his liberty land. But the same political reasons, which required an authorized survey to locate warrants in other parts of the province, applied with equal force to this particular territory. The warrants, with respect to these lands, were severally issued, and were directed to the surveyor general. He, then, or his deputies, could alone execute them.

4th. The next question is, is the plaintiff barred by the statute of limitations? The warrant issued in 1682—it is argued that it was never executed till 1770, and that the plaintiffs never were in possession. It is said that there was a trust in this case, and William Penn, the first, was called the trustee. Under the 3d point, it was said, the legal estate passed to the first purchasers. The counsel perceiving the dilemma to which he was exposing himself, endeavoured very dexterously to avoid it, by calling William Penn, an agent for the first purchasers: but I do not see any ground for this. He issued warrants to each, authorizing them to survey liberty lands. This they might do or not, as they pleased, and he had no control over them, nor had he any agency in the business. But it is said, that when the proprietary took up this manor, he must have intended to include the rights of his two children, William, the second, and his sister. There is no kind of proof of this. But suppose it were the case, then it would follow, that William, the son, had only an equitable claim to lay his warrant somewhere within the manor; which would be a complete objection to his recovery at law.

Jury found a verdict for the defendant.

[A motion for attorney's fees was passed upon in Case No. 6,928. A similar ejectment suit was tried in Case No. 6,936. In Case No. 6,940, a motion for a continuance on the ground of an improper newspaper publication was denied.]

Case No. 6,928.

HURST v. DURNELL.

[1 Wash. C. C. 438.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

ATTORNEYS—WARRANT OF ATTORNEY—FEES.

Where three members of the bar enter their appearance for the defendant, to suits instituted against him, and all are equally called upon, and act as the attorneys of the defendant, no warrant of attorney having been given by the defendant to either; the attorney's fee, in the bill of costs, is to be equally divided among all who have acted in the case, and who have appeared to the suit.

This was a motion made to try the question, whether Mr. Gibson was entitled to the attorney's fees in the ejectments—[see Cases Nos. 6927 and 6936]—80 or 100 in number—brought by the lessor of Hurst, against a number of persons in the Northern Liberties; or whether Ingersoll and Rawle, are not entitled to share those fees with him. It appeared that Mr. Gibson was first applied to, by the defendants in those causes, to enter his appearance, at which time he received a small fee; that at this time, Ingersoll and Rawle had been applied to, but upon some disagreement about the fees, offered and demanded, no engagement had been made, but the treaty was still going on. Mr. Gibson ordered his appearance to be entered before the return day. During the same term, however, to which the suits were returned, Ingersoll and Rawle were employed, to appear to all the suits, and received a payment

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

of some money. They afterwards received other fees, for the arguments in the two causes which were tried. Mr. Gibson was offered an additional fee, but from delicacy to the other gentlemen, refused. The names of all the gentlemen were entered on the docket for the defendants, and all the rules taken in the causes, defences, and motions, were taken and made by Ingersoll and Rawle. No warrant of attorney was given to either, nor is it usual in this state to give them; though it has sometimes been done.

Binney & Hopkinson, for Ingersoll and Rawle.

Lewis & Levy, for Gibson.

BY THE COURT. If a warrant of attorney had been given to Mr. Gibson, the gentleman first employed, he would have been exclusively entitled to the attorney's fees. But this not being the case, the defendant had a right to employ as many attorneys as he pleased; and it appears that the three gentlemen were employed generally, to appear, without any distinction made or contemplated between their duties as counsel and attorney. We can only judge of the nature of their employment, by what they did, and all of them appear equally to have performed the duties of attorneys. All, therefore, are equally entitled to divide the attorneys' fees.

[In Case No. 6,940 a motion for a continuance on the ground of an improper publication was denied.]

Case No. 6,929.

HURST v. HURST.

[3 Dall. 512.]

Circuit Court, D. Pennsylvania. April Term, 1799.

TRIAL—CONTINUANCE.

[The refusal of one of the parties in an action at law to file an answer to a bill seeking discovery of facts essential to the case of his opponent is a ground for the continuance of the trial.]

This cause being marked for trial, Ingersoll moved for a continuance, on the ground, that a bill in equity had been filed by his client, the defendant, in the circuit court, for the New York district, calling for a discovery and account, in relation to the matters in controversy in the present suit; but that the plaintiff here had refused to file an answer to the bill, in consequence of which, an attachment had issued against him. After some remarks by Rawle, in opposition to the continuance,

IREDELL, Circuit Justice. Though on general grounds, I should be very reluctant to agree to the continuance of a cause of this description, which, in a variety of shapes, has been long depending, I think the particular circumstances that have been stated, call for the interposition of the court. The disclosure of certain facts, that depend on the knowledge of the plaintiff, is deemed essential to a fair decision: if the disclosure will not injure him, he can have no reason for refusing to make it; while his refusal to answer the bill in equity filed in New York, at the same time that he presses for a trial of the common law suit here, raises a strong presumption against him. Under this impression therefore, the continuance is now allowed; and we shall be disposed to hear favorably every future application to postpone a trial, until the plaintiff has filed a satisfactory answer to the bill in equity.

Case No. 6,930.

HURST v. HURST.

[1 Wash. C. C. 56.] [1]

Circuit Court, D. Pennsylvania. April Term, 1803.

ARBITRATION AND AWARD—SETTING ASIDE OF AWARD—EVIDENCE—SET-OFF.

1. In what cases courts will interfere, and set aside an award of referees.

2. In Pennsylvania, it is not necessary that a mistake by the referees in point of law, should appear on the face of the award, to induce the court to set it aside; they will re-examine the documents on which the referees decided.

3. In such an examination into an award, no new evidence can be admitted.

4. Whether the debt of one partner, in a joint concern with others, not yet closed, can be set off in an action by one partner against the other?

5. The nature of set off.

[Cited in Barton v. Anthony, Case No. 1,084.]

[Cited in Rand v. Redington, 13 N. H. 77.]

This was a motion to set aside an award.

WASHINGTON, Circuit Justice. On the third day of May, 1801, an agreement was entered into between Charles Hurst the plaintiff, and Timothy Hurst the defendant, which recites, that five actions were then depending between them, and which are more particularly described as follows: 1. An action on the case in the supreme court of Pennsylvania, in which Charles is plaintiff and Timothy defendant. 2. An action of sci. fa. in the supreme court of Pennsylvania, in which Charles is plaintiff, and John Norris, administrator of John Baron, is defendant; in which Timothy alleges himself to be interested as assignee of all the estate of the said Baron. 3. An action of false imprisonment, brought by Timothy against Charles, in the mayor's court of the city of New-York. 4. A bill in chancery depending in the circuit court of New-York, wherein Timothy is complainant, and Charles and others are defendants. For the set-

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tlement of these controversies, the parties mutually agree to discontinue the above suits, in which they are respectively plaintiffs; such discontinuances however not to operate as releases of the several demands involved in those suits. For the adjustment of three of those suits, the parties agree each to furnish the other with their accounts, to enable them to effect an amicable settlement of their differences; and in case this could not be effected, they agree to submit their differences to arbitrators to be appointed by this court, such arbitrators in matters of law to be guided by the opinions of certain law characters named by the parties. On the 20th of September, 1801, an amicable action was docketed in this court, wherein Charles Hurst is plaintiff and Timothy defendant; and by a rule of court, the same was referred to three persons, to hear and determine the matter in difference between the parties, which are recited in the agreement of the 3d of May, 1801, and according thereto. The referees have made their award, by which they report a balance due on the scire facias suit from Charles to Timothy, in right of Baron, of 13,085 dollars, 87 cents. That this balance is exclusive of the real estate, goods and chattels of the said Baron, in the possession of Charles Hurst, and which the referees award to be assigned and given up to Timothy on demand. In the false imprisonment cause, they award to Timothy 666 dollars, 67 cents. In the chancery suit, the sum of 2,607 dollars is stated to be due from Charles to Timothy, which is awarded to the latter; and the estate, which had been conveyed by Timothy to Charles in trust for certain purposes, yet remaining unsold, is awarded to be re-conveyed. As to the action on the case, Charles v. Timothy, the referees say, that "upon the settlement of accounts to the 1st of May 1801, comprehending the sums above mentioned, they find the sum of 15,171 dollars, 70 cents, is the balance due from Charles to Timothy,"

It is ageed that the fifth action mentioned in the recital to the agreement, has been settled, and is not involved in the present dispute. It is also clear, that in the action on the case by Charles v. Timothy, a deduction is made from the aggregate amount of the three sums found due to Timothy, of 1,160 dollars, 84 cents; which gives the amount of the award in favour of Timothy in that suit, although it is informally stated in the report. This will appear by deducting the 15,171 dollars, 70 cents, from the aggregate amount of the three sums found due to Timothy. Exceptions to this report having been filed within the proper time, a motion is now made in behalf of Charles Hurst to set aside this award, for the following reasons: 1st. That jurisdiction is not laid in the declaration. 2d. That the referees were guilty of a mistake in refusing to admit sundry credits, which are specially enumerated, to which Charles was entitled. 3d. That the award is uncertain. 4th. That damages are awarded to Timothy in the action of assault and battery, whereas that suit was not submitted. 5th. To the award of the 2,607 dollars on the chancery suit. To support the second and fifth exceptions, it was necessary for the plaintiffs to go into the examination of the written evidence upon which the referees decided, in order to make out the title of the plaintiff to the credits claimed, and to show the mistake in allowing the debit mentioned in the fifth exception. Upon a hint from the court that this attempt to impeach an award was unusual, the act of assembly of this state was read, and a decision of the supreme court of this state was strongly relied upon as expounding the statute. Without being satisfied that the statute and decision referred to had varied the rule as laid down in the English cases, the court allowed the plaintiff to proceed with the examination, and determined to look into the legal principle more at leisure. The statute of Pennsylvania, passed in 1705, declares, that where a reference is made under a rule of court, the award of such referees being made according to the submission, and approved by the court, and entered upon the record; shall have the same effect, and be as available in law, as a verdict.

The chief justice of the supreme court, in the case of Williams v. Craig, 1 Dall. [1 U. S. 314] lays it down; that where there is an evident mistake in matter of law, or a clear mistake in matter of fact, the court cannot approve the award, and ought therefore to set it aside. In the case of Kunckle v. Kunckle [Id. 365] in the common pleas of Philadelphia, the president narrowed very much the rule laid down in the above case, by saying, that the courts never enter into the merits of the case decided by the referees, or set aside their report, but for misbehaviour, or where objections to it arise on the face of the proceedings. This is the strict rule in England. In the case however of Pringle v. M'Clenachan, [Id. 486], afterwards decided in the common pleas, the court set aside a report, because it appeared that the referees had proceeded upon a mistaken principle; and this mistake, as I understand the case, did not appear upon the face of the award, but from the evidence which was before the referees. Now, there is very little difference between the principle of this case and that of Williams v. Craig. In both, the court corrected a mistake in point of law which did not appear on the face of the report, but was made out by a re-examination of the documents upon which the referees had decided. The error committed in the latter case was not by declining the consideration of a particular subject, but by adopting a principle which, when applied to that subject, led

to a conclusion not warranted by the rules of law. The rule in England is, I think, too rigid to consist with the spirit of the law in this state—that contended for at the bar by the plaintiff's counsel, is much too loose. It is too much to say, that because the court might not have drawn the same conclusions as the referees have done, from the evidence, that therefore they will set aside their report. If awards were liable in every instance to be opened, and the questions, which the referees have decided, to be retried and re-examined by the court, the utility of this mode of deciding controversies would certainly be very questionable. If, on the other hand, awards were to be considered too sacred to be impeached; if, notwithstanding the most injurious mistakes have been committed, every door is to be closed against the court's arriving at the knowledge of the facts upon which the referees decided, I should strongly incline to doubt, whether this mode of trial would deserve half the encomiums, which have been passed upon it. It would be to say that whatever may be the degree of injustice committed by the mistakes of arbitrators, yet the court must approve and give validity to those mistakes, if the referees have been cautious enough not to spread them upon the face of the award.

Upon the whole, I am perfectly satisfied, that the inquiry in this case has been proper. That it was the duty of the court to examine the accounts and documents laid before the referees, to see if they had refused to allow the credits claimed by the plaintiff. In such an examination, no new evidence can be admitted; and in deciding upon that which was before the referees, if they have drawn conclusions from conflicting evidence, different from that which my mind would approve, it would be improper, on that account, to say, that their conclusion is wrong. If on the other hand, plain facts or principles of law have been misapprehended, I could not say that I approved of their report. The principal sum reported in favour of Timothy Hurst, is 13,085 dollars, 87 cents, due from Charles to John Baron; to which Timothy is entitled as general assignee of the estate of Baron. No exception is taken to this debit; but it is insisted, that Baron was indebted to Charles Hurst in four several sums advanced by him in the purchasing and securing certain lands, in which Baron, Morris, Charles, Timothy, and John Hurst, were interested as tenants in common; which credits, it is contended, ought to be deducted from the debt awarded to be paid to Baron's assignee. The answer to these claims is conclusive. At the time when this land company was formed, an agreement was made between the three Hursts, the original members of the copartnership, and Baron and Morris, by which the former agreed to advance all the money necessary for purchasing and securing the lands, in consideration of the personal services to be rendered by Baron and Morris, in pointing out the lands proper to be purchased; and by an express stipulation in that agreement, whatever sums of money should be advanced by the Hursts, were to be charged upon the lands, and were to be repaid, by sales of any part of them, before a division should take place between the partners. The credits now claimed by Charles Hurst, are for Baron's proportion of advances made on account of the partnership fund; and consequently, are, by the agreement, to be charged, not personally to Baron or his assignee, but to the joint fund, the land. This fund, it is admitted, has always been, and still is, under the management and control of Charles Hurst, who consequently has within his own power the proper fund for satisfying these demands. But it is said, that the agreement does not discharge the person or the estate of Baron, from this demand; and that it is only intended to constitute the joint stock as an auxiliary fund. This construction of the agreement, is inadmissible. The most that can be contended, is, that Baron might be made ultimately liable to make good these advances; and in that case, it should appear, that the fund first to be charged was exhausted, before these advances could be converted into a personal demand. But this is not contended. But is it true that Charles Hurst had not received credit for the sums now claimed? With respect to the first sum of 2,692 dollars, 98 cents, for Baron's proportion of advances, as settled in England, the referees (who have been examined) state that they opposed to this sum the consideration money of a tract of land, sold by Baron to Charles Hurst, in the year 1799. It is true, there is endorsed upon the conveyance of that land, a receipt for £500, the purchase money; but this does not furnish satisfactory evidence that the money was actually paid by Charles Hurst to Baron; because it is usual to endorse a receipt for the consideration money on all deeds of bargain and sale, although not a farthing be paid, and because Baron being at that time indebted to Charles Hurst for his proportion of the advances now claimed, it is at least probable that that conveyance was intended as a satisfaction of those advances. At any rate, I have not sufficient light to say that the referees have made a clear mistake in refusing to admit these credits. As to the other credits of 5,175 dollars, 76 cents, and 2,147 dollars, 77 cents, claimed under the second exception, it is most obvious that Charles Hurst, in the account stated between him and the joint fund, has credit for the whole of these advances against the money raised out of those funds, and which are there to be placed to his debit. That which is so clearly proved by figures, cannot be rendered more clear by argument and explanation. The objection made by Charles Hurst, in his fifth exception, to the allow-

ance of 2,607 dollars, is certainly without foundation. Charles Hurst and Timothy Hurst united in a bond to a Mr. Brownjohn, to indemnify him against his responsibility as surety for them, in a bond to Foliot, for money lent to them, to enable them to purchase lands for the company. Charles Hurst, of course, was not only bound in law to indemnify Brownjohn, but retaining the possession and management of the joint funds, he was bound in equity to indemnify his partner Timothy Hurst. It is true, that Charles Hurst was sued by Brownjohn, and judgment against him was rendered and satisfied. His obligation to Brownjohn was thereby at an end. But the court of chancery of the state of New-York determined, in a suit against Timothy, that Brownjohn was entitled to a further sum for his complete indemnification, and by its decree compelled Timothy Hurst to pay to the executors of Brownjohn, the sum now objected to. This decree, made by a court of competent jurisdiction, it would ill become this court to question, by producing an injury to Timothy, which Charles might and ought to have prevented, and against which he was entitled in equity to be indemnified by Charles Hurst, furnishes Timothy with a well founded charge against Charles, and consequently the amount of that injury was properly debited to Charles.

The fourth exception is so totally unfounded, that little need be said respecting it. I presume it would not have been made, if the counsel for the plaintiff had not been misled by the erasure in the counterpart of the agreement which Charles Hurst had.

The third exception is to the uncertainty of that part of the award, which directs Charles Hurst to deliver up to Timothy, the real and personal estate, which were of John Baron, remaining unsold, and now or lately in his possession; and also the estate conveyed by Timothy to Charles, in trust. To which is added, in argument, though it forms no part of the exceptions, that those parts of the award are not within the submission. As I am perfectly satisfied that these parts of the award are not within the submission, and that the objection appearing upon the face of the award may be taken advantage of, without an exception being filed, it will be unnecessary to give any opinion respecting the uncertainty of it. The submission is not general, of all matters in controversy; but is special, and confined to the matters in dispute, in four actions then pending between the parties. The right of Timothy to recover a debt due from Charles to Baron, in the action of sci. fa., or to be indemnified against a decree obtained against him by Brownjohn's executors, and for which his suit in chancery in the circuit court of New-York was brought, or to be compensated in damages for false imprisonment (the three suits in which Timothy was plaintiff and which were submitted) could never directly or incidentally involve the questions, whether Charles Hurst, as trustee for Timothy, in Timothy's own right, or as assignee of Baron, had a right to retain those estates, or was bound to assign them to Timothy. The agreement of 1797 can by no fair means be pressed into the service, in order to clothe the referees with the power of deciding these two points. But as those parts of the report are entirely independent of the other parts of it, the award, though void as to them, is good as to such other parts, and must be confirmed. Should Timothy attempt to execute the parts of the report now declared void, the court can prevent him from proceeding.

[A bill in equity seeking relief from this award was subsequently filed by Charles Hurst, and, upon demurrer, was dismissed. Case No. 6,932. An execution issued upon a judgment obtained in the state court was sustained. Id. 6,931.]

Case No. 6,931.

HURST v. HURST.

[2 Wash. C. C. 69.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

LIEN ON REAL ESTATE—JUDGMENTS—REVIVAL.

1. Construction of the acts of the assembly of Pennsylvania, passed in 1772, and April 4, 1798, relative to judgments, and to their lien on real estate.

[Cited in Koning v. Bayard, Case No. 7,924.]

2. The true construction of those laws, taken together, is, judgments shall be enrolled when they are signed, and they shall not, by relation, affect bona fide purchasers or mortgagees; and as to such persons, the lien of the judgment creditor shall cease, unless revived in five years by scire facias.

[Cited in Thompson v. Phillips, Case No. 13,974; Lane v. Ludlow, Id. 8,052.]

[Cited in Re Howe, 1 Paige, Ch. 130; Trapnall v. Richardson, 13 Ark. 558; Payne v. Wilson, 74 N. Y. 355.]

This was a rule, obtained by the executors of Brownjohn, and other creditors of Charles Hurst, upon the marshal, to bring into court the money levied upon an execution of Timothy Hurst against Charles Hurst, to be disposed of among the applicants according to the priority of their judgments. The judgment of Brownjohn was obtained in the state court of Pennsylvania, in 1787, upon which an execution issued in the same year, and sundry subsequent executions of venditioni exponas issued, down to July, 1799, on which part of the debt was levied. The execution of Timothy Hurst issued upon a judgment, recently obtained in this court. [Case No. 6,930.] The claim of Brownjohn's executors to the money brought into court was opposed by Wilson, who obtained a judgment in this court against Charles

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

Hurst, in April, 1791. The ground upon which a preference was claimed for this judgment, which was subsequent to that of Brownjohn's, was, that the latter had lost his lien on the lands of Hurst, by his having omitted to sue out a scire facias, in pursuance of the act of assembly of Pennsylvania, passed the 4th of April, 1798 [3 Smith's Laws 331], declaring that no subsequent judgment now on record, shall continue a lien beyond five years from that time, or the time it is rendered, unless within that period a scire facias be sued out, and prosecuted in the manner prescribed by the law.

Hallowell & Hare, for Brownjohn.

The act of assembly intended to protect purchasers only, and not creditors; and though the lien would not prevail against the former, if bona fide, yet it cannot be impeached by the latter. The mischief of the law, as it previously stood, was, that purchasers had no means of finding out what judgment liens were outstanding, since they did not lose their force from their antiquity; and therefore the mode prescribed by the law in question, to give them publicity, was well intended to remedy the evil. That this was the intention of the legislature, appears from the preamble, which speaks only of purchasers. But even a purchaser, with notice, would not be permitted to impeach our lien. The preamble is a key to the intention of the legislature. Cases cited, as to the use and force of a preamble: Plow. 232, 369; 1 Inst. 79; 6 Bac. Abr. 380, 381, 384, 586, 587; 1 Atk. 174, 182; 1 Ves. Sr. 364, 365, 366; 1 Eq. Cas. Abr. 19; 2 Eq. Cas. Abr. 684. The subsequent clauses of the law show the true intention to be expressed by the preamble; for the scire facias is to be served on the alienee, terretenants, and debtor, but not on creditors. A purchaser, with notice, will be bound by a judgment, though not docketed according to the statute, 4 and 5 W. & M. c. 20; 2 Eq. Cas. Abr. 684. No statute shall exclude all equity. 2 Rolle, 501; Sir W. Jones, 39, 123; 2 Vern. 234, 750. The same principle applied to purchasers under the registry act of Anne. 1 Ves. Sr. 66. It was admitted, that no case had yet been decided in the state courts upon this act of assembly; but apposite cases, decided upon other acts, were relied upon. [Levinz v. Will] 1 Dall. [1 U. S.] 430; Stroud v. Lockart, 4 Dall. [4 U. S.] 153. Subsequent purchasers, with notice, are bound by a prior unrecorded mortgage, notwithstanding the act of 1715 [Hooton v. Will] 1 Dall. [1 U. S.] 450. The legal relation of a judgment will overreach a domestic attachment, which is even a stronger lien than a judgment. A judgment will relate back as to creditors, but not as to purchasers. 3 P. Wms. 398. Upon the doctrine of relation, to overreach the claims of creditors, were cited, 1 Sell. Prac. 526; 2 Vern. 218; 2 Show. 485; 6 Mod. 225. A general creditor is not so much favoured as a person who has obtained a specific lien, on the faith of which he advanced his money. 5 East, 545; 1 P. Wms. 278; 2 Ves. Sr. 662, 663. No scire facias was necessary in this case, an execution having issued, and having been kept alive. 2 Cromp. Prac. 189.

Mr. Rawle, for Wilson.

The words of the enacting clause are general and unqualified. A judgment on which no scire facias shall have been sued out within five years, shall cease to be a lien; that is, the land, after that period, is absolutely exonerated, not as it regards any particular claimant, but as against all the world. As to the force of a preamble, the rule is, that if it be narrower than the enacting clause, and inconveniencies may exist to be remedied which are not enumerated in the preamble, it shall not control the enacting clause; nor can the former be properly referred to, to explain or govern the latter, but where the latter is ambiguously expressed. 6 Bac. Abr. 380, 381; 1 P. Wms. 520; 4 Term R. 793; Cowp. 543; 5 East, 544, 545. The act was intended to supply the deficiencies of a former law, and is in fact a supplement to one passed in 1772 (chapter 680); and therefore it is against all rule to narrow its construction. That law is an exact copy of the statute of frauds in England, and speaks only of purchasers in the preamble; yet it has always been extended farther by construction. The mischief not remedied by that law, was as extensive and as great in respect to creditors as purchasers; and the law under consideration was intended to make the remedy co-extensive with the mischief. Finch, Prec. 478; [Welsh v. Murray] 4 Dall. [4 U. S.] 320.

The idea of notice is altogether inapplicable to this case; because, if an incumbrance be made void by statute, no person coming in afterwards, though with notice, shall be affected by the incumbrance. Notice will not make good an act void by the statute. Cowp. 280.

It was urged, that execution having been taken out within the year, no scire facias is necessary. This is the doctrine under the statute of Edw. III.; but that statute has a saving in it not to be found in this law. Besides, the scire facias mentioned in this law, is a special one, unlike that at common law.

Mr. Lewis, for Timothy Hurst.

The act extends to the protection of creditors as well as purchasers. He argued in support of the points contended for by Mr. Rawle. Upon the subject of the preamble, he cited 2 Ld. Raym. 1423; 2 P. Wms. 318. The title of a law being the act of the legislature in this state, is as much a part of the law, and as much to be respected, as the preamble. The title to this law was general as the enacting clause. The inconvenience of old judgments continuing a lien to any indefinite time, is as great in respect to cred-

itors, and particularly so to executors, in the administration of assets, as to purchasers. As to the doctrine on the statute of frauds, he cited 1 Eq. Cas. Abr. 358; 1 Burr. 474; 2 Eq. Cas. Abr. 684.

The preamble and enacting clause of the registry act, correspond entirely. That statute proceeds on the ground of fraud; so do the cases under the docketing law of England; but none of them extend to creditors proseceuting legal means to recover their debts.

The act of enrolments (27 Hen. VIII. c. 16) takes no notice of subsequent purchasers, but is general, that no estate shall pass. A deed not enrolled is void, as to all persons whatever. Com. Dig. "Barg. and Sale," D; 1 Id. 543; 1 Inst. 147b; Moore, 34; Sav. 63; Hob. 261, 262; Cas. t. Talb. 167; 4 [Coke] Rep. 71; 2 Rolle, 119; 2 Saund. 11, 12. A recognizance in England, not enrolled, is not a lien, unless the chancellor allow the enrolment; and when this is allowed, the court always takes care that it shall not overreach, by relation, an intermediate security, obtained by a third person. 2 Vern. 234; 1 P. Wms. 240; 2 Cas. Ch. 47. A judgment not docketed, cannot relate so as to overreach a judgment creditor or purchaser. Finch, Prec. 478.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent). This being a case of the first impression, and arising out of a state law, I have only to regret that it has fallen to the lot of this court to give a construction to it, before it had been considered and decided upon by the supreme court of this state. A number of cases have been quoted at the bar, which I do not think entirely applicable to this; but as they seem to have a bearing upon it, it may be proper to notice them, and in doing so, I shall, to save time, arrange them in classes. They were read in order to prove, that the enacting clause of a statute may be construed narrower than the words of it import. The statute of enrolments (27 Hen. VIII.) gives rise to the first class; the cases under it prove, that the statute declared that no estate should pass by bargain and sale, unless enrolled in six months; yet that the deed is valid, except as to subsequent purchasers, without notice. The reason of these decisions is obvious. The plain intention of the law was to remedy certain mischiefs resulting from the statute of uses, which, by tolerating secret conveyances unknown to the common law, was productive of inconveniences to those who might afterwards become purchasers of the estate, without knowing of such former prior conveyance. The reason for passing the statute did not apply. It would require great ingenuity to give to these cases a shape, which could throw light upon that now under consideration. They do not allude to creditors, and they depend upon the peculiar circumstances which produce the law under which they arose. Cases upon the statute of Elizabeth, to prevent fraudulent conveyances, form the second class. But it is to be remarked, that this statute extends, by express words, to creditors, as well as to purchasers, who are not bound, though they purchase with notice; and the reason is plain. The conveyance is fraudulent, and fraud at common law avoids every act. These cases, therefore, are still more inapplicable than the former. The third class relates to leases by ecclesiastical persons for a longer term than three lives, or twenty-one years. Such leases were considered as void only against the successors, because they alone were intended to be protected by the clear intention of the legislature. These cases only prove, that where the intention of the legislature is plain, that intention will control the positive words of the statute—a position which is not denied, but which, as applied to the present case, is a begging of the question in dispute. The registry act of Anne gives rise to the fourth class of cases. That statute avoids all secret conveyances not registered within a limited time, as to subsequent purchasers and mortgagees, for a valuable consideration. The cases decide that such deeds, though not registered according to the requisitions of the act, are nevertheless good against purchasers with notice. The reason is, that if they have notice, the conveyance is not a secret one, and therefore not within the statute. Next comes a class of cases more apposite to the present, and which will deserve more particular notice: I mean those determined upon the statute 4 & 5 W. & M. c. 20, for docketing judgments. It declares that judgments not docketed, shall not affect lands as to purchasers or mortgagees, or have a preference against heirs and executors, so as to affect them. So likewise the statute of frauds (29 Car. II.) declares that judgments shall be docketed when signed; and that the enrolment of recognisances shall be set down at the margin of the roll, within a fixed time; and that as to bona fide purchasers for a valuable consideration, they shall be considered in law as judgments, only from the time they are signed and set down, and shall not relate.

At common law, we know that recognisances, when enrolled, related to the caption, and judgments to the first day of the term. Let us now examine the decisions which have been made upon this statute.

In 2 Saund. pt. 1, p. 9, note 6, it is stated, that that part of this statute which respects the lien of judgments on lands, is applicable only to purchasers, and not to judgment creditors, for that purchasers only are protected by the words of the law: that this is the case, even as to the part of the statute which respects goods, which is general, and does not particularly mention purchasers: that the law is the same as to judgments

under the statute of William and Mary, except that as to heirs and executors in the administration of the estate, judgments not docketed are considered as simple contract debts. In the case of Robinson v. Tonge, 3 P. Wms. 399, it is said, that the statute of frauds concerns purchasers only, and not creditors, who remain as at common law. The case from Finch, Prec. 478, declares, in effect, the same principle. A creditor advancing money on the credit of a judgment, may well stand in a different situation from a general judgment creditor, since he may be considered as a quasi purchaser.

I come now to consider the statute of frauds of this state, and the state decisions upon it. This statute passed in 1772 [1 Smith's Laws (Pa.) 390], and as to judgments, is an exact copy of the English statute of frauds. It enacts, that the judge or officer of any court, who shall sign any judgment, shall at the time of signing it, set down upon the book or record, the day and month, which are also to be entered on the margin of the record, where judgment is entered; such judgment, as against purchasers, bona fide, for a valuable consideration of lands, &c. to be charged thereby, to be judgments only from the time they are signed, and shall not relate to the first day of the term when they were entered, or to the return day, or day of filing bail.

In Hooton v. Will, 1 Dall. [1 U. S.] 450, the court were unanimous, that a judgment related back so as to cut out a domestic attachment; which, it seems agreed, lays as firm hold of the land as any lien possibly can. In the case decided in the common pleas, no regular judgment was pronounced. In the case of Welsh v. Murray, 4 Dall. [4 U. S.] 320, it was decided, that the judgment first entered must first be paid; which seems to show that the court considered that the statute of frauds of this state, respecting the relation of a judgment, applied to judgment creditors as well as to purchasers. Unless the latter case was decided upon the practice of which some evidence was given, (and it it were, it will prove nothing as to construction, and will therefore be unimportant in the view which I shall take of this case;) it will be difficult, nor shall I attempt to reconcile it with that of Hooton v. Will. If the cases are in opposition to each other, I must resort to the English decisions on a statute precisely similar to that of this state; which, it appears, confine the words of the statute to the case of purchasers, and do not extend them to judgment creditors. This principle being approved and adopted by the court, we come more immediately to the statute under consideration, in which the importance of the principle, in assisting the construction of the statute, will be pointed out. Let it be premised, that a literal and strict construction of the enacting clause cannot be insisted upon. It would be too much to insist, that a purchaser with notice of Brownjohn's judgment, or that Hurst, the defendant, could take advantage of the judgment, not having been revived in the mode pointed out by the statute. This would be repugnant to the obvious intention of the law. We must then depart, in some measure, from the letter of the enacting clause.

I admit the soundness of the rule laid down by the opponents of Brownjohn's judgment, that the preamble is only to be resorted to, in order to explain an ambiguity appearing in the enacting clause; but this preamble is worthy of notice, as it refers us to a former law, which this is intended to render more effectual. The latter law has indeed been termed by the counsel for Wilson, a supplement to the former. The preamble requires us to consider is as such, though being in pari materia, they might, and ought to be considered together, were the preamble out of the question. The law to which we are thus referred, is the act of frauds, passed in 1772. Taking it in conjunction with the law under consideration, we at once discover the mischief and the remedy, not from the preamble alone, but from that and the enacting clause taken together. What was the old law? That judgments should not relate back, or be a lien on land, as against bona fide purchasers and mortgagees, but from the time they are signed and enrolled. The mischief which, notwithstanding this law, still existed, was, that after a great length of time, purchasers might find it difficult to discover what judgments were outstanding, so as to affect the land they wished to purchase. The lien extending to all lands of the debtor, no person could certainly know which part he might safely purchase. To remedy this evil, the last law requires the judgment creditor, within five years, to sue out a scire facias, and to give such public notice of its existence, that all the world may know what and where the judgment is. But, who are the persons for whose benefit this additional remedy is provided? Surely those in favour of whom the former law had been made, but which was found not to be effectual. To extend the law to other persons, would be repugnant not only to the preamble, but to the enacting clause also. If we are to consider the two laws together, which is certainly proper, it would provide a remedy where none was intended. How then do the two laws read, taken together? Judgments shall be enrolled at the time they are signed, or they shall not by relation affect a bona fide purchaser, or mortgagee; and as to such persons, the lien of the judgment creditors shall cease, unless the judgment be revived within five years by a scire facias. This reading produces a perfect harmony between the old and new law. That this was the intention of the law, is further manifested from the third section of it; which, noticing those who

may be interested, directs the scire facias to be served on the debtor, or his representatives, his alienees and terretenants. If the judgment creditor had been the object of the law, and intended to be protected by it, why not have directed the writ to have been served on him, who might as easily have been found as the alienee.

I think it is not improper to make some observations on the cases which I before referred to under classes. In not one of them are creditors noticed, except in the following instances: First; those under the first statute of Elizabeth against fraudulent conveyances, and in that creditors are specially mentioned. Second; where the creditor is considered quasi a purchaser; as where he advances money on the credit of the judgment, trusting to that as his security, without notice of the judgment (Finch Prec. 478); and that this distinction is closely observed, appears from those decisions in equity which establish even an agreement to sell land, against a judgment creditor; and which prevent a prior judgment creditor from tacking it to a subsequent mortgage; though in the first case, the agreement would not prevail against a mortgage; and in the latter, a prior mortgagee, obtaining a subsequent judgment, may tack the latter to the former against an intermediate encumbrancer (Finch v. Earl of Winchelsea, 1 P. Wms. 278; 2 Ves. Sr. 662, 663). The reason is plain. The judgment, though a lien, is not a specific lien on the land; that is, the creditors did not go on the security of the land, but trusted to the general credit of the debtor and of his estate. I am therefore of opinion, that the judgment of Brownjohn must prevail against the other judgment creditors.

NOTE.—The act of 1798 [3 Smith's Laws (Pa.) 331] is as follows. The title is, "An act limiting the time during which judgments shall be a lien on real estate, and suits may be brought against sureties of public officers." Preamble.—"Whereas the provision heretofore made by law for preventing the risk and inconveniences to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time without any process to continue or revive the same, hath not been effectual; therefore," &c. It enacts, that no judgment, now on record in the courts of this state, shall continue a lien on the real estate of the debtor longer than five years from the passing of the act, or from the first return day of the term of which such judgment is entered, unless the person obtaining it, or his legal representatives, or other persons interested, shall, within five years, sue out a scire facias to revive the same, which writ of scire facias shall be served on the terretenants or persons occupying the real estates bound by the judgment, or where he or they can be found, on the defendant, his feoffee or feoffees, or the heirs, executors, or administrators of such defendant, his feoffee or feoffees. And if the estate be not in the immediate occupation of any person, and the defendant, his feoffee, or their heirs, executors, or administrators cannot be found, proclamation is to be made in open court, at two terms, by the crier of the circuit where the judgment is; calling on all persons interested, to show cause why such judgment should not be revived; and if sufficient cause be not shown, at or before the second term, the court is to order the judgment to be revived during another period of five years, against the real estate of the defendant; and similar proceedings are to be had, at the end of said five years, and so on from period to period.

[A bill seeking equitable relief from the judgment in favor of Timothy Hurst was dismissed on demurrer in Case No. 6,932.]

Case No. 6,932.

HURST v. HURST.

[2 Wash. C. C. 127.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

ARBITRATION AND AWARD—EQUITABLE RELIEF.

1. The plaintiff filed a bill for relief, from a judgment entered on the award of referees, claiming to have certain credits allowed to him, which had not been given to him in the accounts, stated and adjusted between him and the defendant, upon which the award was given.

2. Plain mistakes in facts, which appear upon the face of the award, or which could be made out from the evidence laid before the referees, or for their examination; might have been taken advantage of by exceptions to the award; and these cannot afterwards be made the subject of a claim to relief in equity.

[Cited in Tracy v. Herrick, 25 N. H. 400.]

3. The bill cannot be supported as a bill of discovery, because the plaintiff does not state that he relies on the discovery to be obtained for the defendant, but that he can prove the mistakes of the arbitrators.

The plaintiff [Charles Hurst] filed his bill praying relief against the award of arbitration, which had been approved by this court [Case No. 6,930], after exceptions had been taken to it; and upon a scire facias issued thereon, judgment had been obtained. [Id. 6,931]. The bill states that against the sum of 13,085 dollars, 17 cents, awarded to the defendant [Timothy Hurst], the referees had not allowed the following credits. First; the sum of 10,382 dollars, 96 cents, (being Barron's proportion of the property), advanced by the plaintiff, on the general account of the persons engaged in the land purchases; that this credit was not admitted, because the plaintiff had received from the proceeds of sales of divers parts of a South street lot, a sum equal to the whole sum he had advanced, which the bill states was in effect giving to Barron one-fifth part of the sales of this lot, though he had sold his interest therein to the plaintiff. Second; that the referees omitted to credit the plaintiff 2,690 dollars, 67 cents, being Barron's one-fifth of other sums expended by the plaintiff for the same concern, as appeared by an account exhibited to the referees, and admitted by the defendant; that the plaintiff has heard, that this credit was not given, under the supposi-

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

tion that the plaintiff was indebted to Barron five hundred pounds, for a purchase in 1774, of all Barron's interest in five thousand acres of land, which sum of five hundred pounds, with the interest, was equal to the credit claimed. Whereas, the plaintiff, had he known of this mistake in the referees, could have made it appear by sufficient evidence that he had satisfied Barron for his part of the above land, and for other land in Bedford county, and of certain sums paid for Barron. The second ground of complaint against the award is, that the referees have given credit to the defendant, as assignee of Barron, who was assignee of Israel Morris; for £758 3s. 4d. due to said Morris; whereas the plaintiff has been informed, and believes, that no assignment was ever made by Morris to Barron; and in fact, Morris has brought a suit against the plaintiff, which is now pending, to recover this very sum of money. To this bill a general demurrer was put in.

Hopkinson & Levy, for plaintiff.
Ingersoll & Lewis, for defendant.

WASHINGTON, Circuit Justice. The reason assigned in the bill for the relief prayed is, that the above omissions to credit the plaintiff, as well as the charge of £758 3s. 4d., are plain and evident mistakes, which a court of equity ought to correct. When these points were argued, on exceptions to the report of the referees, the court laid it down, that plain mistakes might be examined into at law; not only such as appeared upon the face of the award, but such as could be clearly and palpably made out by the proofs laid before the referees, or acknowledged by them. The plaintiff therefore had a complete and adequate remedy on the other side of this court, and either pursued this remedy, ineffectually, or neglected it; in either of which cases, ought a court of equity to interfere, merely upon the ground that these mistakes exist? The plaintiff's counsel seems to have been well aware of this dilemma, and therefore has very prudently attempted to support this as a bill of discovery. But if this be such a bill, so is every bill in equity. It is not pretended that the facts can only be got at, by a disclosure to be forced from the defendant; on the contrary, it is stated, that the accounts on which the plaintiff's two credits are founded, were admitted by the defendant before the referees. There seems to have been no defect of proof before the referees, nor indeed from the nature of the transaction could there well be any, as to the first credit claimed; and if there were a mistake, it must have been, as a stated bill, one which proceeded from error in the judgment of the referees. But this did not appear to be the case, when all the evidence was before the court, on the former occasion. As to the second credit claimed, the bill avers that the plaintiff can prove, by good and sufficient evidence, the facts material to establish it; as to this, then, a discovery is not required. So too, as to the credit claimed by the plaintiff of £758 3s. 11d., so far from its having been refused, because it was not in the power of the plaintiff to establish it by proof, we must suppose that such proof was laid before the arbitrators, not only because the contrary is not stated, but because the referees are charged with having made a plain mistake in disallowing it: at the same time, should J. Morris recover a judgment against the plaintiff, upon the ground that the assignment to Barron was not made; I will not say that the court ought not, in that case, to relieve the plaintiff. Demurrer allowed, and bill dismissed with costs.

Case No. 6,933.

HURST v. JONES.

[4 Dall. 353.]

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

EJECTMENT—FORMER SUIT—NON PROS—COSTS—TRIAL.

[This was an action by the lessee of Hurst against Jones.]

A former ejectment, between the same parties, for the same land, had been non pros'd; but the costs of suit remained unpaid. The defendant's counsel objected to the trial of the present ejectment, until the costs of the former were paid.

Mr. Rawle, for plaintiff.
E. Tilghman, for defendant.

BY THE COURT. The objection is reasonable and just. The defendant cannot, under such circumstances, be compelled to proceed to a trial. The cause continued.

[In Case No. 6,934 certain depositions were offered and received upon the trial to prove descent.]

Case No. 6,934.

HURST v. JONES.

[1 Wall. Jr. Append. iii.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1801.

PEDIGREE—HEARSAY.

1. The contents of affidavits made ex parte several years before to prove pedigree, are admissible as hearsay, even though what was said was in answer to inquiries made by a person interested to obtain a particular answer;—the affidavits having been made, apparently, in compliance with official requirement, and there being no evidence of any actual "controversy" on the subject.

2. The case is somewhat qualified by this circumstance: st.—that it was not quite clear whether the witness swore to the contents of the affidavits, or to conversations which preceded them, and on which they were founded.

In this action of ejectment [which had formerly been continued on account of the

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

non-payment of costs of the former action,—Case No. 6,933], the descent of one Frances Smith, through whom the plaintiff claimed, came into question; and to prove the descent, Lewis offered in evidence the deposition of one Morris, regularly taken in 1787. This person stated in his deposition that having, many years ago, made application to the land-office for a warrant of survey under the right of Frances Smith, the secretary refused to issue any warrant until the pedigree of said Smith should be fully made out; on which he, Morris, in order thereto, made inquiries of, and had many conversations with ancient people of reputation, and was by them informed, in the year 1768, as follows. (The deposition then purported to state, in exact phraseology, what five different persons had said respecting the genealogy in question, and proceeded): "The affirmant further saith, that he was present and saw the several deponents in the depositions hereto annexed, severally make and subscribe the same." Certain ex parte affidavits thus referred to, were annexed, made in 1768, by the same five persons (now dead) before mentioned; and contained, verbatim, what Morris stated that he heard them mention. The defendant, prior to 1768 (when the affidavits were made) was in possession of the land now in suit.

Mr. Lewis and M. Levy, for plaintiff.

The plaintiff's counsel did not allege that the affidavits annexed to Morris's deposition were evidence, nor did they offer to read them; but contended that Morris's deposition was admissible as hearsay.

E. Tilghman and Mr. Ingersoll, for defendant.

The defendant's counsel objected to its introduction. Admitting generally that hearsay was admissible as to pedigree, they contended that it must be mere hearsay; not attempted to be clothed in legal form, but such as was collected from casual, general conversation and information, not having relation to any particular cause, but made a long time ago, and before any dispute stirred. This was the decision in Strickland's Lessee v. Poole.[2] If made with a view of serving a particular end or an interested party, the mind is not pure and unbiassed. If in response to interrogatories formally administered, there is great danger of artifice, for the interrogatories may be built upon a knowledge of the witness' capacity to speak, and so adjusted as to draw forth all that is favorable to the inquirer, and to conceal every thing beside. If not evidence in themselves, how can the affidavits become evidence by another person's relating what they contain? The offer is an ingenious attempt to introduce ex parte evidence; for Morris appears to have taken all his information from the affidavits. He does truly say that he had "conversations"; but what he says as to the hearsay is, totidem verbis, what the five affidavits contain. But however this be, you cannot free the evidence from one incurable fault: st. That all which Morris heard was in answer to his own inquiries upon the very point now in issue, and when he was interested to establish exactly what it is attempted to establish here. Besides: this sort of evidence is admitted only ex necessitate rei; and the necessity ought to shew its extent. Here, the defendant was in possession of the land when the affidavits were made; the plaintiff had notice, therefore, of the claim, and ought to have perpetuated the testimony in a regular way.

Before TILGHMAN, Chief Judge, and BASSETT and GRIFFITH, Circuit Judges.

TILGHMAN, Chief Judge. Is it clear that Morris's information is wholly derived from the affidavits? I think not. He says that he had several "conversations" with ancient persons and was informed &c. But regarding the case as the defendant's counsel view it, is that which is stated under the sanction of an oath, less persuasive or less likely to be true than the prattle of casual conversation? or is the truth of conversation rendered less probable by being afterwards sworn to? Suppose this case:—A person, hearing another giving an account of the lineage of one whose pedigree he wishes to establish, thereupon asks that other to go and swear to it. Is the statement, when sworn to, rendered less probable? I am not aware that any court has decided that the only declarations admissible are those dropped in passing conversation; nor do I see that the value of the declaration is essentially impaired because responsive to inquiry, or even to interested inquiry; provided no controversy has been stirred. Suppose, that being interested to know my descent, I go to an aged friend and ask him such and such questions, and he tells me what he knows: is not this hearsay, and admissible? subject of course to the restriction which I have named, that it must be made before controversy moved.

For the rest, I do not see that any controversy had been stirred in 1768, when these affidavits were made; and I therefore think that Morris's deposition should be submitted to the jury. Under the court's direction, they will decide upon its credibility and weight.

GRIFFITH, Circuit Judge. I agree with the chief justice. Hearsay is admissible when made ante litem motam. That is this case. The present suit, it is admitted, was not stirred when the affidavits were made;

[2] 1 Dall. [1 U. S.] 14. A short note, thus: "To prove pedigree, evidence permitted to be given of hearsay, a great while ago, before any dispute stirred."

nor, in fact, were they made in any controversy properly so called. The secretary of the land office, it would appear, wanted a chain of title produced for his own satisfaction. The rules of his office probably required that the evidence of an applicant's title to a warrant should appear among the records; and Morris produced such evidence. So far as appears, there is no dispute nor doubt as to the descent; nor was there any opposing claimant of the warrant. I infer that the affidavits were made in compliance with the technicality and routine of office. They are, then, nothing more nor less than sworn declarations ante litem motam. I do not see that the jurat destroys their credibility; for if that which is dropped in the laxity of conversation be credible, why ceases it to be so when reduced to form, and sworn to after calm, solemn and thoughtful recollection?

The case from 1 Dall. [1 U. S.] 14, does not conflict with our opinion; for that case is inclusive rather than restrictive. In short, while I have always admired the wise sentiment of Lord Talbot, that it is better to suffer a particular mischief than a general inconvenience; and feel in great strength, that the rules of evidence are founded upon large, general principles never to be broken away by the hardness of circumstances, I must yet admit, that in excluding this deposition we should narrow a rule of law beyond what is found in precedent. I may add, at the same time, that I should not be disposed to go greatly further than we do in this case.

BASSETT, Circuit Judge. If we give to the deposition that favourable interpretation which in support of probable intent human language may reasonably claim, it will by no means appear that Mr. Morris records only what is found in the affidavits. On the contrary; he had been inquiring in regard to the subject; "had many conversations with ancient people;" and as he might remember generally that the essence of what he learned was accurately set forth in their affidavits, we can understand why he presents documentary language (if it be the fact that he does so) rather than the less accurate recollections of an exhausted memory. I agree with the chief justice and my brother on the other points. In 1768, when the affidavits were taken, there does not appear to have been what, in the understanding of the law, is a "controversy stirred;" and though I was, at first, much oppressed by the argument that what Morris heard was in answer to his own inquiries made on the very point now in question, and with an interested view; yet I think, upon the whole, that as the witnesses must be presumed to have been indifferent, as they cannot be regarded as officious volunteers; what they stated is not to be rejected purely because it was in answer to inquiry, or because (being, doubtless, desired so to do) they attested with their oath what they had said in conversation. The evidence ought to be received; but is open, of course, to observation from the court. Depositions received.

Case No. 6,935.

HURST v. KER.

[1 Wash. C. C. 189.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

EJECTMENT—NON PROS.

After the defendant in ejectment has appeared, and entered into the common rule, he may take a rule on the plaintiff for trial, or non pros; although the declaration has not been changed, so as to make it against the real defendant. This is the neglect of the plaintiff, and he cannot take advantage of it.

This ejectment, and many others, were returned to April term, 1803, and were then put to issue, the defendants agreeing to enter into the common rule. The suits, however, were not set down on the docket, for trial at the last term, or at this, and the change in the declarations were not made, so as to make them against the real defendants, until a few days ago, under a rule made this term.

Mr. Ingersoll now moved for an order, that these suits should be tried at next term, or that non pros should be entered, and notice given at bar; and he relied on the laws of this state; that if the plaintiff, after the cause is at issue, do not try, he shall be non prossed, if notice in court was given at the preceding term. Read, Dig. 66. He stated, that though the new declarations were not filed until this term, yet it was mere form, and cited the case of Lessee of Cherry v. Aikens [unreported], where it was decided in the supreme court of errors and appeals, that if the parties go on upon the old declaration, to verdict and judgment, it is not error. He also cited [Duffield v. Stille] 2 Dall. [2 U. S.] 156.

Mr. Levy insisted, that the causes were not at issue, until after the new declarations were filed; which being after this term commenced, they could not have been tried.

WASHINGTON, Circuit Justice, observed to Mr. Levy, that he had no doubt, from the beginning, that the causes were to be considered as being at issue, before the new declarations were filed; that is, at the time the pleas were put in; and that the altering the declarations, to introduce the name of the real defendant, was a mere matter of form. But the difficulty with him was, whether the defendant might not evade the effect of the order, by agreeing to try; and yet most cer-

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

tainly, the causes could not be tried at this term, as no venire had, or could issue.

Mr. Rawle, in answer to this difficulty—By the practice of this state, no person but the plaintiff can set down the case for trial, unless he is compelled by a proviso rule; so that he pleads his own negligence, to prevent the rule from being made.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. I am satisfied with this answer. I did not know that such was the practice here. I was misled by the Virginia practice, where it is the clerk's duty to put down the causes on the trial docket, as soon as they are at issue. But if only the plaintiff can do this, unless hastened by a proviso rule, we ought surely to grant it. Rule granted.

Case No. 6,936.

HURST v. McNEIL.

[1 Wash. C. C. 70.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

EJECTMENT—DEED OF LEASE AND RELEASE—FORMER JUDGMENT—EVIDENCE—NOTICE—LENGTH OF TIME.

1. The freehold estate which vests in a relessee, under deed of lease and release, by enlargement, is an estate at common law, which did not require the aid of the statute of uses to execute the possession to the use.

2. The mere calling a deed of trust, mentioned in the recitals of other deeds, a deed of trust, does not render it so.

[Cited in Stillman v. White Rock Manuf'g Co., Case No. 13,446.]

3. The record of a trial, and verdict against the plaintiff, in a suit brought by him against another person; cannot be given in evidence by another defendant.

[Cited in Smith v. Kernochen, 7 How. (48 U. S.) 216; Barney v. Baltimore City, 6 Wall. (73 U. S.) 288.]

[Cited in Alexander v. Walter, 8 Gill, 250; Byers v. Fowler, 12 Ark. 286; Tams v. Bullitt, 35 Pa. St. 311; St. Louis Mut. Life Ins. Co. v. Cravens, 69 Mo. 73.]

4. The doctrine of a purchaser without notice, applies only to equitable rights, where a legal title is obtained, without notice of a prior equitable title; when the former will prevail in equity, if fairly acquired.

[Cited in Nulsen v. Wishon, 68 Mo. 387.]

5. In the case of legal titles, the rule is caveat emptor.

6. Length of time cannot be presumed by a jury, but must be proved.

7. Length of time may properly induce a jury to presume a grant in support of such possession; which presumption may be repelled, or accounted for.

8. The assent of the grantor to a deed, clearly for his benefit, may be presumed; yet if a consideration is to be paid, the assent must be proved, or nothing passes by the deed.

[Cited in Boone v. Chiles, 10 Pet. (35 U. S.) 212.]

[Cited in Peavey v. Tilton, 18 N. H. 152; County of Wayne v. Miller, 31 Mich. 450.]

9. A deed executed for the purpose of giving jurisdiction to the federal court, will not be countenanced so as to sustain the jurisdiction.

[Disapproved in Briggs v. French, Case No. 1,871.]

Ejectment for one undivided fourth part of 5,000 acres of land in Chester county. [A similar suit was brought in Case No. 6,927, and a motion for attorneys' fees was passed upon in Case No. 6,928.] The plaintiff's title was as follows:—September 4th and 5th, 1682, William Penn, the first proprietor, by deeds of lease and release, conveyed to Sir John Fagg 50,000 acres of land, to be thereafter located in Pennsylvania, to him, his heirs and assigns; in trust, as to one-half thereof, to the use of his son William Penn; and as to the other, to his daughter, Laetitia Aubrey; both children of his first marriage. This deed not produced, being lost, but sufficiently proved, as the plaintiff [Hurst's lessee] insisted, by recitals in subsequent deeds. Some years after this, but when does not appear, five thousand acres, part of the above fifty thousand acres, were surveyed in Chester county, without saying for whom, but endorsed "Wm. Penn's Manor." This is the land in question. In 1716, William, the second, died intestate, leaving Springett, his eldest son, William, Gulielma, and Maria, who afterwards married Mr. Fell. By the intestate law of Pennsylvania at that time, the eldest son took one-half, and the second son and the daughters, one-fourth each. 24th January, 1730, Springett, by will, devised his half to his brother, William, the third, who thereby became entitled to three-fourths of his father's estate. 10th February, 1740, a warrant issued to re-survey William Penn, Jun.'s. Manor; which was done, June, 1741, and found to contain five thousand acres, endorsed "Wm. Penn's Manor." This was accompanied with a list of the settlers on this manor, amongst which is found the name of William Porter. Mr. Fell died intestate, leaving three children, Robert Edward, Mary M., who afterwards married John Baron, and Gulielma Maria Frances, who married Mr. Newcum. Mr. and Mrs. Baron, in February, 1768, conveyed their interest to Crispin, who re-conveyed to John Baron in fee. In 1770, Robert Edward Fell and Mrs. Newcum, by their attorney, and in consideration of £4,500, conveyed to Timothy Hurst all their lots and lands in South street in Philadelphia, and all other their lands in Pennsylvania, and elsewhere in North America. 15th January, 1774, Timothy conveyed to Charles, Thomas, and John Hurst, in fee, as tenants in common, all his lands in America. 2d December, 1783, Charles

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

Hurst, as attorney in fact, under a power from Thomas and John, and in his own right, conveyed all the above lands to Clement Biddle; and the next day, received a re-conveyance of the same; and on the 8th September, 1791, Charles Hurst and John Baron conveyed to the lessor of the plaintiff, a British subject.

Defendant's title: 4th May, 1742, William Penn, the third, who was only entitled, under the law of Pennsylvania, to three-fourths of the five thousand acres, reciting the deed to Sir John Fagg, (ut supra) conveyed the whole of Penn's Manor to John White, in fee. In this deed, he styles himself heir at law of William Penn, the second; and covenants that he has a right to convey, &c. 12th December, 1747, a patent was granted for these five thousand acres of land, to John White, by the then proprietors, Thomas and John Penn. 12th February, 1753, White, by attorney, conveyed 298½ acres, part of Penn's Manor, to William Porter, in fee; who, by will, dated 26th May, 1781, devised the same to the defendant.

The Attorney General (Mr. M'Kean,) moved to nonsuit the plaintiff, on the ground that the deed to Sir John Fagg conveyed to him the legal estate, and that the estate of William Penn, the second, and Laetitia, was a mere trust, not executed by the statute; and of course, that the plaintiff, if he be entitled, must assert his right in a court of equity. The plaintiff cannot, against the express words of the various recitals, from which alone the deed to Sir John Fagg is established, say, that this was not a trust estate, when those recitals declare the contrary. It is clearly to be inferred, that the conveyance was not only to Sir John Fagg, his heirs and assigns, but the usual words added, "to his only use and behoof, in trust," &c.; in which case, the statute would only execute the first use in Fagg. The lease to Fagg, which was no doubt by bargain and sale, most certainly passed only a use to him; and if a second use had been declared, the statute would not have executed the second use. The release, then, only enlarged that estate to an estate in fee, without changing its nature; and therefore, only the first use to Fagg and his heirs was executed by the statute, leaving the second use a mere trust estate. Cases cited by Edward Tilghman, and Mr. Rawle, who supported the motion: 1 Eq. Cas. Abr. 383; Doug. 709; 2 Bl. Comm. 335, 336, 339; 2 Wood. El. Jur. 301, 296.

Lewis & Ingersoll, against the motion: The plaintiff may recover either on the warrant and survey, which, by the decisions of the Pennsylvania courts, and by that of the supreme court of the United States, are determined to give a legal right of entry, which is sufficient in ejectment; or under the deed to Sir John Fagg, which conveyed a use to the children of William Penn, executed by the statute. The general scope of the statute was to execute all uses and trusts; for both are mentioned; and those which were not considered to be executed, were exceptions made by construction, by the subsequent decisions of the courts of law and equity. Those were terms for years, double uses, and cases where it was necessary for the trustee to retain the possession, to enable him to execute the trusts. If this case comes within either exception, the defendant must show it. The conveyance by lease and release to A, to the use of B, to the use of C, passes but one use. Cases cited: 2 Bl. Comm. 332, 335, 336, Christian's note; 2 Wood. El. Jur. 296, 297, 294.

The answer to the title set up under the warrant and survey, was, that this doctrine only applied where they formed the inception of title; aliter of another estate, as in this case, had been created prior to the survey.

Ingersoll & Lewis, for plaintiff.

M'Kean, Atty. Gen., Edward Tilghman, and Mr. Rawle, for defendant.

WASHINGTON, Circuit Justice. The distinction laid down by the defendant's counsel, seems to be a rational and sound one. There is certainly a difference between a title derived originally under a warrant and survey, and one under a prior deed from the proprietor; in which case the warrant and survey seem rather intended to locate and ascertain the land granted, than to pass an estate. But upon this point, we give no positive opinion, as we are against the motion upon the other point. A lease at common law, required the actual entry of the lessee, to enable him to receive a release to enlarge his estate. But after the statute of uses, this formality was rendered unnecessary; because, the lease being made by a deed of bargain and sale, the lessor stood seised to the use of the lessee for a year; and the statute, by executing the possession to the use, put the lessee in possession, and enabled him to receive a release. But the freehold estate, which became thus vested in the relessee by enlargement, is an estate at common law, which did not require the aid of the statute to execute the possession to the use; and therefore an estate conveyed by lease and release to A and his heirs, to the use of A and his heirs, to the use of B and his heirs, is no more within the statute of uses as to the estate of A, than if it had passed by feoffment; and consequently, the first to be executed, would be that to B. There is, therefore, no second use in such a case. But if the conveyance be by bargain or sale, or covenant to stand seised, the statute executes the first use, which is distinct from the possession of the bargainor or covenantor, which remained in him, and required the aid of the statute; and consequently, the second use was supposed not

to be executed, but remained a trust. This doctrine, if my memory serves me, is well explained by Hargrave, in his notes to Coke on Lyttleton.

But it is contended, that the recitals in the various papers relied on to establish this deed, denominate this a trust, which the plaintiffs cannot now deny. No person can doubt that the intention of the statute of uses was to leave no cases of trusts unexecuted. But the common law courts having unfortunately determined, that in three cases, the use remained as at common law; the courts of equity very readily, and in my opinion very properly, laid hold of those decisions, treated such cases as exceptions from the statute, and entertained jurisdiction over them, as they had done over all trusts before the statute.

We must therefore consider them as exceptions; and when we hear of a trust estate, it is to be understood a use executed, unless it appear to be a case coming within one of the exceptions. There is no magic in the word trust, any more than in the word use—they were controvertible terms before the statute, and still are so, except distinguishable by the subject matter of them.

Motion overruled.

In the further progress of the cause, the defendant's counsel offered to read the record of a trial between the present lessor of the plaintiff, and Pemberton; respecting part of the five thousand acres; which was objected to, by the plaintiff's counsel.

WASHINGTON, Circuit Justice. Such evidence is inadmissible. If there be a point completely settled, and at rest, it is this; that a verdict between different persons cannot be given in evidence, in a suit of one of the parties against a stranger. It is true, that in that case, Hurst, against whom the verdict is offered, had an opportunity of cross-examining; yet it cannot be offered against Hurst, unless he might have offered it, had it been in his favour. This is the settled rule. Non constat that the evidence necessary, or supposed necessary by Hurst, in that case, was the same as in this. He might have been unsuccessful there, for many reasons which do not now exist—the absence of witnesses, or the like.

Cases cited by defendant's counsel: Car. 181; Gilb. Ev. 33-69.

Jonathan H. Hurst was examined as a witness, who proved that when Charles Hurst executed the deed to the lessor of the plaintiff, the latter was in England, and had no agent present—that no person was present, but the grantor and the witnesses; nor did any consideration, or security for the consideration, (mentioned in the deed as the consideration,) pass.

It further appeared in evidence, that Kirkbride, the executor of Robert E. Fell, having instituted a suit to foreclose a mortgage given by Timothy Hurst on the South street lots, for securing the consideration money to be paid him; a settlement took place between the parties, by their attorneys, when some allowance was made to Hurst for certain estates in Pennsylvania, which he had been prevented from recovering under the deed from Fell; but none was made on account of Penn's Manor.

After the decision of the court upon the motion to nonsuit, the defendant accidentally heard that the deed to Sir John Fagg was in the city; and he produced, before the argument had closed, a deed to Sir John Fagg, dated 5th September 1682, from William Penn, for fifty thousand acres, but without declaring any uses to William Penn and Laetitia.

The ground relied upon by the plaintiff, was, that by the death of William Penn, the second, intestate, one fourth of the five thousand acres of land descended to Mrs. Fell, which has been regularly passed by the lessor of the plaintiff. That the conveyance of William Penn, the third, to John White, could only pass his right, which was to three-fourths of the five thousand acres.

WASHINGTON, Circuit Justice, asked the plaintiff's counsel if the conveyance to Timothy Hurst, during the adverse possession of Porter, could pass a valid title by the laws or decisions of this state; and if an alien could take and hold lands here.

Edward Tilghman, for defendant, admitted that it had so frequently been ruled in the supreme court, and other courts of this state; that a conveyance of land, where at the time there was an adverse possession, is good to pass the estate; that he could not question the plaintiff's title on this ground. Also, that at the time the conveyance was made to John Hurst, an alien could purchase and hold lands in Pennsylvania.

The defendant's counsel objected to the plaintiff's title on the following points:—First. That it is not to be believed that Mr. Fell and Mrs. Newcum could have intended, by the general words in the deed to Hurst, to convey more than the South street lots, for the trifling consideration of £4,500. That if the jury should be of opinion that this was the intention of the parties, the intention must prevail; and they cited 1 Term R. 701; Cowp. 9. The price being outrageously low, is clear evidence of a fraud. 1 Ves. Jr. 219. Second. That Hurst received compensation for all the lands, except the South street lots, in the compromise made with Kirkbride, the executor of Fell. Third. That after so great a length of time, and so long an acquiescence on the part of Fell, the jury are at liberty to presume a possession long enough to bar the plaintiff; or that Mrs. Fell parted with her right to her brother William Penn, the third. Cases cited, 2 Inst. 118; 12 Rep. 56; 3 Bl. Comm. 188; 1 Eq. Cas. Abr. 306; 2 Atk. 71, 67; Skin. 77; 2 Vern. 391; Cow. 108, 214, 218; Bull. N. P. 75; 2 Atk. 83; 9 Mod. 37; 1 Ld. Raym. 389;

Salk. 421; 1 Brown, Ch. 554; 2 Ves. Jr. 583; 13; 2 Burrows, 961, 2023; 3 Term R. 310; Cowp. 108, 109; 3 Atk. 629; 4 Term R. 683. Fourth. That this court has no jurisdiction, as the deed from Charles to John Hurst, under all the circumstances of the case, was undoubtedly a fictitious conveyance, and intended to give jurisdiction, whilst Charles Hurst remains the real, and John merely a nominal, plaintiff. Besides, it now appears by the deed to Sir John Fagg, that the legal estate vested absolutely in him, and that no uses whatever were declared. Cases cited, Maxwell v. Levy [Case No. 9,321], where the circuit court, on proof that the conveyance was merely to give jurisdiction, struck the cause off the docket. 2 Bl. Comm. 296. Assent to a deed by grantee necessary. Shep. Touch. 283.

For plaintiff on first point: That no evidence or presumption can be offered to contradict, or vary the general expressions of the deed. It was a land lottery, and at that time it was impossible to say, whether the consideration was too high or too low. Second. The argument of compensation, is repelled by the testimony of Fisher. Third. Admit that where a deed appears which would be invalid, without certain formalities, as seisin, surrender, or the like; the jury may in favour of a long uninterrupted possession presume them; but it is going too far to presume a conveyance from Mrs. Fell, or an agreement to sell to her brother, without the slightest evidence. The presumptions relied upon in this case are completely repelled. Fourth. John Hurst had certainly an equitable interest in this land, and if Charles Hurst conveyed the legal estate to him, it does not affect the jurisdiction of this court.

WASHINGTON, Circuit Justice (charging jury). After stating the plaintiff's, and then the defendant's title, observed that the former was regularly deduced down to the lessor of the plaintiff, whereas the defect was obvious in that of the defendant, since it was derived from William Penn, the third, who was entitled to only three-fourths of the five thousand acres of land, and consequently could convey no more to White. But objections have been made to the plaintiff's right of recovery, and if they or any of them should be sustained, the verdict must be for the defendant; notwithstanding the defect in his title.

The first objection made to the plaintiff's title was, that it appears from the smallness of the consideration, that it was not the intention of Fell to convey any thing more than the South street lots. That being a resident in Great Britain, it is hardly probable he knew that he was entitled to a part of Penn's Manor, and many other manors in Pennsylvania, which were mentioned by some of the witnesses, and to which Hurst has laid claim. That it appears Hurst was much better acquainted with the rights of the Fell family than they were, and it was a fraud in him, to throw in the general sweeping words contained in the deed to him, without disclosing to them his knowledge.

Answer—We must judge of men's intentions, in solemn acts of this kind, by the language they use. If they are clear of ambiguity, there is no room left for construction, and we must give effect to the words which are employed to convey their meaning. If nothing is to pass under the deed to Timothy Hurst, but the South street lots, then the descriptive words of other property must be rejected altogether, and if any operation whatever is to be given to them, where can we stop, or by what rule can we limit them? Can we obliterate the words, "and all other their parts of land in Pennsylvania, or elsewhere in America," or say that they did not mean to pass away such rights, if they possessed them? This doctrine can never be tolerated. There is no evidence of fraud on the part of Hurst; and the whole argument is bottomed on surmises and conjectures. It was said by the counsel for defendant, that White and Porter were fair bona fide purchasers, without notice of the claims of Fell. But this doctrine only applies to equitable rights, where a legal title is obtained without notice of a prior equitable title, in which the former shall in equity prevail, if acquired fairly for valuable consideration, and without notice of the latter. In this case, the title of Mrs. Fell was a legal title, and therefore as to White, the principal caveat emptor applies in all its force.

Second objection. Hurst has been satisfied in the compromise made with Kirkbride.

Answer—This is completely negatived by the evidence of Mr. Fisher, who declares that no compensation was made for the claim of Hurst to any part of Penn's Manor.

Third. The next objection goes not only to the destruction of the plaintiff's right, but in affirmance of the defendant's, and upon this point the cause must turn. It is argued that the jury may presume a length of possession sufficient to create a bar, or if not so, that Mrs. Fell parted with her right to William Penn, the third.

I do not admit that length of time can be presumed. If the defendant relies upon it as a bar, he must prove it by some evidence either positive or circumstantial, so as to satisfy the jury of the fact. No evidence in this case has been given of a possession prior to 1741; and the jury therefore, cannot extend it by presumption.

But the jury may presume a deed from Mrs. Fell, or some other agreement between her and William, the third, by which she passed to him her fourth part of Penn's Manor. This presumption, if warranted by such evidence as will satisfy your minds that the fact existed, may be made in favour of this long and quiet possession under William Penn. But those circumstances may be ac-

counted for, and repelled; and after weighing all the evidence, you must decide which preponderates.

The circumstances relied upon to induce the presumption are, the long acquiescence of the Fell family, from the year 1716, when William Penn, the second, died, until 1774, when Robert Edward Fell and his sister sold to Hurst; during all which time no claim was made, or any attempt to exercise any act of ownership over the land in question. The good character of William, the third, and the consequent improbability that he would convey away the rights of his sister. The strong covenants in his deed to White, demonstrating the confidence he felt in his right to convey the whole. That this being a family transaction, the probability that some agreement was made with Mrs. Fell, is stronger than if the right had belonged to a stranger. Thomas Penn, the proprietor, who granted a patent for this five thousand acres of land to White, was also the guardian of the young Fells; and it is scarcely possible that he was ignorant of their rights, if they had been parted with. If they had not, that he would have united in conveying them away; on the contrary, it is to be supposed that he would have taken proper steps to assert and secure them for his wards.

The plaintiff answers these circumstances in the following manner. William, the third, as well as his sister, lived in England. He knew that by the laws of England, he was entitled by descent to the whole of his father's real estate, as heir at law; and that he claimed it in that right, appears from the deed to White, in which he styles himself heir at law; it is hardly probable that he knew of the intestate law of Pennsylvania. He either knew of his sister's right to one-fourth, or he did not. If the former, and he had purchased it from her, then he would have thought it as necessary to state the fact, so as to show his right to that fourth, as he did to set out the right under which he claimed the three-fourths. If the latter, then he never could have purchased it. As to the long acquiescence on the part of the Fell family; this was accounted for by the residence of that family in Great Britain; their ignorance probably of their rights; the little value of the property at that time; and the policy of the proprietors in encouraging settlers on their lands, instead of making attempts to disturb them. That as to the patent to White, from Thomas Penn, this proves nothing; as it was a mere office conveyance in the name of the proprietors, but by their lieutenant-governor in this province, the proprietors themselves living abroad.

I was much struck with the expression in the deed to White, where William Penn styles himself heir at law; which seemed to show that he had mistaken or was ignorant of the law of Pennsylvania, and claimed the whole, not by purchase of his sister's fourth, but in character of heir at law. It is however to be remarked, that William did not claim three-fourths as heir at law to his father; because Springett was heir at law, and as such was entitled to one-half, which by his will he devised to his brother. But after the death of Springett, without issue, William acquired the character of heir at law to his father; and therefore, when he styles himself such in the deed to him, it is rather to be considered as a descriptio personae, than as a description of his title. It was also argued by the defendant's counsel, that when the great family settlement between the descendants of the first William Penn was made in 1731, it is highly probable, the counsel who were employed on that occasion had informed themselves of the law of Pennsylvania, and would then have discovered Mrs. Fell's right.

The jury will weigh the circumstances relied upon to warrant the presumption, and the answers which have been given to them. If they, upon their oaths, feel satisfied that Mrs. Fell did, in some way or other, convey away her right to William, the third, they will find for defendant; otherwise, for the plaintiff, unless the remaining objections be against him.

Fourth. This objection is to the jurisdiction of the court. By the deed of the 15th January, 1774, from Timothy Hurst; Charles, Thomas, and John, became entitled to the land therein conveyed, as tenants in common. The deed from Charles Hurst to Biddle, and the re-conveyance to Charles, vested the legal estate in this land in Charles; but John and Thomas, it is admitted, were not thereby divested of their rights in equity, though they might be in law. Now the deed to John Hurst was meant to be a real deed, or was merely fictitious, and intended to enable John Hurst to sue in this court. If the former, it was void; as the assent of the grantee was not given at the time, nor has it ever been since given: for though the assent of a grantee to a deed, clearly for his benefit, may be presumed; yet, if a consideration is to be paid, as in this case, (£1,000 is mentioned,) the assent must be proved, or nothing passes by the deed. If it was not meant as a real conveyance, then it may operate to pass to John Hurst a legal title to his own third, which had become vested in Charles, but to which John still retained an equitable title. As to any thing more, the deed cannot be supported; because, as to the rights of Charles and Thomas Hurst and John Baron, they remain unaffected by the deed to John; and being merely a fictitious thing, to give jurisdiction to this court, it will not receive our countenance.

As to the deed to Sir John Fagg, which has been produced, it is either not the deed so frequently recited in the title papers which have been read, or there was some other deed executed on the same day, declaring the uses in the fifty thousand acres of land

to William Penn, the second, and Mrs. Aubrey. This, therefore, forms no objection to the plaintiff's title.

Jury found a verdict for defendant.

[In Case No. 6,940 a motion for a continuance on the ground of improper publication was denied.]

HURST (MORRIS v.). See Case No. 9,832.

Case No. 6,937.

HURST v. RODNEY.

[1 Wash. C. C. 375.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

COVENANTS RUNNING WITH THE LAND.

What will be considered a covenant, running with the land, and binding on the party in possession; although such party has not executed the deed, conveying the same to him.

[Cited in Mohler's Appeal, 8 Pa. St. 27; Crawford v. Witherbee, 77 Wis. 429, 46 N. W. 547.]

This was an action of covenant, brought against defendant for many years ground rent, due upon a lot of ground, conveyed by plaintiff to one Perkins, in fee, and by him conveyed by indenture to the defendant, subject to the ground rent. The declaration states these deeds, and the entry of defendant, and the non-payment of rents, due since her possession under the deed to her. The deed to the defendant, not being executed by the defendant; her counsel contended, that it was not her deed, and that she could not be sued on it.

BY THE COURT. The defendant is bound by the covenant to pay the rent, in the first deed to Perkins, which runs with the land, so long as it is retained by the defendant. Verdict for plaintiff.

[In Case No. 6,938 a rule to set aside an execution upon this judgment was heard.]

Case No. 6,938.

HURST v. RODNEY.

[2 Wash. C. C. 49.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

EXECUTION AGAINST REAL ESTATE—NOTICE OF SALE.

Quere, whether under the act of the assembly of Pennsylvania of 1705, relative to the sale of lands taken in execution, personal notice of the time and place of the sale should not be given by the sheriff.

This was a rule to show cause why an execution issued against the defendant by the plaintiff [upon a judgment upon a verdict obtained in Case No. 6,937], and levied on the defendant's land, which had been sold; should not be set aside. The ground of the motion was, that the defendant had not received personal notice of the time and place of sale; and it was founded on an act of the assembly of Pennsylvania, passed in 1705, c. 153, § 4; which directs, that before any sale of land taken in execution shall be made, the officer shall cause so many writings to be made as the debtor shall reasonably require, or so many without such request, as may be sufficient to give notice of such sales, and of the day and hour when, and place where the same shall be, and what lands are to be sold, which notice shall be given to the defendant; and the said papers shall be fixed up by the officer in the most public places of the county, ten days before the sale. The plaintiff showed cause, that the time and place of sale had been duly advertised in the public papers; and it was agreed, by the bar, that this had always been the practice, and that personal notice had been seldom given, and it was not deemed necessary.

THE COURT observed that the words of the law were very strong indeed, and seemed to require personal notice; but that if evidence of notice could be brought home to the defendant in any way, as that he had seen the paper in which it was advertised, or that he took that paper, it might be sufficient; or even an acquiescence under the sale, if known to the defendant, might do. But as the uniform practice was stated to be in conformity with the course pursued in this case, it might be an important consideration, whether it ought now to be disturbed.

Before THE COURT gave any final opinion, the parties consented to setting aside the sale, both being dissatisfied with it. The purchaser of the property having also agreed to it.

Case No. 6,939.

HURST v. TEFT.

[12 Blatchf. 217; [1] 13 N. B. R. 108.]

Circuit Court, N. D. New York. June 16, 1874.

BANKRUPTCY—PRACTICE UPON REVIEW.

1. The approved practice in this circuit is, to review in the circuit court by petition, and not by bill, an order made by the district court, in bankruptcy, in the exercise of the summary jurisdiction of the district court.

2. The circuit court has, however, jurisdiction to review such an order, on a bill filed in the circuit court, in a plenary suit, for the purpose, in the absence of any rule of the circuit court to the contrary. But a review in such manner is not favored.

3. G. proceeded by summary petition, in the district court, against the assignee of H., a bankrupt, to have appropriated to the payment of a claim, property in the hands of the assignee

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

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

which the petition averred was not the property of the bankrupt, but was the property of R., and was in the possession of the bankrupt as security for his endorsements of notes for the accommodation of R., a judgment on one of which notes constituted such claim of G.: *Held*, that such proceeding should not have been brought in the district court by a summary petition, but by a plenary suit, under section 2 of the bankruptcy act [of 1867 (14 Stat. 518)].

4. As the petition in the district court showed that the property was in the hands of the bankrupt for his indemnity against all the notes so endorsed by him, the aggregate of which outstanding was more than the proceeds of the property, it was not proper for the district court to summarily order that the judgment of G. be paid.

5. The fact that G., in recovering judgment against the bankrupt, levied an execution on the property as the property of the bankrupt, commented on, as being inconsistent with the claim set up in the petition in the district court.

[This was a bill in equity by George N. Hurst against Parker W. Teft, the assignee of Johnson W. Hoyt, a bankrupt.]

W. G. Tracy, for plaintiff.
Nicholas E. Kernan, for defendant.

WOODRUFF, Circuit Judge. 1. I am not prepared to say that the bill of complaint herein should be dismissed upon the ground that a summary order of the district court in a proceeding in bankruptcy cannot be reviewed by bill filed for the purpose. It is true, that the approved practice in this circuit, and the practice that has been uniformly sanctioned by this court, has been to bring the proceedings of the district court before this court by simple petition. That practice is most economical, speedy and convenient. Such a review was intended to be summary, as the proceeding to be reviewed is summary; and yet it has not heretofore been held that such review by bill is not warranted by the terms of the second section of the bankrupt law, which gives this court jurisdiction to review such summary orders by "bill, petition, or other proper process." On the other hand, I do not doubt the power of this court to prescribe by rule the mode in which such a review shall be sought. Nor do I think it doubtful, that, in the absence of any specific rule of the court, we are at liberty to treat this present bill, though brought in all the forms of a plenary and original suit in equity, as being in substance a petition for the review of the summary order made in the district court, and not to be dismissed because the petitioner has proceeded more formally than was necessary. This view of the nature of the proceeding here taken shows that the bill is not a "bill of review," technically so called, which is a proceeding in a plenary suit already brought, and for the review of the decree in such suit; and it is not, therefore, within the authority of the cases applicable to such a bill of review, on which the respondent relies. It is, on the other hand, a special proceeding founded on the statute, taken for a special authorized purpose, and, though needlessly formal, it should not, I think, be dismissed on that ground. I trust, however, the case will not become an inconvenient precedent. Such a practice tends to unnecessary and mischievous delay in the settlement of estates, and in proceedings intended to secure the speedy appropriation of the property of bankrupts to the payment of their debts.

2. On the other hand, the controversy itself appears to have been, in the first instance, erroneously begun. The claim of the present petitioner was not the proper subject of summary jurisdiction in the district court, as that claim is now presented. The jurisdiction of that court, under the first section of the bankrupt law, over the property of the bankrupt, does, in terms, extend to the ascertainment and liquidation of the liens and other specific claims thereon. But the theory of the petitioner is, that the property which has come to the hands of the assignee is not the property of the bankrupt, but belongs to the firm of Reddington, Fobes & Co., and that it was in the possession of the bankrupt as security for the notes and endorsements which he had made for the accommodation of that firm, and that, by the recovery of his judgment upon one of the notes, the petitioner has become entitled to have that property of Reddington, Fobes & Co. applied to the debts which were secured thereby. This claim is, therefore, not the setting up of a lien upon the property of the bankrupt, but a claim wholly adverse to the title of the assignee and in denial of property in the bankrupt. Such a claim should, I think, have been prosecuted under the second section of the bankrupt law, when the assignee denied its validity and asserted title to the property, as property of the bankrupt. If the property in question belonged to the bankrupt, then the whole theory of the case now sought to be made by the petitioner fails. If the contest is, whether the bankrupt ever had title, or was a mere bailee or pledgee, holding it to secure advances, and having power of sale for account of the real owners, then the contest was of that adverse character which has been often held not to be within the summary jurisdiction conferred on the district courts by the first section of the bankrupt act.

3. Upon the case, as now claimed by the petitioner to have been made, it would have been eminently unjust for the district court to summarily order the property to be applied to the particular note held by the petitioner. Upon his own theory, the goods in the possession of the bankrupt belonged to Reddington, Fobes & Co., (or to their assignee in bankruptcy,) subject to the lien of Hoyt for indemnity against any and all of the notes and endorsements outstanding—not subject to a specific lien to protect him against the particular note held by the petitioner. There is no proof whatever, and, indeed, no claim, that there was any pledge of particular property to secure Hoyt against any particular

note or endorsement. Upon the theory of the petitioner, every holder of any of Hoyt's notes or endorsements has the same rights which the petitioner claims. Such notes appear to amount to very much more than the fund in the hands of Hoyt's assignee. In this view, then, it is not a case in which it would have been proper for the court summarily to direct the payment of the judgment recovered by the petitioner.

4. The petitioner himself, on the recovery of his judgment against Hoyt, the bankrupt, levied his execution upon the goods in question, as his property. This was wholly inconsistent with the claim which he now makes. I do not say that this is a conclusive fact, or that it estops his present claim, but, in a case in which there was conflict of testimony, and, at least, doubt whether the property was not so purchased by Hoyt as to vest in him the title, such a levy by the petitioner was a very impressive admission by him that the property belonged to the judgment debtor.

5. Finally, I am not satisfied that the conclusion of the district judge, that this note was, as testified, in substance, by Hoyt, given for goods actually purchased, was erroneous, or that all goods ordered after the spring of 1871 were not purchased. No doubt, he had given Reddington, Fobes & Co. accommodation paper. Hoyt's testimony is to the effect that the note held by the petitioner was not of that character. The circumstance that he had given such paper in advance or in anticipation of the maturity of his obligation to pay for his purchases, would not reduce his title to the goods to a mere lien.

Without entering into further detailed discussion, I am of opinion that it was not erroneous to deny the application of the petitioner for an order that the assignee apply the property to the payment of his judgment, and that such denial should be affirmed.

Case No. 6,940.

HURST et al. v. WICKERLY.

[1 Wash. C. C. 276.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

TRIAL—CONTINUANCE.

It is no ground for a continuance of a cause, that there has been published a report of the evidence, the arguments of counsel, and the charge of the court. in a case which had been tried; depending upon the same facts and principles. The publication of such a report of the proceedings of the court, is proper.

When this cause was called for trial, the plaintiff [lessee of Hurst and Carr] moved to put it off, because a statement had appeared in a newspaper, since the trial of the case of Hurst v. Durnell [Case No. 6,927], in which a short account of the evidence, of the points made by the counsel, and of the charge of the court, was given; and, in which it was mentioned, that that was one, out of about eighty causes, depending for property in the Northern Liberties. The ground of the motion was, that this statement, which Mr. Ingersoll admitted had been inserted by one of the defendant's counsel, was calculated to produce a prejudice against the plaintiff.

[A similar case was tried in Case No. 6,936, and a motion for the payment of attorney's fees was decided in Case No. 6,928.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. It is very improper for either party to a cause, to publish his case before the trial takes place; because, he must necessarily make partial statements of the law or the fact, or both; which are always calculated to excite prepossessions unfavourable to an impartial trial. The facts stated, are not what have been proved, according to the rules of law; and, the law is not stated, as the judges have pronounced it. The whole is ex parte. But, this is the first time that I ever heard it contended, that the report of what had passed in a court, whose proceedings and doings are all public, was improper. On the contrary, I wish that reports were made of all important trials, so soon as they have taken place. And, because there may be a cause on the docket, depending on the same principles, shall this information be suppressed, until it shall appear, that every such case has been determined? But, it is said, that such a publication affords a cause for continuing the other causes, because of the prejudice it may have produced on the public mind. Now, my opinion is quite otherwise. We all know, that prejudices become more inveterate, as they ripen by age, and in the soil of ignorance. We seldom recollect the particular facts and arguments, which have led our minds to particular prejudices. The impressions gather strength, and take deeper root, the longer they remain unremoved. The sooner, therefore, the attempt is made to remove them, the better. But, I cannot perceive how a report of a trial in one cause, can create an improper bias in another, though depending on the same principle; and still more difficult is it to discover, how such a prejudice, if it exist, can be less next term than it now is. Will the plaintiff endeavour to remove it, by the same means that it was created? This he cannot do, if his principles be correct. In the case of Hurst v. Durnell [supra], three verdicts were read, given in cases depending on the same title, as persuasive evidence in that cause. This was not objected to. How then can a statement of a fourth verdict, be considered as an improper attempt to create a prejudice? I am, therefore of opinion, that the reason as-

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

signed is not sufficient for continuing this cause.

PETERS, District Judge, gave a separate opinion; in which he concurred, that the reasons assigned, were not sufficient to continue the cause.

HURST (WILSON v.). See Cases Nos. 17,808 and 17,809.

Case No. 6,941.

HURTIN v. PHOENIX INS. CO.

[1 Wash. C. C. 400.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

MARINE INSURANCE—CAPTURE OF VESSEL—ABANDONMENT.

1. Action on two policies of insurance; one a valued policy on the vessel, the other an open policy on the cargo; on a voyage from New-York to Gibraltar.—The vessel was captured, and carried into Algesiras; and there, although the cargo was not condemned, as it was not permitted to the vessel to sail with it, unless security was given that it would not be carried to a British port in the Mediterranean, it was sold by the supra-cargo; and the vessel, which had not been detained with a view to her condemnation, sailed for New-York, with a cargo on freight, and was lost. It is not necessary to disclose to the underwriters on the cargo, the particular language of the bills of lading;* and if they are general, so as to comprehend the port to which insurance is made, it is sufficient.

2. The seizure and carrying into Algesiras, and the prohibition to carry the cargo away without security, was a complete destruction of the voyage, and authorized an abandonment of the cargo.

3. The sale of the cargo by the supra-cargo, if he acted for the interests of all concerned, was proper; and he had a right thereby to convert a partial into a total loss.

4. The insured must, within a reasonable time after notice of the loss, make his election, and give notice of his intention to abandon; but he may take a reasonable time to decide upon the subject.

5. The refusal to give a deed of cession of the cargo, unless the defendants would accept the abandonment of the vessel, insured in another policy, did not vacate the abandonment of the cargo. A deed of cession is not necessary to transfer to the insurers the right to the property, the same being completely transferred by the abandonment.

6. The vessel not having been detained with a view to condemnation, and the inhibition of exportation of the cargo, but upon security, not affecting her; the assured had no right to recover for a total loss.

7. The assured not having abandoned the vessel at the time he abandoned the cargo, and having at that time refused to do so; his right to make the same is gone, and cannot be regained.

8. In case of abandonment, the underwriter is entitled to all the proceeds of the thing abandoned, and to all the profits arising from the investment thereof.

[Cited in Allegheny Ins. Co. v. Ransom, 69 Pa. St. 498.]

9. The expenses incurred by the detention of the vessel at Algesiras, are subjects of general average; but her repairs are entirely chargeable to the vessel, the cargo having been previously landed. All repairs made necessary by any of the risks insured against, must be paid by the underwriters.

[Cited in Hurtin v. Union Ins. Co., Case No. 6,942; King v. Delaware Ins. Co., Id. 7,788.]

This was an action on two policies; one on the Monongahela Farmer, and the other on her cargo, from New-York to Gibraltar; the former a valued, and the latter an open policy. The vessel sailed on the voyage insured, and was seized by two Spanish privateers, in the Gut of Gibraltar, and carried into Algesiras, where attempts were made to condemn her cargo, but without success; the cargo consisting of articles in general contraband of war, but within the exceptions of the treaty between Spain and the United States. The government consented, that the captain should depart, upon his giving security, not to carry the cargo to any British port in the Mediterranean. The supra-cargo, under these circumstances, considering it most for the advantage of all concerned, to dispose of it at Algesiras, procured this to be done, under an order from a judge; and the sales amounted to about half the sum insured on it. The detention produced by this step, kept the vessel at the port of Algesiras, from about the 13th of May, till the 17th of July; during which time, the supra-cargo, by means of a credit, which the plaintiff had given to him, on certain merchants there, purchased a brig and cargo, and sent her to the United States. About the 17th July, he went with the Monongahela Farmer, to Malaga, where he took in a cargo of wines, on freight to New-York; but she was lost, returning to the United States. On, or before the 30th July, in the same year (1805), the plaintiff received notice of the capture, in two letters from the supra-cargo, of the 21st May and 11th June; which stated, that he had been cleared, on condition of not going to any British port in the Mediterranean; advising him to abandon the cargo, and that the vessel would return with a cargo of Malaga wine, on freight, and advising him to insure her. On the 30th July, the plaintiff wrote to Macky, his agent, in Philadelphia, to abandon the vessel and cargo. Macky, after perusing the letters from the supra-cargo, advised him not to abandon the vessel, as he would thereby lose the freight she would earn from Malaga. The plaintiff, in answer to this letter, on the 3d August, desires him to abandon the cargo; observing, that if he should do so, as to the vessel, he should lose the freight. On the 5th, the agent went to the office, and gave in a written abandonment of the cargo; and showed the two letters, from the supra-cargo

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

to the plaintiff. The president inquired if he did not mean to abandon the vessel; to which he answered, that he had no orders to do so. The abandonment was accepted in writing, and the president agreed to pay the loss; but required that the plaintiff should send on a regular cession, proofs of property, and a full disclosure of all circumstances respecting the loss, and respecting the vessel and cargo on the voyage. This answer was immediately communicated to the plaintiff, who, having now determined to abandon the vessel also, wrote on the 6th to his agent, to do so, and agreeing to send on a cession of the cargo, as demanded by the company; provided they would agree to accept the abandonment of the vessel also. The company refused the abandonment of the vessel; and, considering the refusal of the plaintiff to make a cession, as a waiver of his abandonment of the cargo, they declared themselves exonerated from their former acceptance of it, and refused to pay the loss on the vessel or the cargo. The objections to the recovery were, 1st, that the insurance was on a voyage to Gibraltar, and that the bills of lading were to the Mediterranean generally; which circumstance, probably, produced the seizure and detention; and being therefore material to the risk, it ought to have been disclosed, that she was to take a general bill of lading. 2d. That the loss of the cargo was not total, as the supra-cargo was at liberty to go to any other port in the Mediterranean, except a British port, and the loss being thus partial; the supra-cargo had no right to make it total, by a voluntary sale at Algesiras. 3d. That the vessel could not be abandoned, as she was at liberty at all times to pursue her voyage, and did in fact take in a cargo, on freight, for the United States. 4th. That, if the plaintiff had a right to abandon, he had not done so in a proper manner, or in proper time. As to the cargo, the refusal to make the cession, was a waiver of the abandonment, made and accepted on the 5th; and, it was the usual practice in Philadelphia, to make formal cessions in writing, of property abandoned. As to the vessel, the plaintiff elected not to abandon; and, when he changed his mind, it was then too late: nor was it done in due time. 5th. That the brig and cargo, purchased at Algesiras, were purchased with the proceeds of the cargo of the Monongahela Farmer; and, if the plaintiff had a right to claim for a total loss, the defendants were entitled to credit for the proceeds of that vessel and cargo. 6th. That, at any rate, the proceeds of that cargo, ought to be considered, so far as it goes, to have been invested in that purchase, to the amount of which investment, the defendants were entitled to credit; notwithstanding it appears, by the account rendered, that a great part of it was laid out in repairs of the Monongahela Farmer at Algesiras; and because, it is improperly made a charge against the cargo. Cases cited: 1 Esp. 237; Duncan v. Koch [Case No. 4,136]; Craig v. Murgatroyd [4 Yeates, 161]; 2 N. Y. Term R. [2 Caines] 290; 3 C. Rob. Adm. 240.

Mr. Ingersoll, for plaintiff.
Rawle & Hallowell, for defendants.

WASHINGTON, Circuit Justice (charging jury). The first objection, if well founded, goes to the destruction of both policies; but, it appears, that, as it is usual to carry general bills of lading, if you should be satisfied of this, then the assured was not bound to mention the circumstance. It would rather seem, that the risk was lessened, than increased, by having a general bill of lading. But, if it is unusual to carry such bills, you are the proper judges, whether the not disclosing the circumstance, was material to the risk. The important question is, whether the plaintiff can recover, as for a total loss on the vessel and cargo, or either; and, in considering each case, it will be proper to inquire, first, whether the plaintiff had a right to abandon; and, secondly, whether the abandonment was made in a proper manner, and was effectual.

As to the cargo. 1st. Had the plaintiff a right to abandon? The cargo was destined for Gibraltar, but was captured and carried into Algesiras, from whence it could not be removed without security being given, not to carry it to a British port. This amounted to a complete destruction of the original voyage; and it appears, that the supra-cargo, who, upon the spot, must have been the best judge what it was most prudent to do, considered it most for the benefit of the parties concerned, to sell it there, under the sanction of the government. It does not appear that he could have done better, had he gone elsewhere; but, even if he could, he was not at liberty to leave the port, without giving security not to carry the cargo to a British port. He was the agent of the assured; and, I admit, that as such, he could not, without necessity, convert a loss, but partial in its nature, into a total loss, But, here the voyage was broken up; it could not be further prosecuted; and, if he acted for the best, for all concerned, of which you are the judges, then the loss became total, and the plaintiff had a right to abandon.

2d. It is true, that, as soon as the assured receives notice of the loss, he must make his election to abandon or not; and, in the former case, he must, within a reasonable time, give notice of his intention. What is a reasonable time, must always depend upon circumstances, to be judged of by a jury. If he waits a reasonable time to obtain advice, whether he may legally abandon or not, the delay, being in all respects fair and bona fide; it might well enter into the consideration of the question, whether his determination was communicated in due time. There may be other circumstances. But, if he waits with a view to place the loss on the under-

writer, as events might turn up to render it prudent or otherwise, although he at last determines, before he has received any further information on the subject; the delay would be less excusable. Now, in this case, the plaintiff made an absolute abandonment of the cargo, within five days after he appears to have received notice of the loss, which was accepted. It is said, however, that his refusing to make a cession, except upon terms with which the insurers were not bound to comply, amounted to a waiver of the abandonment. If a cession, as it is called, had been necessary to make the abandonment complete, there might be something in the argument. But, this is not the case. The abandonment amounts to a legal transfer of the right of the insured, so as to enable the underwriters to pursue, to manage, and to recover the property, as effectually as if a regular deed had been made to them. It is said to be the uniform practice in Philadelphia, for the insured to make a formal conveyance. This may be so; because, I presume it is never objected to. But, when it comes to be made a question, whether the abandonment is invalid, if the cession is refused, we must say it is not; because, such an instrument is not necessary to pass the right of the insured to the underwriters. The refusal, therefore, of the plaintiff to execute such an instrument, did not affect the prior abandonment, which had been made and accepted. It appears, that he was ready to send forward all such papers, as might be required to prove the property. Upon the policy on the cargo, therefore, the plaintiff has a right to recover for a total loss.

Next, as to the vessel—

1st. Had the plaintiff a right to abandon? It is true, the vessel was detained for a short time, with a view to condemnation; but soon after, the captain was at liberty to go where he pleased with her; but he could not take the cargo with him, without giving security, not to carry it into a British port in the Mediterranean. If the captain had landed his cargo immediately, there was nothing to prevent the departure of the vessel, which was in perfect safety, free from injury by any of the perils insured against, except a temporary interruption. It is said, that the voyage was broke up. As to the cargo, it was; and therefore the underwriters, on that and on the freight, are answerable; but this is nothing to the underwriters on the vessel. Suppose she had been met with at sea, by pirates, and plundered of all her cargo, and then dismissed; would the underwriters on the vessel be answerable, because the object of the voyage was put an end to? Certainly not. But it is contended, that she was detained for two months at Algesiras, as is proved by the depositions of the supra-cargo and mate. The conclusive answer is, that the same letters, which informed the plaintiff of the loss, informed him also, that the vessel was clear, and would proceed to Malaga, to bring home a cargo of wine; and the supra-cargo, to prove his idea of her safety, desired the plaintiff to abandon only the cargo. Knowing, therefore, that the danger was over, at the same time that he knew of the capture, it was not competent to the plaintiff to abandon. But, if these letters had informed the plaintiff, that the vessel was still detained, so as to authorize an abandonment, the plaintiff is not entitled to recover, as for a total loss on her; because, 2dly, the abandonment was not made in proper time, and in a proper manner. As soon as the insured hears of the loss, he should make his election, and communicate to the underwriters his determination to abandon, if he chooses it. But if he makes his election not to abandon, and particularly, if he communicate this determination to the underwriters, he cannot afterwards change his mind, and say, he will abandon; and thus throw the whole loss on the underwriters. And here is the difference between the vessel and the cargo, in the present instance. In the latter case, he made his election promptly, to abandon, and it was accepted. In the former, he first determined to abandon all; but adopting the advice of his agent, he directed him to abandon only the cargo; assigning the very reason, which should prevent him from afterwards changing his mind, namely, that he should, by giving up the vessel, lose the freight, which the letter from the supra-cargo induced him to accept. This letter, confining the abandonment to the cargo, was shown to the defendants, on the 5th, at the time the abandonment of the cargo was accepted. The plaintiff knew that he had barred himself of a right to abandon the vessel, by stipulating, afterwards, the acceptance of it, as the condition of his making a formal cession of the cargo. The plaintiff, therefore, cannot recover on the vessel, more than for any partial loss, which he may prove.

5th point. The argument, that the underwriter, in case of abandonment, is entitled to the proceeds of the thing abandoned, and if they be invested by the agents of the insured, in other articles which produce a profit, to those profits also, is well founded, but does not fit this case. It is clearly proved, and was at first admitted, that the brig and her cargo, purchased by the supra-cargo at Algesiras, was paid for, by bills drawn on the plaintiff, and by money received on letters of credit; the defendants at first supposed, and insisted, that this brig and her cargo should be accounted for. But it would seem, that they were afterwards satisfied upon this subject.

6th. It is contended, that the money for which the cargo was sold, is stated to have been laid out in the repairs and expenses of the vessel, at Algesiras, which could not legally be done; and therefore, that sum, at least, must be considered as invested in the purchase of the brig and cargo, to the proceeds of which, the defendants are entitled. Whether the cargo could, or could not, be

charged with the repairs and expenses, it is a sufficient answer to this claim, that they were in fact appropriated to the making of these repairs; and therefore could not also have been invested in the purchase. It is not enough to sanction the claim, to say, that they might have been so invested; it cannot be supported, unless it appear, that in reality they were so invested, for the benefit of the insured, or for the concerned. It, however, becomes a necessary question, what part of the proceeds of the cargo sold at Algesiras, is to go to the credit of the defendants. It appears, by the account, that the expenses, incurred during the detention at Algesiras, amounted to between four and five hundred dollars; and that the repairs of the vessel exceeded the sales of the cargo. As to the former, that may properly be a subject of general average; but as to the latter, they are certainly not chargeable against the cargo, either in toto, or as general average; since, being landed at Algesiras, it was to receive no benefit from the future repairs of the vessel. They may be charged to the ship, if they were rendered necessary, from any of the risks mentioned in the policy; and as the defendants are underwriters, on both ship and cargo, it will come to the same thing.

The counsel agreeing, that if the jury should find for a total loss on the cargo, and a partial loss on the ship, the adjustment would be made by consent, the jury found accordingly.

[For a similar trial, see Case No. 6,941.]

NOTE. See Scriba v. Insurance Co. of North America [Case No. 12,560]. The court determined, that the protest of the captain, could not be read in evidence by either party.

Case No. 6,942.

HURTIN v. UNION INS. CO.

[1 Wash. C. C. 530.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

FREIGHT — DESTINATION OF CARGO — ACCEPTANCE.

If the cargo shipped, is not carried to the place of its destination, no freight can be demanded; if voluntarily accepted by the owner or his agent at any other port, freight pro rata is due; but if it is received by compulsion, and the supra-cargo or captain, acting for the benefit of all, receives the proceeds thereof, no freight is earned or due.

[Cited in The Nathaniel Hooper, Case No. 10,032; Weston v. Minot, Id. 17,453; The Ann D. Richardson, Id. 410; One Thousand Bags of Sugar v. Harrison, 4 C. C. A. 34, 53 Fed. 834.]

This was a case agreed. The insurance was made on the freight of the same vessel, the Monongahela Farmer, (valued at 3,000 dollars;) on which a policy was effected, and the case tried last term.[2] The evidence was the same. It appeared in this case, as in that, that the supra-cargo was prevented from carrying the cargo from Algesiras, without security not to carry it to a British port; which security he could not give. The cargo was sold under the superintendence of the judge, on the petition of the supra-cargo; and the vessel and cargo remained in custody of the king's guards till the sale of the cargo. The supra-cargo acted throughout for the benefit of all concerned, as he found that he could not carry away the cargo, and that the proceeds were realized under this restriction. As soon as he discovered his situation, he wrote to the plaintiff to abandon the cargo and freight, in consequence of the compulsion to which he was subjected.

Hopkinson & Ingersoll, for plaintiff.

The cargo not being carried to the port of its destination, nor accepted voluntarily at any other port, no freight was earned, and consequently a total loss was sustained. 7 Term R. 381.

Mr. Dallas, for defendant.

If the goods be received at all, at any other than the port of destination, freight pro rata is due. If the freighter does not choose to pay freight, he has nothing to do but to abandon the cargo to the owners of the vessel. But if he receives the goods or even the price of them, where they have been sold upon a capture, and restitution awarded; he cannot get clear of paying freight pro rata. Abb. Shipp. 245, 247–249, 257, 258; 2 Burrows, 282; 2 N. Y. 13; 3 N. Y. 16. The case from 7 Term R. was on a charter party to pay freight, on the arrival of the goods at a certain place. The cases from 2 and 3 N. Y. prove that the underwriters on the cargo are not liable for the freight.

WASHINGTON, Circuit Justice. If the cargo is not conveyed to the place of its destination, no freight can be demanded. If voluntarily accepted at any other port, by the owner or his supra-cargo, freight, pro rata itineris, is due. But if it is received by compulsion, and the supra-cargo or captain is acting for the best, for the benefit of all concerned, with a view to preserve it for the person entitled to receive the proceeds, no freight is earned; and a contradictory doctrine would make it the interest of the owner of the cargo or his agent, to sacrifice the cargo, or leave it to perish where the proceeds of it might fall short of paying the freight. The receiving the proceeds under a compulsion, as in this case, must always be taken as done without prejudice. This is rather a stronger case than that of Simond v. Union Ins. Co. [Case No. 12,876], last term; but in both the cases sale was compulsory; in both, the own-

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

[2] See Hurtin v. Phoenix Ins. Co. [Case No. 6,941].

er of the freight abandoned, and the agent acted for the benefit of all concerned; decidedly so in this case, and in that to the same purpose. Judgment for plaintiff for a total loss.

Case No. 6,943.

HUS v. KEMPF.

[10 Ben. 231.] [1]

District Court, S. D. New York. Jan., 1879.

FREIGHT—BILL OF LADING — MASTER—POWER OF AGENT—TENDER.

1. The master of a vessel filed a libel against the consignee of 97 casks of wine to recover freight for bringing them from Rotterdam to New York. The consignee set up in defence that seven of the casks were broken by reason of bad stowage, and their contents, to a greater value than the freight, lost; and he also set up a tender of performance of an agreement to settle the claim for the face of the bill of freight without interest. It appeared that the respondent ordered the wine of his correspondents at Neustadt, in Bavaria, to be shipped by first steamer. They sent it to Rotterdam, to brokers there to be shipped, and the brokers shipped it by the steamer of which the libellant was master, and took a bill of lading which excepted "insufficiency of package, leakage, breakage and perils of the sea." There was proof of good stowage of the casks, and that the vessel met with heavy weather, during which a noise was heard below, and on the hatches being opened, several of the casks were found broken. The respondent objected that the master could not sue for the freight in his own name: *Held*, that, as the answer admitted that the contract was made with the master, no objection to his right to sue could be made.

2. The brokers who were employed were authorized to bind the respondent to the usual stipulations limiting the carrier's liability, and the bill of lading was the usual form used by that line of steamers.

3. On the evidence, the breakage of the casks was due to perils of the sea or imperfection of the package.

4. There was no proof of an accord and satisfaction which would have discharged the claim for freight.

5. The tender, made after suit brought, could not avail the respondent, as it did not include interest and costs, and the money had not been deposited in court, as required by the rules of the court.

6. The libellant was entitled to a decree for the amount of the freight.

[This was a libel for freight by Jacob Hus against Oscar Kempf.]

Butler, Stillman & Hubbard, for libellant.
C. B. Ripley, for respondent.

CHOATE, District Judge. This is a libel in personam, for freight according to bill of lading, on 97 casks of wine. The defence is that seven of the casks were broken by reason of bad stowage, and their contents, of value exceeding the freight, lost; and secondly, tender of the performance of an alleged agreement between the parties to settle the claim for the face of the bill of freight without interest.

The wine was ordered by the respondent of his correspondents at Neustadt, Bavaria, to be shipped by the first steamer. In pursuance of this order, his correspondents sent it to Rotterdam, to brokers there, with instructions to ship it by the first steamer for New York. The brokers shipped it by the Rotterdam, a steamer running in a regular line between that port and New York, the libellant being her master, and took a bill of lading which acknowledged the receipt of the wine "in good order and condition," "weight, measure, gauge, quality, condition, quantity, brand, contents and value unknown." It excepted, among other things, "insufficiency of package," "leakage," "breakage," "wastage" and "perils of the sea." The form used was a printed blank, which was proved to have been the form of bill of lading used by said line. It appeared that for eight years the respondent had been in the business of importing wines into the United States; that he had received them by this or other lines of steamers. Neither he nor his correspondents gave any special instructions as to the mode of shipment, nor as to a bill of lading or its form, except as above stated. It is objected that the brokers at Rotterdam had no authority to enter into the contract contained in this bill of lading with the master on respondent's account, and that therefore the ship and master were liable, generally, as carriers by water. This position cannot be sustained. The brokers were authorized to bind the respondent to the usual stipulations limiting the carrier's liability. It is objected that the libellant is not the party in interest and cannot sue for the freight in his own name. This objection is not open under the answer. The answer expressly admits that the contract of carriage was a contract with the libellant. The defence that the wine in the injured casks was lost by reason of bad stowage is not sustained. The bill of lading admits that the casks were received in good outward condition. There was no evidence as to their contents at the time of shipment. All that appears is that they left Neustadt filled and in good order, and that they were good and strong casks. No witness is called who saw them at Rotterdam, except the mate of the vessel, and he testified that they were well stowed on the vessel. The vessel had a very long and very rough passage. She lost spars and men. The second mate was washed from the bridge eight or nine feet above the deck. During a tempest a noise was heard below, and when the hatches were opened, several of the casks were found to have been broken. There is some testimony of experts here that the injury to the casks was, in their opinion, caused by improper stowage; but upon the whole evidence, I think it is more probably to be

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

attributed to the perils of the sea, or some defect in one or more of the casks. The libellant does not sustain the burden of proof which is upon him under this bill of lading. Vaughan v. 630 Casks of Sherry Wine [Case No. 16,900]. The tender made by respondent after suit brought cannot avail him as a tender, because it was insufficient in amount, not including interest and costs to that time, and because it was not made good by depositing the money in court according to the rules of this court. Nor is there evidence of an accord and satisfaction, which would have discharged the obligation for freight, nor of a new agreement between the parties discharging the old tender of performance. There seems not to have been an entire agreement as to the terms of a compromise.

Decree for libellant for the full amount of freight, with interest from March 3d, 1873, to be determined by a reference, the parties not agreeing as to the amount, and costs.

[Both parties subsequently excepted to the report of the commissioner to whom the matter was referred. Case No. 6,944.]

Case No. 6,944.

HUS v. KEMPF.

[10 Ben. 364.] [1]

District Court, S. D. New York. March, 1879.

FREIGHT—INTEREST—BILLS ON LONDON.

On a bill of lading stipulating that the freight shall be paid in New York, "at the current rate of exchange for banker's sight bills on London," the amount of the freight being expressed in English money, the amount payable is not to be calculated in gold, but in currency at the current rate for bills on London; and to this is to be added interest at the New York rate from the time when the freight is payable.

[This was a libel by Jacob Hus against Oscar Kempf for freight, according to a bill of lading, on 97 casks of wine. See Case No. 6,943.]

Butler, Stillman & Hubbard, for libellant.

C. B. Ripley, for respondent.

CHOATE, District Judge. In this case, which was a suit to recover freight, under a bill of lading, both parties have excepted to the report of the commissioner; the libellant, on the ground that interest on the freight due has been computed only at the rate of six per cent, instead of seven, and from the commencement of the suit, instead of the time when the freight became payable; and the respondent, on the ground that the commissioner has allowed the premium on gold, in computing the amount of freight due, whereas it is claimed that the gold value only should be given.

The libellant's exceptions are clearly well taken. The debt was payable in New York, at a time fixed by the contract, and it bears interest at the New York rate of seven per cent from that day.

The bill of lading stipulated that freight should be paid "at the current rate of exchange, for banker's sight bills on London, at the date of the steamer's report at the custom house." The freight reserved by the bill of lading is expressed in English money, 30 shillings per ton. It is not, however, stipulated that it shall be paid in gold. Upon the terms of the bill of lading itself there seems to be nothing to restrict the "current rate" of bills on London to a gold rate. The very language used shows that the freight was not to be paid in English money, pounds, shillings, and pence, but in our money. The case differs, therefore, from Forbes v. Murray [Case No. 4,928], and Baker v. Ward [Id. 785]. Being payable in New York, in the current money of the country, the amount to be paid is such sum as would be sufficient to buy the bills on London designated. And see The Vaughan and Telegraph, 14 Wall. [81 U. S.] 258. But whether this is so or not, evidence has been introduced which clearly shows that such was the customary mode of discharging such freight bills, under similar bills of lading, in this trade. The testimony relied upon by respondent as showing a different understanding between these parties—the making up of a statement in gold values some time after the freight became due, and when gold had fallen—does not sustain the respondent's claim, because the making up of this statement was made in the course of an attempt to compromise the differences between these parties, and at the utmost showed a willingness to waive a portion of the claim. Libellant's exceptions sustained. Respondent's exceptions overruled, with costs of the reference to libellant.

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

Case No. 6,945.

In re HUSSEY.

[2 Hask. 244.] [1]

District Court, D. Maine. July, 1878.

BANKRUPTCY—EXEMPTION—GROWING CROPS.

1. Growing crops are exempted to a bankrupt by Rev. St. U. S. § 5045, as exempt from execution by Rev. St. Me. 1871, c. 81, § 59, as "produce of a farm until harvested."

2. An adjudication in bankruptcy operates to convey the title of a farm to the assignee, as a voluntary deed would do containing a reservation of the crop until harvested.

3. A bankrupt may elect to occupy his farm and cultivate the crops until harvested; but he must secure to the assignee a reasonable rental meantime.

In bankruptcy. Certificate of facts from Mr. Register Hamlin, to have determined whether growing crops are exempt to a bankrupt under the act of 1867 [14 Stat. 517], and

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

if they are, whether he may occupy the farm and cultivate them until harvested, and without paying rent to the assignee.

Thomas H. Haskell, for assignee.

Frederick A. Powers and Llewellyn Powers, for bankrupt.

FOX, District Judge. The assignment by the register conveyed to the assignee all the estate of the bankrupt in the farm at the date of the filing of the petition, subject to the rights of the bankrupt in the growing crops so far as they were exempted to him by force of the provisions of the bankrupt law.

By Rev. St. § 5045, all property exempt from levy and sale on execution or other process by the laws of the state is exempted from the operation of the assignment; and it is expressly declared, that in no case shall such exempted property pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title.

By Rev. St. Me. c. 81, § 59, "all produce of farmers" is exempted from attachment and execution till harvested. The conveyance of the farm, therefore, is to be construed as though in terms it had contained a reservation and exception of the growing crops as the property of the bankrupt till harvested; and from such a deed, I think, the implication must be that the bankrupt is to retain a right to use and occupy the land for the cultivation of his crops.

These exemptions have always been liberally construed for the debtors, and the crops remain his property; but to say he is neither to cultivate or harvest them would in effect be an absolute denial of all benefit from the property which the law has allowed him to hold for his support. This implied license to occupy the land, however, must be to the extent only that is necessary to accomplish the purpose intended, and must be on condition that, if he elects thus to occupy the land of another, he must make suitable recompense to the owner of the land for the permission so to do.

The bankrupt has voluntarily parted with all his title to the estate, and he can have no just cause of complaint if his right to the crops be protected, and he is permitted to cultivate them and harvest them, although he is required to pay for the use of the land as other parties would do under similar circumstances.

The decision of the court is, that the hay with the other crops planted prior to the filing of the petition by the bankrupt are still his property, and that he should be allowed to cultivate and harvest the same on paying a fair occupation rent therefor, or securing the same to the satisfaction of the register before cutting the hay. In case of disagreement of the parties, the register to determine the amount of such rent.

Case No. 6,946.

HUSSEY v. BRADLEY et al.

[5 Blatchf. 134; 2 Fish. Pat. Cas. 362; Merw. Pat. Inv. 89.] [1]

Circuit Court, N. D. New York. March 24, 1863.

PATENTS—RE-ISSUE—EFFECT.

1. In deciding upon an application for the reissue of letters patent, and upon the question whether the invention claimed in the reissue is the same invention which was intended to be patented on the original application, the commissioner of patents is not confined to the claims, nor even to the examination of the evidence furnished by the specification, models and drawings accompanying the original application, but any legal proof to show it to be the same invention should be received.

2. The decision of the commissioner of patents upon the question is prima facie evidence of such fact, and the subsequent inquiry, when the question is presented to a court and a jury, is limited to the question of fraud in the surrender.

3. Even a statement, in an original patent, that a part is old, or a disclaimer of a part, does not necessarily prevent such part from being claimed in a reissued patent, though it would have that effect if made advisedly, and not by inadvertence, accident, or mistake.

4. Letters patent were granted to Obed Hussey, the inventor, August 7th, 1847, for "a new and useful improvement in reaping machines," and were reissued April 14th, 1857, in three reissues, granted to him, and numbered 449, 450, and 451. Reissue No. 450 was reissued June 21st, 1859, in two reissues, granted to him, and numbered 742 and 743. Reissue No. 743 was reissued February 28th, 1860, in a reissue, granted to him, and numbered 917: *Held*, that reissues Nos. 449, 742, and 917 were properly granted, and cover only inventions made prior to, and intended to be patented under, the original application; that such inventions are new and useful and patentable; and that the inventor did not lose his right to a reissue by any laches, or any abandonment or dedication to the public of any of the inventions.

5. The invention covered by reissue No. 449 was not put on sale by the inventor, or with his consent, two years prior to his application for his patent.

6. In ordinary cases of reissue, the action of the commissioner of patents has more than prima facie influence, when the question of identity of invention is brought up for judicial decision, and, in all cases, a judge may well rely upon the commissioner's decision, to dispel doubts, or confirm his own impressions, upon the question of identity of devices or inventions.

7. The prior use of an invention, under a defective patent, cannot take away the right to a reissue of it, or authorize the use of the invention by others, after the reissue.

[Cited in M'Williams Manuf'g Co. v. Blundell, 11 Fed. 421.]

8. A reissued patent is generally considered, except in respect to infringements prior to its issue, as if granted at the date of the original patent, and is made to take effect, in respect to subsequent infringements, as though it had been

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 134, and the statement is from 2 Fish. Pat. Cas. 362. Merw. Pat. Inv. 89, contains only a partial report.]

originally issued in its reissued form, even though the original patent was invalid.

[Cited in Sarven v. Hall, Case No. 12,369.]

9. Where H., a defendant in an equity suit for the infringement of letters patent, was shown to have been merely a licensor to his co-defendant B., under patents owned by H., for improvements covered by those patents and embodied in the infringing machine, and it did not appear that H. had any other connection with, or derived any other profit from, the infringement by B., the bill was dismissed as to H., but without costs.

This was a bill in equity, filed to restrain the defendants [Christopher C. Bradley and others] from infringing letters patent [No. 5,227] for an "improvement in reaping machines," granted to Obed Hussey, August 7, 1847, reissued April 14, 1857, in three divisions, numbered 449, 450, and 451. Reissue 450 was reissued June 21, 1859, in two divisions, numbered 742 and 743. Reissue 743 was reissued February 28, 1860, and numbered 917. The patentee having deceased, reissues No. 449, 451, 742, and 917 were extended to complainant [Eunice B. Hussey] for seven years from August 7, 1861. The defendants were charged with infringing reissues No. 449, 742, and 917. A portion of the specification and claims of the original patent and reissue 449, will be found in the report of the case of Hussey v. McCormick [Case No. 6,948], and in the opinion of the court in the present case. It is only deemed necessary to repeat the claims of the several patents in their order.

The claims of the original patent of 1847, afterward reissued as 449, 450, and 451, were as follows: "I accordingly claim the opening above the blades at (A) Fig. 3, and at D, Fig. 1, in combination with the vibrating blades. I also claim the particular application of the flush edge, at the fork of the blades, for the purpose described. The end and design of the improvements above claimed is to prevent the blades choking."

The claims of the reissues were as follows: Reissue 449: "I claim as my invention, a combination of a vibrating scalloped cutter, the indentations of whose edges act as a series of moving shear blades, with slotted guard fingers, the sides of which act as a corresponding series of fixed shear blades; the parts of such fingers forming the slot, being connected at the front end only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described." Reissue 450, afterward reissued as 742 and 743: "I claim," etc., "the improved beveling of the edges of the blades of scalloped sickles, as herein described." Reissue 742: "I claim as my invention the combination of side and cross-bearings of the guards, with flush edges at and near the forks of the blades, substantially as described." Reissue 743, afterward reissued as 917: "I claim," etc., "scalloped cutters with their blades beveled, as herein described." Reissue 917: "What I claim," etc., "is the combination of the finger beam (without a platform)—the short open slot fingers having small projection below the cutter—the scalloped cutter and the guides for the cutter; these parts being constructed and combined substantially as described, the cutter vibrating in a straight line, each scallop having an edge sliding in close proximity to an angular corner of the finger, and forming therewith a nipping angle, substantially as described."

Hussey, in 1833, invented the scalloped vibrating cutter, operating through slots in numerous short iron fingers which projected before the blades, separated the grain and acted as stationary shear blades, against which the scallops, acting as moving shear blades, severed the stalks of grain. The parts of the fingers forming the slots were, however, fastened in front and rear of the blades, and it was found, in practice, that the cut grass, etc., would work into the slots, pass back between the top or bottom of the finger and vibrating blades; and, being unable to escape, would choke or clog the cutter. In 1847, therefore, Hussey opened the slot, by cutting a hole through the top part of the finger, just over the rear of the blade, or rather, by fastening the top part of the finger securely in front and allowing it to remain unfastened in the rear, so that the clogging matter, as it worked back, would work out. This constituted the invention described in reissue 449. A light iron rod, connecting the fingers and bracing them below the vibrating blades, for which it served as a guide, constituted the invention described in reissue 742. Reissue 917 was for a general combination of the parts.

The defendants relied mainly upon the want of novelty of the several improvements. They introduced proof that, in 1834, Enoch Amber had made and sold mowing machines with open slotted fingers and straight knives; that, in 1844, one Nicholson had patented open slotted fingers and revolving knives, with bill-hook or scalloped cutters; that, in 1840, Hiram Moore had constructed and used harvesting machines, which, being designed to cut off the heads of the grain only, were provided with scalloped vibrating cutters, working in slots in long wooden fingers, the parts forming the slot being made of heavy hoop iron, the upper piece of which was unfastened in the rear so as to afford an opening; and that, John Leland, in 1846, had made and used knives and fingers identical with those patented to Hussey in 1847. It was also insisted that the reissued patents were not for the same invention as the original, and that the reissues were obtained too late.

George Gifford and E. W. Stoughton, for complainant

G. M. Lee and S. S. Fisher, for defendants.

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

HALL, District Judge. We can discover no just ground for maintaining that the reissued patent No. 449, of April 14th, 1857, was not proper as a reissue of the original patent of August 7th, 1847, if the patentee was the original and first inventor of the combination therein claimed, and if his rights had not been forfeited or destroyed by the lapse of time between the issue of the first patent and this reissue.

The same remark might, perhaps, have been applied, without further discussion, to the reissues No. 742, of June 21st, 1859, and No. 917, of February 28th, 1860, had not these last reissues been preceded by the reissue No. 450, of April 14th, 1857, and the reissue No. 917 also been preceded by the reissue No. 743, of June 21st, 1859. The claim in the reissue No. 450 is quite limited, and is in the following terms: "I claim as my invention, and desire to secure by letters patent, the improved beveling of the edges of the blades of scalloped sickles, as herein described." This patent was surrendered and reissued as Nos. 742 and 743; and No. 743, in which the claim was in the following terms: "I claim as my invention, and desire to secure by letters patent, scalloped cutters, with their blades beveled, as herein described," was afterwards surrendered and reissued as No. 917. Looking only to the claims in Nos. 450, 742, 743, and 917, it would certainly be difficult to find any evidence that Nos. 742 and 917 were for the same invention as that specifically claimed in No. 450. Indeed, a comparison of the language of these claims would seem, in the absence of all other proof, to repel such an allegation. But it is well settled, that, in deciding upon these applications for a reissue, and upon the question whether the invention claimed in the reissue is the same invention which was intended to be patented on the original application, the commissioner of patents is not confined to the claims, nor even to the examination of the evidence furnished by the specification, models, and drawings, accompanying the original application; and that any legal proof to show it to be the same invention should be received. Ex parte Ball [Case No. 812]; Ex parte Dyson [Id. 4,228]; and Wilson v. Singer [Id. 17,835]. It is, also, well settled, that the decision of the commissioner of patents upon the question, is prima facie evidence of such fact, and that the subsequent inquiry, when the question is presented to a court and a jury, is limited to the fairness of the transaction—to the question of fraud in the surrender. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, 458, 459; Stimpson v. Westchester R. Co., 4 How. [45 U. S.] 380, 404; O'Reilly v. Morse, 15 How. [56 U. S.] 62; Battin v. Taggert, 17 How. [58 U. S.] 74, 84; Woodworth v. Stone [Case No. 18,021]; Day v. Goodyear [Id. 3,678]. Even a statement in an original patent, that a part is old, or a disclaimer of a part, does not, it seems, necessarily prevent such part from being claimed in a reissued patent, though it would have that effect if made advisedly, and not by inadvertence, accident, or mistake. Ex parte Hayden [Id. 6,256], and Hayden v. James [Id. 6,260]. On the application for these reissues, the former claims and specifications and the original model and drawings were, of course, before the commissioner. It is shown by the testimony of Mr. Renwick, an expert, that all the devices covered by these three reissued patents are contained in the original model, and we have no means of knowing what other proof was furnished to the commissioner, or of determining that such other proof, considered in connection with such model, was not entirely conclusive upon the points of inadvertence, accident, or mistake, and of an intention to patent originally the inventions covered by the reissued patents. No proof of fraud, unfairness, or falsehood, in respect to these applications for reissues, has been given; and, in the absence of such proof, we are bound, under the authorities cited, to presume that such reissued patents were properly issued, and that they do. in fact, cover only the inventions made prior to, and intended to be patented under, the first application. See, also, French v. Rogers [Id. 5,103].

It was urged by the defendants, not only that these reissues were needless and improper, but also that they were void on their face, as showing nothing patentable. We can find no solid ground upon which to maintain either of these objections, and shall, therefore, pass to the other questions in the case. In the discussion of such questions, we shall refer to further authorities, which, as well as some hereinbefore referred to, will show, to some extent, at least, the grounds upon which the questions just referred to have been disposed of.

The patents themselves are prima facie evidence of the novelty and utility of the inventions patented; but the defendants are at liberty to show, by other proof, that they are neither new nor useful. The utility of the inventions claimed is not, we believe, seriously questioned, and we may, therefore, properly address ourselves to the questions of novelty, which have been seriously contested, and which certainly require careful examination.

It was insisted, by the learned counsel for the defendants, that the reissued patent No. 449 is void, for want of novelty; and that the invention claimed in the specification annexed to that patent was anticipated by Hussey, in 1833; by Ambler, in 1834; by Moore and Hascall, in 1839; by Nicholson, in 1844; and by Leland, in 1846. We think that neither of these objections urged by the counsel can be maintained. The invention claimed is the combination of a vibrating scalloped cutter, the indentations of whose edges act as a series of moving shear

blades, with slotted guard fingers, the sides of which act as a corresponding series of fixed shear blades, the parts of such fingers forming the slot being connected at the front end only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described.

There certainly was no such combination in Hussey's patented invention of 1833. In his specification annexed to that patent, he says, that "the saw teeth should play clear of the guards, both above and below," and the mode of construction specified makes provision for securing, as far as possible, this particular result; and, in the claim, at the close of the specification, he claims "the peculiar construction that the saw teeth may run free, whereby the necessary pressure and consequent friction of the two corresponding edges, cutting together as on the principle of scissors, is entirely avoided." The vibrating scalloped cutter and the slotted guard fingers, mentioned in the patent of 1847, are differently constructed and arranged for the express purpose of securing the effect, in substance, of the friction and pressure of two corresponding edges cutting together, as on the principle of scissors, making the combination, in this respect, different, in its mode of construction, operation, and results, from that exhibited in the apparatus described in Hussey's patent of 1833. But this is not all, nor is it, in fact, the most important improvement in Hussey's patent of 1847. The open slotted guard finger is not found in the invention patented in 1833; and, as the change in the form and operation of this slotted finger is of very great importance, both in the reaper and in the mower, the invention of Hussey, patented in 1847, was very different from, and a great improvement upon, his invention patented in 1833. The shearing action produced by the different grinding or beveling of the cutters, and the different arrangement of the cutters and fingers, and the opening in the guard finger, were not embraced or described in the patent of 1833.

The Ambler machine of 1834, as described in his patent, or as presented by the evidence, certainly contained no such combination. Ambler's cutter was a straight and not a scalloped cutter, and no shearing action was or could be produced in its operation. His barbed guard fingers were, also, quite different from the open slotted guard fingers of Hussey, and, if they could be used with a scalloped cutter, could not have produced the same results.

Moore and Hascall's machine of 1839, as described in the patent, or as actually constructed, did not embody this invention. There was no combination of vibrating scalloped cutters, operating as moving shear blades, with open slotted guard fingers operating as fixed shear blades; and the same remark is applicable to the Nicholson machine of 1844. The guard fingers of Moore and Hascall's machine were in no sense substantially like those of Hussey, and they may doubtless be used by the defendants without an infringement of Hussey's patent. Moore and Hascall's guard fingers resemble the tusks of an elephant more than they do the guard fingers of Hussey.

The Leland machine, in regard to the parts of Hussey's machine embraced in patent No. 449, was substantially like Hussey's machine, but there is no evidence that Leland's machine, embodying this invention, was constructed, or even invented, until May or June, 1846; and the evidence of Lovegrove shows, that, on his return to Baltimore, after the harvest of 1844, and in the month of August of that year this invention of Hussey was explained to him by Hussey, and that Hussey then showed him the open slotted guard finger, forged strong and solid at the outer end, and not allowing the part of the finger above the slot to go back to the rod by about an inch, and that, in October or November, Hussey showed him a machine in which these improvements were embodied. Although this machine could not be practically and fully tested until the harvest of the next year, this evidence shows that Hussey antedates Leland in this invention.

But it is said, that this machine was on sale two years before Hussey's application for a patent; and that, therefore Hussey's patent is void. The evidence of Lovegrove, which is the only evidence to sustain this position, does not establish the fact claimed. He says that, in October or November, a single machine was complete, with the exception of the tongue or shafts; but there is no evidence to show when these were added, or when the machine was first offered for sale. It is certainly proved, that this machine was then in Hussey's factory, with other machines which he was selling, but it was incomplete, and had never been tried in the field; and the evidence of Lovegrove fails to show that this particular machine was ever offered for sale, or sold, although it is most probable that it was first tried and used in the harvest of 1845, and was afterwards sold during that year. Lovegrove testifies that, in December, 1844, he went to South America and was gone nine months, and had no idea what became of that particular machine. He further testifies, on his cross examination by the defendants, that, while in South America, he received a letter from Mr. Hussey, stating that he was going to try his first new cutters in the field, which he presumed was the machine referred to; and that Hussey was very cautious about alterations, and rarely built more than one machine, with much alteration, without trying it in the field. And this is all the testimony there is on this point. Hussey's application for his patent was made on the 17th of February, 1847, and his patent was granted August 7th, 1847. There

is, therefore, no proof that this invention was put on sale by Hussey, or with his consent, two years prior to his application for his patent. The burden of establishing, by satisfactory proof, the fact that this invention was on sale for two years prior to Hussey's application for a patent, is upon the defendants; and, most certainly, this fact is not proved by this evidence.

The reissued patent No. 742 is for a combination of side and cross bearings of the guards, with flush edges at and near the forks of the blades, substantially as described, and is for this only. It is insisted, by the defendants, that this patent is void for want of novelty, having been as they allege, anticipated by White, in or before 1837. The cutting apparatus of White, in which this invention is alleged to be embodied, was made an exhibit, and has been examined in reference to this question of novelty. It has substantially the same side and cross-bearings of the guards as the Hussey machine, and it has a scalloped cutter with flush edges; but it is insisted by the plaintiff, that it does not present the same combination, because the separate plates, which together constitute the scalloped cutter, each plate forming a single projection of the tooth-formed cutter, were, as a general rule, placed on the cutter bar, with their flushed edges so arranged that only every other flush edge was uppermost, the alternate plates being placed on the bar with their flushed edges on their lower side. It is conceded that there were exceptions to this rule, there being, if we recollect rightly, in one case two, and in another three, of the adjoining plates, having their flush edges on the same upper or lower side, as they were fastened to such cutter bar. The evidence in the case shows, that a cutter bar constructed in this manner is much inferior to one constructed according to the specification of Hussey; that it chokes more rapidly and requires more frequent cleaning; and that the cutters and other parts of the machine are more likely to be broken or injured. It is quite certain, that Hussey's mode of arranging the cutter blades, with the flushed edges of each on the lower side, is so far preferable to the alternate arrangement, as to constitute a substantial difference in the practical operation of the machine. The White machines were substantially abandoned and given up. Those which the witnesses Foster and Williamson had, and on which this point in the defence rests, were not found so useful as to induce a continuance of their manufacture. At this day, it will hardly be contended, that White, or Foster, or Williamson, had discovered or appreciated the fact, that these cutter plates should be arranged in the manner adopted by Hussey. If the maker of the White machine had appreciated the advantages of this arrangement, he would certainly have adopted it, as it was as easy to manufacture the machine with the uniform arrangement of the cutter plates, as it was to manufacture it with the alternate or promiscuous arrangement presented in the cutting apparatus of that machine. As these differences are matter of substance, and as we think the patent of Hussey may properly be so construed as to give such effect to the words, "substantially as described," as to require this uniformity of arrangement, we have concluded, after some hesitation, that the proof of the prior existence of the White machine does not avoid patent No. 742. This view of the question is sustained by the decision of the commissioner of patents, on the application for the renewal of this patent, the commissioner having then decided that the White machine did not contain the same combination as that claimed in this patent. Indeed, the favorable opinion of the commissioner of patents upon the applications for the renewal of the several patents of Hussey under which the plaintiff proceeds in this suit, covers most of the questions now raised and decides them in favor of the plaintiff. In French v. Rogers [Case No. 5,103], Judge Kane held, that, in ordinary cases of reissue, the commissioner's action has more than prima facie influence, in deciding the question of identity of invention; and, in all cases, a judge may well rely upon the commissioner's decision, to dispel doubts, or confirm his own impressions, upon the question of identity of devices or inventions.

The reissued patent No. 917 is for a combination of the finger beam (without a platform), the short, open slot fingers, having small projections below the cutter, the scalloped cutter, and the guides for the cutter, these parts being constructed and combined substantially as described, the cutter vibrating in a straight line, each scallop having an edge sliding in close proximity to an angular corner of the finger, and forming therewith a nipping angle, substantially as described.

The defendants insist that this patent also is void for want of novelty; and they allege that the invention was anticipated by Hussey's machine of 1833, by Ambler, by White, by Nicholson, and by Leland. If we are right in our conclusions heretofore expressed, this patent is not void for want of novelty; and certainly the combination now claimed is not found in any other of the machines proved to have been invented prior to Hussey's invention in the fall of 1844.

But it is said that all these reissues are too late, and that, if they cover more than the original patent protected, the exclusive right to the invention was lost by Hussey's laches of ten years, and that the public are rightfully in possession of the invention, by virtue of Hussey's laches and Leland's free gift.

We cannot say, as matter of law, that these reissues were too late, nor is there any proof of fraud or laches upon which we can, on that ground, declare these reissued patents void. A reissue has been upheld when

the surrender was made more than sixteen years after the first patent was issued,—Gibson v. Harris [Case No. 5,396]; and it was there said, that a patent which had been extended to twenty-one years, under the general law, and afterwards extended to twenty-eight years, by special act of congress, might be surrendered and reissued, after the term of twenty-one years had expired. See, also, Woodworth v. Edwards [Id. 18,014]; French v. Rogers [supra]; and Goodyear v. Day [Case No. 5,566]. The fact, that a portion of these inventions was not claimed in the original patent, does not, as we have already shown, defeat the present claims of the patentee; and even a disclaimer, in the original patent, of an invention claimed in a reissued one, is not, without other proof, enough to avoid the reissued patent. Ex parte Hayden and Hayden v. James, supra. It is true, that, in the case of Batten v. Taggert [Case No. 1,107], Judge Kane decided, that if a patentee neglects, in his specification, to assert his invention as to a certain part, omits to claim specifically such part, and suffers his patent so to stand for a number of years, he cannot afterward surrender his patent and take a reissue, claiming such part, as the use under the former patent, without any claim, will be a dedication to the public. But this decision was overruled by the supreme court of the United States, in the same case (17 How. [58 U. S.] 74); and the cases bearing upon this question, to which we have already referred, are, we think, sufficient to show that we cannot, after the action of the commissioner of patents in respect to these patents, and without other proof, hold that there has been any abandonment or dedication to the public, of the inventions claimed in these reissued patents. Independently of the question of abandonment or dedication, it is well settled, that the prior use of an invention, under a defective patent, cannot take away the right to surrender such patent and take out a new and amended one, or authorize a use under an amended patent. Stimpson v. Westchester R. Co., 4 How. [45 U. S.] 380, 402; Goodyear v. Day [supra]; Carr v. Rice [Case No. 2,439]; Battin v. Taggert, 17 How. [58 U. S.] 74, 84. In law, a reissued patent is generally considered, except in respect to infringements prior to its issue, as if granted at the date of the original patent. Carr v. Rice [supra]. And the corrected patent, in respect to all subsequent infringements, is made to take effect as though it had been so issued originally, even though the original patent was invalid. Bloomer v. Stolley [Case No. 1,559]; Shaw v. Cooper, 7 Pet. [32 U. S.] 292, 315; Stanley v. Whipple [Case No. 13,286]; Smith v. Pearce [Id. 13,089]; Carr v. Rice [supra]. We cannot, under the authorities above cited, sanction the position, that these reissues came too late, or that the patentee had forfeited his rights by the delay in procuring reissues covering such portions of his invention as were not included in the claims annexed to his original patent of 1847.

This brings us to the questions of infringement; and, in respect to these questions, we have examined the cutting apparatus of the machines of the defendants Bradley and Bradley, which were made exhibits in the cause, and the testimony of experts produced by the respective parties. The scalloped vibrating cutter of those defendants is substantially like that shown in the reissued patents Nos. 449 and 917, the only material difference being, that the cutter plates or blades of the defendants' machine are beveled only on one side, from heel to point, while those of Hussey are beveled on both sides, at and near the point of the several cutter blades. This difference we do not, however, consider as essential, under the specifications and claims of these reissued patents. We think that the guard fingers in both machines are, in principle and mode of operation, the same. These two elements of the combinations found in the two machines are substantially the same; and we are, therefore, of the opinion, that the reissued patent No. 449 is infringed by the manufacture and sale of the machines made by the defendants Bradley and Bradley.

We are, also, of the opinion, that the combinations covered by the reissued patents Nos. 742 and 917 are found in these machines of the defendants. The side and cross bearings of the guards are not identical in form, but the change is only of a mechanical equivalent for the side and cross bearings of Hussey's guards; and, if patents can be avoided by changes of the character of those made by the defendants, the exclusive rights of patentees will be of but little practical value. If these conclusions are correct, a decree must be made against the defendants Bradley and Bradley.

But it is insisted, that no decree against the defendant Hubbard should be made in this suit, because he has no interest, except as a licensor, in the manufacture, by the defendants Bradley and Bradley, of the machines which infringe the plaintiff's patents, he receiving a license fee of ten dollars for each machine so manufactured, and because he does not encourage or aid in the manufacture, or receive any benefit therefrom, except as such licensor. The only proof of Hubbard's connection with the defendants Bradley and Bradley, is contained in the admissions in his answer; and, as we understand that answer, it states, in substance, that he is the holder of several different patents for improvements in reaping and mowing machines, and that he has simply licensed the defendants Bradley and Bradley to make and vend machines with such patented improvements, on paying him a license fee for each machine by them made and sold under such license. It is not shown what these patents cover, or whether these

licenses, in form or effect, have any connection with the infringements of the patents of the plaintiff. We think that, before we can make a decree against the defendant Hubbard, there must be some other proof to show that Hubbard has some connection with, or derives some profit from the infringements now complained of. For aught that appears, the improvements patented to Hubbard, and embraced in these licenses, are not at all connected with the infringements shown in this case, and we are, therefore, of the opinion, that the plaintiff's bill, so far as relates to Hubbard, must be dismissed; but, as he has probably indirectly derived advantage from the infringements complained of, by reason of the larger number of sales made by the Bradleys, in consequence of their machines being made more valuable and more saleable by the use of Hussey's improvements, and as all the defendants have joined in their defence, the bill as to Hubbard will be dismissed without costs.

As against the other defendants, there must be the usual decree for a permanent injunction and an account of the profits received by them in consequence of their infringement of the plaintiff's patents.

NELSON, Circuit Justice. I have examined the foregoing opinion, and concur in it.

[In Case No. 6,946a the costs of above proceeding were taxed. For other cases involving these patents, see note to Hussey v. Whitely, Id. 6,950.]

Case No. 6,946a.

HUSSEY v. BRADLEY et al.

[5 Blatchf. 210.] [1]

Circuit Court, N. D. New York. March, 1864.

PATENTS — INFRINGEMENT — TAXATION OF COSTS AND EXPENSES IN SUIT IN EQUITY.

1. In a suit in equity, for the infringement of letters patent, the expenses of the plaintiff for court expenses, in attending court, for the hearing, and the expenses of his counsel to the place of the sitting of the court and back, on a motion to modify the decree, are not proper items of taxation, as part of the plaintiff's bill of costs against the defendant, on a decree in favor of the plaintiff, on final hearing.

[Cited in Wooster v. Handy, 23 Fed. 61.]

2. Nor are the expenses of printing pleadings, abstract of pleadings, testimony and briefs, and of lithographing drawings used on the final hearing, proper items of taxation, it not being shown that such expenses were, by agreement of the parties, to be charged as costs in the cause, or were incurred under an order or rule of the court.

[Cited in Baker v. Howell, 44 Fed. 114; Gird v. California Oil Co., 60 Fed. 1011.]

3. The amount paid for telegraphic despatches in the suit is allowable, if shown, by affidavit, to have been properly and necessarily expended.

[Cited in Kelly v. The Topsy, 45 Fed. 487.]

4. The amount paid for copying papers to be used in the suit is not allowable.

[Followed in Dennis v. Eddy, Case No. 3,793.]

5. The expense of reporting for the court the argument of the plaintiff's counsel on final hearing, is not allowable, in the absence of any agreement by the parties that it shall be taxed.

[Cited in Gunther v. Liverpool, L. & G. Ins. Co., 10 Fed. 830; Wooster v. Handy, 23 Fed. 60.]

6. The expense of such models as are copies of models deposited in the patent office, and as were properly procured for use as a part of the evidence in the cause, is allowable; but the expense of making and transporting other models and machines is not allowable.

[Cited in Wooster v. Handy, 23 Fed. 62; Cornelly v. Markwald, 24 Fed. 187.]

In this case, which was a suit in equity, for the infringement of letters patent [No. 5,227], the plaintiff [Eunice B. Hussey, administratrix of, etc., of Obed Hussey, deceased], having obtained a decree on final hearing [Case No. 6,946], embraced in her bill of costs the following items, which were objected to by the defendants [Christopher C. Bradley and others], on taxation: (1.) Expenses of plaintiff in attending court at Albany, in October, 1862, when the hearing of the cause was transferred to New York, being for court expenses only, $17.59. (2.) Paid for the following named models and exhibits, used in evidence by the plaintiff, on the final hearing, the following sums, namely: Finger beam, and iron guard fingers having no caps, marked Exhibit A 1, and scolloped cutter, marked Exhibit A 2, blades flush on underside, bevelled on upper side, $58.00. Finger beam, and iron guard fingers having flexible hoop iron caps, marked Exhibit A 3, and also cutter marked Exhibit A 7, $58.00. Finger beam used with Moore's (big harvester) fingers, marked Exhibit A 4, $20.44. Moore's (big harvester) fingers used with Exhibit A 4, marked Exhibit A 5, $1.00. Finger beam and guard fingers with cross bearings, (Hussey's,) marked Exhibit A 6, $20.00. Model of Hussey's cutting apparatus of 1847, embodying the improvement claimed in reissues 449, 742, and 917, marked Exhibits A 11 and A 12, $23.16. Model of Hussey's cutting apparatus of 1833, as described in patent of 1847, No. 5,227, marked Exhibits A 13 and A 14, $23.16. Cutting apparatus of the Whiteley machine sold to John Baird, marked Exhibit A 19, $115.00. Guard finger of the Allen machine of 1862, marked Exhibit 1 A B A, $20.00. Cutting apparatus of defendants' combined machine, marked Exhibit A No. 157, $21.50. Cutting apparatus of defendants' mowers, marked Exhibit No. 431, $21.00. Paid for transportation of models and exhibits used in evidence, and for taking charge of the same for the court, $79.45. (3.) Paid for printing pleadings and testimony, and for lithographing drawings used on the final hearing, 362 pages, $745.00. Paid for printing abstract of pleadings, also brief and supplemental brief on hearing,

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

$77.00. (4.) Paid for telegraphic despatches in the suit, $19.46. (5.) Paid for copying papers to be used in the suit, $7.00. (6.) Expenses of counsel to Cooperstown and back, on motion to modify the decree, $39.45. (7.) Paid for copying papers to be used in the suit, and which were used therein, $21.23. (8.) Expenses of reporting argument on final hearing, for the court, $250.00.

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

HALL, District Judge. In regard to the 1st and 6th items, there can be no doubt that they must be disallowed. The 3d item also must be disallowed. It is not shown that the printing charged for was done by the consent of the parties, and under an agreement that the expense thereof should be charged as costs in the case, or that any order or rule of court, either special or general, required or authorized the printing of the papers for the printing of which these charges were made. In Brooks v. Byam [Case No. 1,949], where the record had been printed by order of the court, and the bill was dismissed without costs to either party as against the other, the court directed the costs of such printing to be equally divided between, and paid by, the parties. This was, however, on the ground that the expenditure had been ordered by the court and was considered to have been incurred for the benefit of both parties. I am much inclined to think that the circuit court ought to adopt a rule that, in all equity cases, the papers necessary to be examined by the court on the hearing shall be printed, and to provide for the taxation of the expense as part of the costs of the cause; but, until this is done, the costs of such printing, in the absence of any agreement of the parties or order of the court, should not be taxed.

The 4th item, being the charge for money paid for telegraphic despatches, if the amount is shown to have been properly and necessarily expended in the progress of the cause, should be allowed. This charge is properly taxable, upon the same principle as that which allows the taxation of necessary and proper postages,—Prouty v. Draper [Id. 11,447]; but the affidavit showing the actual expenditure should state the payments in detail and the particular purpose of each telegram, so that the taxing officer may judge of the necessity and propriety of the expenditure and of its allowance on taxation, as a proper disbursement in the suit.

The 5th and 7th items should be disallowed. There is nothing in the charge, or in the affidavit annexed to the bill of costs, to show that this charge is not made for the copying in the solicitor's office, or by a copyist, of the pleadings or proofs in the cause; and, although the costs allowed by the fee bill are entirely inadequate, the copying of such papers being, in the ordinary course of practice, a part of such solicitor's proper business, as such, no expenditure for making such copies can be taxed.

The 8th item, also, must be disallowed. The expenses of reporting the argument of the plaintiff's counsel cannot be taxed against the defendants, as costs of the cause, in the absence of any agreement of the parties that such expenses shall be taxed.

The items charged under No. 2, for models and old machines, or parts thereof, and the expenses of their transportation, &c., require more consideration. The expenses of a certified or sworn copy of a model from the patent office might, under some circumstances, be properly allowed; and, as a general rule, the expense of procuring other models or machines ought not to be taxed. In Hathaway v. Roach [Id. 6,213], Judge Woodbury, after argument by able counsel, said, in a well considered opinion, in respect to charges for models procured and used by the defendant in that case: "If these were models of the stoves described in the plaintiff's patent, it is my opinion, contrary to that of the counsel for the defendant, that the plaintiff was not bound by any law to produce them. The defendant might then properly and usefully obtain them. They were likely to be beneficial in explaining the patent, and were competent evidence of its coincidence or difference, compared with other stoves, as they related to doings of the plaintiff himself on the subject of the patent. For such models the defendant ought, therefore, to be allowed a 'reasonable compensation.' * * * If other models are taxed, I do not think them proper items for the bill of costs, any more than the drawings of other patents procured, or the books which describe them, they all being rather arguments than proofs." I have not been able to find any other reported case bearing upon this question, and none was referred to on the argument. Upon the best consideration I have been able to give to the question, I am of the opinion that the allowance for the expense of models should be confined to such as are copies of models deposited in the patent office, and as were properly procured for use as a part of the evidence in the cause. As there is no proof to show that the models or machines charged for are within this rule, the charges therefor should be disallowed.

It may, perhaps, in this and in many cases, be important to a party to produce the whole or a part of an old machine, or a model of some machine, for the illustration or the better understanding of the testimony. But general rules for the taxation of costs should, if possible, be established; and any general rule which should allow the taxation of such expenditures as are charged for models and machines in this case, might, in many cases, be in the highest degree oppressive. A farmer or a me-

chanic, in moderate circumstances, who should use a patented invention under a license which he supposed valid, or use a patented machine which he supposed was sold by one having full right to make and vend the same, might be ruined by the allowance, in a suit brought against him, of such costs as are claimed in this case, while such models and machines might be used by the plaintiff as evidence in a large number of other suits brought to enforce his rights under the same patent. If any allowance should be made to a plaintiff for such expenditures, it may be made, in suits at law for infringements, by the exercise of the authority of the court to treble the damages; and, in suits in equity, where the plaintiff is entitled to the whole profits made by the defendant in consequence of the infringement complained of, it would not be equitable, in ordinary cases, to allow such expenses, as part of the taxable costs.

[A similar action was decided in Case No. 6,948. An injunction was issued restraining certain defendants from infringing said patents in Case No. 6,950.]

Case No. 6,947.

HUSSEY v. FIELDS et al.

[1 Spr. 394;[1] 20 Law Rep. 673.]

District Court, D. Massachusetts. March 19, 1858.

SEAMEN'S WAGES—WHALING VOYAGE—PROCEEDS.

Where a whaling voyage is from necessity broken up in a foreign port, the master, on request of the seamen, is authorized to pay them their respective shares of the proceeds, by delivering to them, at such foreign port, portions of the oil taken, although, by the shipping articles, the distribution of proceeds was to be made after the return of the vessel to the home port.

[Cited in The Antelope, Case No. 484.]

[Cited in Story v. Russell, 157 Mass. 154, 31 N. E. 754.]

This was a libel brought by an officer of the whale ship Rambler against the owners, to recover his share of the proceeds which had come to their hands. The ship sailed from Nantucket in October, 1851, and prosecuted the enterprise until November, 1854, during which time she had taken eight hundred barrels of sperm oil. In that month she went into the port of Honolulu, whence she sent home to the owners the eight hundred barrels. This libel is to recover the libellant's share of the proceeds of the oil, so sent home and received by the owners. The respondents do not deny this liability, but insist that they have a right to deduct from his claim the value of 267 gallons of oil delivered to him at Apia, as hereinafter stated. After leaving Honolulu, the libellant acted as third mate, with a lay of 1/56, until the death of the master, in May, 1855; during this time, 10,135 gallons of sperm oil were taken. The first mate having previously left the ship, the person who had shipped at Nantucket as second mate became master, and the libellant was made second mate, and one Thompson, who had shipped at Honolulu as second mate, became first mate. At the promotion of libellant to the office of second mate, nothing was said about the lay, and no entry was made concerning the same. He was told "to take Mr. Thompson's place." After this promotion, and prior to the arrival of the Rambler at Apia, she took about seventy barrels of oil. She went into Maui in October, and to Apia in November, bringing into Apia about 12,340 gallons. There a survey was had and the ship condemned as unseaworthy. The officers and crew were there discharged, the master acting in concert with the United States consul, and all, except the libellant, were settled with, by delivering to each his share of the oil then at Apia, in the proportion which, by the shipping articles, each was to have of the net proceeds of the actual products of the voyage, upon the arrival of the ship at Nantucket. The libellant, was to have 1/56 of the oil taken before he was second mate, and 1/25 of that taken afterwards. This 1/25 was fixed upon by the master and consul, and the master gave an order upon the owners, stating the amount of the libellant's debt to the ship, and the lay to which he was entitled out of the oil sent home prior to the ship's arrival at Apia, and requesting them to pay the same. The master also gave him a bill of sale or statement, certifying the quantity of oil brought into Apia, and libellant's share thereof to be 267 gallons. The next day the libellant took the share so set off to him, which was gauged in the presence of the consul and the master, and subsequently sold it. The residue of the oil, after settlement with the officers and crew, was left with the consul, A. Van Camp, to forward to the owners at the earliest opportunity. It had been shipped on board of a vessel which had not left port, before one Jenkins, claiming to have superseded Van Camp as consul, and to have certain claims against him, seized the oil as his property, established a "consular court," and made an ex parte decree, and the same was sold to satisfy the decree. The respondents actually received none of the oil landed at Apia, though they are now pressing their claims against the United States government, for indemnity for the acts of the consul Jenkins.

T. D. Eliot and T. M. Stetson, for libellant.

S. Bartlett and D. Thaxter, for respondents.

SPRAGUE, District Judge. The question is, whether this was a valid payment of

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

the lay or share of the libellant, or a wrongful conversion of the 267 gallons of oil which the libellant received at Apia. After the libellant became mate, he was still under the shipping contract, being only advanced to a higher grade, and entitled to a greater compensation. By the first article of that contract, it is stipulated that the shares of the seaman are "to be paid pursuant to this agreement, and the custom and usage in the port of Nantucket."

By the ninth article it is provided "that each and every officer and seaman * * * shall be entitled to the payment of his share of the net proceeds of the voyage * * * as soon after the return" of the vessel to her home port, as the oil and other products of the voyage can be sold, and the settlement adjusted by the owner. This is the only express provision in the contract as to the time of payment, and it contemplates a payment only after a return of the vessel to Nantucket, an event which became impossible by perils of the sea. We should then, under the terms of the first article, inquire whether there be any usage embracing the present case. No evidence of usage was introduced. The crew list was, indeed, offered for that purpose, but it proves nothing. I have some reason to believe that in the whale fishery there is an established usage for the master to pay a seaman his lay or share, by a delivery of oil or otherwise, in a foreign port, when the voyage is there broken up, or the seaman is otherwise rightfully discharged. But I cannot judicially assume it to exist. I must, therefore, consider this voyage as having been broken up by a calamity not contemplated by the shipping articles, nor covered by any usage. The rights of the parties upon such a contingency, must be deduced from the terms of their contract, the nature of the business, and the principles and analogies of the maritime law. By the terms of their contract, the parties engaged in a joint adventure, in which the ship-owners furnished the vessel, equipments and provisions, and the crew furnished the labor and skill for this fishery, and the products are to be divided in certain specified proportions. The crew are to have no wages or compensation, except the stipulated share of the proceeds. It was at one time contended that this contract constituted a partnership between the owners and crew, or at least, that each seaman was a joint owner of the proceeds; but upon considering the nature of the business, and the best mode of securing its objects, and the interest of all parties, it has been judicially settled that the legal ownership in the oil and other proceeds, vests in the owners of the vessel, who are bound to take care of and dispose of them for the benefit of all concerned. See Knight v. Parsons [Case No. 7,886]. But although the seamen have no legal ownership in the oil, yet it is the fund, and the only fund, from which they are to be paid for their services, and they have a lien upon it which will continue, until it shall have been sold by the owners, under the authority given by the articles. The contract contemplates that, upon a termination of the enterprise, the proceeds shall be divided. It makes provision for only one termination, viz: a return of the vessel and crew to Nantucket; this has become impossible. The voyage has been brought to an end, in a foreign port, by an overwhelming force. The master then became, from necessity, the agent of the owners, and was bound to do whatever he might to diminish the common calamity and promote the interests of all the parties. The master could not furnish another ship and outfits for the prosecution of the fishery, and he did not offer to the crew any means of returning home.

Was the master bound to leave them destitute in a foreign country, when the oil which they had taken, the fund from which they were to be paid for their services, was in his hands, and they were desirous of receiving their share in full compensation? This could not be detrimental to the owners; their full proportion would remain in the hands of their agent, the master, to be sent home to them. It relieved the owners from any further care or responsibility of that part of the proceeds which was to go to the crew. No fact has been stated from which it can be inferred that the owners have been in any degree injured by this payment to the libellant, or that they would have been in any degree benefited, if the master, instead of delivering a portion of the oil to the crew, had kept it all together, for the purpose of sending it home.

It has been suggested, that by delivering to the crew their proportion of the oil, their care and oversight of the rest were withdrawn. But they were withdrawn by the destruction of the ship. The oil was then in the sole possession and control of the master; the crew had no voice in its management or disposition, and had no means of accompanying it, if it were sent home. The enterprise having been terminated in a foreign port, by a common misfortune, and it being in the power of the master to diminish the loss and suffering of the crew, by paying them out of a fund specially appropriated for that purpose, without detriment or inconvenience to the owners or any other party, he was authorized to do so. Indeed it would have been unreasonable and unjust, on his part, to refuse.

It has been urged that the oil was the cargo of this vessel, and that the master had no authority to sell or divide it, but only to send it home. But the proceeds of a whaling voyage are much more analogous to freight, than to the cargo of a merchant ship. They are the earnings of the voyage, and a fund to which the crew have a right to look for payment, and it would not be

doubted that the master of a merchant ship, when a seaman is discharged abroad, either voluntarily or from necessity, having freight money in his hands, would be authorized to pay the wages previously earned.

The legislation of congress tends to the same result. By Act 1840, c. 6, § 2 [5 Stat. 370], whaling ships are brought under the first section of Act 1803, c. 9 [2 Stat. 203]. The proviso to that section expressly recognizes the authority of a consul to consent to a discharge of a seaman abroad. Under what circumstances, and upon what terms and conditions, he may so consent in the case of merchant seamen, will be found in the subsequent provisions of that act and of several later statutes. One of the cases in which the consul may discharge is the joint application of the master and mariner. The right of a master to agree to the discharge of a seaman being thus recognized, it would seem to follow that he would be authorized, as one of the reasonable terms of that agreement, to pay him his wages. But the statutes go further, and generally require the payment of three months wages over and above the amount then due. Surely these acts, which provide for the payment of extra wages abroad, contemplate that the master may pay the wages actually due. By Act 1856, c. 127, § 26 [11 Stat. 62], it is provided that in cases of ships or vessels "condemned as unfit for service, no payment of extra wages shall be required."

In the present case it appears that the proceedings at Apia were with the concurrence of the master, the libellant and the consul, and that all united in making this payment to the libellant. The authority of the master to make such payment is sustained by the principles and analogies of the maritime law, and the acts of congress, relating to merchant seamen.

I am of opinion that the payment to the libellant was rightful, and that he is entitled to recover his share or lay of the proceeds sent home from Honolulu, without any deduction on account of the oil received by him at Apia. Decree for libellant with costs.

Case No. 6,948.

HUSSEY v. McCORMICK.

[1 Biss. 300; 1 Fish. Pat. Cas. 509.] [1]

Circuit Court, N. D. Illinois. Sept. 19, 1859.

PATENTS—RE-ISSUE—PRESUMPTION—"REAPING MACHINES."

1. The invention of Obed Hussey, under his patent of August 7, 1847, and reissued in 1857, consisting of a vibrating scalloped cutter, combined with slotted guard-fingers fastened in front and open in the rear, *held* valid.

2. It is immaterial whether such opening be placed below or above the cutter, as the patent makes no such distinction.

3. Nor is it material that the scallops upon the cutter should be of any particular depth, or that the angle they make should be greater or less. A right which may be lost by the variation of an angle can be of no value.

4. The legal presumption is, from the action of the patent office, that the reissued patent is for the same invention as the original patent.

[Cited in Crompton v. Belknap Mills, Case No. 3,406; Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Id. 8,453.]

5. Differences in the claims are consistent with the identity of the thing designed to be patented in both patents, it being one object of the surrender to correct by changing the description, or claim, or both.

[Cited in Ex parte Ball, Case No. 810; Crompton v. Belknap Mills, Id. 3,406; Young v. Foerster, 37 Fed. 204.]

This was a bill in equity, filed to restrain the defendants from infringing letters patent [No. 5,227], granted to complainant, August 7, 1847, for "improvements in reaping machines," which letters patent were surrendered, and three several patents, numbered 449, 450, and 451, were re-issued April 14, 1857, for distinct and separate parts of the thing originally patented. The defendants were charged with infringement of reissue No. 449. The specification of the original patent was as follows: "Be it known, that I, Obed Hussey, of the city of Baltimore, and state of Maryland, have invented a new and useful improvement on the reaping machine invented by me, and patented in 1833, and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of the specification in which Fig. 1 is a bird's eye view of the cutting apparatus, in which AAAAAA represent the vibrating cutting-blades; BBBBBB the permanent guard-irons; H represents a part of the wood-work. The guards are formed of a lower piece and an upper piece, admitting the blade to pass between in cutting, so that the straw, grass, hemp, corn, &c., which comes in between the guards to be cut, is firmly supported, both above and below the vibrating blades. In my original invention, the upper part of the guards were fastened to the lower part, both before and behind the blades, as represented at CCCC; the grass, straw, etc., which is not perfectly cut is forced in by the motion of the blades, and works back between the blades and the upper piece of the guards, materially obstructing the free movement of the blades; in wet weather frequently causing what the farmers call choking. The improvement for which a patent is now asked is represented at DDDD, where the upper piece of the guard is fastened to the lower piece only at the point, leaving the back end unconnected, consequently the space between the upper and lower pieces of the guard through which the blades vibrate is open be-

[1] [Reported by Josiah H. Bissell, Esq., reprinted in 1 Fish. Pat. Cas. 509, and here republished by permission.]

hind, so that the grass, etc., which is forced in by the action of the blades, now passes freely out through the opening; which opening, when used in combination with vibrating blades, constitutes a claim in this improvement, and is represented at DDDD, Fig. 1, and at A, Fig. 3. My improvement extends also to the prevention of the accumulation of grass, etc., under the blades, which I will describe as follows: In my original invention, the blades are ground with a bevel on both sides of the edge; the purpose of this is, that, by means of the shoulder of the bevel, the sharp edge is prevented from coming in immediate contact with the iron in passing the guard. This bevel is not so necessary near the fork of the blades as near the points, hence, in this improvement, about one inch of edge, at the fork, is flush on the upper side, leaving the bevel all on the upper side. The design of this is that the grass, etc., which is forced in between the blades and the lower part of the guard, shall be cut up and worked out by the flush edge acting close to the iron at the fork. This latter improvement is also claimed as new, in its application to the particular purpose for which it is designed. Fig. 2 is a sectional view of one of the guards in my original invention. A is a part of the wood-work as seen at H, Fig. 1. Fig. 3 represents one of the guards containing the improvement before described. A is the opening; B, part of the wood-work. Fig. 4 represents a view of one of the blades with the flush edge (EE) on each side of and at the fork of the blades, (A 1.) I accordingly claim the opening above the blades at A, Fig. 3, and at D, Fig. 1, in combination with vibrating blades. I also claim the particular application of the flush edge at the fork of the blades, for the purpose described. The end and design of the improvements above claimed, is to prevent the blades choking. Obed Hussey."

The description of the invention in reissue 449, was substantially the same as that contained in the original patent. The only material differences consisted in the addition of the following paragraphs, and in the claims: "Reaping machines have heretofore been constructed, some with straight blades with smooth edges and having a rotary motion, in which the cutters were arranged to work through slots between the upper and lower parts of guard-fingers, which parts were connected only at the front ends. In such machines the fingers acted: 1st, as guards or protectors to prevent the edge of the cutter from being injured by collision with stones or similar obstacles; and 2d, like the teeth of a comb, to divide the stalks of grain or grass while being cut, into narrow strips or parcels and hold them from leaning to the right or left, as the edges of such cutters were borne forward against the stalks, and drawn across to cut them. It is evident that in such a cutting apparatus, the blades, if smooth edged, cut like a knife, or, if sickled, like a saw, without the aid of another edge, between which and the edge of the blade, the stalks may be sheared or clipped. But in machines in which the cutter has a scalloped edge, the fingers serve three purposes: first, they act as protectors to the edge; secondly, they divide and hold up the stalks; and thirdly, they act as fixed shear blades, between which, and the edges of the scallops, the grain or grass is clipped. But the shearing or clipping action tends to force the stalks crosswise of the finger into the slots, so that in such machines the slots, between the upper and lower parts of the fingers, through which the scallops play, are liable to clog or choke, either impeding or wholly preventing the cutting action of the machine; by reason of this tendency of the scalloped sickle to force the stalks across, and thus entangle them upon the fingers, all the modes heretofore devised, of working this sickle were comparatively ineffective. But as the scalloped blade is, in my judgment, the best of all cutters, it is of great importance to overcome every impediment to its successful working, which I have done in the manner before described, viz., by combining with it a slotted finger, the upper and lower parts of which are connected with each other only at the points, and one part only being attached to the frame of the machine, leaving an opening at the rear of the slot, through which the clogging matter can work its way out. I claim as my invention the combination of a vibrating scalloped cutter, the indentations of whose edge act as a series of moving shear blades, with slotted guard-fingers, the sides of which act as a corresponding series of fixed shear blades, the parts of such fingers forming the slot, being connected at the front ends only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described. In testimony whereof, I have hereunto subscribed my name. Obed Hussey."

The defendants denied that Hussey was the original inventor of the improvement claimed, and insisted that C. H. McCormick was the original and first inventor thereof. They also insisted that they did not infringe the reissued patent, because the slot in the finger, used by McCormick, was open below the cutter, whereas in the patent the opening was above; also, because the McCormick cutter was not so deeply scalloped as the Hussey cutter; and also because the reissued patent was not for the same invention as that for which the original patent was granted.

[A bill to protect the same patent was heard in Case No. 6,946, and the costs taxed in 6,946a.]

P. H. Watson and Geo. Harding, for complainant.

Goodwin & Larned and Chas. M. Keller, for defendants.

Before McLEAN, Circuit Justice, and DRUMMOND, District Judge.

McLEAN, Circuit Justice. The complainant states in his bill that prior to February 17th, 1847, he was the first and original inventor of certain new and useful improvements in reaping machines; and that letters patent were granted to him therefore, bearing date August 7th, 1847. That said letters patent were surrendered for insufficient specification, and three several patents dated April 14, 1857, were reissued for distinct and separate parts of the thing originally patented, pursuant to the act of congress of March 3d, 1837 [5 Stat. 191].

That the defendants have constructed machines since the date of the reissued patent, in violation of one of the reissued letters patent, numbered 449. Hussey says: "I claim as my invention the combination of a vibrating scalloped cutter, the indentations of whose edges act as a series of moving shear blades, with slotted guard-fingers, the sides of which act as a corresponding series of fixed shear blades; the parts of such fingers forming the slot being connected at the front ends only, leaving the rear of the slot open and free for the escape of material that would otherwise clog the cutter, substantially as described."

This combination is so succinctly and clearly expressed, that no one can mistake it. A vibrating scalloped cutter, combined with slotted guard-fingers, fastened in front and open in the rear, constitutes the invention. The cutter operates through the slots in the guard-fingers, and they, being fastened in front and open in the rear, permit the material which accumulates to escape.

And the defendants admit in their answer: "If the claim of the reissued patent, No. 449, should be so construed as to cover the employment of a vibrating scalloped-edge cutter, of any kind, in combination with slotted guard-fingers with the opening for the discharge of the material that would otherwise clog the cutter, whether such opening be placed above or below the cutter, then the defendants, further answering, admit that the defendant, Cyrus H. McCormick has long prior to and since the 14th of April, 1857, manufactured and sold large numbers of reaping machines involving the combination so claimed and construed; and that he has now on hand, completed and for sale, a small number of such reaping machines."

This admission is made on the hypothesis that the court shall construe the claim to be for a vibrating scalloped cutter of any kind, in combination with slotted guard-fingers, with the opening for the discharge of material that would otherwise clog the cutter, whether such opening be placed below or above the cutter.

As stated, the admission is made in the language of the patentee, with the exception of the words, "whether such openings be placed below or above the cutter;" but as these words were not used by the patentee, it is difficult to see how they can affect his rights. The call is for slotted fingers, the parts forming the slots being connected at the front ends only, leaving the rear of the slot open and free. If the slot be open and free in the rear, it would seem that there can be no obstruction to the cutter by the clogging matter. "Whether the opening be placed above or below the cutter," is not in the case. It is both below and above the cutter, and unless some new rule shall be found, which shall enable the defendant to modify the claim of the plaintiff, we suppose it must stand.

In their further answer the defendants allege that Hussey is not the original and first inventor of such improvement, but long prior to the invention by him, substantially the same construction and combination was invented and described in letters patent granted to Cyrus H. McCormick, which letters patent are dated June 21, 1834, and that the machines were in use long prior to the invention of the complainant.

In answer to this, it is only necessary to say, that an inspection of McCormick's patent of 1834 will show that it contains no such combination of a vibrating scalloped cutter with slotted guard-fingers fastened at the front only, leaving the rear open and free, as called for by the complainant in his reissued patent of 1857. The cutting apparatus described in McCormick's patent of 1834 was a "vibrating straight-edge sickled blade," stated to be, "a long cutter of steel grooved or notched on its lower edge like a reaping hook, with the grooves running in a line toward the right of the machine."

This cutter, in form and principle, was unlike the scalloped cutter of Hussey, to say nothing of the other parts of the machine, or of the combination claimed and so clearly described by him. The same remark will apply to the alleged improvement of McCormick, in 1840 or 1841. That consisted of "a vibrating cutter with a straight edge, and with the sickle teeth cut therein in sections, and inclined in opposite directions." Whether this improvement had been the subject of experiment, and machines with the improvement had been sold to various persons in 1840–42, can be a matter of no importance, as it was wholly different from the right of the plaintiff. These machines, with "wooden slotted fingers," as appears from the evidence, were abandoned by McCormick, and simple unslotted fingers were substituted in their place. But not one of his experiments, however numerous they may have been, seems to have reached the organization and effect of the plaintiff's machine, until, by his own admission, he adopted its principles.

If anything in addition to this testimony

be necessary, it is found in the testimony of Henry B. Renwick. He was a principal examiner in the patent office a number of years, and for the last four or five years United States inspector of steamers in the port of New York. He states that on examination of the defendant's machine, with the reissued patent No. 449, he finds it is a substantial representation of the invention set forth in the patent, and that the variations are formal and not substantial. Neither the science nor the practical knowledge of this witness is controverted. His statement stands uncontradicted.

It is objected that the scallops used by McCormick in his cutting apparatus have less depth than those used by Hussey. This is a formal and not a substantial objection. The scallops were not required to be of any particular depth, or that the angle they make should be greater or less. This was necessarily left to the knowledge and experience of the mechanic. Practical utility was the end to be attained in the use of the scalloped cutter. Some mechanics may prefer one angle, some another. A right which may be lost by the variation of an angle, can be of no value.

The cutting operation of Hussey is done by shears, which cut the substance presented at an angle, and which many prefer to the sickle-edge cutter. Whether the cutting is done by the one or the other instrument, it is rightly denominated the scalloped cutter.

The objection that the sole purpose of the surrender and reissue of the complainant's patent was to cover what Hussey had not invented and which he knew to have been previously invented and constructed by McCormick, does not seem to accord with the admission of the defendants, that if the claim should be sustained as made, they have manufactured and sold since April 14, 1857, a great number of reaping machines, involving the combination so claimed and constructed.

The legal presumption is, from the action of the patent office, that the reissued patent is for the same invention as the original patent (O'Reilly v. Morse, 15 How. [56 U. S.] 62); and in that case it was held that "differences in the claims are consistent with the identity of the thing designed to be patented in both patents, it being one object of surrender to correct by changing the description, or claim, or both. This is the well settled doctrine of the supreme court." Batlin v. Taggart, 17 How. [58 U. S.] 74.

In their answer the defendants admit "that the letters patent of August, 1847, were surrendered, and that thereupon three several patents were granted April 14, 1857, to Hussey, each for a separate part of the reaping machine described in the surrendered letters patent."

In the patent of 1847, a combination of the scalloped cutter with a slotted finger connected at the point and open at the rear, was represented. The description in the reissued patent is more concisely and clearly expressed; but the identity of the invention plainly appears. The corrected phraseology is clearly within the provisions of the patent law.

A repetition of the elements of Hussey's invention and their combination could add no strength to what has been said in regard to his improvement. There is no ground on which to question his good faith in making a surrender of his patent, and procuring three several patents, each for a separate part of the reaping machine described in the surrendered letters patent.

Nor is there any evidence of a just pretention on the part of C. H. McCormick, that he was the original and first inventor of the improvement claimed by Hussey. In the absence of all evidence as to the want of novelty in this invention, we may well conclude that Hussey was the inventor, and that he is entitled to damages for a violation of his patent, and to an injunction.

As Cyrus H. McCormick, from the facts alleged and admitted in the answer, is the person responsible to the complainant, the other two defendants being his employes, the bill will be dismissed as to them, and the case will be referred to a master, who will take an account, etc., under the directions of the counsel of the complainant, subject to the objections which may be made by the defendant's counsel.

[For other cases involving this patent, see note to Hussey v. Whitely, Case No. 6,950.]

HUSSEY (REED v.). See Case No. 11,646.

Case No. 6,949.

HUSSEY v. The SARAGOSSA.

[3 Woods, 380.] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1876.

CARRIERS—NEGLIGENCE—BURDEN OF PROOF.

1. A shipper seeking to recover damages of a common carrier for an injury to the thing shipped, must show some injury which cannot be the result of its inherent nature or defects, or some carelessness or negligence on the part of the carrier likely to cause the injury, before the burden is cast on the carrier to show that he is not in fault.

2. So where a horse, in apparent good health and condition, was shipped on board a steamer, and was delivered at the end of the voyage in a sick and dying condition, but without any fractures, wounds, or any external or visible injury: *Held*, that some negligence or carelessness on the part of the carrier, which would account for the condition in which the horse was delivered, must be shown by the shipper before he could put the carrier in fault, and recover damages for injury to the horse.

[Cited in St. Louis & S. F. Ry. Co. v. Clark (Kan.) 29 Pac. 314; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 142, 31 N. E. 781.]

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

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

On October 25, 1873, the libelant [George W. Hussey] shipped on board the steamship Saragossa, at Baltimore, to be carried to Savannah, a gray gelding, a trotting horse, known as Nick King. The horse was delivered to the stevedore, on the wharf, and slung on board by means of the sling and rope and tackle usually employed for such purpose. The horse was delivered to the libelant at Savannah, on October 29, without any apparent external injury, and on the next day he died. The libelant claims that the horse was sound and in good health and condition when he was delivered to the stevedore and officers of the Saragossa; that he was injured by the careless and negligent manner in which he was slung on board; that immediately after he was placed on board he showed signs of injury; that he grew worse from day to day, and when he was delivered to libelant, on the 29th, he was in a dying condition, and died the next day, and his death, as above stated, was in consequence of the injury received at the hands of the officers and crew of the Saragossa, in slinging him on board. The libelant claims that the horse was worth three thousand dollars, and asks a decree against the respondent for his value. The claimants, the owners of the Saragossa, deny that the horse was sound and in good health when delivered to the ship, deny that he was slung on board in a careless or negligent manner, and deny that he died from any injury received when he was slung on board or during the voyage, and aver that he died from natural causes, for which the ship is in no manner responsible, and they deny that he was worth the sum of three thousand dollars.

S. Yates Levy, A. P. Adams, and S. B. Adams, for libelant.

C. N. West, for claimant.

WOODS, Circuit Judge. It is claimed by proctor for libelant that the horse, having been delivered to the ship in apparent good health and condition, and the ship having delivered him to the libelant, on the termination of the voyage, in a dying condition, the burden of proof is upon the respondent to show that the illness and death of the horse did not result from the act or neglect of the respondent, but from causes beyond its control. The rule of law is, that when the carrier fails to deliver goods, or when he delivers goods in a damaged condition, the onus is cast upon him to show that he is not in fault. In other words, loss or injury is sufficient proof of negligence or misconduct, or of the intervention of human agency, and when shown, the burden is on the carrier to exempt himself. Ang. Carr. § 202; Story, Bailm. § 329; Code Ga. § 2066. But the shipper must show an injury to the article shipped before the burden is cast upon the carrier to exonerate himself. Is an injury shown when the article shipped is a horse or other live stock, which is proved to have been delivered to the carrier in good health and condition, and to have been re-delivered to the shipper in a sick and debilitated condition, but without any fractures, wounds, abrasions, or other external or visible injury? I think not. As well might a passenger who embarks in good health claim to support an action for damages against the common carrier, by simply showing that when he disembarked at the end of his voyage he was in a sick and debilitated condition.

The liability of a common carrier of animals is not in all respects the same as that of a carrier of inanimate property. For instance, he is not an insurer against injuries arising from the nature and propensities of the animals and which diligent care could not prevent. He is not liable for injuries by disease contracted without his fault after the stock is delivered to him. On the same principle, proof of the decay of perishable fruit committed to a common carrier, would not of itself be sufficient to charge him. Boyce v. Anderson, 2 Pet. [27 U. S.] 150; Clarke v. Rochester & S. R. Co., 14 N. Y. 570; Smith v. New Haven & N. R. Co., 12 Allen, 531; Hall v. Renfro, 3 Metc. (Ky.) 51; Story, Bailm. § 492a. When the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain. He must show some injury to the thing shipped which can not be the result of its inherent nature or defects, before the burden is cast upon the carrier to show that he is not in fault. But without applying this rule in this case, we are satisfied from the weight of evidence that the horse of libelant was not injured by the careless handling of the respondents, but that he died from natural causes, and that he would have died if he had never been put on board the Saragossa. Libel dismissed.

Case No. 6,950.

HUSSEY v. WHITELY et al.

[2 Fish. Pat. Cas. 120;[1] 1 Bond, 407.]

Circuit Court, S. D. Ohio. Dec., 1860.

PATENTS—ASSIGNMENT—LICENSE—DUTY OF DISTRICT JUDGE.

1. H. assigned to M. A. & Co. all his right and interest under his patent in twenty-three counties in Ohio, including that in which the defendants' manufactory was carried on. M. A. & Co. were to pay ten dollars for each machine made and sold by them, while H. reserved the right of sending machines of his own manufacture into the territory named in the contract. *Held*: That this paper was not an assignment of the interest of H. in the patent within the territory named, but a mere license.

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 1 Bond, 407; and here republished by permission.]

2. H., by virtue of the rights reserved to him, must be viewed as a "party aggrieved" in the words of section 17 of the act of July 4, 1836 [5 Stat. 124], and he had an undoubted right to proceed in equity, for the protection of his rights, without joining M. A. & Co. as parties complainant.

[Cited in Edison Electric Light Co. v. Electric Manuf'g Co., 57 Fed. 619.]

3. By law, a district judge is associated with a justice of the supreme court of the United States in holding a circuit court, and may hold that court alone, in the absence of the superior judge; but it would be clearly wrong in a district judge, as a judge of the circuit court, in any case, to review or set aside the action of the superior judge.

4. But, if the aspect of the case, as presented to the district judge, is substantially changed by new evidence, which, it may be fairly presumed, if brought to the notice of the presiding judge, would have led to different action, it would be the duty of the former to consider such proof and act in accordance with it.

[Cited in Preston v. Walsh, 10 Fed. 317; Norton v. Eagle Automatic Can Co., 61 Fed. 295.]

5. Presumptions of the novelty of a patented invention may arise from some or all of the following grounds: 1. The oath of the patentee that he was the first and original inventor. 2. The action of the patent office in granting the patent after full examination. 3. Undisturbed enjoyment of all the benefits of the exclusive rights granted by the patent. 4. Direct adjudications, either at law or in equity, establishing the validity of the patent. 5. Injunctions granted to restrain infringement of the patent.

[Cited in Johnson v. McCabe, 37 Ind. 539.]

6. The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of a patented invention, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence.

7. If the defendant, upon a motion to dissolve an injunction, so clearly and conclusively impeaches the novelty of the invention of complainant as to leave no doubt on that point, it might be the duty of the court, against all the presumptions in the patentee's favor, to release the defendant from the operation of the injunction.

8. The fact that a defendant is suffering serious injury from the stoppage of his manufactory, by an injunction, furnishes no reason for a departure from the well-settled rules of chancery practice in patent cases; especially if there be no pretense that he has proceeded in ignorance of the patentee's invention.

In equity. This was a motion to dissolve a provisional injunction, granted by Mr. Justice McLean, while sitting at chambers in Cleveland, to restrain defendants [William N. Whitely, Jerome Fassler, and Oliver S. Kelly] from infringing letters patent [No. 5,227] for an "improvement in reaping machines" issued to Obed Hussey, August 7, 1847, and reissued April 14, 1857, in three divisions [Nos. 449, 450, and 451]. The claims of the original and reissued patents, with a sketch of the invention, will be found in the report of Hussey v. Bradley [Case No. 6,946. See, also, Id. 6,948.] The motion to dissolve was predicated mainly upon a license from the complainant [Eunice B. Hussey, administratrix of Obed Hussey, deceased] to Minturn, Allen & Co. to use the invention within twenty-three counties of Ohio, including that in which the manufactory of the defendants was located. It was insisted that this paper constituted an exclusive grant, and that suit must be brought in the name of the grantees, or that, in any event, they must be joined as parties complainant.

N. C. McLean, P. H. Watson, and E. M Stanton, for complainant.

G. M. Lee and S. S. Fisher, for defendants.

LEAVITT, District Judge. A motion has been made and fully argued by counsel on both sides, for the dissolution of the injunction granted by Judge McLean, in July last. The grounds stated in the written motion on file, are in substance, that the order for the injunction was improvidently made, contrary to the evidence in the case, and that the improvements patented to Hussey were known and in public use prior to the date of his invention. Before referring to the grounds upon which the present motion is urged, it will be necessary to notice another, set forth in the answer, and insisted on in the argument by the counsel for the defendants, but not included in the written reasons on file. In their answer they aver that Hussey, on February 5, 1852, by a written instrument, assigned to Minturn, Allen & Co. all his right and interest, under his original patent of 1847, in twenty-three counties in the state of Ohio, including the county of Clark, and that if said patent and the reissued patents are valid, and have been infringed by the defendants, a suit for such infringement can only be maintained by Minturn, Allen & Co., and that Hussey, therefore, in his lifetime had, and his representatives since his death have, no right of action for such infringement. If the legal effect of the contract referred to is as claimed by the defendants' counsel, it is clear that the motion to dissolve the injunction must prevail. It is, therefore, necessary to look into the contract to determine the question. The written instrument referred to in the answer is made an exhibit by the defendants, but was not before Judge McLean when the application for injunction was made, and the question now presented was not brought to his notice. By this agreement or contract, Hussey granted to Minturn, Allen & Co. the exclusive right to make and sell his improved reaping and mowing machine, during the continuance of his patent, within the county of Clark, and a number of other counties in the state of Ohio, and they were to pay ten dollars for each machine made and sold by them. Hussey expressly reserved the right of sending machines of his own manufacture into the territory embraced in the contract. The inquiry arises, whether this contract imports such a transfer of Hussey's interest in this patent as to preclude him from a

remedy in chancery for infringement in making and vending the patented machine within any counties included in the grant to Minturn, Allen & Co. And it would seem that section 17 of the act of July 4, 1836, viewed in connection with the contract, furnishes a satisfactory solution of the inquiry. That section, after declaring that the circuit courts of the United States (or district courts having circuit court powers) shall have jurisdiction of all suits and controversies arising under the patent laws of the United States, proceeds as follows: "Which court shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any laws of the United States, on such terms and conditions as said courts may deem reasonable."

The sole question is whether Hussey can be viewed as a "party aggrieved" within the meaning of the provision just quoted. And of this there does not seem to be any reason for doubt, if it be conceded that there has been an infringement as alleged in the complainant's bill. The contract between Hussey and Minturn, Allen & Co., is not and does not purport to be an assignment of Hussey's interest in the patent within the territory named. It is a mere grant of the right to make and sell the patented machine within those limits in consideration of the payment of Hussey of ten dollars for each machine made and sold, reserving to Hussey an unlimited right to send into that territory and vend machines manufactured by himself. Under this contract, Minturn, Allen & Co. are mere licensees of Hussey, incurring no obligation except the payment of the stipulated price of each machine they may construct and vend. Hussey's interest in his patent remained in full force, within the counties included in the grant to Minturn, Allen & Co., subject to their right to make and sell under the contract; and his profit was wholly dependent on the number of machines made and sold by his licensees. And that profit would be reduced in proportion to the number of machines made and sold by others in violation of his right under his patent. Moreover, the right reserved by Hussey to send machines for sale within the territory named, would be of no value to him unless he was protected from unlawful infringement, as every machine made and sold within the district by an infringer would have a direct effect in depriving him of the profit he would otherwise derive from sales made within it. He must be viewed as a "party aggrieved," in the words of the statute, and has heretofore an undoubted right to proceed in equity, for the protection of his rights.

The next inquiry is, whether the court, constituted as it now is, can rightfully order the dissolution of the injunction, on the facts now presented. There is some controversy between the counsel as to what occurred on the application for the injunction before Judge McLean, and the ground of its allowance by him. The order made by him, and which is now before the court, must be viewed as conclusive of the facts which it recites. That order recites that the complainant, Hussey, "had shown a valid right in equity to be protected in the exclusive enjoyment and use of the improvements patented to him in his reissued patents, No. 449 and No. 917, and that the said patents are unlawfully infringed by their use without the complainant's license or authority in the reaping machines made by Whitely, Fassler & Kelly, and that the defendants have failed to show any good cause for impeaching or disputing the validity of said reissued patents." It is clear, from the language of this order, that Judge McLean had distinctly under review, and passed upon: 1st. The novelty of Hussey's invention as covered by his patents; 2d. The infringements of those patents by the defendants, and upon these grounds, after full argument, it was adjudged by him that it was a proper case for an injunction, and the order was accordingly made. Now, it is insisted that the order was made by mistake, and against the evidence, and that the injunction should therefore be dissolved. On the part of the complainant it is contended, that the questions presented on the present motion are precisely those which were before judge McLean when the injunction was ordered; and that its dissolution now, by the action of the district judge sitting alone in the circuit court, would be equivalent to a review and reversal of the judgment of the presiding judge. And most certainly, if the issue and facts involved in the present motion are substantially those submitted to and passed upon by Judge McLean in granting the injunction, it would be improper in this court, as now organized, to order its dissolution. This court will not ignore the true legal theory of the organization of the courts of the United States. By law, a district judge is associated with a justice of the supreme court, in holding a circuit court, and may hold that court alone, in the absence of the superior judge; but he would fail, in a just appreciation of the proprieties of his position, if he did not, under all circumstances, show a proper deference to the action of that superior. And clearly, it would be wrong in a district judge, as a judge of the circuit court, in any case, to review or set aside such action. At least, the reasons that would justify such a course must be peculiar and stringent. In my judgment, the reasons now urged are not sufficient to require this court to set aside the order of Judge McLean granting the injunction in this case. I am not informed whether the learned judge, who ordered this injunction, gave an opinion in writing in deciding the

questions before him. If the opinion was so given, it has not been presented to me; and I can not, therefore, know the course of reasoning by which the judge reached the conclusion he announced: but it appears, by reference to the order made by him, that he held the patents to Hussey—449 and 917—to be valid, and that the defendant had infringed them; and, therefore, that they ought to be restrained from the further manufacture of the infringing machines, until the case could be fully and finally heard on its merits. It is readily conceded, that if, in support of this motion, the defendants have substantially changed the aspect of the case by adducing evidence not presented to Judge McLean, and which it may be fairly presumed, if brought to his notice, would have led him to refuse the injunction, it would be the duty of this court to release them from its further operation. But if the questions involved are essentially the same in the two motions, and the ground of the motion to dissolve is based on the mere fact that the defendants have adduced additional evidence, altogether cumulative in its character, the motion will be refused.

In considering briefly whether the phase of this case is materially changed by the additional proofs offered by the defendants, it will not be necessary to analyze the patents to Hussey now in controversy, nor to notice critically the proofs touching the novelty of the inventions embraced in them. It is not my desire or purpose to prejudge any question which may arise on the final hearing of this case, and which must then be decided. I shall endeavor to limit my inquiries to such considerations as are necessarily connected with the motion to dissolve this injunction. And it may be remarked, in the first place, that the complainant, in his application for the injunction, claimed only that the patents No. 449 and No. 917 had been infringed by the defendants, and these alone are referred to in the order made by Judge McLean. The patent No. 449 is dated April 14, 1857, and is a reissue of a patent to Hussey dated August 7, 1847. The principal element of the invention covered by the original patent of 1847 was an improvement in the cutting apparatus of the reaper and mower, by the use of a slotted finger, the upper and lower parts of which were connected with each other only at the points, leaving an opening in the rear for the escape of material that would otherwise clog and impede the action of the cutter. The reissued patent 449 embraced this improvement in the finger, used in combination with a vibrating scolloped cutter; the structure and operation of which are fully and minutely described in the specification. The patent 917 is also a reissue, embracing substantially the open slotted finger of the preceding patents, with the scolloped cutter, but dispensing with the platform called for in the specification of those patents, and thereby adapting the machine to use as a mower. The novelty of the inventions covered by these two patents was the only question before Judge McLean on the application for injunction. All the evidence in the case had a primary reference to this point, as it was not controverted that the machines made and sold by the defendants embodied substantially the improvements patented to Hussey. And the machines, the prior knowledge and use of which, it was insisted by the defendants, impeached the novelty of Hussey's invention, were the same now relied on for the same purpose. These were the Moore & Hascall Harvester, and the reaper constructed by John M. Leland. The argument then, as now, was that these were identical in the cutting apparatus with the principle of Hussey's patent of 1847, and were known prior to his invention. Thus it will be seen that the questions made before and decided by Judge McLean were the same that are now before this court, on this motion to dissolve this injunction. The fact that the defendants have, since the hearing on the application for the injunction, filed their answer denying the novelty of Hussey's invention, and offering additional evidence on that point, does not negative the fact that the issues then and now are the same. Nor are the presumptions, which justified the order for the injunction, in any degree weakened by the present posture of the case. As to the additional evidence, it is not offered as proving any fact not in issue and controverted, on the original hearing, and is, therefore, altogether cumulative in its character, and affords no sufficient grounds for setting aside the order then made.

In the case of Woodworth v. Rogers [Case No. 18,018], Judge Woodbury, delivering the opinion of the court, says: "The main point (on a motion to dissolve an injunction) is, not whether an injunction should be imposed at all, for that has been already done, and after a full hearing, and till the contrary is shown, it is to be presumed it was done rightly." Several authorities cited. He then proceeds: "The burden is on the respondent to overcome that presumption. It is open to be overcome by new matter, or evidence arising since the injunction was imposed; though very seldom by matter then existing which the party then neglected to present to the consideration of the court." The learned judge, after referring to the presumptions arising in the case in favor of the validity of the patent, says: "Such facts, in these preliminary inquiries into the legal title, as connected with the propriety of imposing or dissolving an injunction, are proper and legal ones to influence the decision of the court, and are paramount in their character over all individual opinions of witnesses, and should usually be conclusive till parties contest these in some issues in a court of law, and disprove or rebut their

force;" and then adds: "Their great strength, when united as here, is entirely superior to any evidence offered against them by the respondent." And this view is the more conclusive as applicable to the present motion, from the fact that the complainant has also taken additional testimony since the hearing, which, to some extent, invalidates and rebuts that offered by the defendants. The presumptions in favor of the novelty of the inventions and improvements patented to Hussey, which may be supposed to have operated on the learned judge who granted this injunction, can not be overlooked or disregarded, in deciding the present motion. They are still in full force, and of sufficient potency at least to neutralize, on this preliminary question, all the evidence adduced by the defendants to show that the patent is invalid on the ground of want of novelty in the improvements for which it issued.

Without dwelling on the various grounds of these presumptions, it will be sufficient to state them very briefly. They arise: First. From the oath of the patentee, that he was the first and original inventor of the improvements covered by the patent of 1847 and the reissues. Second. That the commissioner of patents, after the fullest investigation of the claims of the patentee as to the novelty and originality of his inventions, granted the patents. Third. That Hussey, for more than ten years, was in the undisturbed enjoyment of all the benefits of the exclusive rights granted him by the patent of 1847; that during that time he has made extensive sales of his right to make and use his improved reaper throughout nearly all the grain growing states of the Union; thus evidencing the entire acquiescence of the public, not only in the originality of the invention, but also its great utility. Fourth. That as to the patent of 1847, there has been a direct adjudication establishing its validity in a suit in equity brought, in 1857, by Hussey against Cyrus H. McCormick and others in the circuit court of the United States for the Northern district of Illinois, in which the question of the novelty of Hussey's invention was in question, and strenuously contested by the defendants. Fifth. That injunctions have been granted upon the application of Hussey, by the judges of the circuit court of the United States for the Eastern district of Pennsylvania, restraining sundry persons from the infringement of his patents 449 and 917. The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of an invention covered by a patent, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence. In the case of Orr v. Littlefield [Case No. 10,590], the court say: "When the complainant has made out not merely a grant of the patent, but possession and use, and sale under it for some time undisturbed, and beside this, a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction till a full trial on the merits counteracts or annuls it. In several cases where the equities of the bill were even denied, and in others where strong doubts were raised whether the patent in the end could be sustained as valid, the courts decided that injunctions should issue under such circumstances as have been before stated in favor of the plaintiff, till an answer or final hearing; or, if before issued, should not be dissolved till the final trial, and then cease or be made perpetual, as the result might render just." See numerous authorities cited.

In the case of Ogle v. Ege [Case No. 10,462], the learned judge says: "I take the rule to be in cases of injunctions in patent cases, that when the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, if he has been in possession, having used or sold it in whole or in part, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right." See, also, Curtis on Patents (section 329). Many other authorities on this point might be cited; but those referred to seem to indicate very clearly the proper action of the court on the present motion. It might perhaps be conceded that if the defendants, in support of this motion, had, by their evidence, so clearly and conclusively impeached Hussey's patent, on the ground that he was not the first and original inventor of the improvement patented to him, as to leave no doubt on that point, it might be the duty of the court, against all the presumptions in his favor, to release the defendants from the operation of this injunction. But, in the judgment of the court, the evidence does not make out such a case. I can not now say what may be the conclusion of the court, on the point in controversy, after the final hearing between these parties, when all the proofs and evidence shall be adduced. As the case now stands, the defendants rely on their evidence of the prior knowledge and use of the Leland and the Moore & Hascall machines, to establish the want of novelty in Hussey's invention. As to the Leland machine, it is conceded by the counsel for the complainant that its cutting apparatus is substantially the same as that covered by Hussey's patent of 1847. The evidence shows that the first machine made by Leland was in the spring of 1845, and that it was first used in the harvest of that year. Several others were made the next year, with the open slotted fingers, but there is perhaps some uncertainty whether, in the first of these machines, the fingers were open or closed. It is not, however, material whether the open fingers were first

used in 1845 or 1846, if, as the complainant insists, the invention of Hussey dates back to 1844. And the evidence for the complainant does prove that Hussey had perfected a machine combining the scolloped cutter with an open slotted finger, in the summer of 1844. The witness, Lovegrove, swears that this apparatus was put into a machine for trial during that year, and that Hussey then informed the witness that he had devised the open slotted finger to prevent the cutter from choking. Without intimating any opinion on this question of the priority of invention, I merely refer to it now as showing that the defendants' evidence as to the Leland machine is by no means conclusive to prove that it was of an earlier date than Hussey's invention. From the evidence, it seems that Moore & Hascall's Harvester was first used in the harvest of 1836. It was first made with a straight sickle or cutter; but a scolloped cutter was introduced in 1839. It is insisted by the defendant's counsel that the fingers of this machine had the open slot, substantially as claimed by Hussey.

The defendants have introduced the affidavits of several witnesses to prove the structure and the mode of operation of the cutting apparatus of the Moore and Hascall machine, to show that it had substantially the open slotted finger claimed by Hussey in his patent of 1847. And a finger of one of the machines constructed by Moore & Hascall is in evidence to impeach the novelty of Hussey's invention. I do not propose to give any opinion at this time on the point, nor to examine critically the evidence which bears on it. If there is even a reasonable doubt as to the identity of the fingers of the Moore & Hascall machine, and those claimed by Hussey, it would furnish a sufficient reason for refusing to dissolve this injunction, and for referring the decision of the question to the final hearing. The Harvester, which was the name by which the Moore & Hascall machine was known in Michigan during the time it was in use, was a cumbrous machine, requiring some fourteen or sixteen horses to move it in the field, intended to cut off the heads of the grain, and thresh and clean it by one operation. The fingers of the cutting apparatus were constructed of wood, not less than two and a half feet in length, and framed into the cutter bar, and plates of thin hoop iron were attached to the upper part of the finger, and so arranged as to form a slot, open in the rear, in which the sickle vibrated. The experts, whose evidence has been taken as to the identity of these fingers with the short, iron, open slotted fingers claimed by Hussey, differ widely in their conclusions. It is not necessary now to decide as to the preponderance of this testimony. It is not improper, however, to advert to the fact that there is not only a palpable difference in the construction of the fingers of the two machines, but also in the mode of their operation. The Hussey machine, in its practical effects, is a reaper and a mower, and cuts the grain or grass near the surface of the earth, while, as already noticed, the Moore and Hascall machine was designed to cut off the heads of the grain.

In the deposition of Moore, one of the inventors of this machine, taken in the case of Seymour v. McCormick,[2] as appears from the record of the case, he states that the design of the machine was "to cut off the grain just below the heads:" and again, "it was not adapted to a mere reaping machine." And he testifies also, that "grain cut with my machine would not be in a state that it could be bound up." The very intelligent experts for the complainant swear, that, from the structure of the fingers in the Moore & Hascall machine, they are not adapted to perform the office of a reaper and a mower. And it is not unworthy of remark that, in the judgment of the commissioner of patents, the prior patent to Moore & Hascall was not regarded as in conflict with the invention of Hussey, patented to him in 1847. But, without going more fully into the consideration of this question of identity, it is clear the evidence does not so conclusively impeach the novelty of Hussey's invention as to require this court to release the defendants from the operation of this injunction, and I have no hesitation in holding that the defendants are not entitled to the order for which they now ask. It is stated by their counsel that they are suffering serious injury from the stoppage of their manufactory, under the operation of the injunction granted in this case. If this is so, it furnishes no reason for a departure from the well-settled rules of chancery practice in patent cases. Nor, under the circumstances of this case, will the injury of which they complain excite much sympathy in their behalf. It appears they have been making reapers and mowers, with the scolloped vibrating cutter, and the open slotted fingers, since the year 1858, and that they commenced the manufacture with the knowledge that they were infringing Hussey's patent. There is no pretense that they proceeded in ignorance of his patented invention. It appears, from the correspondence of two of the defendants, proved and in evidence, that they were apprehensive they would be held to an account for the infringement, and have been exceedingly vigilant in getting up evidence to impeach the novelty of Hussey's improvements. The correspondence shows that long before the commencement of this suit they had avowed a purpose of setting Hussey at defiance, and had used the most strenuous efforts to defeat his rights. Among other things, it appears that they had proposed to organize a combination of

[2] [See Case No. 8,726.]

all those interested in the manufacture of mowers and reapers in the United States who had not taken licenses from Hussey, for the purpose of contesting his claim. They seem to have entertained the hope that a combination of sufficient means and influence could be formed to secure a triumph before any court and jury. I forbear to speak in such terms as the facts might well justify of the spirit and motives which seem to have impelled these defendants in their course in this transaction. I advert to it now to show they were not taken by surprise in the institution of this suit, and in the order for the injunction which has issued. It was precisely what they had long before anticipated, and what they seemed determined to bring about. They have not, therefore, any very well-grounded cause of complaint if arrested for a time in their manufacturing operations. The court will see to it that there is no unreasonable delay in bringing the case to a final hearing. Motion to dissolve injunction overruled.

[For other cases involving this patent, see Hussey v. Bradley, Case No. 6,946; Hussey v. McCormick, Id. 6,948.]

Case No. 6,951.

In re HUSSMAN.

[2 N. B. R. 437 (Quarto, 140);[1] 2 Am. Law T. Rep. Bankr. 53; 1 Chi. Leg. News, 177.]

District Court, D. Kentucky. April, 1869.

BANKRUPTCY — FRAUDULENT SALE — DISCHARGE — JUDGMENT OF STATE COURT—EVIDENCE.

1. Where an alleged fraudulent sale had been made by a debtor, and action commenced in chancery by certain creditors to have the same declared void, the bankrupt filed his petition in bankruptcy, but failed to disclose that he had any interest in the property, and the assignee in bankruptcy was made a party to the proceedings in the state court, which adjudged the sale fraudulent and void, but held attachment to have been dissolved, because sued out within four months before bankruptcy proceedings, and that the attached property vested in the assignee in bankruptcy. The same creditors opposing discharge in bankruptcy. *Held*, a fraudulent sale of property by bankrupt, before the passage of the bankrupt act [of 1867 (14 Stat. 517)], is sufficient or itself to preclude his discharge.

[Cited in Re Rainsford, Case No. 11,537; Re Antisdel, Id. 490.]

[Cited in Stevenson v. McLaren, 23 Minn. 113.]

2. A judgment obtained in a state court is conclusive evidence in this court of the fact ascertained by it, and binding on the court until reversed in due course of law.

3. The concealment denounced by the twenty-ninth section of the said act, embraces a concealment of title to property as well as the hiding from view of the property itself. Discharge refused.

In bankruptcy.

BALLARD, District Judge. This case is now heard upon the specification of grounds of opposition filed by Daniel and Walker to the discharge of the bankrupt. There are nine separate grounds of opposition specified, but I do not consider it necessary to notice the second, third, fifth, seventh, eighth, or ninth, because some of them are sufficient, and the others are substantially embraced in grounds one and two. Those which I shall notice are as follows: First. The said Hussman did, on the 21st of February, 1867, make a fraudulent and pretended sale of his stock in trade, fixtures, goods, and apparatus situated in a bakery on Market street, in said city (Louisville), and valued at one thousand three hundred dollars, to one J. H. Landrath, in contemplation of bankruptcy, and with the intent to cheat, hinder, and delay his creditors. Fourth. The said Ernest Hussman wilfully and fraudulently omitted to disclose his ownership of the furniture, fixtures, goods, stock in trade, and apparatus owned by him at the time of filing his petition, and situated in his bakery * * * valued at one thousand three hundred dollars; that he wilfully and fraudulently omitted to include the same in the schedule of his effects, and has never surrendered the same for distribution among his creditors, but has fraudulently withheld and concealed the same, &c.

It will be perceived that the first ground specified is that the bankrupt made a fraudulent sale of his property prior to the passage of the act. The alleged sale was made February 21st, 1867, and the bankruptcy act was not passed until March 2d, 1867. I am of the opinion that this ground is not sufficient. The twenty-ninth section, among other things, provides that "no discharge shall be granted if * * * since the passage of this act (the bankrupt) has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or has removed, or caused to be removed, any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate," &c.; my opinion is that the words, "since the passage of this act," qualify all of the above alternative provisions. The grammatical arrangement of the sentence sustains this conclusion, and the reason and justice of the thing demand it. The withholding of a discharge from a bankrupt is in its nature a penalty for some improper conduct, and to refuse a discharge because of the improper conduct of the

[1] [Reprinted from 2 N. B. R. 437 (Quarto, 140), by permission.]

bankrupt, prior to the passage of the bankrupt act, would be to make the act retroactive. Courts never give a retroactive construction to statutes, unless their language imperatively requires it. The construction here adopted has been approved by the district court of New Jersey. In re Rosenfield [Case No. 12,058], and by the district court of the Southern district of Ohio.

The fourth ground of opposition specified does, I think, sufficiently charge that the bankrupt concealed a part of his effects. And if the charge is sustained by the evidence, the case is brought within the terms of the statute, which declares that "no discharge shall be granted * * * if the bankrupt * * * has concealed any part of his estate." It appears that some time after the alleged sale by the bankrupt to Landrath, on the 21st of February, 1867, the opposing creditors brought suit in the Louisville chancery court, in which suit they sought to have said sale declared fraudulent and void, and by attachment and other process to have the goods mentioned in the alleged bill of sale applied to the payment of their debt. A few days after the institution of this suit, the bankrupt filed his petition in bankruptcy, but he did not in his schedules disclose that he had any interest in said goods, nor has he ever disclosed to his assignee, or to any of his creditors, that he has any such interest. On the contrary, in his answer in said suit he denies all interest in said goods, and he persists in this denial still. After the appointment of the assignee of the bankrupt, he became a party to the proceedings in the state court, and they were allowed to progress to a final decree. By this decree the said sale was adjudged fraudulent and void, and the attachment was held to have been dissolved because sued out within four months next preceding the commencement of the bankruptcy proceedings, and the attached property to have vested in the assignee in bankruptcy. Upon the order of reference, made by this court, to the register, to take proof respecting the grounds of opposition specified, the only evidence offered by the opposing creditors, consisted in a copy of the aforesaid judgment of the state court, the bill of sale to which it refers, and the schedule annexed to the bankrupt's original petition. On the hearing before me it was agreed that the judgment of the state court relates to the contract of sale above mentioned, and the whole record of the case in the state court, including the evidence, was also, by agreement, produced and read.

It is insisted by the counsel of the bankrupt: First. That the judgment of the state court cannot be read in this court. Second. That the whole record shows that said judgment is erroneous. Third. That admitting the sale to have been fraudulent, still, as between the bankrupt and Landrath it was valid and passed the title to the property; that therefore the bankrupt, at the time he filed his petition, had no legal interest in the property, and cannot be charged with concealing it. Fourth. That the sale, if fraudulent at all, was only constructively, not positively, so, and that under no circumstances can it be maintained that a bankrupt conceals his effects who simply fails to disclose that some conveyance made prior to the passage of the bankrupt act was constructively fraudulent. Fifth. That said effects were not concealed, within the meaning of the bankrupt act; because their existence and locality were not only known to the creditors of the bankrupt at and prior to the filing of his petition, but the fact of the sale was also known—the creditors having, prior to the filing of the petition in bankruptcy, actually instituted suit alleging said sale to be fraudulent.

The state court had undoubtedly jurisdiction of the subject matter as well as of the parties. Its judgment is therefore binding on the parties, and between them and their privies it is conclusive evidence in this court of the fact ascertained by it. It so happens that the opposing creditors in this proceeding are the same creditors at whose instance the state court adjudged the sale to Landrath fraudulent. The same issue is presented in this case which was presented in that court, and the persons who are parties in this case were parties in that. I can therefore conceive of no reason which can preclude the judgment there from being conclusive here. Besides, the assignee of the bankrupt was a party to the suit in the state court, and, as the assignee is, in a certain sense, the representative of the creditors, I am inclined to the opinion that the judgment of the state court is conclusive, between not only the bankrupt and the present opposing creditors, but between him and any other creditor not a party to that suit.

In respect to the second proposition it is necessary to say only that this court has no authority to sit in judgment on the errors of the state court. That judgment, whether erroneous or not, is conclusive and binding on this court and on all courts, until reversed in due course of law.

The third and fifth propositions may be considered together.

The fourteenth section of the bankrupt act, among other things, provides that "all the property conveyed by the bankrupt in fraud of his creditors * * * in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee." The property sold by the bankrupt to Landrath on the 21st of February, 1867, though sold prior to the passage of the bankrupt act, being sold in fraud of the vendor's creditors, did, by the terms of the statute, vest in the assignee. It is wholly immaterial that the title, as between the vendor and the vendee, did, by the contract

of sale, vest in the vendee. As to creditors, the sale was then void, and the title, in theory of law, remained in the vendor for the benefit of creditors, and abode in him until his assignee in bankruptcy was appointed, when it passed to him. But if the title remained in the bankrupt, I think he concealed his estate and effects within the meaning of the statute, by concealing that title from both his creditors and assignee, though there was no physical concealment of the effects themselves. The concealment denounced by the twenty-ninth section of the act embraces a concealment of title to property as well as the hiding from view of property itself. What matters it to a debtor's creditors that his property may be seen by all men, if his right to it be concealed? Undoubtedly, concealment of property may be effected by the literal hiding of it, so that, though it is known to exist and to belong to the bankrupt, it cannot be found. This is doubtless the kind of concealment mentioned in the thirty-ninth section. But the most dangerous sort of concealment takes place when the debtor places the title of his property in some other person's hands to hold the same for his secret benefit, and conceals his beneficial right to it from his creditors. And I am satisfied that both kinds are equally forbidden by the statute, or, to speak more accurately, that either kind will preclude a discharge being granted to the petitioning bankrupt.

The bankruptcy statute was in one sense designed for the relief of insolvent debtors; but it was meant to relieve, and does, only such debtors as come with all their property of all kinds, and lay it at the feet of their creditors. It never was meant to give the smallest comfort or relief to a debtor who had at any time attempted, by sale, conveyance, or otherwise, to place his property beyond the reach of his creditors, and who persisted in the fraudulent purpose and effort to keep it from them. A fraudulent conveyance, I have already said, made by the debtor anterior to the passage of the bankruptcy statute, will not of itself preclude his discharge; but in such case he should not conceal nor attempt to conceal the fraud when he comes to ask the benefit of the statute. He should come into court with clean hands, or at least with a clean conscience, and disclose fully all property and rights to property which his creditors may appropriate to the satisfaction of their claims. Though the sale in this case was made prior to the passage of the statute, and is on this account to be held no offense against it, the concealment has taken place since as well as before, because it is a continuing act, commencing at the moment of the fraudulent sale and continuing until long after the bankrupt filed his petition in bankruptcy. And if the judgment of the state court did not operate legally to put an end to the concealment, it continues still by reason of the continued denial by the bankrupt of his interest in the property so fraudulently disposed of by him. But it is insisted that the sale made by the bankrupt was not fraudulent, in fact; that it was not made with any intent to cheat creditors; that it was at most only constructively fraudulent, or, at least, that it cannot be assumed, from the chancellor's decree, that he found any actual fraud. It is insisted that, on the assumption that the chancellor's decree is conclusive of the fraud, it was not shown whether it was actual or constructive fraud, and if the latter, the failure of the bankrupt to disclose the property is no concealment.

I will not say that a sale which a court, in obedience to an inflexible rule of law, might be constrained to pronounce fraudulent, could not, under some circumstances, be so free of moral turpitude as to absolve the vendor who should fail to disclose such sale from the charge of concealment; but it is difficult to conceive of such a case. It is difficult to conceive of fraud free of moral turpitude, and surely it cannot be assumed that it is free. It may be, too, that as every concealment implies something wilful, a bankrupt might be excused for failing to disclose a fraudulent conveyance when made many years past, and when he had long ceased to have any enjoyment of the property. But it is not necessary to say more of these conjectural cases, or to indicate a more decided opinion respecting them. It was to avoid the question suggested by them that the parties were allowed to present, and did present, the evidence or testimony read and produced in the state court. The case thus presented is, to my mind, free from all difficulty. The evidence shows the case to be this: The bankrupt, Hussman, was, on the 21st of February, 1867, a merchant conducting business on Market street in Louisville, between Brook and Floyd streets. On that day he sold his whole stock of goods to his father-in-law, Landrath, who was likewise a merchant, conducting business on the same block or square. The consideration expressed in the bill of sale is one thousand three hundred dollars cash. After the sale the vendor continued in possession, buying and selling goods as before, except that in some instances he caused the accounts to be made out in the name of Landrath as purchaser. The sign over the door continued the same, except that in addition to the name of Henry Hussman there was added in small letters, "Agt." Landrath remained at his store conducting business as before, though he was occasionally seen in the store of Hussman, and appeared to be there exercising some equivocal acts of ownership. So matters continued about nine months, and until the suing out of the attachment from the state court in November, 1867, hereinbefore mentioned. There is testimony to the effect that, at or about the time of the alleged sale, Landrath was seen to pay or give Hussman a considerable sum of money, but this testimony cannot relieve the transaction from the impu-

tation of fraud with which all the circumstances indelibly stamp it. Landrath had no motive to make the purchase, and it is absolutely incredible that he actually paid Hussman one thousand three hundred dollars, especially as it appears that he then claimed that Hussman owed him six hundred dollars, which debt the parties do not pretend was cancelled or satisfied by the sale. It is an easy matter for the parties to go through the form of paying and receiving money in the presence of witnesses. This is a common device of parties contriving a fraud, but endeavoring to fortify themselves with the evidence of good faith. So, too, the placing of the device "Agt" on the sign of the bankrupt is so generally the cover on fraud that, so far from freeing the transaction from suspicion, it serves only to awaken it.

No principle has been more conclusively settled in this state, by adjudged cases, or more invariably recognized and applied, than that which denounces a retention of the possession and use and ostensible ownership of movable property after an absolute voluntary sale of the title, as a fraud, conclusive and intraversable, as against creditors. Dale v. Arnold, 2 Bibb, 605; Hundley v. Webb, 3 J. J. Marsh. 643; Allen v. Johnson, 4 J. J. Marsh. 235; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545-574; Woodrow v. Davis, 2 B. Mon. 298; Waller v. Cralle, 8 B. Mon. 11. In the latter case the court says: "An actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale as to creditors and subsequent purchasers, whenever the vendor, at the time of the sale, is in the possession of the property. And this transmutation of possession, to be effectual, must not be merely nominal or momentary, but must be real, actual, and open, and such as may be publicly known." See, also, Jarvis v. Davis, 14 B. Mon. 424. [Robbins v. Oldham, 1 Duv. 29; Williams, Bankr. 350.][2] The rule in the courts of the United States has been almost equally explicit and absolute (Hamilton v. Russell, 1 Cranch [5 U. S.] 309; U. S. v. Hoe, 3 Cranch [7 U. S.] 73-89; Meeker v. Wilson [Case No. 9,392]; Phettiplace v. Sayles [Id. 11,083]; Brooks v. Marbury, 11 Wheat. [24 U. S.] 78-82; Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 388-449), though the extreme rigor of the rule is perhaps somewhat modified by the more recent case of Warren v. Norton, 20 How. [61 U. S.] 448.

I am well aware that in England, and in most of the states, the more liberal rule is adopted, and that it may now be regarded as generally settled that the retention or possession by the vendor of a chattel is only prima facie evidence of fraud. But whether the more absolute rule fixed by the unbroken current of decisions in this state, or the more liberal one generally adopted, be applied to this case, the result is the same. From Twyne's down to the very latest case, no sale, I imagine, has ever been upheld by any court where it had appeared that the vendor had remained in possession as Hussman did, performing all the offices of an absolute owner, and continuing so for many months, and in fact, until interrupted by his creditors, in every beneficial use and enjoyment which ordinarily appertain to the ownership of property.

There is still another circumstance entitled to some consideration. Both Landrath and Hussman are competent witnesses in this proceeding, but neither of them has testified or offered any explanation of the transaction. Certainly the most charitable must concede that the whole transaction is surrounded by circumstances of extreme suspicion. And I think it a sound rule, sustained by reason as well as by authority, that when it appears that a party to a suit has in his possession evidence which he can give to clear up any doubt or to resolve any difficulty, and he does not give it, the presumption is that the evidence, if given, would be in corroboration of that which has been already given against him. Clifton v. U. S., 4 How. [45 U. S.] 242. Counsel deem it important to inquire by what law the validity of the sale is to be determined. I hold the sale equally fraudulent, whether tested by the common law, by the statutes of Elizabeth, as interpreted in this state or other states, or by the general law of this state, where the sale was made, and the enquiry, therefore, becomes unnecessary. The discharge is refused.

[2] [From 2 Am. Law T. Rep. Bankr. 53.]

HUSTED, The NELLIE. See Case No. 10,098.

Case No. 6,952.

HUTCHINGS et al. v. MUZZY IRON WORKS.

[6 Chi. Leg. News, 27; 8 N. B. R. 458.[1]]

District Court, D. Maine. 1873.

BANKRUPTCY—MORTGAGE—RIGHTS OF MORTGAGEE.

A mortgagee can not, after proceedings in bankruptcy have been commenced, without the consent of the bankrupt court, take possession of the bankrupt estate held by his mortgage, or process under the state law, to foreclose his mortgage, where the assignee objects. He should apply to the bankrupt court, which under the act of congress [of 1867 (14 Stat. 517)] has exclusive jurisdiction over the mortgaged estate.

[Cited in Byrd v. Harrold, Case No. 2,269.]

[Cited in Weeks v. Prescott, 53 Vt. 69.]

The questions which arose in this case were certified to the judge by the register upon his certificate, under section 6, and upon the following agreed statement

[1] [8 N. B. R. 458, contains only a partial report.]

of facts: The bankrupts,[2] by their mortgage dated 24 February, 1871, and duly recorded, conveyed to the Muzzy Iron Works of Bangor, several parcels of land situate in Bradley, in said district. One of said parcels is a saw-mill, and said conveyance includes "all the mills, buildings situate on said premises, together with all machines, machinery and apparatus," to secure the payment of $4613.40, according to the tenor of said bankrupts' four several promissory notes, payable to said iron works, with annual interest. The first of said notes has been paid, but the other three and all interest thereon are unpaid; two of them being overdue, and held by said Muzzy Iron Works. On the 25th day of July, 1872, and after the filing of the petition in bankruptcy, and after they had been adjudged bankrupts, and before the appointment of assignees, said Muzzy Iron Works, by their treasurer, Franklin Muzzy, Esq., with a view to foreclose said mortgage in the manner provided by item 3, § 3, c. 90, Rev. St. Me., and to receive and appropriate the rents and income of said mill and mortgaged property towards the payment of said unpaid notes, and the discharge of said mortgage, entered peaceably and openly and took possession of all of said mortgaged premises, and held the same by an agent appointed by said iron works, until after the appointment of assignees; but the certificate required in said item of said section of the Revised Statutes has never been made or recorded in the registry of deeds. At the time of the filing of the petition in bankruptcy against said Blackman Bros., they owned the equity of redemption of said premises, and were in the possession and occupancy of the same as mortgagors, and remained in possession and occupancy of the same until the Muzzy Iron Works took possession as aforesaid. Said assignees [Jasper Hutchings and others] and creditors deemed it important, and for the interest of all parties, that said mill should at once be put to work, manufacturing the logs and lumber then at the mill. Accordingly the assignees went the next day after they were appointed and qualified to said Muzzy, and expressed to him doubts as to the right of the Muzzy Iron Works to possession of said mill, or to the rents and profits for the use of it; and it was then and there agreed between him and the assignees that the assignees should have the use of said mill—said use not to interfere with the possession of the same by the Muzzy Iron Works, such as it then was—and that this agreement and arrangement should not prejudice the rights of either party; and that the right of the Muzzy Iron Works to possession and rents and profits, if it should be, or deemed to be material to determine the same, should at some future time be determined by the proper tribunal. This arrangement has been carried into effect, and the assignees have had and now have the use of said mill. Said Muzzy Iron Works are second mortgagees, and took possession of said premises by consent of the first mortgagee, and it is very questionable whether all of said mortgaged property, including rents and profits, is sufficient to pay both mortgages and a large amount of taxes. Said parties respectfully ask the opinion of the court whether, 1st, said iron works had a right, as between said parties, the first mortgagee not interfering, to take possession as aforesaid, or being in possession so as aforesaid, to hold and retain possession of said premises against the assignees for the purpose of foreclosure, or to enable them to appropriate the rents and profits towards the payment of the mortgage debt; 2d, whether said Muzzy Iron Works, the first mortgagee not interfering, are entitled to the rents and profits of said mill and premises from the time of said agreement between said Muzzy Iron Works and assignees, and whether said assignees shall account to them accordingly.

Jasper Hutchings, for assignees.
A. G. Wakefield, for Muzzy Iron Works.

By HAMLIN, Register:

The argument of the solicitor for the Muzzy Iron Works is, that the legal freehold of the mortgaged premises is in the mortgagees, and unless restricted by the conditions in the mortgage, they might enter at once and hold the same even before condition broken, and with force, etc. Such are undoubtedly the relations of mortgagor and mortgagee at common law. It is sufficient to observe that the bankruptcy of the mortgagors changes the remedy of the mortgagees. Per Lowell, J., Foster v. Ames [Case No. 4,965]. And "proceedings in bankruptcy are based upon principles of equity." Per Fox, J., in Re Stowe [Id. 13,513]. The common law undertakes to decide only between the plaintiff and defendant, and after proceedings in bankruptcy are commenced, where various classes of creditors are interested in the estate, resort must be had to equity in order "to secure the rights of all parties and due distribution of the assets among all the creditors." An unbroken series of decisions concur in establishing the jurisdiction of the district court sitting in bankruptcy over the parties and the subject matter from the filing of the petition, and withholding all power from the mortgagees to take possession of any portion of the bankrupt estate without the consent of the bankrupt court. The solicitor cites Pennington v. Sale [Id. 10,939], and In re Noakes [Id. 10,281], in support of the principle that "assignees must surrender to owners property found in the possession of the bankrupt, but belonging to others." In the former, the court retained possession of the property in controversy, and in the latter, held "that if the assignees are satisfied

[2] [Blackman Brothers.]

that the property taken by them did not belong to the bankrupt, they should return it without delay to the owners;" thus recognizing the distinction between cases where, on the one hand, the property does not belong to the bankrupt, and therefore does not pass to the assignee, and where, on the other hand, the property belongs to the bankrupt, and being a part of his estate, by the assignment becomes vested in the assignee. The land mortgaged to the Muzzy Iron Works by Blackman Brothers is a part of the bankrupt estate, passed to the assignee by the assignment, and in the same sense of the term as employed by the court, supra, "belonged" to the bankrupt.

The intent of congress in preventing interference with the bankrupt's estate by precepts from other courts after proceedings in bankruptcy have been commenced, is primarily to enable the bankrupt court to have and retain the custody and possession of the bankrupt's property for the purposes of the bankrupt act. This intent is as much contravened by these mortgagees taking possession in the manner they did, as it would have been if they had taken possession under process of a state court after proceedings in bankruptcy were commenced. If such possession is valid, then no reason is perceived why persons having other kinds of liens, whether by statute, contract or otherwise, on real or personal estate, may not also take possession of the property upon which they have a lien after proceedings in bankruptcy are commenced, whenever by the laws of the state they can legally do so without resort to process from the state courts, and whenever by so doing they will benefit themselves—a claim wholly inconsistent with the prompt, speedy and advantageous settlement of the bankrupt estate by the assignee, contemplated by the bankrupt act, and in opposition to the settled practice of this court. The concession of such right to possession before the determination of the validity of the lien or mortgage, might prevent assignees from bringing that question into court, and thus work serious injury to other creditors, and practically deprive the bankrupt court of its jurisdiction in many cases. Says Hawley, J., in Re Snedaker, 3 N. B. R. (Quarto) 155, in a full and elaborate opinion: "For just and equitable purposes, and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management in reducing it to money in his chosen way without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent of the court, and at the same time the representative of the rights of all parties in interest, is supposed to be above all temptation to fraud, and directs him in such capacity, and under the pledge of his official bond as assignee and under the direction of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all priorities shown to exist in the proceedings of bankruptcy by proofs of claims against the bankrupt. So far from taking any right or rights from the secured creditor under the mortgage, lien or pledge by which he holds the same, it simply regulates the modes and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice." * * * No better illustration of the justice of these interpretations of the bankrupt act can be found than in the present case. In their report at the second general meeting, the assignees say that they are completing delivery of staves manufactured by them under a contract with the Cobb Lime Company, made by the bankrupts with that company before proceedings in bankruptcy, and from stave material which they found on hand at the mills, and expect, from this source, to derive sufficient funds to pay off a large amount of priority claims due the workmen, as well as other debts, for the benefit of creditors; that this is the principal source from which they are now realizing money for the estate. If these mortgagees were entitled to the possession of the mills without invoking the aid and consent of the bankrupt court thereto, the creditors might lose the benefits which they are now receiving from the stave contract. What obligation would rest on the Muzzy Iron Works, when once in possession, to complete the stave contract, or pay over the proceeds to the bankrupt court?

1. For these reasons, the register is of opinion that the first question arising upon the certificate should be answered in the negative.

2. Being of the opinion that the Muzzy Iron Works should apply to the bankrupt court on petition, in accordance with the usual practice, it seems that the court should not answer the second question in the present stage of proceedings.

FOX, District Judge. I concur in the above conclusions of the register.

A petition having been subsequently presented to the court, in accordance with the foregoing decision, by the Muzzy Iron Works, the following order was made thereon: "The assignee of the bankrupts having acknowledged notice of the within petition of the Muzzy Iron Works, and all parties having been duly heard thereon, it is ordered, adjudged and decreed by the court, that said petitioners are entitled to have and recover from said assignees, a reasonable compensation for the use of said premises mortgaged, from the 7th of August, 1872, so long as said assignees shall continue in the occupation thereof, the amount so to be paid, to be determined by Register Hamlin, to

whom the petition and this order is referred for that purpose."

For the judicial history of section 1 of the bankrupt act (commonly called the jurisdiction clause), the reader is referred to Ex parte Christy, 3 How. [44 U. S.] 308, opinion by Judge Story.

HUTCHINGS (UNITED STATES v.). See Case No. 15,429.

Case No. 6,953.

HUTCHINS v. TAYLOR.

[5 Law Rep. 289.]

Circuit Court, D. Rhode Island. Sept., 1842.

INVOLUNTARY BANKRUPTCY—ACT OF BANKRUPTCY—ASSIGNMENT.

1. An assignment, made by debtors, subsequent to the passage of the bankrupt act of 1841 [5 Stat. 440], and before it was to go into operation, of all their property, in trust, securing to certain creditors a preference and priority of payment over their general creditors, is of itself an act of bankruptcy, subjecting the debtors to be decreed bankrupts on the petition of creditors.

[Cited in Beekman v. Wilson, 9 Metc. (Mass.) 439.]

2. The clause in the bankrupt act relative to assignments, &c., made by a debtor after the first day of January, 1841, was designed to give a retrospective effect only as to voluntary bankruptcy.

[Cited in Day v. Bardwell, 97 Mass. 246.]

3. The meaning of the word "future," in the first clause of the second section of the bankrupt act, is future, with reference to the passage of the act.

[Cited in Ex parte Quackenboss, Case No. 11,489.]

[Cited in Swan v. Litchfield, 4 Cush. 576.]

4. The words "in contemplation of bankruptcy," in the second section of the bankrupt act, mean simply in contemplation of a state of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage in business.

[Cited in Morse v. Godfrey, Case No. 9,856; Everett v. Stone, Id. 4,577; Ashby v. Steere, Id. 576.]

This case came before the court upon an adjourned question in bankruptcy from the district court of Rhode Island, upon a petition by Theodore Hutchins to have George W. Taylor and Benjamin F. Taylor decreed bankrupts. The act of bankruptcy, alleged to have been committed, was "making a fraudulent conveyance, assignment, sale, and other transfer of their lands, tenements, goods, chattels, and evidences of debt." Upon the hearing, the district judge ordered that the following question be adjourned into the circuit court, namely; "whether the assignment of the said George W. Taylor & Co., (a copy of which is herewith presented) being an assignment in trust of all their property, made the eighteenth day of December, A. D. 1841, and securing to certain creditors of the said George W. Taylor & Co., a preference and priority of payment over their general creditors, be such an act of bankruptcy as will authorize the court agreeably to the said petition to declare them bankrupts." The assignment referred to above was as follows: "Know all men by these presents, that we, George W. Taylor, and Benjamin F. Taylor, both of the city and county of Providence, in the state of Rhode Island, copartners in company, under the name and firm of George W. Taylor & Co., for and in consideration of the trusts hereinafter declared, and of the sum of one dollar to us paid by Amasa Manton, of said city of Providence, the receipt of which said sum is hereby acknowledged, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto him, the said Amasa Manton, his heirs and assigns, all and singular the entire stock of goods and stock in trade held by us, whether situate in the store occupied by us, on Weybosset street, or elsewhere in said city of Providence, or wherever else said goods or any portion of them may be situate. Also all and singular the counting room and store furniture, scales, weights, measures and other articles used in said store, or in the prosecution of our business. Also all sums of money due and payable to us by note, book account, or otherwise, together with the books of account and all and every evidence of such indebtedness. And also pew number 84, in Grace church, in said city of Providence. To have and to hold the same with full power and authority to use our names or the names of said firm in the collection or adjustment of said debts, to him the said Amasa Manton, his heirs and assigns; but in trust, nevertheless, to sell and dispose of said personal property, to collect said sums of money, due and payable to us, using a reasonable discretion as to the times and modes of selling and disposing of said property as it respects making sales for cash or on credit at public auction, or private sale, and with the right to compound or compromise with any person or persons indebted to us for the said sum or sums of money due and payable from such person or persons to us, taking a part for the whole wherever the said trustee shall deem it expedient to do so, and then in trust to dispose of the proceeds of such sales and of such collections in manner following, to wit: First. To the payment of all the expenses attending the drawing and execution of this deed, the execution of the trusts herein contained, and a reasonable compensation to said trustee for his services. Second. To the payment of all notes, drafts, or checks, made and executed by us, which have been indorsed, guaranteed, or the payment thereof otherwise secured by the aforementioned Amasa Manton, or by the firm of Manton & Hallett, at our request, or for our accommodation; all notes, drafts, or checks, made and executed by any other person or persons which have been indorsed, guaranteed, or the payment thereof otherwise secured by the aforementioned Amasa Manton, or by the firm of Manton & Hallett at our request and for our accommodation." Sev-

eral other liabilities are then enumerated under this class, and then it is provided, that "after payment of all the debts and expenses hereinbefore mentioned, the balance of said proceeds, or so much thereof as may be necessary for that purpose, shall be appropriated to the proportional payment of all other debts due from us the said George W. Taylor & Co.: provided, that no payment shall be made to any creditor, other than those named in the preceding classes, who shall not agree to accept his proportional part in full discharge of his debt, and execute a release of all his claims upon us the said George W. Taylor & Co., within four months from the date of this deed; and the proportion or dividend of any creditor refusing or neglecting to execute such release, shall be paid to us the said George W. Taylor & Co. In testimony whereof, we have hereunto set our hands and seals at said Providence, this 18th day of December, 1841." Another deed of assignment of the same date from Benjamin F. Taylor to Amasa Manton, conveyed certain property in trust, (1.) To pay the expenses of the assignment. (2.) To the payment of all sums due from the assignor individually and not as a copartner with any other person. (3.) To apply the residue to the trusts specified in the other deed of trust.

Whipple & Rivers and Hazard & Jencks, for petitioner.

Richard W. Greene and James M. Clarke, for George W. Taylor & Co.

STORY, Circuit Justice. This case has, from accidental circumstances, remained for consideration a longer period than has been usual in bankruptcy. The arguments have been very elaborate, and have exhausted the subject. The case, however, after all, lies within a narrow compass; and mainly turns upon the true construction of the second section of the bankrupt act of 1841, c. 9 [5 Stat. 442]. That section declares, that "all future payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the other creditors, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act." The section further provides, that "in case it shall be made to appear to the court, in the course of proceedings in bankruptcy, that the bankrupt, his application being voluntary, has subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment, or otherwise, given, or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred." The seventeenth section of the act declares, that this act shall "take effect from and after the first day of February next." The act passed and was approved on the nineteenth day of August, 1841. Now, the question adjourned by the district court, is, whether the assignment of Taylor & Co., (stated in the case) being an assignment in trust of all their property, made on the eighteenth of December, 1841, (some months after the passage of the act, but before it was to go into operation,) securing to certain creditors of Taylor & Co., a preference and priority of payment over their general creditors, be an act of bankruptcy within the first section of the act, which declares, that whenever any person being a merchant, &c., shall among other things, "make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidences of debt, &c.," he may, upon petition of any one or more of his creditors, &c., be declared a bankrupt. Now, under the English bankrupt laws, it has been settled, for at least three quarters of a century, that an assignment of the nature stated, made by any person within the scope of the bankrupt laws, is a fraud upon those laws, and of itself an act of bankruptcy. The cases cited at the bar, are conclusive as authorities upon this point; and put it upon the ground, that it is against the whole policy and objects of those laws, and must supersede their operation. See Linton v. Bartlet, 3 Wils. 47; Butcher v. Easto, 1 Doug. 294; Eckhardt v. Wilson, 8 Term R. 140; Ex parte Bourne, 16 Ves. 145; Worseley v. De Mattos, 1 Burrows, 467, 477; Wilson v. Day, 2 Burrows, 827; Alderson v. Temple, 4 Burrows, 2239; Harman v. Fishar, Cowp. 117, 123; Rust v. Cooper, Id. 629, 633; Tappenden v. Burgess, 4 East, 230; Newton v. Chantler, 7 East, 138, 143. Our bankrupt act of 1841, c. 9, §§ 2, 4, demonstrates, that congress had an earnest intention to prevent all preferences and priorities in favor of particular creditors, and to secure the assets of all persons, falling within the purview of the act, for distribution equally among all their creditors pro rata. This is the main scope, and object and policy of the act. It would, therefore, be a matter of surprise, if the act had permitted preferences and priorities to particular creditors, going even to the extent of sweeping away all the property of the debtor, to the exclusion of his general creditors, in cases like the present case, without rebuke or prohibition.

The whole question, therefore, turns upon the language of the two first clauses of the act. The first declares all future payments, securities, conveyances, or transfers of property, made in contemplation of bankruptcy, and to give a preference or priority to par-

ticular creditors, void, and a fraud upon the act. The second, declares all other payments, securities, conveyances, or transfers of property, void, that is, all such payments, securities, conveyances, or transfers, made, &c., in contemplation of bankruptcy, but without any such intention of preference or priority to any creditor or purchaser, with notice, void, and a fraud upon the act. So that it is perfectly manifest, that when a person, within the purview of the act of 1841, makes any such payment, security, conveyance, or transfer of property, in contemplation of bankruptcy, it is a fraud upon the act, and void, if it is designed to give such a preference or priority; or if not so designed, if the creditor or purchaser has notice, that the debtor contemplates bankruptcy. In each case, however, the payment, security, conveyance, or transfer, must be after, and not before the passage of the act. For the other clause of the section relative to assignments, &c., made by a debtor after the first day of January last, that is, after the first day of January, 1841, uses expressions, which plainly show, that it was designed to give a retrospective effect only as to voluntary bankrupts, and not to involuntary bankrupts. And the rule here, is, "Exceptio probat regulum." Besides; the universal construction of statutes is, that they are prospective and not retrospective, unless the language absolutely requires such an interpretation. "Lex dat formam futuris non preteritis negotiis." What, then, is meant by "future" in the first clause of the second section of the act? Does it mean future to the passage of the act, or future to the first day of February, 1842, when the act was to take effect? My judgment is, that it means future with reference to the passage of the act. The argument against this construction appears to me not well founded in general principles of construction; and it is incompatible with the obvious objects and purposes of the act. Such a construction of the words of every act ought to be made, if consistent with its terms, as shall give full effect to its objects and policy, and not defeat them. "Ut res magis valeat, quam pereat." Now, there is no ground to say, that the word "future" may not in this connection apply reasonably and sensibly, and according to the ordinary proprieties of language, as well of legal interpretation, to the passage of the act. It is not a well founded argument to assert, that the act was no act until the first day of February, 1842. It was an act, and became a law by the very terms of the constitution of the United States, as soon as it was approved by the president, although its operation was suspended until the first day of February, 1842. It is the time of approval, which makes it a law; and if not a law at that time, it never can be one; for the president has no authority to approve what shall be a law only at a distant period. He may then be dead, or have a successor in office. He approves in presenti, and every act of congress, upon such approval, becomes a present law. That law may be carried into effect in presenti, or in future, as its own terms justify or require.

But if this were not the natural or necessary interpretation of the language of statutes generally, no one can doubt, that it is competent for congress to provide, that particular provisions shall be in force or efficiency from the passage of any act, if such is its pleasure, although the general operation of the act is suspended until a future time. The very clause of this section, respecting assignments made since the first day of January, 1841, (long before the passage of this act,) demonstrates this; and no one can deny, that it must, from the passage of the act, be deemed to have possessed and retained its full potency, and virtue, and designed operation. It is true, that if the bankrupt act of 1841 had never gone into operation, there could have been no such proceeding as that of the present petitioner against Taylor & Co., in invitum, to be declared bankrupts. But it is equally true, that having gone into operation, all its provisions are to be deemed to be equally in force, and to have due effect, according to the language and intent of the act. Now, to me, at least, it seems impracticable, consistently with the known objects and policy of the act, to give any other interpretation to the word "future," in the connection, in which it stands, than that it means "future" to the passage of the act, not "future" to the act's going into operation. If the latter had been the intent of congress, similar language would have been used to that used in the bankrupt act of the fifth of April, 1800, c. 19, § 1, addressed to the same subject, of fraudulent conveyances; where it is said, "that from and after the first day of June next, if any merchant," &c., "shall make, or cause to be made, any fraudulent conveyance," &c. See Wood v. Owings, 1 Cranch [5 U. S.] 239. So here, the language in the bankrupt act of 1841, could have been, not "future," generally, but, "from and after the first day of February next," or, "from and after this act shall take effect," all payments, securities, conveyances, or transfers, &c., made in contemplation of bankruptcy, &c., shall be deemed utterly void, and a fraud upon this act. What would be the effect of giving to the bankrupt act of 1841, the construction contended for by the respondents' counsel? It would be to enable every debtor, at any time, between the nineteenth of August, 1841, and the first of February, 1842, in contemplation of bankruptcy, to make all such payments, securities, conveyances, or transfers, which he might choose, giving preferences and priorities, which the very act would treat as a fraud, and thus enable him to strip himself of every dollar of his property, in favor of his preferred creditors, and leave all the rest of his creditors without any payment or dividend. Now, if the act imperatively required such

an interpretation, I agree, that the court would be bound to follow it. But if another interpretation, equally consistent with the words of the act, carrying into full effect all the objects and policy of the act is presented, and makes the whole system harmonize for the same uniform purpose, and avoids the very mischiefs, which have been stated, it seems to me, that it is the duty of the court to obey and follow it. So far from the case of Wood v. Owings, 1 Cranch [5 U. S.] 239, shaking this interpretation, it rather aids and strengthens it; for the court put the case expressly upon the ground, that the words of the act required, that the fraudulent conveyance should be made after the first of June, and not before. The words "in contemplation of bankruptcy," used in the second section of the bankrupt act of 1841, do not mean in contemplation of committing an act of bankruptcy, within the bankrupt act, or in contemplation of taking the benefit of that act; but simply in contemplation of a state of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage of business. It is the old meaning of the term bankrupt, when a man being insolvent, his bank or counter of business is broken up. See 2 Bl. Comm. 471, note. But I have had occasion in another case to examine this matter; and therefore do not here dwell upon it. No one can reasonably doubt that the assignment in the case at bar was in contemplation of bankruptcy in the sense above stated. See the next case of Arnold v. Maynard [Case No. 561]. It does not appear to me, that any thing in the first section of the act controls this interpretation. That section declares, who shall be the persons, who are within the provisions of the act, and the circumstances, under which they may proceed or be proceeded against under the act. I agree, that all its provisions, as to voluntary and involuntary bankrupts, are prospective; that is, the parties and the facts must exist, and fall within the predicaments pointed out after the passage of the act. But it by no means thence follows, that if the parties are in such predicaments at and after the passage of the act, and they afterwards do any of the things contemplated by the act, before the act take effect, or goes into operation, that, when it does go into operation, all the provisions of the act do not attach to and govern their own rights and the rights of the creditors. The act may well say, you must not in the intermediate time between the passage of the act and its going into operation, do such and such things, which are deemed a fraud upon this act; and if you do, you shall be liable, when the act goes into operation, to be thereafter and thereupon declared a bankrupt. That would at once be reasonable, and just, and appropriate. It would be a question not of time, but of case; not of whether you are liable to be declared a bankrupt; but when you may be declared so. In my judgment, this is the very intendment of the act, as to the case in judgment. I shall send a certificate to the district court accordingly.

The certificate was as follows:

Circuit Court of the United States, Rhode Island, September, 1842. In the Matter of Theodore Hutchins, Petitioner. v. George W. Taylor, and Another, in Bankruptcy. It is ordered by this court, that the following answer be sent to the district court upon the question adjourned by that court into this court, namely. It is the opinion of this court, that the assignment of the said George W. Taylor & Co., referred to in the question, being an assignment in trust, of all their property, made on the eighteenth day of December, A. D. 1841, and securing to certain creditors of the said George W. Taylor & Co., a preference and priority over their general creditors, is an act of bankruptcy within the true intent and meaning of the bankrupt act of 1841, chapter 9, and as such, will authorize the district court, agreeably to the prayer of the petition of the said Theodore Hutchins, to declare them bankrupts. Joseph Story, One of the Justices of the Supreme Court of the United States.

Case No. 6,954.

In re HUTCHINSON.

[2 Hughes, 245.] [1]

District Court, E. D. Virginia. April 17, 1877.

BANKRUPTCY—PARTNERSHIP IN LAND—JOINT BOND—INTEREST.

Where two obligors have made a joint bond bearing six per cent. interest and given a lien to secure it, prior in dignity to other incumbrances upon the property conveyed as security, and one of the obligors by indorsement in writing agrees after the bond becomes due to double the rate of interest, and pay it semi-annually instead of annually as inducement to forbearance in closing the deed, *held*, that this agreement did not invalidate the bond or the lien, nor affect the contract of the other obligor, but that all payments made upon the bond must, as to junior lienors and as to the other obligor, be credited at the rate only of six per cent. per annum, payable annually, and not at the rate of twelve per cent. per annum, payable semi-annually.

On the 10th day of October, 1867, W. F. Hutchinson and R. L. Hutchinson purchased of John B. Bell, a tract of land in Orange county, Virginia, containing 408 acres, and gave their bonds for the deferred payments of purchase-money to the amount in total of $4600, of which one of the bonds, for $866.66⅔, became due on the 1st day of January, 1870, and was not paid. The interest was to be paid annually. The trust was to secure the payment of the bonds and interest due upon them as they should fall due. Interest was paid on this bond up to January

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

1st, 1869. This bond had priority under this provision of the deed, over all others secured by the deed at the hearing of the cause. A few months after it fell due, the obligee, John B. Bell, assigned it to John R. Graves, by a written indorsement upon the bond, dated May 24th, 1870. On the same day that Graves received this assignment, W. F. Hutchinson, one of the obligors made an indorsement upon the bond in these words: "The within bond bearing six per cent. interest shall bear twelve, and the deed of trust may be executed if the said interest is not paid semi-annually. W. F. Hutchinson, Orange C. H., Va., May 24th, 1870." There were payments subsequently made upon the bond to the amount of about $500. The Hutchinsons went into bankruptcy in 1874. After proper proceedings the land covered by the trust deed was sold by the trustee and assignee under an order of this court in bankruptcy. The proceeds are now to be distributed. The holders of bonds secured by the deed prior in date of maturity and priority to the one mentioned, claim that the new contract between the holder, Graves, and one of the obligors, operated as a release of the lien of the deed of trust in favor of the holder of that bond; and, at all events, that the payment of interest should be collected at the rate of six per cent. interest, and not at the rate of twelve per cent.

W. R. Talliaferro and W. W. Burgess, for senior lienor.

James C. Neale, for junior lienors.

HUGHES, District Judge. This was a joint bond. The indorsement made by one of the Hutchinsons agreeing to pay twelve per cent., and to pay interest semi-annually, did not bind R. L. Hutchinson, and did not invalidate the bond as a lien upon the land. It did not at all affect the bond as to R. L. Hutchinson, or as to subsequent lienors. Therefore the bond must be paid off by the assignee as the first lien binding the property; and the payments which have been made must be credited at the rate of six per cent. per annum, payable annually, and not at the rate of twelve per cent., payable semi-annually. The agreement between W. F. Hutchinson and the holder of the bond is good to bind Hutchinson individually, but not to bind his brother, and not to affect the rights of junior lienors.

Case No. 6,955.

HUTCHINSON v. COOMBS.

[1 Ware (65), 58.] [1]

District Court, D. Maine. Feb., 1825.

SEAMEN—DISCHARGE—WAGES.

1. The master may discharge a seaman from the vessel before the termination of the voyage for a legal cause; but not for slight offences, nor for a single offence, unless of a very aggravated character.

[Cited in Nieto v. Clark, Case No. 10,262; The T. F. Oakes, 36 Fed. 445.]

2. If he has sufficient cause for discharging him, and the seaman repents, and offers amends and to return to duty, the master is bound to receive him.

3. The policy of the law discourages the discharge of seamen in foreign ports.

4. If a seaman is discharged without justifiable cause, and without his own consent, the measure of damages is the full amount of wages till the return of the vessel, and the expenses of his return.

[Cited in Worth v. The Lioness, No. 2, 3 Fed. 925; The Paul Revere, 10 Fed. 158.]

[Cited in Croucher v. Oakman, 3 Allen, 188.]

5. The intermediate earnings of the seaman may be deducted from the expenses of his return, but not from the wages due.

[Cited in Coffin v. Weld, Case No. 2,953; McCarty v. The City of New Bedford, 4 Fed. 827.]

6. The certificate of a consul that the seaman was discharged with his approbation, will not preclude the court from inquiring into the cause of the discharge, and awarding damages, if the discharge was unjustifiable.

[Cited in Jay v. Almy, Case No. 7,236; Campbell v. The Uncle Sam, Id. 2,372.]

7. If the master detains the clothing of the seaman, the value of it may be recovered in the same libel.

This was an action for a marine tort, brought by a seaman against the master for a wrongful discharge, before the termination of the voyage.

C. S. Daveis, for libellant.

Mr. Anderson, for respondent.

WARE, District Judge. This is a libel brought by Hutchinson, a mariner, to recover damages for a tortious discharge from the vessel, in a foreign port, before the completion of the voyage for which he shipped. The facts are, that he shipped as a seaman on board the bark Lloyd, of which the respondent was master, for a voyage from Portland to one or more ports in the West Indies, and back to her port of discharge in the United States, at fourteen dollars a month wages. The bark went to Havana, and remained there until she had completed the taking in of her cargo, before the occurrence of the event which led to the separation of the libellant from the vessel, and no suggestion has been made of any difficulty existing between Hutchinson and any of the officers, or of any complaint on the part of the officers against him, until this time. On the 7th of July, in the evening of the day before she sailed, Hutchinson was ordered by the mate to go down on the outside of the vessel and break up a raft, which had been used in the work about the vessel, and pass it on deck. The raft lay by the side of the bark, and was made fast to it by ropes. When he went down, the ropes were loosened and taken in, and it remained without any thing to confine it,

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

or prevent its drifting off with the tide. There was a gentle motion of the water, described by some of the witnesses as a soak, by others as a current, carrying the raft astern. When the ropes by which the raft was made fast were taken in, Hutchinson asked for the boat to be let down, to stand in, while he broke up and passed the raft on deck. The mate refused to permit this to be done. He then asked for a rope, to hold by and prevent the drifting of the raft, while he was breaking it up. This also was refused. The request for a boat or a rope was a number of times repeated, and as often refused, while Hutchinson was holding by the side of the vessel, to prevent the drifting of the raft. Once or twice he attempted to get on deck, but was prevented by the mate. He remained on the raft in this way, an hour, holding by the side of the vessel, and unable, as he said, to break up the raft without either a boat or a rope. He at last declared he could hold on no longer, and when he let go his hold the raft was carried off by the tide towards the Madeira packet, which was lying at anchor a short distance from the Lloyd. He got on board the packet, and remained there over night, and the next morning a Capt. Preston took him in a boat to put him again on board the Lloyd. On their way, they met Capt. Coombs in another boat. Preston spoke to him, and told him that he had a man whom he wished to put on board his vessel; Coombs replied that he might carry him back again, that he did not want him, that he would not take him in his boat, nor have him on board his vessel. Hutchinson then informed Capt. Coombs that he had secured his raft by the side of the Madeira packet, and returned with him to that vessel. This was in the morning. Capt. Preston also testifies that in the course of the day Hutchinson went on shore, as he stated, to find Capt. Coombs, and to get on board the Lloyd. He, however, either failed to find the captain, or failed in getting himself restored to the vessel. During the whole time that Hutchinson was on the raft by the side of the bark, Captain Coombs was on board, knew what was passing, and sanctioned the conduct of his mate. When Hutchinson left the bark, all his clothing, together with a quadrant belonging to him, remained on board and are still detained by the captain. He claims damage for the detention of these, as well as for his wrongful discharge.

These facts must be taken, I think, as fully making out the allegation in the libel of a discharge from the vessel without the mariner's consent. The question would then arise whether the circumstances of the case justified the master in dissolving the contract without the consent of the other party. But the master has pleaded a former judgment, and it is contended that this court is precluded from an inquiry into the merits, the same subject-matter having been formerly in controversy and adjudicated upon in another suit before a court of competent jurisdiction. From the copy of the record which is produced, it appears that Hutchinson was sued by Coombs and another, in an action of assumpsit, for the value of the raft, which it is alleged that he had taken and converted to his own use, on an implied promise to account for its value, stated at $12.50. There is also a charge of $4, for money paid a man in his absence, and $15 for detention of the vessel, occasioned by his desertion. Hutchinson defended, and filed an account in offset, charging the plaintiff for the whole amount of wages, which would have been due had he remained with the vessel till the completion of her voyage, amounting to $35, and giving him credit for $19.67, received of them, and $5.86, received as wages in the Madeira packet, during the time, leaving a balance of $9.47, due on the account. A copy of the account comes up among the papers, but no notice is taken of it in the record. Judgment was given by the justice, for the plaintiff, for the sum of $16.50, the exact amount of the two first charges in the account annexed to the plaintiff's writ.

It is contended by the counsel for the libellant that he is not precluded by this record from recovering damages in this libel, for his tortious discharge, if he has a just claim, because the claim is of such a nature as could not legally be allowed as an offset, and therefore the justice could not take it into consideration in making up his judgment, and because it does not appear from the record that it was adjudicated upon. If the account was legally before the justice, and was decided upon, the party, if aggrieved, should have sought his remedy by appeal. The merits of that judgment could not be reviewed in this way. But if the claim is one which by law cannot be admitted as an offset, but one the merits of which could be legally examined only in an original action on the demand, then it seems to me that the legal presumption will be that the justice gave the right judgment, and did not take the offset into consideration. If this be so, this court is not precluded from an examination of the merits of the claim.

The right of pleading or filing offsets is given and limited by statute. At common law, if the plaintiff was indebted to the defendant in as large or larger sum than the defendant owed him, there was no method of striking a balance, but the defendant was driven to his separate action, or obliged to resort to a court of equity. Tidd, Prac. 601. By the law of Maine, the defendant is allowed, when sued in certain actions, "to file any account which he hath" against the plaintiff, "and upon the general issue give the same in evidence against the plaintiff's demand." Laws Me. c. 59, § 19.

If his account exceeds that of the plaintiff, he shall have judgment for the balance. From the manner in which the word "account" is used in the statute, one would naturally infer that it was the intention of the legislature to restrict offsets to such claims as could properly be made the subject of a book charge, and this construction of the statute receives confirmation from the fact that a subsequent act was made to authorize the filing in offset of promissory notes. Id. c. 228. However this may be, the statute has never been construed so as to include a claim for unliquidated or uncertain damages. The English statute allowing of set-off, provides for setting off "mutual debts," adopting a word in common understanding of larger import than that used by the statute of Maine. Yet it has always been holden by the English courts that a claim for unliquidated damages cannot be the subject of a set-off. Howlet v. Strickland, Cowp. 56; Weigall v. Waters, 6 Term R. 488. The same point was decided in the supreme court of the United States, in the case of Winchester v. Hackley, 2 Cranch [6 U. S.] 342.

If this principle be correct, it becomes important to inquire what was the nature of the claim offered in this case as an offset. This I take to be conclusively settled by the case of Emerson v. Howland [Case No. 4,441]. The learned judge, in that case, after an ample discussion of the question upon principle and authority, decided that when a seaman is tortiously discharged before the completion of the voyage, he is entitled to a compensation for the injury according to the circumstances of his own particular case; that the amount of his damages is neither to be measured by the amount of wages which would be due, computed to the successful termination of the voyage, nor computed to the time of his own return to his country, but should be an indemnity for the actual injury he sustained by the breach of the contract. The claim, then, of Hutchinson, is most manifestly a claim for unliquidated damages, as uncertain as they can possibly be in any case, and therefore not the proper subject of an offset. As the court could not legally pronounce a judgment on the account, and as the record furnishes no evidence that it did, the legal and proper presumption is, that it gave the proper judgment, and did not consider the offset in the damages awarded.

This court is not then precluded by the record from an investigation of the merits of the case. Looking at the evidence, it cannot, as it appears to me, admit a doubt that this was a tortious discharge. The only fault or neglect charged on the mariner was his refusal to break up the raft under the circumstances before stated. As the case appears to me, there was quite as much fault in the officers as the man. He was required to break up the raft in the night time, the rope by which it was made fast to the vessel taken in, and a moderate current, according to all the witnesses, constantly carrying the raft from the vessel. It is evident that while he was passing up the boards, the raft would be constantly receding from the vessel, and would in a short time be at such a distance that it would not only be impracticable to pass the boards and plank on deck, but also impossible for him to regain the vessel. He did not refuse to do the work which was required of him; he merely asked for the boat to be let down, or a rope to be thrown to him, to enable him to do it. The refusal even of a rope, which might have been given without the least possible inconvenience, seems to have proceeded more from caprice than from any conceivable objection that could be made to so reasonable a request. The next day, Hutchinson offered to return, but the master refused to receive him. The only justification now offered for this refusal is his alleged misconduct the evening before. I have given my opinion of that transaction. But admitting all that is now pretended by the master, I am clear that it would not amount to a justification of his discharge.

That a master has, by the marine law, a right in certain cases to turn a mariner out of the vessel, is admitted. But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character. The cases stated in which a master is permitted to discharge a seaman are, when he is incorrigibly disobedient, and will not submit to do his duty (Thorne v. White [Case No. 13,989]); or if he is mutinous and rebellious, and persists in such conduct (Relf v. The Maria [Id. 11,692]); or guilty of gross dishonesty, as embezzlement or theft (Black v. The Louisiana [Id. 1,461]); or if he is an habitual drunkard, and a stirrer up of quarrels and broils, to the destruction of the discipline of the crew; or by his own fault renders himself incapable of performing his duty. The old sea laws mention some other cases which justify the master in discharging a mariner. But they enjoin temperance and forbearance on the part of the master, and require him to deny the man his mess three times, and permit him to remain in the vessel in the mean while, that is, for a day and a half, to allow him time to reflect and submit, before he proceeds to this extremity. If he repents and offers amends in that time, the master is bound to accept the satisfaction, and receive the man again into favor; if he refuses, the seaman will be entitled to his wages, and the master responsible to his owners for any loss or damage that may arise from this cause. These laws even go further, and say that a seaman shall not leave the vessel on the single order of the master, nor until he

has been three times denied his mess. Laws Oleron, arts. 6–13; Cleirac, 51, 52; Consulat. de la Mer. c. 267.

But without recurring to ancient marine ordinances, the principles of which have been generally adopted by all commercial nations, and which are referred to as constituting a sort of common law of the sea, the master must find insuperable difficulties in reconciling the discharge of a seaman in a foreign country, under these circumstances, with the spirit, or even letter of our own law. Every maritime nation has a deep interest in the protection and preservation of its seamen, as a class of men of indispensable necessity, for the purposes both of peace and war. Their preservation, therefore, for the service of the country, becomes an object of public policy. The policy of the United States, in this respect, is very distinctly marked. As early as the year 1792, an act was passed, making it the duty of our consuls to provide for the support, at the public expense, of mariners employed in vessels belonging to citizens of the United States, who were suffering from shipwreck, sickness, or captivity, and also to provide the means of their returning to this country. 2 [Bior. & D.] Laws, p. 276, c. 125 [1 Stat. 256, c. 24]. The provisions of this act were superseded by the act of Feb. 28, 1803 [2 Stat. 203], which makes more ample provision for the same objects. By this act it is made the duty of the consuls to provide for such mariners of the United States as are found destitute within their districts, sufficient sustenance, and a passage to the United States at the public expense; and masters of vessels are required to receive them, and allow them a passage home, for a sum fixed by the law. By the same law it is provided, that whenever a vessel is sold in a foreign port, and the crew discharged, or a mariner is discharged with his own consent, the master shall, for every mariner so discharged, pay to the consul three months' wages beyond what is due for the time the men have served; two thirds of which are to be given to the seaman, to enable him to return to his country, and one third to be paid into the treasury, to constitute a fund for the payment of the passages of seamen who may be desirous of returning to the United States, and for the maintenance of destitute seamen in foreign ports. These enactments sufficiently show the solicitude of the government for the preservation of our seamen. But there is another section of the law more peculiarly applicable to the present case. This requires the master of a vessel bound on a foreign voyage, before he clears out his vessel, to deliver to the collector a list of his crew, certified by his oath, and the collector is required to give him a certified copy of this list. The master is also required to give a bond in the penal sum of $400, that he will produce to the first boarding officer, on his return to the United States, this copy with all the persons whose names are upon it, and report them to the collector. If he arrives at a different port from that from which he sailed, the collector shall transmit the copy to the collector of the port out of which he sailed. He is excused from producing any of the persons whose names are on the list, only by proof that they are dead, have absconded, or been impressed into other service, or that they have been discharged in a foreign port with the consent of the consul, which must be proved by his official certificate, under seal. The master appears not to have been ignorant of this law; for there is attached to the shipping articles which are produced in evidence, a certificate of our commercial agent at Havana, stating that Capt. Coombs has produced evidence, satisfactory to him, of the desertion of one of his crew, and that he had, with his consent, discharged another. I do not mean to say that this law will render a master liable in all cases to the seamen, in an action for damages, for a discharge without complying with its terms, however it might be in a suit for the penalty. The seaman, to entitle himself to damages, must make out his own case on its own merits; and his conduct may be such as to justify the master in a suit for the private injury, when it would not be a defence in a suit for the penalty. But the provisions of the act most strongly mark the parental solicitude of the government for the preservation and protection of the seamen of the country; and I think myself fully warranted in inferring from them, as the sense of the legislature, that a master ought not to discharge a seaman hastily, or for light or trivial causes. Finding the policy of our own laws in perfect accordance with the spirit and principles of the marine law on this subject, I cannot hesitate to pronounce the discharge of Hutchinson, in this case, illegal, and without a justifiable excuse.

The next question is, as to the rule of damages; and this, as I have before observed, is settled by the case of Emerson v. Howland [Case No. 4,441]. They are to be measured by injury. The principle stated in Abb. Shipp. 485, is to allow full wages to the end of the voyage, deducting such sum as the mariner may in the mean time have earned in another vessel. It is remarked by the learned judge, in the case before cited, that this deduction is not supported by any authority referred to in the text; and he adds, "If it be not supported by some authoritative decisions, it will deserve consideration, whether it be not more consonant to sound policy and justice to disregard it, especially as the laws of the United States manifestly intend to discourage all discharges of our seamen in foreign countries." The actual injury in such case to the seaman, is the loss of his full wages to the prosperous termination of the voyage, added to the expense of his return. Estimating the damages in this way, if there be

no precedent for deducting the intermediate earnings of the seamen from the amount of wages, after the intimation of the court just recited, I do not feel authorized to make one of the present case. It appears more in harmony with the policy of our law, as well as the principles of justice, to make the deduction, not from the amount of wages, but from the expenses of return; and this is the rule of the French law, 1 Valin, Comm. 706. I am the more willing to adopt the principle in this case, as the discharge appears to me to have been not only wholly without justification, but to be attended with some circumstances of unnecessary hardship. Hutchinson was not permitted to take from the vessel his necessary clothing. It was detained under the pretext of a forfeiture by desertion, without a shadow of reason; or as an indemnity for the loss of the raft, though the master was informed where the raft was to be found; and he was obliged to seek his passage home with no other clothing than what he had about his person at the time of leaving the vessel.

The libellant also claims damage for the tortious taking and detention of his clothing and a quadrant by the master. These articles were immediately taken by the captain into his possession, and are still detained. If Hutchinson had deserted, they might have been detained as a forfeiture, or if he had committed any offence which justified his expulsion from the vessel, the same right might perhaps have resulted to the master. But both these grounds of justification fail. I can see no legal right which the master had to withhold them; and his preventing Hutchinson from coming on board the vessel and taking them, and his immediately taking them into his own possession, may reasonably be considered as completing the tort on the water and within the jurisdiction of the court, and if the jurisdiction attaches, there can be no doubt that damage ought to be awarded.

Decree, $52 and costs.

NOTE. Since the decision of this case, by the act of March 3, 1825 [4 Stat. 115], congress have legislated further on this subject. By the 10th section of this act the master is made liable to a fine of $500, or to six months' imprisonment, who, in any foreign port or place, without justifiable cause, forces any officer or mariner on shore, or leaves them behind, or refuses to bring any home who are willing and in a condition to return.

Case No. 6,956.

HUTCHINSON v. DECATUR.

[3 Cranch, C. C. 291.] [1]

Circuit Court, District of Columbia. May Term, 1828.

VERDICT—NEW TRIAL.

If the jury take out the plaintiff's account, without the consent of the defendant, the court will grant a new trial.

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

The jury having taken out an account of the plaintiff without the defendant's consent, came in and declared their verdict.

Mr. Redin, for plaintiff, before the verdict was entered and affirmed, discovered the error, and requested that the paper should be withdrawn, and the jury sent out again with an instruction that the paper was not evidence; which THE COURT (nem. con.) granted.

The jury then retired and returned a verdict for a smaller sum.

R. S. Coxe, for defendant, moved for a new trial, and cited Irvine v. Cook, 15 Johns. 239, and Penfield v. Carpenter, 13 Johns. 350.

New trial granted.

HUTCHINSON (HOLMES v.). See Case No. 6,639.

HUTCHINSON (KINTZING v.). See Case No. 7,834.

Case No. 6,957.

HUTCHINSON v. MEYER.

[3 App. Com'r Pat. 436.]

Circuit Court, District of Columbia. Jan 21, 1861.

PATENTS—EQUIVALENTS—"IMPROVED PATTERN ROLLERS."

[1. The use of separate patterns, to be passed between plain rollers for causing adhesion between India rubber and cloth in certain portions of the cloth, is not an equivalent for embossed rollers used for the same purpose.]

[2. Whether two things are or are not equivalents is matter of skill and sound judgment, for the determination of the patent office, which can in no way be limited or restrained by the admissions or denials of parties.]

[Appeal by Christopher Meyer from the decision of the commissioner of patents, awarding priority of invention to Hiram Hutchinson for improved pattern rollers, in the application of India rubber to cloths by means of embossed rollers.]

MERRICK, Circuit Judge. The claims of both parties in this appeal, which, relying upon the use of embossed pattern rollers as the special patentable device, for causing adhesion between India rubber and cloth at those parts of the cloth which it may be desirable to coat with India rubber, have also declared, as the sense of the applicants, that the use of separate patterns, to be passed between plain rollers, is the equivalent of their respective inventions. Upon an interference declared, the office was of opinion that the separate pattern was not the equivalent of the embossed roller, and, being further of opinion that Hutchinson was the prior inventor of the same embossed roller, awarded a patent to him for that invention. From that decision an appeal has been taken, and sundry reasons of appeal have been assigned. Unfortunately for the appel-

lant, his counsel, who prepared the reasons of appeal, not adverting to the express and imperative provision of the law which debars the judge upon appeal from investigating any other questions, however obvious they may be, than those specifically presented by the reasons of appeal, has presented none among the reasons he has filed in this case which raise the question of priority between the parties in the use of embossed rollers. That was the most material question in the cause, and having myself called the attention of the counsel who argued the cause (he was not the same who prepared the reasons of appeal) to this difficulty, he has, with very becoming candor, admitted in his supplemental argument that the point is not presented for my consideration by any just construction of the reasons filed. This being conceded, I am obliged to pass by the consideration of all those parts of the testimony in the case bearing upon the question of priority of invention of that device.

Of the specific reasons assigned, the first seems designed to assert that the office is estopped from determining the true limits of patentable invention by the admission or statements of the contestants in their specifications that some other device is the patentable equivalent of the one claimed. The rules and principles which govern the law of estoppel have no relation to such a state of case. Whether two things are or are not equivalents is matter of skill and sound judgment, for the determination of the office, which can in no way be limited or restrained by the admissions or denial of parties. The fourth reason of appeal is very similar to the first, alleging error to be in the award of priority to Hutchinson for an invention described by him in Dec., 1858, notwithstanding Meyer, in Oct., 1857, described and experimented with what Hutchinson himself claims as an equivalent. Unless it were really the equivalent of Hutchinson's invention, the fact that Hutchinson so described it cannot avail, and the priority of discovery of a non-equivalent is no bar to his patent. It seems to me very clear that the separate patterns are not the equivalents of the embossed roller, the latter having advantages in economy and rapidity of application which give to it a superiority over the former, which superiority will support a patent, notwithstanding the fact that the article of which it is the supposed equivalent was first discovered, and may itself possess merit enough to uphold a patent.

In looking through the decision of the office, I do not find any such proposition decided as is covered by the second reason of appeal. The commissioner was of opinion that there was a radical difference between the invention of the separate patterns and the embossed roller and awarded priority of invention as to the latter to Hutchinson upon the evidence as he construed it, but decided no such erroneous principle of law, as is embodied in the reason in question. Nor do I think that the office has given any conclusive weight, as alleged in the third reason of appeal, "to the testimony of" one witness for the appellant to the exclusion of others who testify to the economic utility of separate patterns. In passing, the commissioner alludes to the testimony of one witness as to the efficiency of the system of working with separate patterns, but this allusion is manifestly in connection with the question of equivalency of the two inventions, and in that aspect I do not see any error in his judgment upon the reason assigned. Nor does the commissioner any where decide the point that separate patterns are not of themselves patentable. He intimates, indeed, an opinion on the point, but does not decide that question; and if it were decided, there is nothing in the reasons of appeal to present that matter for my review. He appears really to have considered only the two points of equivalency of the separate patterns to the embossed rollers and the priority of invention of the embossed rollers.

I regret extremely that the reasons of appeal as framed do not present the merits of the case fully for my consideration. Whatever judgment I might have formed upon the case and the testimony if presented to me in a different form, I must, upon the case as made, affirm the decision of the office.

Case No. 6,958.

HUTCHINSON et al. v. PEYTON et al.

[2 Cranch, C. C. 365.] [1]

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

EVIDENCE—PAROL—PARTNERSHIP — PROOF OF INSURANCE.

1. If an agreement in writing be made by one of the partners of a mercantile firm, it is competent for the plaintiffs, in an action in the name of the members of the firm, to prove, by parol, that it was made by that partner as the agent, and for the use and benefit of the firm.

2. The fact that insurance was made, cannot be proved without producing the policy, or showing it to be lost.

An agreement in writing, respecting the advance of bills on London to the amount of £4,000 sterling, and the consignment of a cargo of flour to John Traverse, one of the plaintiffs, in Lisbon, was made between the defendants and the said Traverse. In an action by the firm [Hutchinson, Traverse & Co.], their counsel offered parol evidence to prove that the agreement, although in the name of Traverse alone, was made by him as the agent and for the use and benefit of the firm.

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

Mr. Swann and Mr. Hewitt, for defendants, objected that it was not competent evidence, because it contradicts the written papers in which the name of the firm is not mentioned.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection and admitted the evidence.

The plaintiffs, to support a charge for the premium of insurance, gave in evidence the defendants' orders to Traverse to cause insurance to be made, and the deposition of a witness stating positively that insurance was made by Baring & Co. in London; and the acknowledgment of Peyton, one of the defendants, that the premium was reasonable.

But THE COURT (THRUSTON, Circuit Judge, absent, and CRANCH, Chief Judge, doubting) said that it was necessary to produce the policy, or to show it to be lost.

The plaintiffs became nonsuit with leave to move to reinstate the cause, on the ground of misdirection to the jury by the court. But it was not moved again.

HUTCHINSON (UNITED STATES v.). See Case No. 15,431.

HUTCHINSON (WHIPPLE v.). See Case No. 17,517.

HUTCHINSON (UNITED STATES v.). See Case No. 15,432.

Case No. 6,959.

HUTSON v. JORDAN et al.

[1 Ware (385) 393; [1] 18 Am. Jur. 294.]

District Court, D. Maine. June Term, 1837.

ADMIRALTY—PRACTICE—FORM OF LIBEL—ANSWER.

1. In the admiralty, the libellant is required to verify the debt or cause of action on which a libel is founded, by his oath.

2. In like manner the respondent is required to verify his answer by oath.

3. There is no rule in the admiralty like that in equity, which precludes the court from making a decree, against a denial by the answer of any matter alleged in the libel, unless it is disproved by two witnesses.

[Cited in Jay v. Almy, Case No. 7,236; The Moslem, Id. 9,876.]

4. How far the answer in the admiralty is considered evidence.

[Cited in Cushman v. Ryan, Case No. 3,515; Havermeyer's & Elder Sugar Refining Co. v. Campania Transatlantica Espanola, 43 Fed. 91.]

This was a libel for an assault and battery, by a seaman against the master and mate. The facts in the case, as well as the grounds taken by the counsel, in the argument, are fully stated in the opinion of the court.

Mr. Haines, for libellant.

C. S. Daveis, for respondent.

WARE, District Judge. This is a libel for a marine trespass. The libel alleges a joint assault by the master and the mate. The assault is admitted by the mate in his answer, and is fully proved by the witnesses, though not with all the aggravating circumstances stated in the libel. It was not only severe, but at the particular time when it took place, it was without provocation, and is clearly a case for damages.

The case of the master requires more consideration. Hutson, in his libel, states that while the mate was pursuing him on the deck, and flogging him with a cow-skin, he fled to the companion-way and called on the master, who was in the cabin, to protect him; that the master, instead of interposing for his protection, ordered the mate to take him forward and flog him. If the facts were proved as alleged, I should feel no difficulty, on the supposition that there was no justifiable cause for punishment, in holding the master jointly responsible for the assault. The law vests in the master the whole authority for the government of the crew, and for the maintenance of discipline on board the vessel. The inferior officers are subject to his control, and bound as well as the men to execute his orders, and if any inflict punishment by his command, the act is considered as his. But the master is bound also to protect his men against the oppression and cruelty of his subordinate officers, and if he permits them to be abused, without interposing for their protection, the just inference is, that he authorizes the act of his subordinates, and he becomes legally a party to it. But the allegation, in the material part of it, is directly contradicted by the master in his answer. He denies that he had any knowledge of the assault of the mate, until it was ended. He says, that "hearing a sudden noise on deck, he went to the companion-way, where he saw Hutson with the mate having hold of him. He asked what was the matter, and the mate replied, that Hutson had been striking the second mate, and that he had been taking him to do for it; that he then told Osgood (the mate) to take the man forward and set him at work, and that if he ever lifted his hand against an officer again, to let him know it, and he would correct him." The cook, who was the only witness to this part of the affair, gives a different account from that of either the libellant or the master. He says, that when Hutson called on the master, though he called with a very loud voice, he gave no answer and took no notice of it, and that the assault was still continued by the mate. If the witness is to be credited, even without referring to the master's answer, it can hardly be doubted, but that he must have heard repeated and loud calls upon him, and there can be as little

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

doubt, but that it was his duty to interpose and arrest the violence of the mate. But the statement of the witness, and that of the master, as to the material point, are in direct contradiction. Which is to be believed?

This presents a question of great importance in practice, namely, how far the answer is evidence. The libel is sworn to, and it calls for the answer of the respondent on oath. It is stated in a recent and valuable work on the practice of the admiralty, that when the libellant calls for the answer of the respondent on oath, the answer has the same effect as evidence, with an answer in chancery; and is to be received as true, so far as it is responsive to the bill, unless contradicted by two witnesses, or one witness with strong corroborating circumstances. Dunl. Adm. Prac. p. 122. It is admitted, that the rule in chancery is as it is stated. It is there understood to be a positive rule binding on the court. A decree cannot be made against the positive denial in the answer of any matter charged in the bill, unless it is overborne by two witnesses, or one witness whose testimony is corroborated by circumstances proved by other evidence. Hughes v. Blake, 6 Wheat. [19 U. S.] 453; Mortimer v. Orchard, 2 Ves. Jr. 243; Biddulph v. St. John, 2 Schoales & L. 532.

But has this principle been adopted, as a rule of jurisprudence, by courts of admiralty? Two cases only are referred to in support of it, that of Teasdale v. The Rambler [Case No. 13,815], and U. S. v. The Matilda [Id. 15,741]. The latter case was before Chief Justice Marshall, in the circuit court, and it is to be remembered was not on the instance side of the court, but was a case of prize. The practice of the prize court is different from that of the admiralty, acting as an instance court, in the exercise of its ordinary jurisdiction. And again, the doctrine is not stated directly by the chief justice, but is merely an inference from what he does say. It was argued by counsel, that the answer in that case should be received as evidence, like an answer in chancery. The report, which is very brief, then goes on to say, that the "chief justice admitted the rule in chancery, as to the negative matter in the answer, but not in a case where it asserts a right affirmatively, in opposition to the complainant's demand; but he took this distinction between the case in chancery and in admiralty; in the former, the complainant calls upon the defendant to purge his conscience and disclose facts; by this appeal to his conscience, the complainant makes the answer evidence; in the latter no such demand or appeal is made." U. S. v. The Matilda [supra]. It is a matter of inference only from this case, if the answer is called for on oath, that it is evidence to the same extent as an answer in chancery. Judge Bee does, indeed, state the principle more explicitly. He says, that "the actor in civil law courts, and the complainant in chancery, is entitled to call for the oath of the defendant, because it is otherwise difficult to get at the knowledge of the facts. To counteract this oath there must be two witnesses." If it is intended to be said, that the Roman law gives this effect to the answer of the party, it is a mistake into which the learned judge was led for the moment, probably, by confounding the decisory oath with an answer to interrogatories; for it is certain that the Roman law does not give this effect to such answers.

Now, if there was any such established rule of jurisprudence in the admiralty, it is to say the least, surprising, that it should be nowhere met with, or explicitly declared and laid down, as a known rule of decision, as it is found in almost every volume of equity reports; that no instance in point should have occurred in all our admiralty courts, where it was the very turning point of the cause, as it frequently is in equity; that the only evidence, that can be found existing of so important a rule of jurisprudence, and one of which the application must be of such frequent occurrence, is two obiter dicta, where it is just mentioned, and that in connection with the familiar and well-known rule in chancery. Nor is it a legitimate inference, that, because a certain effect is given to an answer in chancery, the same must be allowed to an answer in admiralty. Not to insist on the fact, that the course of proceeding in the two courts is different in many respects, it is more material to be remarked, that their rules and principles of practice are derived from different sources; those in equity being derived from the canon law, through the English ecclesiastical courts, modified, it is true, from time to time, by the court itself, while the general rules of practice in admiralty come to us directly from the Roman law. 4 Bl. Comm. 446; 2 Browne, Civ. Law, p. 348. The form of the libel and answer, the securities, or stipulations, taken to enforce the jurisdiction of the court, the interrogatories put to the parties, in the progress of the trial, after the pleadings are completed, the method of proceeding by defaults and successive decrees, are all so far as my information extends, which I admit is limited, derived directly from the practice of the Roman forum, or from that practice as it is modified by the usages of civil law courts in modern times. There is nothing analogous to a good deal of this in the proceedings of a court of equity, but what is most material to the question under consideration, the practice of the civil law courts, by which the parties may extract evidence from each other, by interrogatories put at the hearing of the cause, is entirely different from the practice of courts of equity.

By the Roman law, both parties were obliged to verify their causes by oath; that is, the actor was obliged to swear to the de-

mand on which the libel was brought, and the defendant that the defence was made in good faith, was in his belief true and a good defence to the action. In the brief and comprehensive form of pleading in the Roman forum, the oaths of the parties amounted in substance to the actor's swearing to the libel, and the defendant's swearing to his answer. And such, notwithstanding the doubts expressed on the subject, I have supposed to have been always the practice of the admiralty. The libellant is required to verify the debt or claim, on which the action is founded, by his oath, before he is entitled to take out process against the party. Our practice differs in some respects from that of the high court of admiralty of England. There, the first step taken in a cause is to enter the action and take out a citation or a warrant of arrest, and the libel is filed on the return of process. But the libellant is required to verify the debt, when the action is entered. Clerke, Praxis Adm. tits. 1, 11, 19; 2 Browne, Civ. Law, 397, 410, note; Dunl. Adm. Prac. c. 3, p. 111. It appears from title 4, Clerke, Praxis Adm. that the pleadings, in ancient times, were viva voce. It may, perhaps, be inferred from Clerke, Praxis Adm. tit. 12, that formerly process was issued without the oath of the party to the debt, but the oath was required on the suggestion of the defendant, that the action was for a larger sum than was due. But whatever may have been the former practice, it is now according to Browne, required before process is issued, In our courts, the libel is filed in the first instance. If it is on a contract, as for wages, the account is usually annexed to the libel and sworn to as a debt due, or the libellant swears to his libel. If it be for a tort, the libel should be verified by the oath of the party. The affidavit required of the libellant to the debt or claim, on which the action is brought, corresponds to the oath of calumny required of the actor by the Roman law: "Quod non calumniandi animo litem se movisse, sed existimando bonam causam habere." Inst. 4, 16, 1, C 2, 59, 2.

Dunlap, in his Admiralty Practice, says, that "in the admiralty courts of the United States, although it is usual, it is not generally understood to be necessary, that the libel should in the first instance be supported by the oath of the libellant. This however, he adds, depends on the rules of the different courts. In the district of Massachusetts, libels are usually signed by the proctor, without being sworn to, unless process of arrest of persons or property is prayed for." Dunl. Adm. Prac. p. 126. There may be little inconvenience in issuing a citation merely, where no arrest is asked for, without the affidavit of the party, because on the appearance the omission may be cured, on motion of the adverse party, upon pain of the libel being dismissed with costs. Though it may not be necessary in all cases, that the libel should be formally sworn to, it is necessary, I apprehend, in correct practice, that the debt, or cause of action, on which the libel is filed, should be verified by affidavit, as a good and subsisting cause of action. At least such has always been the practice in this district, since I have been acquainted with it. Cases may have occurred, which have passed without notice, when it has been omitted, but whenever it has been asked for, the rule has invariably been enforced. It has been considered as a positive rule, which the court in ordinary cases, was not authorized to dispense with. Cases have happened, in which, in the absence of the party, the oath of his agent or attorney, has been admitted from necessity; but the verification of the debt by oath has been always held to be indispensable, when it was insisted upon. The practice in this district has been in conformity with that of the court of New York. By the first rule of the district court of New York, all libels are required to be sworn to, except where the United States is a party; and by the eleventh rule of the circuit court, when new allegations are made on appeal, they are required to be put in under the oath of the party. Id. Append. p. 355.

It is also in conformity with the form given in our books of practice, and this, in a matter of mere practice, will be admitted to be of no inconsiderable authority. It may be added, that in the excellent collection of precedents added to Mr. Dunlap's work by the learned editor, which are as remarkable for their accuracy, as for their neatness and comprehensive brevity, and have evidently been prepared with great care, the libels and answers are all verified by oath. The practice of the admiralty, and in this also it follows the Roman law, equally requires the defendant to verify his answer by his oath. Clerke, Praxis Adm. tit. 24; Gammell v. Skinner [Case No. 5,210]. "Reus non aliter suis allegationibus utatur, nisi prius juraverit, quod putans se bona instantia uti, ad reluctandum pervenerit." Inst. 4, 16, 1; Code, 2, 59, 2.

Such being the practice, the question presents itself, how far the answer denying any of the allegations of the libel, is evidence for the respondent. In the Roman law, the oath of the party to the debt, or to the defence, was no more evidence for him, than the affidavit of debt required of a plaintiff by a court of common law, to hold the defendant to bail. If the answer of the respondent is evidence in his favor, why is not the allegation of the libellant evidence for the libellant, as it is equally under oath? In the courts of law and equity where the affidavit of a party is required, the same credit is given to the oath of the plaintiff as to that of the defendant. Neither one nor

the other, as I have understood the practice of the admiralty, is it the strict and proper sense of the word, "testimony." But where they contain as they do in the admiralty, a particular statement of the cause of action, and of the ground of defence, with all their circumstances, they are not considered as they would be, if the cause of action were set forth in a fixed and established formula, as, for instance, like a declaration in trover at common law, and the answer was nothing more than a general denial. They are the statement of the parties themselves of their case, under the solemnities of an oath, and are to be considered as such. They form part of the record of the case, and though not strictly testimony, they are certainly not to be regarded as a mere formal statement of the cause of action and ground of defence. The answer is carefully to be compared with the allegations of the libel, and with the proofs and the testimony in the case; and the degree of credit, to which it is entitled, must depend on the result of that comparison. When the answer is carefully drawn, and it appears from comparing it with the facts proved in the case by disinterested witnesses, that the party has stated his case fairly, or with no more than that bias which one naturally feels towards his own cause, and with no more coloring than an upright man may insensibly give to facts, in which his interest and feelings are involved, the statement of the party himself may justly have a material influence on the mind, in coming to a final result. But whether the answer is to be treated as the statement of the party, or whether it be received as the testimony of an interested witness, and treated as constituting a part of the proofs of the case, I know of no technical rule in the admiralty, like that in equity, which binds the conscience of the court, and undertakes to determine the precise degree of credit, to which it is in all cases entitled. It is to have that weight, to which, in addressing itself to the judgment of the court, it is fairly entitled. If it be said, that this is giving no rule, the answer is, that the nature of the case does not admit of any precise rule. And it may be asked, by what rule of law, or jurisprudence, we are authorized to believe one disinterested witness in preference to another? And yet who ever had a cause to decide, either as a judge or a juror, who has not felt himself bound in conscience to give more credit to one witness than another, though they may have had equal opportunities of knowledge. One is more observing, has a more accurate and retentive memory, is more intelligent, is more free from bias and prejudice; he is a ready, or he is a reluctant witness, and yet by what technical or arbitrary rule are we to mark the precise distinction, when the cases vary from each other by imperceptible shades of difference? It is a matter, that can only be referred to the sound discretion and conscience of the tribunal, which has the cause to decide.[2]

To apply these principles to the present case. The witness, says that the libellant, repeatedly, while at the companion-way, called with a loud voice on the master, to protect him from the violence of the mate; that he made no answer, and suffered the mate to continue the assault. The answer of the master is in direct contradiction to the witness. Whether the allegation of the answer is to be received as the testimony of a witness, or treated as the sworn statement of a party, it is at best but the testimony of an interested witness, swearing to his own discharge, and on common principles it would be entitled to less credit, than the testimony of a witness, who has no interest in the cause. But the account of the witness is also in opposition to the allegation of the libel. The libellant himself states, that the master did answer, and order the mate to take him forward and flog him. As both the parties contradict the witness, the reasonable conclusion is, that in this particular he is mistaken, and as the allegation of the libel is denied in the answer, and this denial is not overcome by proof, the master must stand acquitted.

As to the mate, although the assault was without any sufficient provocation at the time, I do not think it a case which calls for exemplary damages. It is in proof, that the libellant imposed himself on the master as an able seaman, when he was at best but an ordinary seaman. But this will not justify corporal punishment. The proper corrective, as was said at the argument, is diminished compensation. But he was not only inapt, he was slow, reluctant, and careless in the performance of his duty, and in his general deportment, wanting in a proper respect to the officers of the ship. Had the punishment been inflicted by the master, this might have been held, as in a case somewhat similar, it was, by Lord Stowell, to be a justification. The Lowther Castle, 1 Hagg. Adm. 384. But it is no justification for the mate. But this habit and continued course of conduct did operate as a continued provocation to the officers of the ship, and without being allowed as a justification for

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[2] This is the first case that we remember in which the question, what is the precise effect of an answer in admiralty, has been discussed at any considerable length. The subject was again presented in the case of The Crusader [Case No. 3,456], and it arose in Sherwood v. Hall [Id. 12,777]; in Cushman v. Ryan [Id. 3,515]; and in Jay v. Almy [Id. 7,236],—but in neither did the court undertake to say what precise effect is to be allowed to it as evidence further than that the rule in equity, that the answer must prevail unless overcome by more than the testimony of a single witness, does not apply in the admiralty. Mr. Greenleaf, in his treatise on the Law of Evidence, gives the rule substantially as it is stated in this case.

so severe a beating, it may justly be considered in mitigation of damages. I decree thirty-five dollars damages against the mate with costs, and dismiss the libel as against the master.

NOTE. As the forms and modes of proceeding in the admiralty are derived principally from the Roman law, some light may be thrown on the question discussed in the above case, by a more extended account of the practice of the civil law courts in relation to the same matters. In all countries, and under all systems of jurisprudence, it has been found necessary to establish some check to causeless and vexatious litigation. In the jurisprudence of the common law, the principal check is the liability to costs. But in the jurisprudence of ancient Rome, it appears that a party was not liable for the costs of the adverse party, merely because judgment was rendered against him. He was liable only when he instituted an action without probable cause; that is, when the suit was vexatious, or, in the language of the Roman law, calumnious; and then costs were not given against him, as part of the judgment, but could be recovered only by a new action called an action of calumny, corresponding to an action for a malicious suit at common law. By this action, the party could recover ordinarily a tenth, but in some cases a fifth and even a fourth of the sum in controversy in the former action. This was given as an indemnity for his expenses, in being obliged to defend himself against a vexatious suit. Gaii, Comm. lib. 4, §§ 175–178; Inst. 4, 16, 1; Vinn. in loc.

In the time of Justinian, and perhaps at an earlier period, the action of calumny had fallen into desuetude, and he, as a substitute, required the oath of calumny. The oath required was in substance an affidavit on the part of the actor, that the debt or cause of action, on which the suit was brought, was in his opinion well founded, and on the part of the defendant, that the defence was made in good faith and in the belief that it was a good defence. "Actor quidem juret, non calumniandi animo litem se movisse, sed existimando bonam causam habere; reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit, quod putans se bona instantia uti, ad reluctandum perveneri. Code, 2, 59, 2; Vinn. in Inst. 4, 16, 1; 1 Huber. Praelect. Jur. Civ. l. 4, 16, 1." But these affidavits were not evidence in the cause. They were required solely and professedly as a check to vexatious litigation. But the oath of calumny, though not evidence, was an essential part of the proceedings in the cause. It was ordered by Justinian to be officially required by the judge, although not insisted upon by the parties, and it omitted, it vitiated the whole proceedings. Gail, Pract. Obs. l. 1; Obs. 23, 1, 90, 1; 1 Huber, Praelect. l. 4, 16, 2. The practice of requiring the oath of calumny appears to be preserved generally in the civil law courts of the continent of Europe. It is not, however, observed in France, and Dupin condemns it as conducing more to perjury than to the prevention of litigation, which he says, is more effectually checked by a liability for costs. Heinn. Recitationes (Dupin's Ed.) 4, 16, 1.

Another part of the Roman jurisprudence, from which our admiralty practice has been in part derived, is the interrogatory actions of the Roman law. These were derived from the edict of the praetor, and constituted a part of that large portion of the law of Rome called "Jus Praetorium," or "Jus Honorarium." The reason of the introduction of these actions was this. If the actor demanded in his action more than was his due, he failed in his whole demand; judgment was rendered against him, and if he failed for this cause, it was with difficulty that he could be restored to his rights in integrum. Gaii, Comm. 4, 53; Inst. 4, 6, 33. As he could not in all cases know the precise extent of his rights, or rather of the defendant's liability, that is, whether he was liable for his whole demand, in solido, or for a part, as if the action was against him in his quality of heir, whether he succeeded to the whole inheritance or to a part (Dig. 11, 1, 1, §§ 2, 3), this action was allowed by the praetor, in the nature of a bill of discovery to compel a disclosure, for the purpose of enabling the actor to make his claim to correspond precisely with his right and with the defendant's liability. Brown says, that these actions "were confined to a few cases and were introduced to discover to what part of the 'as,' or inheritance, the defendant was entitled." Though this seems to have been the principal object of their introduction (Dig. 11, 1, 21), and there might be more frequent occasion for their use in these cases than in others, it is clear, from the whole title of the Digest, where they are treated, that they were not confined to them, but might be resorted to in all cases, where the actor required a discovery: "Ubicunque judicem aequitas moverit, aeque oportere fieri interrogationem, dubium non est." Code, 3; 10, 2; Inst. 4, 6, 33.

By a constitution of the Emperor Zeno, the law de pluris petitione, by which the actor failed if he demanded too much, was abolished (Dig. 11, 1, 2), and by the time of Justinian, if not at an earlier period, these interrogatory actions had fallen into disuse, as we learn from a fragment of Callistratus preserved in the Digest. A new practice arose of putting the interrogatories after contestation of suit, and the answers thus obtained, instead of furnishing the grounds for the commencement of an action, became evidence in the case for the adverse party. This appears from the law referred to above: "Ad probationes sufficiunt ea, quae ab adversa parte expressa fuerint. Dig. 11, 1, 1, 1." The general practice of the courts, which have adopted the forms and modes of proceeding of the Roman law, of requiring the parties to answer interrogatories under oath, called positions and articles, or facts and articles, seems to be derived through this law of the Digest and the later practice of the Roman forum, from the ancient interrogatory action; although Heineccius has expressed a contrary opinion. Ad. Pand. Pars. 2, note 245.

The clause of the law in question is generally supposed to be an interpolation of Tribonian in the text of Callistratus, and considered as the introduction of a new practice. It is so viewed by Pothier, and in his edition of the Pandects it is called jus novum. L. 11, 1, 24. Voet, however, seems to think, that there is evidence of a change in the practice, as early as the age of Ulpian, who was contemporary with Callistratus. Ad. Pand. 11, 1, 4; Dig. 11, 6, 25. But at whatever period the change took place, whether in the age of Ulpian or Tribonian, it has passed with various modifications into the practice of the courts of all nations, which have adopted the Roman law as the basis of their jurisprudence. Gail, Pract. Obs. l. 1, Obs. 79, 82; Huber. Praelect. vol. 2, l. 11, 1, b; Poth. Procedure Civile, pt. I, ch. 3, art. 5; Voet, ad Pand. 11, 1, 4. Either party may interrogate the other as to any matters of fact, which may be necessary to support the action or maintain the defence, and the party interrogated is bound to answer, unless his answer will implicate him in a crime. The answer is evidence against himself, but not to affect the rights of third persons. Voet, ad Pand. 11, 1, 4, §§ 5, 10; Toull. Droit Civil Francais, vol. 10, n. 274; Code de Procedure Civile Francais, tit. 15. This appears to be the usual mode in which parties extract evidence from each other. But modern practice has introduced another innovation, and has authorized, for the purpose of expediting causes, the introduction substantially of the positions and articles into the libel itself, although regularly they cannot, in the form of positions and articles, be propounded until after contestation

of suit, and of course not until after the answer is in. A libel in this form is said to be an articulated libel or a libel in articles. Gail, l. 1, Obs. 79, 3, 4. The evidence sought for is then obtained in the answer. It is a special answer to each article in the libel; and the litis contestatio, when the pleadings are in this form, is said to be special and particular, in contradistinction to a simple libel, and a general answer amounting to the general issue. An issue is formed on each article. Heinn. ad Pand. Pars. 2, note 42. From this account, it is apparent, that the practice of the admiralty, so far as relates to the libel and answer, is in its forms identical with that of the Roman law. As in the Roman law, so in the admiralty, the parties are required to verify the cause of action and the defence by oath; the libel may either be simple or articulated, and the answer must correspond with it; either party also may require the other to answer interrogatories on oath, touching any matters which may be necessary to support the libel or the answer.

We have seen, that the oath of calumny, or the general verification of the cause of action and ground of defence, was not evidence for either party. How far are the answers to interrogatories on positions and articles held to be evidence by courts of the civil law? It has been before stated, that this practice of interrogating a party after contestation of suit was derived from the interrogatory actions, and took their place, when they fell into disuse. The answers of the defendant in these actions were evidence against him but not in his favor. The object of the action was to extract from the party facts, the knowledge of which was confined to himself, or which were difficult to be proved except by his own admission, and without which the actor could not safely commence his action. If he answered truly, he was responsible according to his actual legal liability; but if he answered falsely, by denying his liability altogether, or by alleging it to be less than it was in fact, unless he could show that it was by an honest mistake, he was held liable for the whole demand: "Ut vel confitendo vel mentiendo sese oneret. Dig. 11, 1, 4; Dig. 11, 1, 11, § 3."

The late period in the progress of Roman jurisprudence, at which this innovation on the ancient practice took place, is the reason why we find so little relating to it in the corpus juris. The natural presumption would be, that the answers would be held to be evidence to the same extent, that the answers to interrogatory actions were, for which they were a substitute. And this seems to be a clear inference from the words of the law, whether they are to be considered as the words of Callistratus or of Tribonian: "Ad probationes litigatoribus sufficiunt ea quae ab adversa parte expressa fuerint apud judices, vel in hereditatibus vel in aliis rebus quae in causis vertuntur. Dig. 11, 1, 1, § 1."

The civilians teach us accordingly, that the interrogatories, on positions and articles, are subject to the same rules and are governed by the same principles, as the interrogatory actions. 2 Huber, Praelect. L. 11, 1, 9; Voet, ad Pand. 11, 1, 2. Pothier states the doctrine and explains the reasons of it with his customary clearness. "When a party," says he, "proposes facts and articles, upon which he obtains an order, that the opposite party shall be interrogated by the judge, the oath which is taken on such interrogatories is very different from the decisory oath. While the decisory oath is proof for him who makes it, this on the contrary, is no proof in favor of the party who makes it; the answers which the party interrogated makes are proof only against him; they prove nothing in his favor. The reason of the difference is, that he, who causes the party to be interrogated, does it not with the intention of having the decision depend on his answers, but he puts him to answer, in order to draw from the avowals of the party, or from the contradictions into which he may fall, some proofs or presumptions in his favor: "Ut vel confitendo vel mentiendo sese oneret. Pothier, des Obl. note 910; Traite de Procedure Civile, pt. 1, c. 3, art. 5, § 5." The answer cannot be divided; the whole must be taken together or the whole rejected. It seems, however, that when a series of articles is propounded, the answer to each article is distinct and independent, and may be taken by itself; and the party making use of one is not bound to admit the rest. Repertoire de Jurisprudence, art. Chose Juge, § 15; Questions de Droit, Confession, § 2. In the admiralty practice in this country, it is believed, that when a party is required to answer special interrogatories, put at the hearing, the answers are evidence as well for the party who is interrogated, as for the other party. The practice in this district has been to allow a party to put to his adversary such questions as he pleases, but he does it at the hazard of rendering his answers evidence in the cause.

Case No. 6,960.

In re HUTTO.

[3 N. B. R. 787 (Quarto, 191);[1] 3 Am. Law T. 197; 1 Am. Law T. Rep. Bankr. 226.]

District Court, E. D. Texas. 1870.

BANKRUPTCY—MORTGAGE—PRIOR LIEN—WAIVER.

Where a mortgage was given by bankrupt, on five bales of cotton, while a lien existed on three hundred and twenty acres of land, in favor of mortgagee, which register claimed was a waiver of the prior lien, *held*, the register was in error. The lien on the land was not waived, nor in any way affected, by the mortgage on the cotton. The creditor has a valid, subsisting lien upon said three hundred and twenty acres of land; and that the opposition of bankrupt thereto be overruled. The assignee is ordered to sell said land, according to law, to satisfy said lien.

[In bankruptcy. In the matter of Solomon Hutto.]

DUVAL, District Judge. I have carefully examined this case in connection with the questions certified to me for decision. My opinion is that the register was in error, when he held that the mortgage given by the bankrupt, on the five bales of cotton, was a waiver of the prior lien on the land. He should have held that the vendor's lien upon the three hundred and twenty acres of land, claimed as a homestead by bankrupt, subsisted as against the same, in favor of the creditor, Joseph Werner. It is very clear to me, that this lien was not waived, or in any manner affected, by the mortgage given on the cotton. It is therefore adjudged that the said creditor has a valid, subsisting lien upon the said three hundred and twenty acres of land, and that the opposition made thereto by the bankrupt be overruled. It is further ordered that the assignee of said bankrupt do proceed to sell, according to law, the said tract of three hundred and twenty acres of land, to satisfy the lien existing thereon, in behalf of the creditor, Werner. The clerk will certify this decision to the assignee.

[1] [Reprinted from 3 N. B. R. 787 (Quarto, 191), by permission.]

Case No. 6,961.

HUTTON v. SCHELL.

[6 Blatchf. 48;[1] 7 Int. Rev. Rec. 84.]

Circuit Court, S. D. New York. March 3, 1868.

CUSTOMS DUTIES — DUTIABLE VALUE — INLAND TRANSPORTATION—COMMISSIONS—DECISION OF COLLECTOR.

1. There is nothing in the act of March 3d, 1851 (9 Stat. 629), which justifies a collector of customs in requiring an importer of foreign merchandise to add to his invoice, as forming part of the dutiable value of such merchandise, charges for inland or coastwise transportation, whether by land or water, of such merchandise, from the place of its production or manufacture to another place, before it leaves its foreign port of shipment, for the United States.

2. A charge for commissions, at "the usual rates," forms part of such dutiable value. This charge must be made, whether the importer has paid any commissions or not; and a charge for commissions at a rate higher than the usual rate, cannot be made, even though the importer has paid a higher rate.

[Cited in Moke v. Barney, Case No. 9,698.]

3. The charge for "costs and charges" must include those actually paid, and nothing more, and it is not lawful to insert an arbitrary estimate.

4. Under the act of March 3d, 1857 (11 Stat. 192), a valid prospective protest against the payment of duties, made on a particular importation of merchandise, and expressing the intention of the importer that the protest shall apply to all future similar importations made by him, is valid as to subsequent importations of similar merchandise on which like duties are exacted.

[Cited in Wetter v. Schell, Case No. 17,470; Ullman v. Murphy, Id. 14,325; Davies v. Miller, 130 U. S. 287, 9 Sup. Ct. 561; Schell's Ex'rs v. Fauché, 138 U. S. 571, 11 Sup. Ct. 380.]

5. A protest against paying duties on costs and charges, because the goods were invoiced "free on board," is insufficient, unless the words "free on board" are found in the invoice.

6. A protest against paying duties on 2½ per cent. commission, because no commission was paid, is insufficient, it being immaterial whether any commission was paid or not.

7. Under the provision of the 5th section of the said act of March 3d, 1857, which declares that the decision of the collector, unless appealed from, shall be final and conclusive as to the liability of goods to duty or their exemption therefrom, it is not necessary that the importer should appeal from the decision of the collector requiring the addition to the invoice of illegal charges for inland freight, and commissions, and costs and charges, in order to prevent such decision from being final.

This was an action [by Benjamin H. Hutton, survivor] against [Augustus Schell] the collector of the port of New York, to recover back duties paid under protest, and which were alleged by the plaintiffs to have been illegally exacted by the defendant, on sundry importations of goods from Europe. It now came up for a second trial, having been once tried in December, 1866. On the first trial, all the questions now raised were passed upon by the court, except the question as to the construction and application of some of the protests. A verdict was rendered for the plaintiffs, and a reference was ordered to adjust the amount of the recovery. The adjustment was made, the report of the referee was filed, exceptions to such report were taken, and, after a hearing thereon, judgment was entered for the plaintiffs. The defendant excepted to various rulings made by the court at the trial and on the exceptions to the report of the referee. When the case was in readiness to be taken to the supreme court, by the defendant, by writ of error, the parties agreed to set aside all the proceedings, and that a new trial should be had. It now took place before Judge SMALLEY and a jury.

E. Delafield Smith, for plaintiff.

Samuel G. Courtney, Dist. Atty., and Simon Towle, for defendant.

SMALLEY, District Judge (charging jury). This case depends, almost exclusively, upon legal questions. It is, virtually, an action against the government. No execution can issue against the collector, unless, in the opinion of the court, he acted in bad faith, or, in the language of the law, "without probable cause." Against any errors of judgment, or erroneous constructions of law, the collector, as the law now stands, is protected.

The plaintiffs claim, in substance, that, commencing in July, 1857, and continuing through a period of years, until 1861, during nearly the entire time while the defendant held the office of collector of the port of New York, they were in the habit of importing merchandise from various places on the continent of Europe; that, when they presented their invoice and their entry, at the custom house, to the entry clerk, whose duty it was to superintend and take charge of that branch of the business, they were told that they must add certain specific items; that, in some cases, they were told they must add a larger amount for commissions than they admitted they were liable to pay—a larger amount than that which they say was the "usual rate" under the law; that they were compelled, also, to add certain fixed and arbitrary sums for inland transportation, and port charges, and other costs of various kinds; that, when they remonstrated with the officers against doing so, they were informed that, unless they made these additions, the entry would not be received; and that, in consequence of this, and for the purpose of obtaining possession of their goods, they made the entries as required, protesting against the payment of extra charges for commissions, and for other items. The plaintiffs claim, that their evidence tends to prove, (1.) That, in some cases, they paid no freight or charges of any kind, and that the goods were "free on board;" (2.) That, in other cases, they were compelled to add an arbitrary sum for costs and charges—more than the amount

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

paid by them, although they paid something; (3.) That they were compellel to add to their invoices, internal freight; (4.) That they were compelled to pay duties on an extra charge for commissions, above the usual rate of commissions in the markets in which the goods were purchased; and, (5.) That they duly protested against these exactions, and only submitted to them for the purpose of obtaining possession of their goods. The defendant resists the recovery, on the ground that inland freight was properly added to the invoice, under the act of March 3d, 1851 (9 Stat. 629), and that the other costs and charges were proper and legal, under the treasury instructions and the law.

The question as to inland freight has been a good deal discussed, and there has, undoubtedly, been some diversity of opinion in regard to it. On the 1st of February, 1856, Mr. Guthrie, then secretary of the treasury, issued treasury regulations to collectors of the customs, in which he says: "Freight or transportation from the foreign port of shipment to the port of importation, is not a dutiable charge. In cases, therefore, of goods arriving in the United States, after having been first transported from the place of their production or manufacture to another port or place, whether in the same or another country, by land or by water, and thence transhipped for the United States, provided satisfactory evidence be adduced to the collector of customs at the port where the goods shall arrive, that they were originally shipped with the bona fide intention of having them transported to a port in the United States, as their final port of destination, no dutiable costs or charges will have accrued, either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportation being regarded as continuous from the country whence originally exported in good faith, on a declared destination for a port and parties in the United States." This construction was thus early given to this act by the treasury department.

The question came before the circuit court in California, in Gibb v. Washington [Case No. 5,380], in July, 1858. The court consisted of Judges McAllister and Hoffman, and the opinion was that of the full bench. The question was carefully considered, and the court says, that charges for the transportation of goods from the interior of the country, by railroad or water carriage, incurred prior to the time of exportation, cannot be added to the value of the goods, to be ascertained in the manner prescribed by the act of March 3d, 1851.

The same question was raised in this court, at the April term, 1860, in Strange v. Redfield [Case No. 13,524], and a series of other cases, in all of which the plaintiffs recovered. A question was raised in those cases, as to the sufficiency of the protests, which was argued at the October term, 1860, but the court decided them to be sufficient, and the judgments were paid.

A treasury circular was issued on the 21st of May, 1863, while the present chief justice of the United States was secretary of the treasury, reaffirming the principle laid down in the treasury regulations of 1856, and in accordance with the decisions of the court in Gibb v. Washington [supra].

It is, undoubtedly, true, that the action of the treasury department has not been uniform upon this subject. It appears that, in some cases, both coastwise and inland freights have, by order of the treasury department, been added, to make dutiable value. The courts, however, as soon as the question was brought before them, decided that coastwise freight was not dutiable; and I think that the correctness of that decision has never been questioned, except upon this trial, and has been invariably acquiesced in by the treasury department. It appears that different secretaries have, at different times, ordered duties to be refunded, that were paid on charges for freight from Nantes to Paris, from Manchester and Glasgow to Liverpool, and from Buenos Ayres, via Montevideo, to New York. This last question was decided by Mr. Justice Nelson and Judge Betts in Wilbur v. Lawrence [Case No. 17,635].

But, it is claimed that there is a difference between inland freight and water freight. No reason has been assigned for any such distinction, and I cannot conceive of any. It must be purely arbitrary. Why should duty be charged on goods sent by rail from Nantes to Havre, when it cannot be if they are sent down the Loire? And what difference does it make whether goods are forwarded from Glasgow to Liverpool, for New York, by rail or down the Clyde? I think that there is nothing in the act of March 3d, 1851, nor any sound reason, to warrant any such distinction. The policy of the tariff acts is, to equalize the duties on goods of similar descriptions; and, to interpolate this arbitrary distinction into the law would, in many cases, defeat that object. The present secretary of the treasury, in his circular of April 16th, 1867, abolishes all distinction between inland land and water carriage, as to charges for freight on merchandise imported from the adjoining British provinces into the United States, which shows that he, too, regards this arbitrary distinction as unfounded and unjust. I am satisfied, therefore, that the charges added for inland freight were made in violation of law, and ought to be refunded.

Then, as to commissions. The statute requires the charge to be of "the usual rates." This term has received a judicial construction. If it had not, it would seem to be very difficult for lawyers to differ upon the subject. There seems to be room for

but one opinion. It is not what the importer may have paid as commissions. He may have procured his goods without paying any commissions; but he will still be liable for a charge for commissions, and must pay the duty upon it. On the other hand, he may have paid much more than the usual rate of commissions. But he is not bound to pay duty on more than the usual rate, because that is the sum fixed by law. What the usual rate is, is a question of fact.

The costs and charges actually paid, if not included in the invoice, should undoubtedly be added. The officers of the customs have no more right than the merchant has to make an arbitrary estimate, for the purpose of convenience. The merchant is bound to enter the costs and charges, as they were paid. If none were paid, if the goods were delivered "free on board," then, as has been repeatedly held in this court, the importer is not liable for any, for the reason that these charges entered into, and constituted a part of, the market value of the goods. This point has been repeatedly decided by Mr. Justice Nelson, the presiding judge of this court, and by Judges Betts, Hall, Ingersoll, and Shipman, and by myself.

Therefore, so far as this class of cases is concerned, whenever it appears, upon examination, that inland freight has been added to the invoice, or that the plaintiff has been compelled to pay duties on extra commissions, or that costs and charges have been added to a larger amount than have been paid, it follows that the duties exacted upon such additions were illegally exacted, and ought to be refunded.

The second objection taken by the defendant is, that there were no protests sufficient to entitle the plaintiff to recover in this case. The act of February 26th, 1845 (5 Stat. 727), required the protest to be made at or before the payment of the duties. The act of March 3d, 1857 (11 Stat. 195), under which these entries were made, changes the expression, "protest," but uses language very similar, and says that the act must be done within ten days after the entry of the goods. The language of the act of March 3d, 1857, as to what the protest must contain, is precisely like the language of the act of February 26th, 1845, the later act being, probably, copied from the earlier one, and provides that the protest shall set forth, distinctly and specifically, the grounds of objection to the payment of the duties, so that the collector may know the reason of the protest.

But, it is objected that, in some of these cases, there were no protests filed at the time, or even within the ten days. It is conceded, however, that there had been previous protests filed, which claimed to be prospective and continuous, and which the merchants intended to be so. In these protests they say: "You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us."

The question of prospective protests has undergone a good deal of discussion in the courts; but it seems to be now well settled, so far, at least, as this circuit is concerned. The first time that this question arose, whether a protest of this kind, a prospective or continuous protest, was valid as to subsequent importations, was in the circuit court for the district of Maryland, before Chief Justice Taney, in the case of Brune v. Marriott [Case No. 2,052], which appears to have been tried in April, 1849. The question was discussed before the chief justice by a very able lawyer, Mr. Reverdy Johnson, who maintained that the protest was invalid and insufficient. But the chief justice, after examining the question, decided that the protest was clearly sufficient, and said that there was nothing in the letter of the law, or in its reason or spirit, which required a protest to be attached to every particular entry that was made. That case of Brune v. Marriott went up, by writ of error, to the supreme court of the United States, and was there decided at the December term, 1849. It is reported as Marriott v. Brune, in 9 How. [50 U. S.] 619. The question was again pressed upon the supreme court, by Mr. Reverdy Johnson, with his usual ability, as the report of the case will show. Mr. Justice Woodbury delivered the opinion of the court, sustaining the opinion of the chief justice, and saying that the protest must be held to be valid. So far as appears from the report, this was the unanimous opinion of the supreme court. This was in May, 1850.

The question came up before Mr. Justice Nelson and Judge Betts, in this court, in November, 1855, in the case of Steegman v. Maxwell [Case No. 13,344]. In the opinion, which was given by Judge Betts, but was the opinion of the full bench, the case of Marriott v. Brune [supra] is referred to, and the principle is established, that a prospective protest of this kind is sufficient to entitle the merchant to recover back duties illegally exacted from him. This ruling has been followed, in this court, in very many instances, among which is the recent case of Fowler v. Redfield [Case No. 5,003], which is not reported, but was decided by Mr. Justice Nelson, as lately as December, 1862; and this view seems to have been regarded as the settled rule in this court. Certainly, I have so understood it myself, in disposing of this class of cases; and it must be regarded as settled in this circuit, if not throughout the United States.

I am at loss myself to conceive how a distinction can be drawn between this class of prospective protests, and the protest that was made in the case of Brune v. Marriott [supra]; for, clearly, the protest in this case is quite as distinct and specific as the pro-

test in that case, if not more so, when we compare them.

Another suggestion may, and perhaps ought to, be made. All the protests in the cases referred to, were made under the act of February 26th, 1845, the language of which, as we have already seen, is adopted in the act of March 3d, 1857, to describe the character of the protest and the circumstances under which it may be made. The act of 1857 does not use the word "protest," but uses another phrase. The protests in the cases referred to, having been made prior to the passage of the act of 1857, it is hardly to be supposed that the eminent lawyers in both branches of congress, when they adopted, in the act of 1857, the language of the act of 1845, did not know what construction the courts had given to that language. It cannot be, that the supreme court decided this question in 1850, and that this legislation took place six years afterward, in ignorance of such decision. If it had been the design of congress to change the construction which the government and the courts had given to the language used in the act of 1845, it is very natural to suppose that they would have used different language, in the act of 1857, in order to indicate such design.

There is but one case, so far as I am aware, in which the decision in Marriott v. Brune has been criticised; and that is the case of Warren v. Peaslee [Case No. 17,198], where Mr. Justice Curtis, in the circuit court for the district of Massachusetts, ruled that the protest was insufficient. He attempted to draw a distinction between the case of Marriott v. Brune and the case before him. I must confess, however, that it seems to me to be a distinction without a difference. The principle in each appears to be precisely the same.

But, if there were no judicial decisions upon the subject, the same result would be reached by reasoning. What is the object of the legislation providing for a protest? It is, that the collector shall be advised, distinctly and specifically, what it is which the merchant insists he ought not to pay, and what it is against which, as an illegal exaction, he protests, and what it is for which he intends to hold the collector responsible, under the law. Why is it necessary to repeat the protest? This case furnishes a very fair illustration. Here is a merchant, making some five hundred entries in this port, of precisely the same character, at least one every week in the year, and perhaps more. What sound reason is there for compelling him to go through the formula of saying, in each one of these cases, "I protest," when he has told the collector, in the first case, that he protests against that and against all similar exactions? I am at a loss to see that any good purpose would be answered by adopting such a construction.

The protest must set forth distinctly, specifically and truly, the objection to the payment of the duty, so that the collector may know what the merchant claims, and why he makes the claim. In some of the protests, in this case, the protest is against paying duties on costs and charges, because the goods were invoiced "free on board," when, by examining the invoice, it appears that the words "free on board" are not there. Such a protest is insufficient, because the invoice shows that the statement made in it is untrue, although it might have been good, if it had merely said, "free on board," omitting the word "invoiced." Others of the protests are against paying duties on two and one-half per cent. commission, because no commission was paid. That is insufficient, because it is immaterial whether any commission was paid or not. The duty was payable on the usual rate of commission. All such claims, therefore, the adjuster will disallow.

In relation to inland freight, it is immaterial whether the invoice shows that the goods were "free on board" or not; for, as we have already seen, inland freight was no more dutiable than coastwise or ocean freight.

The third objection made to the recovery in this case is, that no appeal was taken to the secretary of the treasury, under the 5th section of the act of March 3d, 1857. In giving a construction to that act, it is perhaps well and wise to consider the purpose of it. That it is a severe act, one that was intended to, and does, limit and restrict the common law and equitable rights of the merchant, all must agree. It is a well-settled rule of construction, in all courts, that acts of this description shall be construed strictly, and that they shall not be extended any further than the language of the law requires, where they restrict or limit the common law or equitable rights of any individual. They must, however, be enforced, so far as the language of the law requires. The language of this act, so far as this question is concerned, when it says that the decision of the collector shall be final and conclusive, unless it is appealed from under certain conditions afterward prescribed, is, that the decision of the collector shall be final and conclusive, "as to their liability to duty or exemption therefrom." What is "their liability to duty or exemption therefrom?" The question here is not, whether the language of the act necessarily implies that the decision of the collector shall be final, when he decides whether a certain article is liable to duty, or, if liable, at what rate of duty—five, ten, or fifteen per cent. The question here is not, whether this property was liable to duty. It is conceded that it was. The question is not, what the rate of duty shall be—whether any of this property shall pay one rate or another. It is admitted to be liable to duty, and the rate is

conceded. The merchant and the collector agree upon that. The collector claims, however, that certain charges should be added. This the merchant denies. Now, does it necessarily follow, from the reading of the language of the statute, construed as I have already stated it should be, that the decision of the collector shall be final upon that question [because it is an act which limits and restricts the rights of the merchants very materially from what would be their common law and equitable rights?] [2] Such would be my construction, even without authority; but I am gratified to find that I have been anticipated in this by a decision of the treasury department itself, having charge of these questions. It seems to have been the decision of Secretary Cobb, upon this precise question, in instructions to custom-house officers throughout the country, given December 20th, 1859, and April 7th, 1860, that, in such cases, the rule requiring an appeal did not apply, and that it was unnecessary to take it. Secretary Chase, on the 9th of June, 1862, took the same view, and, in a very full letter, says, that no appeal is required. This was in relation to this particular class of cases —costs and charges. It also appears, from various pieces of evidence, that these constructions of Secretary Cobb and Secretary Chase have been acted upon by the treasury department, in a great variety of instances. Thousands of dollars have been refunded, which would not have been refunded, if this 5th section of the act of March 3d, 1857, had been understood to be applicable to this class of cases. It appears that, on the 30th of March, 1865, Secretary McCulloch repudiated this construction. But, even in that case, he reconsidered his ruling, and ordered judgments that had been recovered without an appeal to be paid. So that it can hardly be considered that there was a revocation of the previous action of the department. I hold, therefore, that the objection cannot be sustained, and that there is no bar to a recovery in this class of cases, to be found in the 5th section of the act of March 3d, 1857.

On the former trial, three additional objections were made to the plaintiffs' right to recover. It was claimed, (1.) That the payments were voluntary, and that, therefore, they were not entitled to recover; (2.) That the action of the appraisers was conclusive, and the plaintiffs could not go behind it; (3.) That the illegal exactions, if any were made, were made by the defendant's subordinates in the custom house, and that he, as collector, was not liable for them. These objections are, at this time, all abandoned; and it is conceded that they constitute no defence.

There is a single question of fact, which I will now submit to the jury. What was the usual rate of commission, in Great Britain, between the 1st of July, 1857, and the 1st of January, 1861—the time embraced in these entries? What was it in continental Europe, outside of Paris, and what was it in Paris? These questions the jury will answer by their verdict.

[An action for excessive duties, under the act of 1857 (11 Stat. 192), was tried in Case No. 6,962, and a verdict rendered for plaintiffs.]

[2] [From 7 Int. Rev. Rec. 84.]

Case No. 6,962.

HUTTON v. SCHELL.

[25 Int. Rev. Rec. 168.]

Circuit Court, S. D. New York. May 21, 1879.

CUSTOMS DUTIES—"DELAINES"—ACT OF 1857—ACTION AGAINST COLLECTOR—BURDEN OF PROOF.

[1. Where congress has designated an article by a specific name, and by such name has imposed a duty upon it, general terms in a succeeding part of the same act, although sufficiently broad to comprehend such article, are not applicable to it.]

[2. What goods are included in the term "delaines," in the second section of the act of 1857 (11 Stat. 192), is a question which the jury must determine, upon evidence showing how that term was used, at the date of the passage of the act, by importers and dealers in that class of goods.]

[3. The presumption is that the decisions of the collector and secretary of the treasury are correct, and plaintiff must overcome that presumption by a fair preponderance of proof as to the commercial use of the term at the date of the act.]

[This was an action by Benjamin N. Hutton, surviving partner, against Augustus Schell, to recover an excess of duties exacted by defendant as collector of the port of New York. A similar action for duties assessed upon the cost of inland freight and commissions was tried in Case No. 6,961.]

SHIPMAN, District Judge (charging jury). The plaintiffs imported into this port in the year 1857, and subsequently to March 3d of that year, sundry invoices of ladies' dress goods, made wholly of worsted, and styled by the plaintiffs "mousseline delaines," upon which defendant, as collector, exacted a duty of 24 per cent. ad valorem, which was paid under protest. The action is brought by the plaintiffs to recover an alleged excess of duty, the plaintiffs claiming that the legal rate was 19 per cent. only.

By the tariff act of 1846 [9 Stat. 42], these goods fell under the designation of "manufactures of worsted not otherwise provided for," and were included in Schedule D of that act, and were dutiable at 25 per cent. By the act of 1857 [11 Stat. 192], the duty upon manufactures of worsted or manufactures in which worsted was a component material, and which were not otherwise provided for, was reduced to 19 per cent. When congress has designated an article by a specific name, and by such name has

imposed a duty upon it, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it. In the second section of the act of 1857, manufactures composed wholly of cotton, which are bleached, printed, pointed, or dyed, and delaines, were transferred to Schedule C. Goods in Schedule C were chargeable with a duty of 24 per cent. "Delaines" were chargeable there with a duty of 24 per cent., but the question is whether these goods were or were not, under the principle of law which I shall give you, delaines, and whether the commercial term "delaines" at the time of the passage of the act meant a different article from that imported by the plaintiffs. The collector was of the opinion that these goods, although exclusively of worsted, were delaines, and assessed them at 24 per cent. The plaintiffs were of opinion that the goods were not and never had been generally commercially styled "delaines," but that "delaines," in the commercial signification of that word, were a different article, composed of cotton and worsted. It is a well settled principle that terms of specific description are used in the tariff acts in their general commercial signification; that is, that inasmuch as the tariff laws relate to matters of trade and commerce, and particularly concern business men, the terms are employed in the sense in which at and before the time of the passage of the act they are used by the commercial men in this country who import and largely deal in the articles to which such terms relate, and that the commercial designation of an article among importers of and wholesale dealers in the article in this country at the time of the passage of a tariff act, when such designation is clearly established, fixes its character for the purposes of the tariff laws, and that such terms were not used in their scientific or dictionary sense, if such signification is at the date of the act different from the commercial sense.

The question of fact, then, is, were the imported goods, samples of which have been shown you, known generally among importers and large dealers in such goods in this country at and prior to March 3d, 1857 (the date of the act under which they were dutiable as delaines), under the denomination of "delaines," or did the term "delaines," in commercial signification generally among importers and large dealers, mean a different article? If the term "delaines," as generally understood by the class of men to which I have referred, is established to your satisfaction to have meant a different article from that of the plaintiffs' importation, or, in other words, if the article which was imported by the plaintiffs was not included in the term "delaines," as that word was generally understood among importers and large dealers in such goods in this country at and prior to March 3d, 1857, then your verdict is for the plaintiff; otherwise it will be for the defendant. You are to ascertain what was the distinctive trade meaning of the word "delaines" among the importers and wholesale dealers of the class of goods which is in controversy; not what persons who were exclusively importers of French goods and nothing else called "delaines;" not what dealers in domestic manufactures and nothing else called "delaines;" but what both importers and wholesale dealers in this class of fabrics, who were generally acquainted with the subject, and not speaking vaguely or loosely, generally understood to be the commercial meaning of the word.

The theory of the plaintiffs is that for many years prior to 1857 the article composed wholly of worsted had been imported from France, the country of its manufacture, and had been exclusively known as "mousseline de laine,"—that is, a thin fabric of worsted,—and that it always continued to have this name among wholesale merchants who dealt in it in this country. That subsequently English manufacturers commenced to make a cheaper article of cotton and worsted, which was extensively introduced into this country,—an imitation of the worsted fabric; and that still later American manufacturers competed with the English, and made and sold the same cotton and worsted fabric, which bore generally the name "delaine," and was so bought and sold generally among wholesale merchants; while the superior worsted goods continued to be known as "mousseline de laine," and that the term "delaine" was not applied to them.

The theory of the defendant is that, admitting the general statement of the history of the act which I have given to be correct, after the commencement of the English manufacture both classes of goods were called indiscriminately mousseline delaines, and after awhile and prior to the date of the act of 1857, were also called generally "delaines," and thus "delaines" became a general term which included both classes of fabrics. Before examining more particularly the testimony which has been given in support of these separate theories, I have to say that the plaintiffs take the burden of proof; that is to say, the presumption is that the decisions of the collector and the secretary of the treasury were correct, and that the plaintiffs must overcome that presumption by a fair preponderance of proof which satisfies you that the plaintiffs' importations at the date which I have mentioned, were not generally known among importers and wholesale dealers under the denomination of "delaines." If they do not thus satisfy you, the defendant is entitled to a verdict.

The plaintiffs say that they have fully maintained the correctness of their definition of "delaines" by the following considerations: First. It is admitted that the original name of the fabric was "mousseline delaine," and that this was its only name for

a series of years, and that the name "delaine" was never used in this country prior to the introduction of the English article. Second. They say that the testimony of the men who principally dealt in New York, Boston, and other cities in this article is very uniform. I mean the testimony of Mr. Roumage, Mr. Bliss, Mr. Cheeks, Mr. Bates, and the other large dealers who have testified that the worsted article was called "mousseline delaine," and nothing else, and that there was no change in terms. The foundation of the plaintiffs' case is the established fact that the original name was "mousseline delaine," and that the term "delaines" was not known so long as the French article was the only article in the market; and then they insist that the men who knew most about the subject, and who sold most largely the French and the English article, never heard of a change in the name of the French fabric, but did know when the English article was introduced as an imitation of the worsted goods it was called the "delaine;" and testify that "delaines" never came to be the name of a family, or a general term descriptive of a class. Third. They insist that the history of the art in this country indicates that their commercial definition is correct, for they say that the term "delaines" did not come into use until after the introduction of the English article of cotton and worsted, and was applied first by the dealers in that article, and hence the plaintiffs argue that the term was confined to that article by the persons who dealt in it.

The theory of the defendant is supported by the following considerations: First: That the term "delaines" at and prior to March, 1857, and after the English and American manufactures of cotton and worsted dress fabrics had been introduced to the public, was a general term which was used by importers and wholesale dealers in this country, and meant as well all worsted goods as the imitation which was made of cotton and worsted. The defendant claims that while he admits that the French goods were specifically styled "mousseline delaine," yet that this term had become in the process of time, and in the progress of trade, a subordinate term, and that both classes of dress goods, whether made exclusively of worsted, or of worsted and cotton, were generally known and called "delaines," and the different classes bore specific and subordinate names. Their point is that gradually and progressively after the English goods were introduced, all the goods of this class were called "delaines," and that the term "delaines" became, prior to 1857, the term which was commercially used to designate the two classes of goods indiscriminately. Second. The defendant's witnesses also insist that while the French goods were always called "mousseline delaine," the English and American cotton and worsted imitations were also alike and generally called "mousseline de laines," and so there was no distinction between the trade names of the two classes of goods, and thus "mousseline delaine" was indiscriminately applied to each class, and that, dropping the word "mousseline," "delaines" came to mean either class. Third. The defendant criticizes the testimony of the plaintiffs, and seeks to show that it is self contradictory.

I have thus placed before you the question of fact which is to be passed upon by you, and briefly given the opposing theories and summarized the testimony which has been presented in behalf of each theory. If you find this question of fact in favor of the plaintiffs it is agreed that your verdict shall be in their favor in the sum of $14,902 91. If you do not find this question of fact for the plaintiffs your verdict will be for the defendant.

After the judge had finished his charge to the jury, the counsel for the plaintiffs excepted to the refusal of the court to instruct the jury, either in form or substance, as the plaintiffs had prayed. The counsel for the defendant declared that he had no exceptions to take. The jury rendered a verdict for the plaintiffs.

HUTTON (UNITED STATES v.). See Cases Nos. 15,433-15,435.

Case No. 6,963.

HUTZ v. KARTHAUSE.

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

Circuit Court, E. D. Pennsylvania. Oct. Term, 1820.

BILL OF EXCHANGE—PROTEST—PROMISE TO PAY—NOTICE.

1. The defendant accepted an order to pay certain debts, out of the proceeds of a bill of exchange, which bill was protested for non payment. The plaintiff declared upon this promise. The bill not being paid, the obligation was at an end; and the plaintiff failed in his action, so far as it was founded upon that promise.

[Cited in Catlin v. Jones, 1 Pin. 132; Corwith v. Morrison, Id. 491.]

2. When the defendant promised to account for the proceeds of a bill of exchange remitted to him as soon as the fate of the bill should be decided, the clear meaning of the undertaking was, to pay, provided the bill should be paid.

3. The principle of law, which requires notice of the dishonour of a bill to be given by the holder of it, or by an agent, requires notice to be given only to those persons to whom the owner of a bill has a right to look for payment. Third persons, who are not liable on account of the dishonour of a bill, and could look to no person on the bill for indemnification, or for payment of it; are not entitled to notice.

[Cited in West Branch Bank v. Fulmer, 3 Pa. St. 401.]

This is an action on the case by the surviving trustee, for the creditors of one Bur-

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

kle, to recover the amount of a bill of exchange, dated the 20th of July 1814, drawn by Elbert on Baring & Co. of London, for £894 sterling, in favour of Burkle, which he deposited with the defendant to remit and collect. On the 21st of September 1814, Burkle gave an order on the defendant, to pay the amount of the said bill to Slessman and the plaintiff; the two trustees; in the following words: "on receiving advice of the acceptance by Messrs. Baring & Co. of London, of Elbert's bill of exchange on Baring & Co. in favour of, and indorsed by me to you, for $894 sterling, please pay to George Slessman and Hutz, or order, such balance as may be due to me on account of said bill, after deducting therefrom the $800 advanced to me by you, on account thereof." The acceptance of the order was in the following words; "the amount due me is $289 25 cents for premium of insurance; $583 79 cents balance per account current; and $500 advanced you in Philadelphia; in all, $1373 4 cents, which being deducted out of the proceeds of the bill on London, I promise to account for the balance to the abovementioned gentlemen. The second count is on a special agreement, to account for the balance of the aforesaid bill, and is founded on the above acceptance. The third count is on a special agreement to charge Crafts with the amount of this bill, and to account with the plaintiff for the same; and is founded on the following letter from the defendant's clerk to Burkle, dated 4th of February 1815: "as soon as the fate of the bill is decided, I will account with your creditors in due time. As Crafts is responsible for the bill on London, I shall charge the amount to him, and be responsible for the same to your creditors." The fourth count is upon a promise to pay the amount of the bill to the plaintiff, and is founded on a letter from the defendant to Slessman, dated the 26th of June 1815, in which he says that the business of Elbert and Crafts has become troublesome, and that he expects at last to become a large sufferer; and then adds: "when my partner comes to Baltimore, which will be soon, we will try to render Burkle's account current, and settle the balance with you." The first count is general indebitatus assumpsit, for money had and received.

1. Upon the special counts it was contended by the plaintiff's counsel, that the promises contained in the above acceptance and letters fully support the charges, and are either of them sufficient to bind the defendant to pay the bill, subject to the deductions stated in the acceptance.

2. That the defendant is liable on the ground of neglect, in not giving due notice to the plaintiff of the dishonour of the bill, which was protested for non-payment, in December 1814, and the first notice which the plaintiff received of it from the defendant was on the 1st of July 1815; although, in the defendant's account, he debited the cost of the protest on the 9th of May 1815. Cases cited: Kyd, Bills, 76; Chit. 246, 247, 322; 3 Bos. & P. 599; 6 East, 3; 12 East, 227; 5 Mass. 167; 4 Term R. 320.

For the defendant it was contended, that the acceptance, as well as the special promises relied on, were all contingent, and depended on the ultimate fate of the bill. That if otherwise, still the promises were made without consideration, and therefore were not binding. The doctrine in Pillans v. Van Mierop [3 Burrows, 1663] is confined to negotiable instruments of a commercial nature, in the hands of a third person. Cases upon the point of a want of consideration: 1 Com. Cont. 13, 14, 19; 1 Sandf. 110; 3 Johns. 100.

2. As to the failure to give notice of the dishonour of the bill, the cases read on the other side apply to the holders, and the previous parties on the bill. The agent guilty of this neglect may be answerable over to his principal, in a proper action, to charge him; but not otherwise. Chit. 177.

Mr. Randall and Joseph R. Ingersoll, for plaintiff.

Chauncey & Binney, for defendant.

WASHINGTON, Circuit Justice (charging jury). This is an action of assumpsit, founded upon three separate and distinct promises; and the declaration contains three special counts founded upon these promises, and a general count for money had and received. Some observations were made by the counsel for the defendant upon these special counts, to show a variance between them and the promises given in evidence to support them; and also the insufficiency of the consideration stated as the ground of the different undertakings. Not considering it necessary, in this case, to give any opinion upon these points, and wishing to place the cause before the jury upon its real merits; I shall pass over all objections to the form of the declaration, and examine the case upon the true construction of the promises themselves, which are all in writing.

The first promise referred to in the declaration, and relied upon by the counsel for the plaintiff, is contained in an order drawn by C. J. Burkle on the defendant, dated the 21st of September 1814, in favour of the plaintiff and George Slessman, in the following words, viz.: "On receiving advice of the acceptance by Messrs. Baring & Co. of London, of Elbert's bill of exchange on said Baring & Co. in favour of, and indorsed by me to you, for £894 sterling, please pay to George Slessman and Hutz, or order, such balance as may be due to me on account of the above bill, after deducting therefrom the $800 advanced to me by you on account thereof." The acceptance of this order was underwritten in the following

terms. "The amount due me is $289 25 cents for premium of insurance, $583 70 cents balance per account current, and $500 advanced you in Philadelphia; in all $1373 4 cents, which being deducted out of the proceeds of the bill on London, I promise to account for the balance to the above mentioned gentlemen." If the defendant's acceptance of this order had been general, it is perfectly clear, that his undertaking would have been to pay the balance of the amount of the bill, as soon as he should have received advice of its acceptance. And it would be equally clear, that the dishonour of the bill would have discharged the defendant from the obligation he assumed, which was made to depend upon the acceptance of the bill on London. The contract created by the special acceptance, was made equally to depend upon a contingency, though of a different kind, that is, the payment of the bill; because, it is to pay out of the proceeds of the bill, and if the bill should prove unproductive, there could be no proceeds; and consequently the event upon which the obligation to pay was to arise, not having happened, the obligation itself was at an end. In this case, the bill was protested for non-acceptance and non-payment, and the plaintiff must necessarily fail in his action, so far as it is founded upon this promise.

The second promise, which is styled by the plaintiff's counsel the guarantee of the bill on London, was made in a letter addressed by the clerk of the defendant to Burkle, (not to the plaintiff or to Slessman,) under date of the 4th of February 1815, to the following effect, viz. "as soon as the fate of the bill is decided, I will account with your creditors in due time." In a postscript he adds: "as Crafts is responsible for the bill on London, I shall charge the amount to him, and be responsible for the same to your creditors." The authority of the clerk to write this letter is not questioned; and the only point in controversy between the parties in respect to it, is its just and legitimate construction. It is perfectly obvious, that the body of the latter and the postscript, taken separately, or together, contain two independent and dissimilar promises. The first is, to account with the creditors or Burkle as soon as the fate of the bill should be decided: that is, as I understand it, if the bill should be paid, he would pay to the creditors so much of the amount as they were entitled to, agreeably to the defendant's acceptance of the 21st of September; or if not paid, he would account for the bill. It would be quite unreasonable to construe this promise into an agreement to account for the amount of the bill, whether it was paid or not; not only because such a promise would be inconsistent with the obligation which the acceptance of the 21st of September laid him under, but because the writer, if he had so intended, would probably, and might as well have said at once, that he would pay the bill at all events. This promise, so construed, is both future and contingent. The second promise is to charge the bill to Crafts, as he is responsible for it, and to pay the amount to the creditors; which, if rightly construed by the plaintiff's counsel, is a promise to pay immediately and unconditionally. Now, that the writer could have intended to make two promises, so different from and inconsistent with each other, cannot fairly be presumed; and it is our duty to give a reasonable construction to this letter, such as the expressions used will sanction. Taking the two promises together, I understand them to mean, that the defendant would account to the creditors for the proceeds of the bill, in case it should be paid by the drawees; or if not, that he would charge the bill to Crafts, if, as the writer supposed, he was responsible for the same; and in that event also, would become himself responsible to the creditors of Burkle. The word as, in the postscript, is clearly used to express a condition or the consideration of the undertaking. As if the writer had said, "although the bill should be dishonoured in London, yet in consideration of the responsibility of Crafts to pay it, I will charge it to him and account for the same to your creditors." That Slessman so understood this letter is obvious from his subsequent letters to the defendant, in which he always speaks of the impatience of the creditors and requests information respecting the bill. But if the defendant was bound to pay it at all events, whether Crafts was responsible for it or not, the fate of the bill was altogether an unimportant matter to the creditors, and the defendant was liable to be called upon for payment of it, as soon as the promise was communicated. No doubt the defendant supposed that Crafts was responsible for the bill, either because he believed him to have been a partner of Elbert, the drawer, or upon the ground of the promise made in Crafts's letter to the defendant, of the 6th of January 1815, to make himself responsible for the bill. But if the defendant's belief of Crafts's responsibility was founded upon this letter, he should have recollected that the promise was conditional, and had neither been accepted, nor was the condition performed by the defendant. The truth is, that the defendant was altogether mistaken in the opinion he had formed upon this subject, both as to the fact and the law; for Crafts does not appear at any time to have been responsible for this bill. There was therefore a total failure of the consideration which induced the promise, and consequently, the promise itself ceased to have any obligation upon the defendant. Or, to speak, perhaps, more correctly, the promise never was obligatory upon him, as it was induced by, and founded upon a mistake of an important fact. The third promise has

not been much relied upon by the plaintiff's counsel, and may therefore be passed over with this remark, that the promise contained in the defendant's letter of the 26th of June 1815, being "to render Burkle's account, and to settle the balance with Slessman," no proof of its breach has been given, since it has not been shown, nor is it pretended that the balance of that account was against the defendant.

2. The second ground taken by the plaintiff's counsel on which to fix the responsibility of the defendant, is, his neglect of the duty of an agent to give timely notice to the plaintiff or to Slessman, as well as to the drawer and indorser of this bill, of its dishonour. To this claim there appear to the court, to be two or three insurmountable objections. 1. In the first place there is no count in the declaration under cover of which this claim can for a moment be asserted. It certainly is not embraced by the general count, since it cannot be pretended that the mere omission of an agent to give notice to his principal of the protest of a bill placed under his care, is evidence of money had and received to the use of the principal. The other counts are founded upon special undertakings to pay this bill, and have not the most remote reference to a charge against the defendant for neglect and breach of duty. 2. In the next place, the defendant never was the agent of Slessman and the plaintiff. The bill was placed in his hands for collection by Burkle, previous to his order of the 21st of September in favour of Slessman and Hutz; he was directed to pay the amount of the bill to those persons, which he agreed to do out of its proceeds. But the bill itself was not transferred to Slessman and Hutz, nor did the defendant act or profess to act as their agent. They had a right to inquire, as they frequently did, respecting the fate of the bill, because they had an interest in its proceeds when paid. But they had no further or other connexion in the business with the defendant. The dishonour of the bill put an end to their interest in the bill, and to their claim upon the defendant. 3. Lastly—The principle of law which requires notice of the dishonour of a bill to be given by the holder of it, or by an agent, does not apply to a case of this kind. It must be given to all those who are liable to be called upon to pay the bill, that each person may have an opportunity to obtain security from those to whom he has a right to look. But Slessman and Hutz were not on the bill as indorsers. They were liable to no person on account of the dishonour of the bill, and could look to no person on the bill for indemnification or for payment of it. Burkle, the indorser, and the drawer, were entitled to notice; and if on account of the want of it, Burkle should fail in his recourse against the drawer, it is for him, not for the plaintiff, to call the defendant to account in a proper action.

Upon the whole it is the opinion of the court that the verdict should be in favour of the defendant.

Verdict for defendant.

Case No. 6,964.

The H. W. EDYE.

[10 Ben. 238.] [1]

District Court, S. D. New York. Jan., 1879.

EXECUTION OF CONTRACT—CONDITIONAL DELIVERY.

L., as agent for the owners of a steam-tug, conferred with T., in reference to a charter of the tug by T. and others. The terms of the employment were agreed upon between them. L. had insisted that security should be given for the payment of the charter money, and, T. having proposed one Lewis as surety, L. and T. met at his office, where the charters were drawn up in duplicate and signed, Lewis signing as witness, and each took his part of the charter. When L. saw that Lewis had signed only as witness, he objected, and declared that the affair should go no farther, and that the boat should not leave the port till security was given. The boat had already gone to Hoboken to take in coal for the voyage, but the security not being given, she went no farther, and T. and his associates filed a libel against the boat to recover damages for the refusal of the owners to perform the charter: *Held*, that, on the facts, the charter was not completely executed, and that the action could not be maintained.

In admiralty.

W. R. Beebe, for libellants.

T. E. Stillman, for claimants.

CHOATE, District Judge. This is a libel by David W. Terhune and others, against the steam-tug H. W. Edye, to recover damages caused by the alleged refusal of the owners of the tug to permit the tug to leave the port of New York, and for retaining her from the libellants after the said owners had executed and delivered to the libellents a charter party granting the use of her for some five months to run on the river Kennebeck and after the said tug had entered upon the performance of said charter party. Among other defences the claimants alleged that the charter party sued on was never executed and delivered by them. The libellants have produced a paper purporting to be a charter party and complete in form, under seal, the parties to which are recited to be "L. and F. Luckenback, agents of the steam propeller H. W. Edye, parties of the first part, and D. V. Terhune and Robert Wylie, parties of the second part," and signed by L. and F. Luckenback and D. V. Terhune and witnessed by John H. Lewis. L. and F. Luckenback are conceded to have been the agents of the tug, having authority to charter her. The charter is dated May 13, 1876.

It appears that the negotiations prior to the signing of the charter were between Mr.

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

Terhune on the part of the libellants and Mr. Lewis Luckenback on behalf of the claimants, that those negotiations were for the chartering of two boats and extended through several days; that Terhune and Wylie were strangers to Luckenback and resided in Boston; that the boats were wanted for the ice business on the Kennebeck river, for five months or more, the charter price of the boats, as finally agreed upon before the signing of the charter parties, being $925 per month. It appeared also that from the beginning of these negotiations Mr. Luckenback had insisted that the libellants should give security for the performance of the charters on their part, and that the boats would not be chartered except on such security. Terhune at first proposed as surety one Starks W. Lewis, whom Luckenback accepted. Afterwards he represented that there was some difficulty in getting Starks W. Lewis and proposed Mr. John H. Lewis, whom, after inquiry, Luckenback agreed to accept. On this point of a prior agreement to give security, Mr. Terhune's denial is overborne by so great a weight of evidence that I consider the point proved in favor of the claimants beyond any doubt whatever, and it is in accordance with all the probabilities deducible from the circumstances and the nature of the transaction. The terms of the charters having been arranged, Luckenback and Terhune met at the store of John H. Lewis on the 13th of May, to execute the papers. Terhune had previously drawn up the charters for the two boats, two copies of each. Mr. John H. Lewis was present at this interview. The charters were read over by Mr. Luckenback and Mr. Terhune, and the copies compared and found to be correct. Mr. Wylie was not present. In accordance with an arrangement made the previous day, he had gone with the boats, which were still under the command of the claimants' masters, to Hoboken to take in their coal, in order to be in readiness on the completion of the business of the charters to proceed at once to the eastward. It is claimed by Terhune that he had authority to sign for Wylie and that Luckenback assented to his doing so, and that the charter parties are valid and binding although not signed by Wylie. It is unnecessary to consider these questions in the view that is taken of the case.

The principal question in the case is whether what took place at Lewis's store at that interview amounted to an execution and delivery of the charter parties. Terhune's statement is that he and Luckenback signed the charter parties; that they handed each to the other the papers thus executed by them; that Luckenback took his two parts and Terhune his; that nothing whatever was said about security; that Lewis witnessed the papers at their request and that Luckenback went away; that it was only afterwards when Luckenback returned, after an absence of half an hour or more, that he demanded security. In this he is corroborated to some extent by Mr. Lewis. Luckenback's statement is that Lewis was not asked to sign as a witness; that when he saw, after Lewis had signed, that he had signed merely as a witness, he objected that it was not according to the agreement; that he was to be the surety, and that after some discussion he declared that the matter should go no further and that the boats should not leave till security was given.

The evidence is conflicting, but one fact I consider clearly proved, that the parties met upon an agreement distinctly understood between Terhune and Luckenback, but apparently not communicated by Terhune to Lewis; that Lewis was to become the surety on the charters; that he was to sign them in that capacity. This purpose there is not the slightest reason on the evidence to believe, had been abandoned by Luckenback, and this circumstance adds great probability to the truthfulness of his account of the affair. I consider Terhune substantially discredited, especially by the evidence in relation to the agreement to give security; and after a careful consideration of all the testimony I am satisfied that Luckenback's account is correct and that Lewis is mistaken on this point, and that his recollection is at fault as to the time when the objection as to security was made by Luckenback, and which he places at the subsequent interview, when Luckenback returned. There is a great deal of evidence, mostly circumstantial, which has been produced as bearing on this question, but which need not be reviewed in detail. It has all been carefully considered. If this is the true view of the case, there was no valid execution and delivery of the charter parties. The fact that they are in form complete; that they are signed, and that the several parts are in the possession of the two parties, is not conclusive of execution and delivery. It may be explained, and I think in this case it has been successfully explained by the claimants. The charter parties were never completed according to the intention of the parties as they met there for their execution. The signing and passing of them over was not with intent nor understood by either party to be with intent to deliver and give them effect as perfect instruments, but preliminary only to the signing by a surety which never took place. Libel dismissed with costs.

HYATT (BANK OF COLUMBIA v.). See Case No. 869.

HYATT (CORNELL v.). See Case No. 3,237.

HYATT (HYER v.). See Cases Nos. 6,976 and 6,977.

HYATT (VAN NESS v.). See Case No. 16,867.

HYDE (ANDREWS v.). See Case No. 377.

Case No. 6,965.

HYDE v. BAKER.

[Cited in Crane v. Morrison, Case No. 3,355. Nowhere reported; opinion not now accessible.]

Case No. 6,966.

HYDE v. BANCROFT.

[The case reported under above title in 8 N. B. R. 24, is the same as Case No. 14,513.]

HYDE (BLEEKER v.). See Case No. 1,537.

Case No. 6,967.

HYDE v. COHEN et al.

[11 N. B. R. (1874) 461.] [1]

District Court, S. D. New York.

BANKRUPTCY —FRAUDULENT TRANSFER OF STOCK.

A bill was filed against C., alleging that the bankrupt had fraudulently put into C.'s hands certain sums of money which, after the adjudication, was used to purchase a number of shares in a sewing machine company, and praying that the plaintiff, as assignee, may be declared to be entitled to the stock as assets of the bankrupt's estate. *Held*, that plaintiff is entitled to a decree; that the defendant C. vest in the plaintiff the title to the stock in question, and pay the cost of this suit.

[This was a suit by Charles H. Hyde, assignee, against Abraham Cohen and others, for the recovery of certain shares of stock.]

G. A. Seixas, for plaintiff.

R. S. Newcombe, for Cohen.

BLATCHFORD, District Judge. The bill claims that the bankrupts fraudulently put into the hands of the defendant Cohen certain sums of money which he, after the adjudication in bankruptcy, and before the commencement of this suit, paid out, at their request, for the purchase of seven hundred and twenty-five shares of the New York Shuttle Sewing Machine Co., certificates for which he holds. The bill prays that the plaintiff may be declared to be entitled to the stock, as assets of the estate of the bankrupts, and that he may recover the same from the defendant Cohen. I think the plaintiff has established such claim by the evidence; and as it appears that the defendant Cohen has certificates for the seven hundred and twenty-five shares still in his possession, certificates for five hundred and fifty of them being in his own name, and certificates for one hundred and seventy-five of them being transferred thereon to him in blank, the plaintiff is entitled to a decree that the defendant Cohen vest in the plaintiff the title to the seven hundred and twenty-five shares, and pay the costs of this suit. The decree will also declare that, as against the plaintiff, the bankrupts and Cohen have no title to the stock, or to the moneys with which it was purchased.

[1] [Reprinted by permission.]

Case No. 6,968.

HYDE v. CORRIGAN.

[9 N. B. R. 466.] [1]

District Court, D. California. April, 1874.

INSOLVENCY—FAILURE TO APPLY FOR BENEFIT OF BANKRUPT ACT.

Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473] examined, and *held* not to cover a case where a debtor who is utterly insolvent, and with no reasonable prospect of being able to pay his debts, fails to apply for the benefit of the bankrupt act [of 1867 (14 Stat. 517)], but passively permits certain creditors to appropriate all his assets to their debts. Such a case is not that "honest struggle to meet their debts and to avoid the breaking up of all their business," referred to by the supreme court.

W. W. Foote, for plaintiff.

J. Chadbourne, for defendant.

HOFFMAN, District Judge. This is an action brought by the assignee of John Jackson, a bankrupt, to recover back certain moneys alleged to have been paid by the bankrupt to the defendant, (a creditor) in fraud of the provisions of the act. The testimony discloses the following facts: The bankrupt was indebted to the defendant for moneys loaned, which the latter had borrowed at bankrupt's request from a third person. About a year after this money was lent, the person from whom Corrigan had borrowed it, demanded re-payment, and Corrigan thereupon made a demand on the bankrupt, who replied that he would sell some sheep and get the money. About a week afterwards, Corrigan received a dispatch from a friend in this city informing him that the bankrupt was about to return to Red Bluff, near which he resided, and advising him to get his money. It would seem that the bankrupt had succeeded in obtaining moneys from parties in this city to whom he stated that "he was hard up" and wanted help. The money was lent by them to enable him to pay off his debts. This at least is the bankrupt's statement, and it is not contradicted. On the arrival of the bankrupt at Red Bluff, Corrigan demanded his money, and the next day commenced suit, threatening to attach all the bankrupt's property, which was very considerable, unless a settlement was effected. The bankrupt promised to pay in a few days, and about a fortnight after did pay Corrigan in full, having obtained the means of doing so by the sale of some sheep. In the meantime two other attachment suits had been commenced by other creditors. These, with two other creditors who had not sued, were paid about the same time, but before the payment to Corrigan. These

[1] [Reprinted by permission.]

transactions occurred in the early part of June, 1872. About two months afterwards an attachment suit was commenced against the bankrupt by one Wellington, and about one month thereafter another suit was brought by Kraft.

The petition in bankruptcy was filed on the 2d day of October, a little less than two months after the commencement of the last suit. It being admitted that the debt to the defendant was justly due, he cannot be held liable in this suit unless it appear that at the time the payment was made the bankrupt was insolvent or in contemplation of insolvency; that he made it "with a view" (section 35), or "with intent" (section 39), to give a preference to a creditor, and the creditor receiving the payment had reasonable cause to believe the debtor to be insolvent, and "that the payment was made in fraud of the act" (section 35), or "that a fraud on the act was intended" (section 39). With respect to his condition at the time of the payment to Corrigan, the bankrupt testifies: "I was under the impression I was insolvent, but I thought that if they didn't press me, I could collect some old debts and meet all my liabilities. I could not say whether I knew I was insolvent. I was in hopes not to be; I was trying to pull through. I think I could have collected those old debts. They would have paid me when they wouldn't pay the assignee. I didn't give up all hopes until thirty or forty days afterwards; I was disappointed in getting moneys. I was in hopes when I paid Corrigan to be able to pay every one, if they didn't press me, but not, if they did. I told Corrigan he was the cause of the other parties suing me. I hoped to pay off these loans," (obtained from parties to whom he applied for assistance,) "from increase of sheep wool and these old debts." At the time the payment to the defendant was made, the bankrupt was possessed of considerable property—a large rancho, five thousand sheep, some thirty American horses, cattle, etc. He had also a rancho in Trinity county, which he wished the defendant to take for his debt. Mr. Wellington, a creditor, to whom the contents of the dispatch above referred to were communicated, testifies that about the time Corrigan's suit was commenced he applied to the bankrupt for payment. He was assured by Jackson that he was able to pay all his creditors; he said he had ranchos, sheep, cattle and horses, spoke of a rancho in Trinity county, saw he could pay if let alone. On the strength of these assertions Mr. Wellington "concluded not to trouble him." The bankrupt continued to live on his rancho, doing business as usual for some months after his payment to Corrigan. His petition was filed only four days before the expiration of the four months fixed by the statute as the period within which the payment to Corrigan could be assailed.

The recent decision of the supreme court in the case of Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473] has modified, in some important respects, the interpretation given by many of the district courts to the clause in section thirty-nine relating to the suffering by an insolvent of his property to be seized on legal process. It had been held that the omission of an insolvent to prevent the seizure of his property on attachment or execution by filing a voluntary petition in bankruptcy, constituted a suffering of his property to be taken on legal process, and inasmuch as such taking was the natural and probable consequence of his inaction, and the effect of the proceeding would, if not arrested, be to enable one creditor to obtain an advantage over the rest, the insolvent must be deemed to have suffered his property to be taken with the intent to give a preference. But the supreme court refused to adopt the view upon which this interpretation of the act was based. They declared that a person in embarrassed circumstances and unable to meet all his engagements as they accrue is not under any legal or moral obligation to go into bankruptcy and thus convert what may be a temporary embarrassment into final ruin, any more than a master is bound to voluntarily strand his vessel when as yet it is not known whether he may not weather the storm or escape the shore. That to hold his omission to do so to be an act of bankruptcy is to give creditors the right to initiate a proceeding in bankruptcy against insolvents in a class of cases not enumerated in the act, viz: those where the debtor ought himself to go into court as a bankrupt and fails to do it, and this on the ground that the act requires him, under the circumstances, to become a "voluntary," bankrupt. It being thus established that the insolvent is under no legal or moral obligation to go into voluntary bankruptcy, it necessarily followed that his failure to do so furnished no evidence of the fraudulent intent which is made by the act an element of the act of bankruptcy. The general proposition that a man must be held to intend the natural consequences of any positive act committed by him was admitted, but it could not be inferred that a man intends, in the sense of desiring, promoting or procuring a result of other persons' acts when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

On these grounds the lien obtained by a judgment creditor in the ordinary course of law, and without any complicity on the part of the debtor, was sustained against the claim of a subsequent assignee in bankruptcy, notwithstanding that the creditor, at the time he commenced his suit, was aware of the insolvent condition of his debtor. This decision seems substantially to adopt the view expressed by Bradley, J., in his dissenting

opinion in Buchanan v. Smith [16 Wall. (83 U. S.) 277]. In that opinion Bradley, J., holds: "That an adversary suit may be prosecuted to judgment up to the very moment of bankruptcy. The creditor is not bound himself to petition against his debtor in bankruptcy, nor does the neglect of the debtor to file such petition deprive him of his fairly gained preference unless complicity between them be shown." But slight circumstances will be sufficient to show such complicity. In Wilson v. City Bank of St. Paul [supra], the court observes: "Undoubtedly very slight evidence of an affirmative character of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. These cases must rest on their own circumstances."

What, then, are the circumstances of the case at bar? At the time of the payment to the defendant he was clearly insolvent. Technically so, by his own admission, for he knew that if pressed he would be unable to meet his engagements. He was also insolvent in the sense of not having sufficient property to pay his debts. He seems to have entertained a vague hope that, if not pressed, he might collect some old debts, which have since proved worthless, and realize sufficient to meet his engagements from other sources. But he was pressed, not only by the defendant, but by two other creditors who had attached his property. This the defendant well knew, and those creditors were paid before he was. Thirty or forty days after the payment to defendant the bankrupt, as he says, gave up all hope. Other creditors attached and he sold out and realized all he had to meet those attachments. He admits it would have been better to have gone into bankruptcy. His schedules show unredeemed debts to the amount of fifteen thousand five hundred and eighteen dollars. His assets did not exceed two thousand five hundred dollars, including a book account of one thousand two hundred dollars, of no value. It is not shown that he sustained any losses or contracted any new liabilities subsequently to his payment to defendant. It is, I think, plain that at the time of that payment he was legally insolvent. Such being his condition, the natural and inevitable effects of his payments to the defendant and the other attaching creditors was to give them a preference over the rest. And this effect he must be deemed to have intended. His conduct was not like that of an insolvent who omits to go into voluntary bankruptcy, "a mere passive indifference and inaction where no action is required by positive law or good morals," but the preference was given, and the intent to prefer manifested, by affirmative acts of the most unequivocal character, the effect of which was certain and apparent.

It is observed by the court, in the case so often above cited, that "many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and by the submission of some of their property to be seized on execution, they are finally able to pay all and to save their commercial character and part of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court; but until this is done their honest struggle to meet their debts and to avoid the breaking up of all their business is not to be construed into an act of bankruptcy, or a fraud upon the act." Under the circumstances mentioned in the above extract, it is plain that neither justice nor sound policy requires the embarrassed though solvent debtor to precipitate his own ruin. While honestly struggling he may pay pressing debts or suffer some of his property to be levied on. But his right to do so can exist only under the circumstances mentioned by the supreme court. He must know that his means are ample, his assets sufficient to pay all his debts, and that his condition is one of merely technical insolvency. His struggle to meet his debts must not only be honest, but made with reasonable ground for expecting a successful issue. He cannot, because he indulges a vague hope that something may occur to add largely to his assets and enable him to pay his debts, distribute his property or its proceeds among preferred creditors until the bankruptcy by which he is speedily overtaken finds him in possession of nothing but the fragments of a wreck. Such I conceive to have been the course pursued by the bankrupt in this case. He can therefore derive no benefit from the liberal and enlightened doctrines recently promulgated by the supreme court.

It remains to inquire whether, at the time he received payment in full of his debt, the defendant had reasonable cause to believe the debtor to be insolvent, and that a fraud on the act was intended. This inquiry must be answered in the affirmative. He had received a dispatch informing him of the bankrupt's return to Red Bluff, and advising him to get his money and communicate the contents of the dispatch to another creditor. The terms of the dispatch, and the fact that it was sent by telegraph, indicated that the business was urgent and quite different from the ordinary collection of a debt from a solvent debtor. On the receipt of this dispatch he instantly commenced suit, and on the arrival of the bankrupt demanded the immediate payment of his debt under a threat that he would attach all his property. He refused to listen to the bankrupt's request for time, although informed by him in effect that he could not pay his indebtedness if pressed. At the time he received his money he knew the bankrupt was pressed, not only by himself, but by other creditors who had

attached his property and had exacted payment.

Under these circumstances no reasonable man could resist the belief that the bankrupt was insolvent, and that in making the payments to the defendant and other creditors he was giving an unlawful preference and committing a fraud upon the act. This inference is confirmed by the testimony of the bankrupt, who swears that before he paid the defendant one dollar the latter told him he knew he was broke. The statutory conditions of the defendant's liability are thus fully satisfied. The bankrupt, being insolvent, has made a payment with intent to give a preference to a creditor who, at the time he received it, had reasonable cause to believe the debtor to be insolvent, and that a fraud on the act was intended. Judgment for plaintiff.

Case No. 6,969.

HYDE v. DOE.

[4 Sawy. 133.] [1]

District Court, D. California. Dec., 1876.

CORPORATIONS—CERTIFICATE.

Where certain persons formed a corporation under the act of April 11, 1862 (St. Cal. 1862, c. 187, p. 199), and without transacting any business re-incorporated themselves under the act of 1853, under which last incorporation all their business was done: *Held*, that the validity of those acts must be determined by the provisions of the act of 1853, notwithstanding that the first corporation was not formally disincorporated. The filing of the duplicate certificate with the secretary of state is not essential to the legal existence of a corporation, except as between it and the state.

[This was a suit by Henry C. Hyde, assignee, against Bartlett Doe.]

G. Cobb and Thomas B. Bishop, for complainant.

James L. Boyd and W. W. Crane, Jr., for defendant.

HOFFMAN, District Judge. The principal points discussed in the voluminous brief filed by the counsel for the plaintiff have already been considered and decided by the court. The only new facts developed by the testimony taken since the former decision are as follows: It appears that the corporation was originally formed under the act of April 11, 1862, but being advised by counsel that that act did not permit the extended operations contemplated by the company, a new incorporation was effected under the act of 1853. As no business whatever had been transacted under the original incorporation, it was not deemed necessary to formally disincorporate, and re-incorporate under the new certificate. All the business ever transacted by the bank was done under the second incorporation. It appears, however, that the corporation was organized before the copy of its certificate, filed in the office of the county clerk, was filed in the office of the secretary of state. It is claimed that under these circumstances the corporation must be deemed to have been formed under the act of 1862, and that the validity of its acts must be determined by the provisions of that statute. But in this view I cannot concur.

There can be no question that its original incorporation was abandoned. It has never claimed or pretended to act under that certificate, and there was for several years a total non-user of any franchise it might have acquired by its first incorporation. The claim it now makes is purely technical and grossly inequitable. It seeks to recover back from the lender securities given to him for money honestly lent to it, and used in the course of its business and to pay its debts, without notice or suspicion that it was under any disability to contract the debt, and this without offering to return the money, or any part of it.

This court has already decided that the bank was not under any disability to contract a debt if incorporated under the act of 1853. To hold, that in judgment of law and contrary to the fact, it was incorporated and acting under its first abandoned and disused incorporation, and not under the substituted incorporation, which was made for the express purpose of increasing its powers and enabling it to extend its operations, would, in my opinion, be to establish an erroneous rule on purely technical grounds, and to the manifest defeat of justice. No authority for the position assumed by the counsel for the plaintiff is cited.

The names of the incorporators and that of the incorporations were the same in both cases. I am not aware of any legal obstacle to the formation by the same persons, and even under the same name, of as many corporations as they may desire. If in this case the second incorporation was regular, it may be regarded as creating a new and independent corporation, entitled to all the rights and privileges acquired by the act of incorporation as fully and completely as if the same persons had not previously incorporated themselves under the same name, but for a different purpose. In this view there would be two existing corporations having the same name, and composed of the same persons, but constituting distinct legal entities.

To determine the validity of an act purporting to have been performed by a corporation having the name common to both, it would be only necessary to inquire which of the corporations was acting. An in-

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

quiry, in this case, of easy solution, for the first corporation never transacted any business whatever. If it be objected that this view is technical and artificial, it may be answered that the claim of the plaintiff is based on purely technical grounds, and if allowed, would work a practical injustice.

It may further be urged that the mere act of creating a corporation by complying with the simple requirements of the laws on that subject does not, when the franchise has never been used, and all rights under it have been abandoned, create such a legal disability in the persons who have formed it, to create a new corporation for different purposes, though under the same name, as will make all acts, though in fact performed in the exercise of the new franchise, yet in the eye of the law considered to have been performed under the old and abandoned one; and this merely because the formality of a technical dissolution of the first corporation was not observed.

It is further contended that the acts of this corporation must be deemed to have been done under the first franchise, because the second corporation was organized before the copy of the certificate was filed in the office of the secretary of state. To this it is only necessary to say, that this point has been otherwise determined by the supreme court of this state.

In Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 426, it was held that though the right of the corporation to be considered such, and to exercise corporate powers depends upon the fact of the performance of the particular acts named in the statute, as essential to its corporate existence, yet that the filing of the duplicate certificate with the secretary of state is not one of these acts; that the corporation acquired a valid legal existence by the filing of the certificate with the county clerk, and that the remedy for the omission to file the duplicate rests with the state alone, and must be enforced by a direct proceeding instituted by it.

I consider this authority conclusive. So far as private persons are concerned the corporation acquired a valid legal existence by the filing of the certificate in the county clerk's office. A decree will be entered in accordance with this opinion.

[NOTE. A bill was subsequently filed by the defendant praying for a payment to him by the said assignee in bankruptcy of certain notes, with interest. A demurrer setting forth the statute of limitations according to the act of March 2, 1867 (14 Stat. 578), was sustained by the circuit court, and, upon appeal by the complainant, the decree was affirmed by the supreme court, opinion by Mr. Justice Blatchford. 114 U. S. 247, 5 Sup. Ct. 841.]

HYDE (EDMONDSON v.). See Case No. 4,285.

Case No. 6,970.

HYDE et al. v. FIRST NAT. BANK.

[7 Biss. 156; 2 N. Y. Wkly. Dig. 342; 8 Chi. Leg. News, 262; 11 Bankers' Mag. (3d S.) 140; 2 Law. & Eq. Rep. 257.] [1]

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

LIABILITY OF A BANK TO WHOM COMMERCIAL PAPER IS SENT FOR COLLECTION.

1. A second bank receiving the paper from the first and collecting the money on it, is not liable to the owner of the paper.

[Cited in Power v. First Nat. Bank (Mont.) 12 Pac. 604.]

2. On the deposit of a note with a bank for collection, a contract is implied between the owner and the bank, but this implied contract does not follow the note into the hands of the bank's collecting agents.

[Cited in First Nat. Bank v. Reno Co. Bank, 3 Fed. 265.]

3. The owner has no remedy against an agent of the collector.

[Cited in City Bank of Sherman v. Weiss, 67 Tex. 331, 3 S. W. 299.]

Action was brought to recover a certain sum of money, charged to have been collected from John Hutchins, by defendant for plaintiffs [Albert G. Hyde and others]. Plea, general issue. The case was tried by the court by stipulation.

Tenneys, Flower & Abercrombie, for plaintiffs.

Dent & Black, for defendant.

HOPKINS, District Judge. The evidence showed that John Hutchins, of Lacon, in this state, gave his note to the plaintiffs, residents of New York City, for $407.63, on the 15th day of September, 1874, payable in four months, at the First National Bank of Lacon, the defendant. The plaintiffs indorsed the note to the order of A. Hest, Esq., cashier, for collection for their own account. Hest then indorsed it to the defendant for collection for Cook County National Bank. Mr. Hest was the cashier of the Cook County National Bank, and sent the note in a letter to the defendant, on the 11th day of January, 1875, with instructions "to collect and credit." The defendants kept an account with the Cook County Bank, and then had a considerable sum in that bank. The note was paid to defendant on the 18th of January, 1875, and credited to the Cook County Bank, as other collections in the usual course of business. The defendant remitted, on that day, to the Cook County Bank, more money than this collection amounted to, and had at that time a large balance due it from that bank. The Cook County Bank failed on the 19th of January, but the defendants had no knowledge of its failure or embarrassment until about noon on the 19th.

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[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 2 N. Y. Wkly. Dig. 342, contains only a partial report.]

The testimony also showed that the custom between that bank and defendant, and also between the other Chicago banks and their country correspondents, was to make collections of notes sent there for that purpose, and credit the proceeds to the bank transmitting them, that no account was kept with any other person of such paper sent for collection; that this custom prevailed as well when the paper was indorsed to the bank sending for collection on account of their own, as when indorsed generally; and that accounts of all such transactions, in all cases, were kept in the same way.

These are the substantial facts, and the law applicable as now settled by the supreme court of the United States, may be stated as follows: That when an owner of commercial paper sends it to, and it is accepted by a bank for collection, whether payable at the place where such bank is located, or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note, but on the contrary "its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated, are its agents and not the agents of the owner of the note;" that its duty is not discharged when it selects responsible agents to perform the duty entrusted to it; that the owner of the paper is not to look to the responsibility of the agents entrusted by the bank with his collections; that the bank to which he commits the paper is alone answerable to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected (Ayrault v. Pacific Bank, 47 N. Y. 570); and that the liability to pay over attaches as soon as the money is paid, either to it, or to a sub-agent selected by said bank to collect for it.

This being so, it follows that the owner is to look to his immediate contractor, and has no remedy against the under contractor or agent employed by the bank; that such agents or contractors have no privity of contract with the owner and are not liable to him, but are only liable to the party immediately employing them; in short, that the sub-agent employed by the bank owes no duty to the party who deposited the paper for collection with his principal, and hence is not responsible to him for any damages. This, I understand to be the effect and meaning of the late decision of the supreme court of the United States in the case of Hoover v. Wise [91 U. S. 308].

Although prior to that decision I had considered that the weight of authority was in favor of the owner's having a right of action against the party who actually collected the money upon the note, although a secondary agent, unless he had paid it before notice of the owner's claim, or had made advancement upon the paper to the party from whom he received it in such a way as to enable him to hold the proceeds on the ground that he was a bona fide holder of the paper for value.

But this decision, by declaring that a secondary agent is not liable at all to the owner, completely overthrows the theory upon which such supposed liability was based, and excludes the consideration of the question of the rights of such agent, as against his immediate principal, and renders immaterial the question as to whether he knew the bank employing him was the owner of the paper or not, for not being answerable to the owner in any case, without some arrangement changing the implied contract arising from the said employment to collect, it is unimportant to the owner to inquire what right such agent may have against his employers.

In the case of McBride v. Farmers' Bank, 26 N. Y. 450, a recovery was had against the secondary agent, which, at first, seems to be in conflict with the earlier New York cases cited, and followed in the opinion of the United States supreme court above mentioned. But on examining that case carefully, it appears that the bank gave an order to the owner of the paper, or its agent, for the notes, before the payment of the notes, and that he demanded them of the agent before payment, and that the failure of the bank was before payment, which distinguishes it from the case cited, and from this also; for here the money was collected by the defendant before the Cook County Bank failed, and was by this defendant passed to the credit of that bank the day before the failure, so that the Cook County Bank's liability to the plaintiff for the money attached before its failure, which brings the case, in my judgment, clearly within the doctrine of Hoover v. Wise, supra.

It is difficult to reconcile this decision with that of Dickerson v. Wason, 47 N. Y. 439, and Sweeny v. Easter, 1 Wall. [68 U. S.] 166. But it is not for me to reconcile these cases; the case of Hoover v. Wise being the latest expression on that subject, it must be regarded as the law, by this court.

The defendant is, therefore, entitled to a judgment.

Case No. 6,971.

HYDE v. FOLGER et al.

[4 McLean, 255.] [1]

Circuit Court, D. Michigan. June Term, 1847.

EQUITY PRACTICE—EJECTMENT—INJUNCTION—PARTIES.

1. By statute, an action of ejectment, in Michigan, must be brought against the tenant in possession. If no one be in possession, suit must be brought against any one exercising acts of ownership over the premises, or who claims title thereto.

2. A bill being filed by complainant, represented that he had purchased and paid for the land, and prayed that a title might be decreed, and for an injunction, etc. It was objected that the name of Hyde, the complainant, is not known in the proceedings at law. The court required the tenant in possession, to be named as co-complainant.

In equity.

Mr. Witherell, for complainant.

Mr. Backus, for defendants.

OPINION OF THE COURT. The bill states that the land in controversy in 1840, was purchased by complainant from Thomas Folger, by his agent, Henry G. Folger, who was authorized to sell the same by letter. That the said Henry was then in possession of the same, the terms not specially recollected. But complainant purchased the land and paid for it, in property and money, the sum of seven thousand dollars. In 1842 Thomas Folger died, and the land descended to his heirs, who are made defendants. That a deed was made by the said Henry, which, by the letter, he was not authorized to make. Since the death of Thomas, his heirs commenced an ejectment to recover the possession of the land, which action is still pending. And an injunction is prayed, and that the heirs may be compelled to make a good title, etc.

The motion for an injunction is resisted, on the ground that the name of Hyde is not known to the suit at law, his tenant being sued. By the 4th section of the act of Michigan, 1838, Revised Statutes, it is provided: "If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration, by which the suit is commenced; if no occupant, the action must be brought against some one exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit." Section 6: "No names, other than the real claimants and the real defendants, shall be used." The court required the tenant Jerome to be named as co-complainant, and granted the injunction. Under the statute, the name of the landlord may be inserted on the record, on proof of his claim, and he will be permitted to defend.

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

HYDE (KNEVALS v.). See 6 Fed. 651.

Case No. 6,972.

HYDE v. LIVERSE.

[1 Cranch, C. C. 408.] [1]

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

TRIAL—CONTINUANCE—INDEBITATUS ASSUMPSIT.

1. The court will not grant a continuance for the defendant on the ground that his receipts are mislaid, unless the affidavit state the amount and date of the receipts, so that the plaintiff may admit or deny them; nor unless it state circumstances by which the court can judge whether reasonable diligence has been used in searching for them.

2. Indebitatus assumpsit will lie for money due upon a special contract executed on the part of the plaintiff.

The affidavit to continue the cause stated that the defendant had receipts for money paid to the plaintiff, which were necessary, material, and competent evidence for his defence; that he has used his reasonable endeavors to procure the same, but finds they have become mislaid; and though he has searched among his papers with diligence, without success, he believes by the next court he will be able to ascertain where they are and to produce them, and that they would considerably reduce the plaintiff's claim.

THE COURT (DUCKETT, Circuit Judge, absent) refused to grant a continuance, because the affidavit did not state the sums of money for which the receipts were given, nor the dates, so that the plaintiff could admit or deny the same; and because the affidavit did not state any circumstances by which the court could judge whether the defendant had used reasonable diligence in searching for the receipts.

This was an action of indebitatus assumpsit for 207 dollars, for 88⅛ cords of wood sold, and delivered. There was another count upon indebitatus assumpsit "for sundry matters properly chargeable in account, as per account filed." The plaintiff's witness proved an agreement, by which the defendant was to cut and take away from certain land of the plaintiff's, all the wood growing thereon, either at the gross sum of eight hundred dollars, or at the rate of three dollars a cord; and if he did not choose to go on and take the whole, he was to pay three dollars and a half a cord for such as he should take. That the defendant was to proceed to cut and take away the wood im-

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

mediately, without ceasing. That the defendant had three weeks to make his election to take the whole wood at eight hundred dollars or at the rate of three dollars a cord. That he chose the latter, and paid one hundred dollars when he had taken away thirty-three and one third cords. That he did not proceed to take the whole, but desisted after taking eighty-eight and one third cords.

F. S. Key, for defendant, prayed the court to direct the jury that the plaintiff could not recover upon that evidence in this action, upon this declaration.

But THE COURT refused, on the authority of Aubrey v. Aubrey [Case No. 643], at Alexandria; and said that where the contract of sale has been executed on the part of the plaintiff, and the agreement on the part of the defendant is to pay money, the plaintiff may maintain indebitatus assumpsit. See the cases cited in Talbot v. Selby [Id. 13,729]. Bill of exceptions taken, but no writ of error prosecuted.

Case No. 6,973.

HYDE v. PHOENIX INS. CO.

[2 Dill. 525.] [1]

Circuit Court, D. Iowa. 1873.

REMOVAL OF SUITS FROM STATE COURT—PRACTICE—FILING TRANSCRIPT.

1. Where the defendant removed a cause to this court from the state court under section 12 of the judiciary act [1 Stat. 79], but failed to have the transcript of the record of the pleadings and proceedings filed herein on the first day of the term, leave was given to the plaintiff to have the same filed and the case docketed.

[Cited in Jackson v. Mutual Ins. Co., Case No. 7,141; Woolridge v. McKenna, 8 Fed. 667.]

2. The practice of the court in cases thus removed, stated.

This suit was commenced in one of the courts of the state, and, on entering its appearance therein, the defendant made application for its removal, under section 12 of the judiciary act, to this court; and an order for the removal was accordingly made. The present is the next term of this court after the removal. The clerk of the state court has sent to the clerk of this court a certified copy of the papers and proceedings in the state court, but the same was not accompanied with any instructions or fee, and there has been no appearance here as yet by the defendant. The plaintiff now asks leave to file the transcript thus transmitted of the pleadings and proceedings in the state court, and if granted to move thereon, either to remand the cause or to default the defendant if no appearance shall be entered, or answer filed.

Gatch & Wright, for the motion.

No appearance for the insurance company.

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

DILLON, Circuit Judge. The court perceives no objection, under the circumstances, to granting leave to the plaintiff to file the transcript from the state court and to have the suit docketed. The plaintiff may, thereupon, move either to have the cause remanded to the state court or elect to treat it as pending in this court. In the latter event, as the issues were not made up before the removal, the case, under the practice (should there be an answer filed to the merits), is not triable at this term unless by consent; but the issues must be settled during the term, and if the company shall not appear and answer when required, it may be defaulted.

The motion to file the transcript is sustained. Motion sustained.

Practice in cases removed from the state court. McBratney v. Usher [Case No. 8,661]; Rule, 1 Dill. 594.

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

Case No. 6,974.

HYDE v. SONTAG et al.

[1 Sawy. 249; [1] 8 N. B. R. 225.]

District Court, D. California. Aug. 2, 1870.

BANKRUPT—FRAUDULENT CONVEYANCE BY.

Judgment in favor of the assignee for the value of property conveyed to an alleged creditor of the bankrupt, notwithstanding that the conveyance was made more than six months before the commencement of the proceedings in bankruptcy, it appearing that the conveyance was fraudulent and intended to cheat and hinder creditors.

[This was a suit by Henry C. Hyde, assignee of George C. Eldridge, a bankrupt, against H. P. Sontag and George C. Eldridge.]

H. F. Crane, for assignee.

E. J. & J. H. Moore, Howe & Rosenbaum, and D. T. Sullivan, for defendants.

HOFFMAN, District Judge. The proofs in this case clearly establish that the bankrupt, being insolvent, made an assignment of all his property in this city to an alleged creditor with a view to give him a preference, and that the alleged creditor knew the bankrupt to be insolvent and that a fraud on the act was intended.

The adjudication in bankruptcy having been made on the voluntary petition of the bankrupt, which was filed more than six months after the assignment, the suit cannot be sustained under the provisions of the 35th and 39th sections [of the act of 1867 (14 Stat. 534, 536)].

It is contended, however, on the part of the assignee, that the sole object of the assignment was to hinder, delay and defraud the creditors of the bankrupt. That the transfer was merely colorable and to cover up the

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

title to the property, and that the bankrupt was not at the time indebted to the defendant.

In my judgment the proofs taken before the register sustain these allegations. The bankrupt admits that his property in Nevada had been attached, and that he had assigned the whole of it to the First National Bank of that state. It appears that very soon after making this assignment he left Nevada for this city, openly declaring his intention to put his property in this city where his creditors would not be able to reach it. Immediately on his arrival he made the transfer in question to the defendant. He started from Nevada on the nineteenth of May; he made the transfer to defendant on the twenty-second of May. The latter had been for some months employed as his agent to carry on the business of a coal yard, belonging to the bankrupt, at a salary of $75 per month.

The sale of the coal yard, its furniture, appurtenances, good will, and outstanding debts, appears to have been concluded in great haste and under circumstances fit to excite suspicion. The price for which it was bought ($1,500) seems to have been grossly inadequate, even on the defendant's own showing. His second explanation in regard to the value of the property transferred to him, in no respect alters the complexion of the matter. No accounting was had between the parties, such as would naturally take place in a business transaction of this nature.

The receipts from the coal yard are stated to have been about $1,300 per month. The defendant alleges that he sent to the bankrupt, at various times during the three months the latter was in Nevada, $960. The whole of this sum he charges as a debt due him from the bankrupt. He gives no account whatever of the large sums which, during that period, he must have received from the coal yard. That he did not expend any considerable amount in replenishing the stock of the establishment, is evident. For he would have us believe that the value of the stock at the time of the transfer was but a few hundred dollars.

The statements of both the bankrupt and the defendant are confused and contradictory. They entirely fail to furnish that clear, detailed and precise explanation which, if the transaction were an honest one, could readily be afforded.

Their close relations to each other subsequently to the transfer, corroborate our suspicions. We find the defendant advancing considerable sums to the bankrupt, becoming interested with him in a store on Fourth street, a large part of the stock of which they clandestinely carry off and dispose of on joint account. The bankrupt spends much of his time at the coal yard, but objects to parties being directed to him at that place, for fear, as he says, of exciting suspicion.

He files his petition in bankruptcy just two days after the six months from the date of the transfer have expired, and now to this suit by the assignee he pleads, while admitting a clear fraud on the bankrupt act by an assignment of all his remaining property to an alleged preferred creditor; that the assignment was not made within six months previous to the filing of the petition, and that the assignee cannot, therefore, recover.

All these circumstances seem to me clearly to disclose the true nature of the transaction, viz.: that it was a fraudulent contrivance and device by the bankrupt and the defendant to cover up and conceal the true ownership of the property, and to hinder, delay and defraud creditors. The value of the property sold, as testified to by the defendant himself was $3,226, and for this amount a judgment must be entered.

HYDE (TYLER v.). See Cases Nos. 14,309 and 14,310.

Case No. 6,975.

HYDE v. WOODS et al.

[2 Sawy. 655; [1] 10 N. B. R. 54; 1 Am. Law T. Rep. (N. S.) 354.]

Circuit Court, D. California. June 8, 1874.[2]

STOCK BROKERS—PROPERTY IN MEMBERSHIP.

1. Where under the articles of association of a board of stock brokers, a member cannot transfer his seat to a party not elected, and approved by the board; and where upon the insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat, and apply the proceeds to the payment of his indebtedness to other members of the board, to the exclusion of all others, only the residue of the proceeds of the sale after paying all the liabilities provided for in said articles of association, is assets of such insolvent member.

[Cited in Bear v. Heasley (Mich.) 57 N. W. 280.]

2. Under such articles, F., a member, failed to meet his engagements in the board August 24, 1872, and being indebted in a large amount to sundry members, on that day assigned his seat in the board to W., with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W. sold the seat to T., who was elected by the board, for ten thousand dollars, and, with the approval of the board, paid the entire proceeds pro ratably to F.'s creditors, who were co-members. October 1st, 1872, F. was adjudged a bankrupt on petition of a general creditor, filed September 18, 1872. After said sale and payment, an assignee having been appointed, he brought suit against W. to recover said sum of ten thousand dollars: *Held*, that the assignee was only entitled to the residue after payment of F.'s liabilities to the co-members provided for in the articles of association, and there being no surplus, he was not entitled to recover.

Statement of facts as disclosed by the findings filed by the court. The action is by [Henry C. Hyde] the assignee in bankruptcy of Thomas W. Fenn, to recover the proceeds of the sale of the seat of Fenn in

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

[2] [Affirmed in 94 U. S. 523.]

the San Francisco Stock and Exchange Board, which were received by defendants [F. H. Woods and others] within four months before the filing of the petition in bankruptcy. The petition in bankruptcy against Fenn was filed by a creditor September 20, 1872, and he was adjudged a bankrupt thereon October 1, 1872. In 1862 the San Francisco Stock and Exchange Board was organized, and a constitution and by-laws adopted for the government of all who should become members. Under said constitution and by-laws, the number of members was limited, and no person could be admitted except upon an election by ballot upon a proposal, made at least five days preceding the election; and five negative votes excluded the applicant. Every party so elected subscribed to the constitution and by-laws, and agreed to be bound by their provisions. There was at no time any ownership or property in the privilege of membership in said board, or right to do business therein as a member, except as provided in and limited by said articles, constitution and by-laws; and the privileges granted to any one becoming a member were not assignable, descendible or transferable, except as provided in said constitution and by-laws.

Article 9 of said constitution provided as follows: "Any member who fails or has failed to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors. That on his application for re-admission, a committee of three members shall be appointed by the president to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the board, upon the assent of two thirds of the members there present." Article 14 provided as follows, to-wit: "In case of a retirement of any member in good standing from this board, he shall have the right to sell his seat to the best advantage, and to nominate his assignee to fill the vacancy; provided, that said nominee shall thereby acquire no right or privilege, until proposed and elected in the manner and form prescribed by the constitution of this board, it being distinctly understood that this board reserves to itself the right to reject any or all nominees at its pleasure. Any member assigning his seat, shall be entitled to the initiation fee at the time, in case his nominee shall be elected by the board. In case of the death of a member, this board pledges itself to dispose of the vacant seat to the best advantage, for the benefit of the widow and children of the deceased; and in case there be neither widow nor children, then for the benefit of such parties as the deceased may indicate in his last will and testament. In case of the suspension of any member by failure to fulfil his contracts, or by insolvency, the board will exercise a generous discretion, guided by the circumstances of each case in disposing of the seat for the benefit of the party suspended. Provided, that a party who accepts the proceeds of the sale of his seat under this restriction, shall not be re-admitted, except in the manner and form prescribed by the constitution and by-laws, for the admission of new members. All members of this board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership of this board; and their seats become the property of their creditors in the board." Article 15 provided as follows: "In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of the board, exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

Thomas W. Fenn became a member of said board October 21, 1871, subject to said articles, and thereby his privilege of doing business therein, and his seat became security to said board and the members thereof, for his obligations and indebtedness incurred in said board to the members thereof. On the twenty-fourth of August, 1872, he became delinquent in said board by failure to fulfill his contracts therein made with divers members thereof. On the same day, and for the purpose of securing to his said creditors in said board all benefit and advantage, which the security of said seat afforded them under said constitution and by-laws, and his agreement theretofore made on October 21, 1871, he, on said day, executed and delivered to the defendants a certain instrument in writing, in the words and figures following: "San Francisco, August 24, 1872. I hereby assign my seat in the San Francisco Stock and Exchange Board to Messrs. Wood & Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said board. T. W. Fenn. Witness, J. W. Freeborn." Thereafter, one W. B. Thornburgh applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member, and the defendants then and there, to-wit, on the sixteenth of September, 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership or seat to said Thornburgh, and received from him therefor, the sum of ten thousand dollars, gold coin of the United States. At the time of the execution of said instrument, the admission of said Thornburgh and receipt of said money, said Fenn was insolvent, and said defendants then had reasonable cause to believe him to be insolvent, and at said times the said defendants were members of said stock board, and said Fenn as a member of said board, was indebted to said defendants as such members upon transactions had in said board, within the intent and meaning of said provisions of the constitution and by-laws hereinbefore set

out, for which the seat and privileges of said Fenn as such member were security, in the sum of more than $2973 30, and said Fenn was at said time in like manner, indebted to divers other members of said board, arising upon like transactions, and for which his said seat and privileges were in like manner security, in amounts exceeding the sum of ten thousand dollars in gold coin. Upon the receipt of said sum of ten thousand dollars, as aforesaid, and prior to the commencement of the proceedings in bankruptcy, set forth in the complaint herein, the defendants applied to the payment, and paid over to the several creditors of said Fenn in, and as members of said stock board, upon the said several amounts of indebtedness, the whole of said sum of ten thousand dollars so received, dividing the same pro ratably between said several creditors, the sum received and retained by said defendants, and applied to the satisfaction of a portion of the said indebtedness to themselves, being upon said pro rata division the sum of $2973 30, and no more, the remainder of said sum of $10,000 having been paid on the said claims of said other creditors in said stock and exchange board. At the time of the commencement of said proceedings in bankruptcy, the said funds had all been paid over and applied as aforesaid. There were not at that time any funds of said Fenn in the hands of said defendants, nor had there been any funds of his in their hands at any time other than as aforesaid.

Geo. B. Merrill, for plaintiff.
W. H. L. Barnes, for defendants.

SAWYER, Circuit Judge (after stating the facts). The San Francisco Stock and Exchange Board is a voluntary association. The members had a right to associate themselves upon such terms as they saw fit to prescribe, so long as there was nothing immoral, or contrary to public policy, or in contravention of the law of the land, in the terms and conditions adopted. No man was under any obligation to become a member unless he saw fit to do so, and when he did, and subscribed to the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights with such limitations, and no others, as the articles of the association provided for. I find nothing in the articles, constitution and by-laws of this association in contravention of the law of the land. The rights acquired by a party entering the association with the assent of the other members are clearly prescribed in these articles. Under their provisions there is in a member no absolute unlimited right of disposition of his seat or the privileges of membership. Each member holds his seat and exercises the privileges conferred subject to certain prescribed rights of the association, and of the other members in his seat, in case he fails to perform his duty towards the association, or to his fellow-members. And the rights accorded to the association or his fellow-members, by the terms upon which a member is admitted, cannot be abrogated or limited by any subsequent act of his. A member cannot dispose of his right of membership to another, unless the association shall accept that other in his stead, in the mode and upon the terms prescribed. If he fails to meet his liabilities to his fellow-members, incurred in the course of the proper business transactions of the board, he is suspended, and if his obligations are not met, and he is not restored within the time prescribed, his rights and privileges as a member become the property of the association, and are disposed of for the benefit of his creditors in the board to the exclusion of all others. He cannot himself by any act of disposition of his own, prevent this result. His general creditors can obtain through him no greater rights of property than he himself possesses. His privileges as a member of the stock board could not be seized and sold on execution, and transferred to another in violation of the rights secured by the contract of association, nor could a court of bankruptcy override the rights of the association or its members, secured to them by the terms of the contract under which he acquires any rights at all as a member, by disposing of a greater interest than he himself possesses. The only property of a pecuniary nature in Fenn after his default in the board, would be the residue left after disposing of his seat by the board in accordance with its prescribed usages, or with the assent of the board, and payment of his indebtedness to the members of the board, incurred in the transaction of its business. This is all that, under any circumstances, would be available to the general creditor, or with which the court of bankruptcy has any concern. The rest is the property of the board and its members, not Fenn's. In this case there was a delinquency of Fenn in his transactions in the board. He was indebted in large sums to the members upon transactions occurring in the board, for which his seat and privileges, as a member, were first liable, under the rules of the association. It is true that he did not insist upon waiting six months under the rules, as he might have done, before his seat became absolutely forfeited. He merely waived this right, and allowed his seat to be disposed of at once, and applied to the purposes provided for in the articles of association. His assignment to defendants only enabled them to close up without delay his connection with the board, and distribute the avails to the proper parties, instead of waiting six months. There is no claim set up that the privileges of Fenn did not sell for all they were worth; and the money realized did not satisfy the just claims of the other members. Nor is there any claim that this proceeding was in fact more dis-

advantageous to creditors, than if the proceedings had taken a different course. There was nothing left which, under any circumstances, could be available to the general creditors. Fenn transferred nothing to defendants that a court of bankruptcy could take hold of.

There was no residuum. His estate being subordinate to the claims of his associates, under the articles of association, and consisting only of such residuum, there was nothing of it of value. Defendants only received and distributed to the proper parties that part of the proceeds of Fenn's seat, which belonged to the other members, as they had a right to do under the articles of association.

The error of the plaintiff consists in regarding the seat of Fenn and its proceeds as wholly his property, subject to his absolute disposition, whereas he only had a qualified and limited property in it—an interest subordinate to that of his associates. His estate is what is left after other paramount claims are satisfied out of it, and there appears to be nothing left. The prior rights of his co-members accrued by virtue of the very act by which Fenn acquired any rights at all, as a member of the board, and they cannot be divested. The articles of association do not authorize Fenn, or anybody else, to dispose of Fenn's property contrary to the provisions of the bankrupt act [of 1867 (14 Stat. 517)], as claimed by the plaintiff. They only determine what the extent of his rights of property under the articles of association are, and authorize the board to administer its own affairs, and protect the rights of its own members in matters pertaining to the transactions of the board, in its own way. There must be judgment for the defendants with costs.

[NOTE. The plaintiff took the case to the supreme court on writ of error, where, in an opinion by Mr. Justice Miller, the decision of the lower court was affirmed. 94 U. S. 523. It was held, following the principle laid down in Nichols v. Eaton, 91 U. S. 716, that membership in the board was not a matter of absolute sale. Although it is property, yet it is, when purchased, qualified and incumbered by the conditions of article 15 and others, which conditions the creators of it had a right to impose, and a compliance with which is necessary to obtain it.]

HYDE PARK (NORTHWESTERN FERTILIZING CO. v.). See Case No. 10,336.

Case No. 6,976.

HYER et al. v. HYATT et al.

[2 Cranch, C. C. 633.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

ACTION AGAINST TWO DEFENDANTS — CONFESSION OF JUDGMENT BY ONE—SETTING ASIDE FOR IRREGULARITY—CONSOLIDATION OF CASES.

In an action against two defendants, if one be taken and issue be joined, and plea waived, and judgment confessed against him after the other has been taken, and before the cause is at issue against him, the judgment may be set aside for irregularity, and the two cases consolidated, and the issues made up and set for trial.

This was a joint action against Hyatt and Wilson. Hyatt was first taken. Afterwards, upon an alias capias, Wilson was taken; and, while his case was standing on the imparlance-docket, judgment was confessed by Hyatt, and accepted by the plaintiff, by mistake, not being aware at the time that Wilson had been taken.

Mr. Key and Mr. Dunlop, for plaintiffs, now moved that the judgment against Hyatt should be set aside for irregularity, the continuance entered up, agreeably to the act of assembly of Maryland of November, 1787 (chapter 9, § 6), and the actions consolidated and set for trial.

Mr. Jones and Mr. Lee, contra.

THE COURT (MORSELL, Circuit Judge, absent) granted the motion.

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

Case No. 6,977.

HYER et al. v. HYATT et al.

[3 Cranch, C. C. 276.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

INFANCY—CONTRACTS — RATIFICATION AFTER SUIT BROUGHT—NECESSARIES.

1. No contract of an infant is so absolutely void that it cannot be confirmed and made valid by the infant at full age.

2. An acknowledgment, after suit brought, will not avail the plaintiff, although made by the defendant after full age.

3. All contracts by infants are voidable, except for necessaries; and even then the plaintiff can only recover the value of the articles furnished; the infant not being competent to bind himself absolutely as to the price.

[Cited in Young v. Bell, Case No. 18,152.]

Assumpsit upon the defendant's acceptance of an inland bill of exchange drawn July 1, 1815, by one Okeley at New York, on the defendants at Georgetown, District of Columbia, for $645.73 at six months after date, accepted on the 20th of July, 1815. The defendants pleaded severally non assumpsit, and the defendant Hyatt, at the trial relied upon his nonage at the date of the acceptance; to rebut which the plaintiffs [Hyer and Bremner] showed by the record in this case, that the defendant, after the commencement of the suit, and after he was of full age, confessed judgment, which was set aside upon the plaintiffs' motion, for irregularity, inasmuch as the other defendant, Wilson, had been taken but had not yet pleaded, and the cause as to him stood upon the imparlance docket, so that the cause as to Hyatt, ought to have been carried back and consolidated with that of Wilson. The

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

plaintiffs also relied upon the defendant Hyatt's acknowledgment of the debt in his schedule filed with his petition for the benefit of the insolvent act, after his full age, but since the commencement of this suit.

Mr. Morfit, for defendant Hyatt, contended that his acceptance of the bill, while under age, was absolutely void (not voidable only,) and was no consideration for a new promise, much less for a mere acknowledgment. That if the acknowledgment amounted to a promise, it was a mere nudum pactum. He contended also, that an acknowledgment or promise, after the commencement of the suit, could not support the action of the plaintiff, who must recover, if at all, upon his cause of action as it existed when he commenced his suit. He cited Davis v. Dodd, 4 Taunt. 602; Pierson v. Hutchinson, 2 Camp. 211; Thornton v. Illingworth, 2 Barn. & C. 824.

Key & Dunlop, for plaintiffs, cited Swasey v. Vanderheyden, 10 Johns. 33; Fenton v. White, 1 South. [4 N. J. Law] 100; Whitney v. Dutch, 14 Mass. 457; 4 Starkie, Ev. 723, 724.

The jury found a verdict for the plaintiffs, by consent, subject to the opinion of the court upon the points suggested in the argument of the defendant's counsel, namely: (1) Whether the acceptance of the bill was absolutely void as to the defendant Hyatt, by reason of his nonage, so that a new promise at full age to pay the acceptance would be nudum pactum; and (2) whether a new promise or acknowledgment, made after the commencement of the suit, would support the present action.

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

CRANCH, Chief Judge. I am inclined to think that no contract entered into, by an infant, is absolutely void, although all contracts by infants, except for necessaries, are voidable. There are some dicta that contracts made by an infant to his prejudice, are void, not voidable; but I doubt whether, in law, there be any difference as to validity, between those which are beneficial, and those which are prejudicial to the infant; both are voidable, but neither is absolutely void. There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult, upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant, is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract.

In Baylis v. Dineley, 3 Maule & S. 477, it was held by the court of K. B. that a bond by an infant in the penalty of £100 to pay £50 with interest was clearly, upon the face of the instrument, to the prejudice of the infant, and that it could not be confirmed by parol so as to give it effect. The action, in that case, was upon the bond. Plea, infancy. Replication, that the defendant, after full age, "assented to, ratified and confirmed the said writing obligatory." Demurrer, and joinder; and judgment for the defendant on the demurrer. The court did not say that the bond was absolutely void; but that it could not be set up as a bond, by a parol confirmation. In the argument of the case, Campbell, for the defendant, contended that the bond was void ab origine and could not be ratified in any way. He cited Com. Dig. tit. "Enfant," c. 2; Bac. Abr. "Infancy," 1; Bull, N. P. 182; Ayliff v. Archdale, Cro. Eliz. 920; Delavel v. Clare, Noy, 85; Edmonds v. Barton [Godb. 138], cited in Stone v. Wythipol, Cro. Eliz. 127, and Thompson v. Leach, 3 Mod. 310.

The 1st case cited by Comyns (C, 2) is Lane v. Cowper (17 Eliz.) Moore, 103, which case was several times argued, and at length by all the judges in bank openly. The 7th question was: "Whether the lease of an infant, without rent reserved, be void, or voidable; and they all, except Gawdy, agreed that it is void, because there is no consideration; but if rent had been reserved, it would have been only voidable. So a feoffment made with the proper hand of an infant, is only voidable: and they said that any stranger might take advantage of this," (that is, the want of consideration) "by way of allegation, evidence or otherwise."

2. The 2d authority cited by Comyns is Perkins ("Grant," 13), who says, "that all gifts, grants, or deeds made by an infant, which do not take effect by delivery of his hand, are void. But gifts, grants, or deeds made by an infant by matter in deed or in writing, which take effect by delivery of his hand, are voidable by himself and his heirs, or by those which shall have his estate. And therefore, if an infant make a deed of feoffment, and a letter of attorney to a stranger, to make livery of seizin, and he makes livery of seizin by force thereof, he shall be taken for a disseizor. And if an infant, being seized of a curve of land, grant a rent-charge to be issuant out of the same curve, by deed, and the grantee distrain, he shall punish him as a trespasser, notwithstanding that the infant did deliver the deed with his own hand. But in such case, the infant, nor his heir, nor his feoffee, cannot, against such a deed in pleading, say that he did not grant by the deed; for that the deed is not void, but voidable; as to say that the grantor was within age, &c. at the time of the grant, &c." "And an infant shall be bound by all acts done by him, during his nonage, which acts are for his advantage, unless in some special cases." See Perkins, "Grant," 12–14.

3. The 3d authority cited by Comyns is

Thompson v. Leach, 3 Mod. 310. The question in that case was, whether a deed of surrender, by a person, non compos mentis, was absolutely void as against the remainderman, so as to destroy the intermediate estate which was to support the contingent remainder; or whether it was voidable only by himself and his heirs. "It was likened to the case of infancy;" and the court said: "There are express authorities that a surrender by an infant is void." Lloyd v. Gregory, Cro. Car. 502. "If an infant grant a rent-charge out of his estate, it is not voidable, but ipso facto void; for if the grantee should distrain for the rent, the infant may have an action of trespass against him." "In all these cases which have been cited, where it is held that the deeds of infants are not void, but voidable, the meaning is, that non est factum cannot be pleaded, because they have the form, though not the operation of deeds, and therefore are not void upon that account, without showing some special matter to make them of no efficacy. Therefore, if an infant make a letter of attorney, though it is void in itself, yet it shall not be avoided by pleading non est factum, but by showing his infancy. Some have endeavored to distinguish between a deed which gives only authority to do a thing, and such which conveys an interest by delivery of the deed itself, that the first is void, and the other voidable; but the reason is the same to make both void; only where a feoffment is made by an infant, it is voidable because of the solemnity of the conveyance."

4. In the case of Lloyd v. Gregory, cited above from Cro. Car. 502, "all the court held that a surrender of an infant cannot be by deed, but it is absolutely void; and that a surrender, by acceptance of the second lease, is void because it is without increase of his term, or decrease of his rent; and where there is not an apparent benefit, or the semblance of a benefit, his acts are merely void; and here is no benefit nor appearance of any to the infant, for he hath no manner of advantage thereby, but cause of quarrelling, by this lease." But see Zouch v. Parsons, cited below, and Bac. Abr. by Gwillim, tit. "Infancy and Age," pl. 1, 2, 3, etc. See, also, the following cases:

Monnings v. Knoppe, 1 Roll. Abr. 18, pl. 2. If an infant enter into an obligation to pay a certain sum of money, and the obligee bring debt upon the obligation, and procure a latitat to arrest him, and the obligor being of full age, and knowing this, say to the obligee, that if he would not arrest him, he will pay the money, this is no consideration to maintain the action, inasmuch as the infant might have avoided the obligation by plea.

Hill v. Whittingham, 1 Roll. Abr. 729, pl. 15. If an infant be a mercer and buy goods to sell again, he is not chargeable upon the contract.

Williams v. Harrison, Carth. 160. So if he give a bill of exchange.

Manby v. Scott, 1 Mod. 137. Judge Hide's dictum cites 21 Hen. VII. pl. 39; 26 Hen. VIII. pl. 2. If an infant give or sell goods and deliver them with his own hand, he shall have no action of trespass against the donee, or vendee, by reason of the delivery; but if an infant give or sell goods, and donee or vendee takes them by force of the gift or sale, the infant may have an action of trespass against him.

Brooke, Abr. "Coverture and Infancy," pl 1. "Nota per curiam. If an infant grant an advowson by his deed, and at full age confirm the same grant, yet it is of no value, for the first grant was void. But if he give goods, and deliver them with his own hands, trespass does not lie. The same law of feoffment, and livery by the infant himself, and not by attorney, it is voidable and not void. Note the diversity; and so see that the delivery of the deed of an infant is not like the delivery of land or goods by him. 26 Hen. VIII. pl. 2."

Brooke, Abr. "Coverture and Infancy," pl. 26. "Vide tit. 'Trespass.' The gift of an infant is void; and yet if he deliver the goods to the donee, this is a good excuse in trespass; contrary if the donee take them by virtue of the gift; and the law appears to be the same where the infant makes a feoffment, and makes livery in person. E contra, if he make a letter of attorney to make livery, who does it, trespass lies. 22 Hen. VI. pl. 3." Id. pl. 28. "Debt. Per Brudnel: If an infant make an indenture, and at full age bind himself to perform it, he shall not avoid the indenture. And if an infant sell a horse for £10, and bring debt for the £10 at full age, he shall not avoid the contract; and the law is the same if he make a lease, reserving rent, within age, and accept rent at full age. 14 Hen. VIII. pl. 29." Id. pl. 12. "Dum fuit infra aetatem was brought of a rent, (tit. 'Dum Fuit Infra Aetatem,' 1,) and so see that the grant of an infant is not void, as it is there admitted; and by Kirton, if an infant within age, seized of rent, purchase the land, &c. and aliene the land within age, he shall have election, whether he will demand the land or the rent; which was not denied. 46 Edw. III. pl. 33, 34."

Brooke, Abr. tit. "Dum Fuit Infra Aetatem," 1, referred to as above. "The writ of dum fuit infra aetatem was brought of land and rent, against the alienee of the father of the demandant. And note here, that the writ was admitted to lie of the rent; and yet some say that the grant of an infant is void, and not voidable; which is not so, as is here apparent; for then action would not lie; and also the delivery of the deed cannot be void, but voidable. 46 Edw. III. pl. 34."

Brooke, Abr. tit. "Coverture and Infancy," pl. 40, "Mort d'Ancestor." "It was clearly held that a release by an infant of all his

right in land, of which he was never seized, is void, so that another who is of the half-blood, shall have the land as heir of their common ancestor, if he who released, die without issue; but otherwise it is said of a feoffment: the reason of which diversity seems to be the livery of the land: this is only voidable, the other is void. 34 Ass. pl. 10."

Brooke, Abr. tit. "Trespass," pl. 338. "Per Brian and Littleton, justices. If an infant lease his land for years, where there is no livery, and the lessee enter, the infant shall have trespass without reëntry, for it is void as to the infant, where there is no livery. And where he sells his goods, he may elect to have debt upon the sale, or debt for the rent reserved upon the lease, or to have trespass for the land or goods, for it is void at his election. But where the infant delivers a horse, or bails goods, trespass does not lie. And if an infant make exchange, he shall have assize; and e contra if it be by deed and livery of seizin, for there is a livery; and this livery ought to be made by himself; and e contra where it is made by attorney. But where action is brought against an infant, there he may plead nonage. 18 Edw. IV. pl. 1, 2."

In the case of Zouch v. Parsons, 3 Burrows, 1803, 1804. The judges were all of opinion that a conveyance made by an infant mortgagee to a third person, at the request of the mortgagor, who had redeemed the property, bound the infant. The court also agreed with Perkins, (section 12) that the deeds of infants which do not take effect by delivery of his hand, are void; but that those which do take effect by delivery of his hand are voidable by himself, by his heirs, and by those who have his estate. That there is no difference in this respect between a feoffment, and deeds which convey an interest. The reason is the same. Littleton (section 229) says they all serve for nothing, "and may be avoided." Lord Mansfield, in 3 Burrows, 1805, says: "An infant, and they who stand in his place, cannot plead non est factum and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed; and that plea avoids it by relation back to the delivery. The reason of this is, because it has an operation from the delivery, and not because it has the form of a deed," as stated in Thompson v. Leach, 3 Mod. 310. He says further, in pages 1806, 1807, that a lease by an infant by deed, upon which no rent is reserved, is not absolutely void; nor is a surrender by an infant. See, also, Bac. Abr. by Gwillim, tit. "Infancy and Age," I. 1, 2; Forrester's Case, 1 Sid. 41; Farnham v. Atkins, Id. 446; Davies v. Manington, 2 Sid. 109; 2 Roll. Abr. 21, e. 10, "Faits," A.; Ball v. Hesketh, Comb. 381; Southerton v. Whitlock, Strange, 690; Whitney v. Dutch, 14 Mass. 457; 4 Starkie, Ev. 725.

In Thornton v. Illingworth, 2 Barn. & C. 824, the action was assumpsit for goods sold to the defendant, for the purpose of trade. Plea, infancy. Replication, that the defendant ratified the contract after he came of age. The question was whether evidence of a new promise, made after the commencement of the action, would support the issue on the part of the plaintiff. The counsel for the defendant were stopped by the court; and in taking the distinction between the plea of infancy and of the statute of limitations, Bayley, J., said: "In the case of an infant, a contract made for goods for the purposes of trade, is absolutely void; not voidable only." "If he makes a promise after he comes of age, that binds him, upon the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make it a legal debt from the time of making the bargain." Holroyd, J., said: "Here no ground of action, capable of being enforced in a court of law, existed at the time when the action was brought: there was no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one." Littledale, J., said: "When the statute of limitations is relied upon, an acknowledgment admits the perpetual existence of the debt; and therefore it suffices, whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void, and not voidable, the promise, in this case, did not prove that any legal cause of action existed at the time when the cause of action was commenced." The dicta of Judges Bayley and Littledale, that the contract of an infant for the purpose of trade "was absolutely void, not voidable only," are in direct contradiction to the whole current of English decisions. There is not, I believe, a previous case to be found in which such a contract has been decided to be so absolutely void that the infant, when he arrives at full age cannot confirm it; and I am strongly inclined to think, as I have before observed, that no contract by an infant is absolutely void by reason of infancy alone; but that they are all voidable, unless for necessaries; and that even on a contract by an infant for necessaries, the plaintiff can only recover their value, the infant not being competent to bind himself absolutely as to the prices. Chit. Bills, pt. 1, p. 20, c. 2.

In the present case of Hyer and Bremner v. Hyatt and Wilson, I am of opinion that the acceptance of the draft by the infant, for a valuable consideration, and his moral obligation to pay it are a good consideration of a new promise made after his full age; but that a promise made after the commencement of the action (and a fortiori, an acknowledgment), cannot be given in evidence, or if given, cannot alone support the issue on the part of the plaintiff.

THE COURT upon this last ground, name-

ly, that a promise made after the commencement of the suit, would not support the present action, rendered judgment upon the verdict for the defendant Hyatt.

MORSELL, Circuit Judge, dissented upon the last point.

See Ford v. Phillips, 1 Pick. 202; Gibbs v. Merrill, 3 Taunt. 307; Burgess v. Merrill, 4 Taunt. 468; 1 Tuck. Bl. Comm. 465; Young v. Bell [Case No. 18,152].

Case No. 6,978.

HYER v. SMITH.

[3 Cranch, C. C. 376.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

SURETY FOR COSTS—ATTACHMENT—WITNESS FEES.

The surety for fees and costs is not liable to attachment for not paying the daily compensation to the plaintiff's witnesses.

Mr. Barrell, the plaintiff's attorney, who had become security for the plaintiff for fees and costs, was attached for not paying the plaintiff's witnesses for their daily attendance in court.

Mr. Swann and Mr. Jones, moved to discharge the attachment, on the ground that the plaintiff's attorney, who was surety for fees and costs, was not liable for the daily compensation allowed by law to the plaintiff's witnesses. See the Maryland Laws, 1715, c. 48, § 12; Id. 1716, c. 20, § 2; Id. 1796, c. 43, § 12.

THE COURT being of that opinion, (nem. con.) discharged the attachment.

Case No. 6,979.

HYER et al. v. SMITH.

[3 Cranch, C. C. 437.] [1]

Circuit Court, District of Columbia. May Term, 1829.

NEGOTIABLE INSTRUMENTS — ACTION AGAINST DRAWER—ADMISSION BY INDORSER AS EVIDENCE —NEW COUNT—DISCHARGE OF BAIL.

1. An acknowledgment to the plaintiff's counsel, by the indorser, that he indorsed a draft drawn by the defendant, which was not then shown to him, is prima facie evidence of his indorsement, in a suit against the drawer, and throws the burden of proof on the defendant, to show that there were other drafts drawn by the defendant and indorsed by the same indorser. The declaration averred that the draft was indorsed to the plaintiffs, who were stated to be Hyer and Burdett, "survivors of Bremner." The indorsement, which was in full, was, "to the order of Messrs. Hyers, Bremner, and Burdett." *Held*, that such an indorsement did not support the declaration.

2. If, upon leave to amend, the plaintiff add a count upon a cause of action which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged.

[Distinguished in Stone v. Lawrence, Case No. 13,484.]

Assumpsit against the drawer of a draft upon M. S. C. Clarke, indorsed to Hyers, Bremner, and Burdett. The plaintiffs, having proved the handwriting of the defendant [J. C. R. Smith], offered to prove by Mr. Barrell, one of the plaintiffs' counsel, that Mr. Black, the indorser, in conversation with him about this draft, which was then in Mr. Barrell's possession, but which Mr. Barrell did not show to Mr. Black, admitted that he had indorsed the draft.

Mr. Coxe and Mr. Hall, for defendant, objected that such an admission by Mr. Black was not competent evidence of his indorsement, and cited Chit. 498.

Mr. Barrell, contrà, cited Maddocks v. Hankey, 2 Esp. 647; 4 Petersd. Abr. (Ed. 1826) 550; Chit. 289, 311.

Mr. Coxe cited Hemings v. Robson, Barnes, Notes Cas. 436; Chit. 497; Bayley, Bills, 322; Gray v. Palmers, 1 Esp. 135; 4 Bac. Abr. "Merchant," M. 739; Starkie, Ev. pt. 4, p. 249.

CRANCH, Chief Judge, was of opinion that as the draft was not shown to Mr. Black, his admission that he indorsed a draft of Mr. Smith on Mr. Clarke, was not sufficient proof of his indorsement of the draft now produced. But THE COURT thought the indorsement sufficiently proved to throw the burden of proof on the other side, to show that there was another draft of Smith's indorsed by Black.

Mr. Coxe, for defendant, then objected to the admission of the draft in evidence, because the declaration avers that it was indorsed to the plaintiffs, and the plaintiffs are averred to be Hyer and Burdett, "survivors of Bremner;" but the indorsement, which is in full, is, "Pay to the order of Messrs. Hyers, Bremner, and Burdett." 1 Comyn, Dig. p. 53, § 12, tit. "Abatement, E." 12.

Mr. Barrell, contrà, cited 1 Chit. Pl. 6, 12.

Mr. Hall, in reply, cited Webber v. Tivill, 2 Saund. 121d.

THE COURT (THRUSTON, Circuit Judge, absent), was of opinion that the indorsement offered in evidence did not correspond with the averment, and could not be admitted in evidence to the jury upon that declaration. A juror was then withdrawn, and the plaintiffs had leave to amend, upon payment of the costs of the term. The plaintiffs then amended their declaration, which contained only the common money counts, by adding a count upon the bill of exchange.

Mr. Coxe then moved the court to exonerate the bail, on the ground that the new count introduced a new cause of action, upon which the plaintiff could not have recovered upon the old declaration; and cit-

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

ed the Maryland Act of 1715, c. 46, § 3; Garibaldo v. Cagnoni, 6 Mod. 266; Kerr v. Sheriff, 2 Bos. & P. 358; 1 Petersd. Abr. 396; 3 Petersd. Abr. 289, 291.

CRANCH, Chief Judge (after stating the facts and authorities cited) delivered the opinion of the court (nem. con.) as follows: Upon consideration of these cases, the court is clearly of opinion that if the plaintiff amends his declaration by adding a count upon a cause of action, which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged. Bail discharged.

HYER v. The WAVE. See Case No. 17,297.

HYER (The WAVE v.). See Case No. 17,300.

Case No. 6,980.

HYLTON v. BROWN.

[1 Wash. C. C. 204.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

EJECTMENT—RIGHT OF POSSESSION—TITLE OUT OF PROPRIETARY.

1. In an ejectment, the plaintiff must show, and it will be sufficient for him to show, a right of entry; or, in other words, a right of possession.

[Cited in Lair v. Hunsicker, 28 Pa. St. 123.]

2. If plaintiff proves twenty years' possession, or the seisin of his ancestor, and a descent cast, it is a sufficient prima facie title; and the defendant can only succeed, by showing a better right in himself, or out of the plaintiff.

3. If the plaintiff shows a right of possession in himself, it is sufficient against every person, but the proprietary; or one claiming under him.

4. In an ejectment, the plaintiff, who has shown title in himself, is not bound to show the title to the same land, to be out of the proprietary.

5. If a defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in himself, claiming under the proprietary.

[Cited in Bank of U. S. v. Voorhees, Case No. 939.]

[This was an action at law by Hylton's lessee against Brown.]

A rule was obtained at the October term, in 1803, to set aside the nonsuit entered in this cause; and the question now came on to be argued.

WASHINGTON, Circuit Justice. During the vacation, I have considered this question; and I am now satisfied, that the court was wrong, in ordering the nonsuit. I permitted my judgment to be influenced, more than it ought to have been, by the nisi prius opinion of the chief justice of this state, as reported by Mr. Dallas. I think, that in an ejectment, the plaintiff must show, and it is enough for his purpose, if he does show a right of entry; or, in other words, a right of possession. If he prove twenty years' possession, or the seisin of his ancestor, and a descent cast, it is in general sufficient, prima facie, unless the defendant show a better right. But, the defendant may succeed, by showing a better right in himself; or, by showing it out of the plaintiff. But, is it sufficient for the defendant to show an original title in the proprietary? If the plaintiff show a right of possession in himself; this, I think, is certainly sufficient against every person, but the proprietary. If the defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in some one claiming regularly under him. I admit the rule, as laid down in the case cited, to be correct, if the suit be against the proprietary, or one claiming under him; but not otherwise. Nonsuit set aside.

NOTE.—This opinion requires some explanation; for, though it seems to be correct, as applied to the very case before the court; yet, the principles seem to be laid down too general. It is, I think, quite clear, that the plaintiff must show a right of entry; that is, his right of entry must not be taken away. If he prove twenty years' uninterrupted possession, or possession in his ancestor, and a descent cast; his title must prevail against a complete paper title in the defendant, or any third person. Salk. 421, 685; 2 Esp. 431; 1 Ld. Raym. 741. But, still this title is not conclusive. For instance; the defendant may defeat it, by showing, that the plaintiff's possession had not been adverse; that he and the defendant claim under the same title; that the ancestor of the plaintiff had not possession for five years, under the statute Hen. VIII., and so on. So the defendant may set up a better title in himself: as for instance; a deed from the plaintiff himself to the defendant, or, as in the very case under consideration, that the estate of the plaintiff had been legally confiscated by the state, and his title passed to the defendant, or to some other person. 3 Esp. 433-435, 437. In all these cases, the right of entry in the plaintiff, is only prima facie evidence of his title; but it is sufficient to drive the defendant to disprove the title thus shown, or to show a better some where else. In short, wherever the defendant claims under the plaintiff's title, the possession of the plaintiff cannot be said to be adverse; and, of course, his right of entry, though prima facie good, may be repelled. But, if the defendant does not claim under the title of the plaintiff, the right of entry in the latter will prevail over that of the defendant, however valid it might be in case a writ of right had been brought. In this case, Hylton proved a right of entry, and the title of the defendant, was under an act of confiscation against Griswold, under whom Hylton claimed. It was, therefore, unnecessary to show the title out of the proprietary, in this suit; though it might have been, had the suit been against the proprietary, or against a tenant of his, which is the meaning of the expressions in the opinion, "those claiming under the proprietary," For, admit the proprietary entitled to the benefit of the maxim of nullum tempus, &c., though he and his tenant would be privileged against twenty years' possession, or a descent cast; yet, a third person would not. See Runn. Ejectm. 59, 63. And these cases

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

clearly show, that except against the king, or his tenant, the plaintiff is not bound to show the title out of the king. Nor can I find any special verdict in the books, where this is done. But, I am not so clear, that the principle does apply to the proprietary; and, if it does not, then there is no difference whether the ejectment is against him, or a stranger. Perhaps this principle may be incorporated into the common law of Pennsylvania; and, if so, it ought to govern this court. It applies, I presume, to the commonwealth. But, for the reasons above given, I do not think it necessary to show the title out of the commonwealth, in a suit against a person resting merely on his possession, or not claiming as tenant of the commonwealth; for, though a right of entry cannot be gained against the commonwealth, it may against third persons. I think, however, that it was unnecessary for the court to go further, than to say, that, in this case, it was sufficient for the plaintiff to prove a right of entry; and that it was not necessary to show the title out of the proprietaries, thus avoiding the question, as to the privilege of the proprietary, in case he was defendant. W.

[See Cases Nos. 6,981 and 6,982.]

Case No. 6,981.

HYLTON v. BROWN.

[1 Wash. C. C. 298.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

ATTAINDER—PRODUCTION OF PAPER UNDER NOTICE—DISCOVERY—ADMISSION OF WILL IN EVIDENCE—HOW PROVED—RESIDENCE—TEMPORARY DOMICIL.

1. The operation and effect of the attainder laws of Pennsylvania.

2. It is premature, before the jury are sworn, and the trial commenced, for either party to call upon the other to produce a paper, which he has received notice to produce on the trial.

3. It is sufficient for one party to suggest that the other is in possession of a paper, which he has, under the act of congress, given him notice to produce at the trial; without offering other proof of the fact; and the party so called upon, must discharge himself of the consequences of not producing it, by affidavit, or other proof, that he has it not in his power to produce it.

4. The court will not, upon a notice of the defendant to the plaintiff, to produce a title paper to the land in dispute, which is merely to defeat the plaintiff's title, compel him to do so; unless the defendant first shows a title to the land.—Merely showing a right of possession, is not sufficient to entitle him to the aid of a court of chancery, or of this court, to compel a discovery of papers, which are merely to defeat the plaintiff's title, without strengthening the defendant's. It is sufficient, in order to entitle him to call for the papers, to show title to the land, although none is shown to the papers.

[Cited in Russell v. McLellan, Case No. 12,158; Gregory v. Chicago, M. & St. P. R. R., 10 Fed. 531.]

5. Evidence of the political character and conduct of a particular person, was allowed to be given, in order to satisfy the jury, that he was not the person meant and intended by a proclamation, under the attainder laws; but not to impeach the attainder or confiscation of property; on the ground, that the person was not guilty of the crime imputed to him.

6. The copy of a will of land lying in Pennsylvania, made in New-York, proved before the surrogate of New-York, by one of the subscribing witnesses, who also proved, that the other two witnesses attested the same in the presence of the testator, the copy being authenticated under the seal of the surrogate's office, and entered in the register general's office in Pennsylvania; is not admissible in evidence, in the state of Pennsylvania.

7. In all cases, no matter where the will is made and proved, if it concern land in Pennsylvania, it must be proved by two witnesses.

8. What will constitute a residence, in contradistinction to temporary domicil.

[Cited in U. S. v. Penelope, Case No. 16,024.]

Previous to the jury being called to try this cause, the defendant read a notice to the plaintiff's counsel, to produce, at the trial, the will of Joseph Griswold, who, by deed, had leased the land in question to the plaintiff [the lessee of Hylton]; also, an affidavit, to prove that the original will was in the plaintiff's possession, by his own acknowledgment. It was objected, by the plaintiff's counsel, that the motion was premature, and should be made during the trial; because, the act of congress says, that the courts shall have power, in the trial of actions at law, on motion, and notice, to order papers to be produced, which contain evidence pertinent to the issue; so that the court, until the trial is gone into cannot know whether it is pertinent or not; and the order is to be made on the trial. The court overruled the motion. The jury being empannelled, the plaintiff deduced his title from the proprietors to Joseph Griswold; who, in the year 1789, leased the land in question to the lessor of the plaintiff, at a pepper-corn rent, for twenty-one years; but, to cease, and be void, on the lessor's conveying away the same by deed, or disposing of it by will. The defendant, after proving a possession for a number of years, renewed his motion for a production of Joseph Griswold's original will. To prove the land in possession of the plaintiff, he offered, only a copy of the will, proved in the surrogate's office at New-York, by one witness, and the payment of the expenses of probate, and an ex parte affidavit, to prove the plaintiff's acknowledgment that he had it. This latter was objected to, as the other party had no opportunity to cross examine.

BY THE COURT. The suggestion of the defendant is sufficient, without more, to authorize him to call for the production of the deed. If the possession is denied, the affirmative must be proved, to enable the party to derive any advantage from the non-production of it.

Upon this, the plaintiff gave the will to the court, and then insisted, that this was not a case in which, under the act of congress, they were compellable to produce the will. The words of the law are, that a party may be compelled to produce a paper, which contains evidence pertinent to the issue, in cases,

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

and under circumstances, where they might be compelled to produce the same, by the ordinary rules of proceeding in chancery. That, to enable the plaintiff to obtain this relief in equity, he must show a title to the thing. Whereas here, the defendant relies merely on possession. Cases cited, Finch, Prec. 36, 44; 1 Vern. 35, 479; 2 Vern. 50, 255; Mitf. Eq. Pl. 19, 50, 53, 68, 215; 1 Eq. Cas. Abr. 772.

The defendant replied, that possession was a sufficient title to authorize the interference of a court of equity.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. The remedy provided by the act of congress, is merely cumulative; and, to save the time and expense of a bill of discovery, it enables this court to do, in a summary way, what they might do, if a bill of discovery were filed on the equity side of the court, and no more. Now, if such a bill were filed, the court would not compel a discovery, unless the defendant showed a title to the land. A right of possession might protect the party in ejectment, unless the plaintiff can avoid it, and show a complete title in himself. But, this would not be enough to enable him to come into a court of equity, for a discovery of papers, which merely tend to defeat the plaintiff's title at law, without strengthening that of the plaintiff in equity. It is not alone necessary for the party applying, to show a title to the paper; for, if he show a title to the land, and the paper called for be necessary to its establishment, the court may relieve him; though, strictly, he has no title to the paper called for. At law, the defendant may not only shelter himself under his possession, without disclosing a better title; but, may do so by showing a subsisting title out of the plaintiff, and, consequently, out of himself. But, if in his bill of discovery he were to state this, or it was otherwise to appear, he could not be relieved.

The defendant then proceeded to show; that the land in question was confiscated, as the land of Joseph Griswold, distiller, late of the Northern Liberties of Philadelphia; and had been regularly forfeited under the laws of this state, and sold to persons, who sold and conveyed to Charles Thompson, under whom the defendant claims. This sale, and the conveyance from this commonwealth, took place in 1780. Having shown this title, the motion to produce the will of Joseph Griswold, was again renewed; but, the court was of opinion, that the defendant had no right to call for the will, which he does not pretend is necessary to strengthen his own title, but merely to defeat the plaintiffs.[2] The plaintiff's counsel then proceeded to show, by evidence, that Joseph Griswold, under whom the lessor of the plaintiff claims, was not the person intended by the proclamation, but Joseph Griswold his son; by the examination of certain witnesses, who stated, that Joseph Griswold the father, always resided at New York, and only came here in 1775, and remained for about eleven months, to instruct his son in the art of distilling brandy. When the plaintiff's counsel were about to read certain depositions, to prove the political character and conduct of Joseph Griswold, during the war; the defendant's counsel objected, on the ground that the court and jury were precluded, by law of Pennsylvania, from inquiring into the guilt or innocence of the person attainted. The court observed, that the evidence now intended to be offered, was proper, not to authorize a decision against the confiscation and sale, on the ground, that the person was not guilty; but as a circumstance, combined with others, to satisfy the jury, that the person, whose estate had been sold, was not the person named in, or intended by, the proclamation. The defendant, after the testimony was gone through, offered in evidence a copy of Joseph Griswold's will; proved before the surrogate in New York, by one of the subscribing witnesses, who also proved that the other two witnesses attested the same, in the presence of the testator, authenticated by the seal of the surrogate's office. This was opposed, because the probate was not conformable to the laws of Pennsylvania. The act of 1705, declares, that all wills in writing, whereby any lands, tenements, or hereditaments, within this province, shall be devised, being proved by two or more credible witnesses, on their solemn affirmations, or by other legal proof in this province; or being proved in the chancery of England, &c. or being proved in the hustings' or mayor's court, in London, or in some manor court; or before such as shall have power in England, or elsewhere, to take probate of wills, &c. and a copy of such will, with the probate thereof annexed, being transmitted hither, under the public or common seal of the courts or offices where the same have been taken or granted, and recorded or entered in the register general's office in this province; shall be good, &c. to pass lands here, &c. This copy was entered in the register general's office here. The plaintiff's counsel contended, that by this law, the proof of the will, wherever made, must be by two witnesses; although it is not necessary that they should be subscribing witnesses; for such are the express words of the law; whereas, by the statute of frauds in England, where proof in the manner this will was proved, is allowed, requires only, that the three witnesses shall subscribe their names in the presence of the testator; but as to the mode of proof, it is left open to the common law rules, of prov-

[2] See Fonbl. 484, which fully supports the opinion of the court.

ing any written instrument. On the other side, it was insisted, that the fair construction of the law is, that if the will be proved in this state, there must be two witnesses; but if proved elsewhere, it is sufficient if it be proved according to the laws of the country where it is so proved.

Judge Peters, having consulted the late Chief Justice Shippen, and Mr. Chew, formerly president of the high court of errors and appeals in Pennsylvania, as to the common understanding and practice of the state, in this case (for there were no cases cited, but [Weston v. Stammers] 1 Dall. [1 U. S.] 2; [Morris v. Vanderen] Id. 66; and [Lewis v. Maris] Id. 278, 288,—which were not express, and Mr. Ingersoll and Mr. Lewis differed on the practice under the law), and being informed by them, that they never knew it questioned; but that in all cases two witnesses were necessary; the court informed the bar, that the will was not sufficiently proved, to authorize a copy of it being read in evidence. If the law had not uniformly received this construction in practice, and the common understanding of men, the correctness of it might have been doubted, in consequence of the repetition of the words "being proved;" which would seem to make each disjunctive part of the paragraph a new sentence, unconnected with the first, which prescribes the mode of proof in this state. Mr. Dallas commenced the summing up, and made two points: first, that Joseph Griswold the elder, was not intended by the proclamation; and second, that he was not sufficiently described. He relied on the evidence, which proved, that the father always resided in New York; was never here, but for eleven months, in 1775, and 1776, frequently within that time returning home; that he came here for a special purpose; that he never adhered to the enemy, but acted during the revolution as a peaceable citizen. That the proclamation describes him as being late of the Northern Liberties, in the county of Philadelphia, and state of Pennsylvania; whereas, he never was here, after Pennsylvania became a state, and never did inhabit the Northern Liberties at all. That this description fitted Joseph Griswold the son; of course the former could not have been meant, neither was he sufficiently described. Cases cited: Respublica v. Chapman, 1 Dall. [1 U. S.] 53; Buffington's Case [Id.] 60; 1 Wils. 164; 1 P. Wms. 612; Fost. 79; 1 Strange, 51, 60, 594; Salk. 6, 7; 2 Hawk. P. C. c. 46, § 4; Id. c. 23, §§ 120, 121; Id. c. 25, §§ 69, 70; 4 Burrows, 2563; Show. Parl. Cas. 50; 2 Hawk. P. C. c. 23, §§ 108, 120.

The court asked the plaintiff's counsel, after Mr. Dallas had finished, and one of the defendant's counsel had partly entered upon the argument, whether they meant to contend, that the act of the 31st of January 1783, which cured all misnomers and defects in prior attainders, was invalidated by the preliminary articles of peace; since, in the opening, this had been hinted at, and the foundation laid for the objection, by referring to the period at which the treaty was signed, made public, and ratified, in this country; but that no notice had been taken of it, in the summing up. That the validity or invalidity of that law, might have a material effect upon the decision of this cause. That this point was not decided in the case of Gordon v. Holiday [Case No. 5,610] at the last term; because, the day fixed for the appearance of Gordon being long after the preliminary articles were ratified, or acted upon, by our government, there was no necessity to decide it.

Mr. Dallas, to prove that the treaty was complete before the passage of this law, and consequently avoided it, laid down the rule; that unless it be postponed till the ratification, it takes effect from the signing; it is binding on the governments from that time, though not on individuals, till made public. He cited Vatt. Law Nat. bk. 4, c. 3, p. 647, § 24; Id. bk. 2, c. 12, §§ 156, 157; Mart. Law Nat. 332; Grot. bk. 2, c. 11, § 12; Park. Ins. p. 75; Case of The Mentor, 1 C. Rob. Adm. 181; 4th January, 1784, congress recommending to the states the restoration of confiscated estates, between the 30th November, 1782, and the ratification of the treaty; 3 Gord. Hist. 362. Correspondence between Mr. Jefferson and Mr. Hammond, pp. 13, 15, 24, 28, 29, 41, 48; Vatt. Law Nat. bk. 3, c. 16, §§ 6, 38, 339.

The Attorney General, and Mr. Ingersoll, for defendant, contended: 1st, that the father was meant, and intended in the proclamation, and relied upon his political character; his having an estate here; the petition of the son, and the claim of the brother; the subsequent arrest and discharge of the son, which could not have happened if he stood attainted, &c; the long acquiescence of the father, since the sale; his not being called junior: and cited 2 Hawk. P. C. c. 23, § 106; Hob. 330; that where there is father and son of the same name, and the son is called upon, the addition is necessary: 2d, that he is properly described in the proclamation; that he boarded in the city; he was conversant in the Northern Liberties, for there he carried on business. Barnes, Notes Cas. 162. He may be styled of the parish he is in, or where he is conversant. 4 Bl. Comm. 407, 431. They cited the following cases: [Respublica v. Sweers] 1 Dall. [1 U. S.] 44; [Camp v. Lockwood] Id. 403; 1 Bl. Comm. 48, 49; 2 Wood. El. Jur. 621; Strange, 924. They contended; thirdly, that the question, under the act of 31st of January, 1783, is, was the father meant and intended to be named in the declaration; and that this law passed, prior to the operation of the treaty of peace; and if afterwards, still it is not in contravention of it. That the provisional articles were to depend upon a treaty being made between Great Britain and

France; which, though signed on the 20th of January, 1783, were not ratified till the 3d of February, after the passage of this law; and that its taking effect, was made, by the terms of it, to depend upon the ratification. That this appears from the periods fixed for the performance of certain acts, all of which are dated from the ratification; and to prove this, the Annual Register for 1783, was cited, page 12, 14. That such a clause is inserted in all modern treaties. 1 Ves. Jr. 392. That the opinion of our own government was, that the treaty between Great Britain and the United States, did not take effect till 11th of April, 1783. Correspondence between Mr. Jefferson and Mr. Hammond, pp. 41, 53, 88, 93, 105. In answer to a point, which plaintiff's counsel stated they should press, that the attainder was illegal, they contended, that it was too late now, and in this collateral way, to dispute it. That it must be considered, that Joseph Griswold had committed treason, by adhering to the enemy within this state; because, it is so stated in the proclamation, which became a sentence or conviction by his non-appearance. That the act of 1783 was not a law of confiscation, but merely a confirmatory law, and therefore not contraventive of the treaty. But if it were, still, the act of the 29th of March, 1779, protects the rights of the purchaser; though the attainder should be avoided, for error or any other cause whatever, except as to a paramount title. But the plaintiff's is not such an one; because he claims under Joseph Griswold, the father, who was attainted, and his estate sold.

Lewis, in reply, answered all the points made by the defendant, and pressed the one of which he gave notice, viz. that the forfeiture is made the consequence of the attainder, and consequently, if that attainder be invalidated, the forfeiture cannot be supported. The executive council acted upon a delegated authority, which was, to call upon all persons by name, inhabitants of this state, or who had real estate here, and who now do, or hereafter may, adhere to the enemy, by joining their armies, &c.; not those charged with doing these things. To support this attainder, then, it should appear, that Joseph Griswold, the father, did, then or thereafter, adhere, &c.; the contrary of which appears by the evidence. In England, in cases of this kind, the greatest strictness is used, in requiring proof of every thing necessary to give validity to the attainder. Harvey's Case, Fost. Crown Law, 51.

WASHINGTON, Circuit Justice (charging jury). This is a cause of consequence, and attended with considerable difficulty. It has been argued with great ability on both sides. Many preliminary questions have been discussed, and disposed of; by which means it will now be presented to the jury, narrowed down to a single point. You will dismiss from your minds, every attempt which has been made to enlist your passions, on either side, by the supposed hardship which the plaintiff or defendant may be exposed to, by a verdict unfavourable to his pretensions. To correct minds, appeals of this kind, if they disgust not, can never be successful. We must ascertain the material facts in the cause, and the law applying to them; and then declare the result, let that be what it may. As to Mr. Thompson, who, it is argued, will be without redress, should he now fail, it seems to be agreed, that if the plaintiff recovers by a title paramount to the attainder, that the door is left open for him to ask and receive compensation from the state. The court admit the right of the state of Pennsylvania to confiscate the estates not only of its own citizens, but of non-residents who failed to surrender themselves, in conformity with the requisitions of the law of March, 1778; and we mean to enforce that authority, and the subsequent laws, according to the true intent and meaning of them; unless we should be of opinion, that any of them are abrogated by some superior law.

The facts in the case, and which seem not to be disputed, are as follows: Joseph Griswold, the father, whose land was seized and forfeited, always, from the moment we hear any thing of him, lived in the state of New York; was a married man, and a father. He carried on his trade, which was that of a distiller, in the city of New York, from the year 1759, and before, until about the year 1776; when he left that city, and retired with his family to his country residence on Long Island. Having a son also named Joseph, whom he wished to instruct in the same trade, and to establish in business, he came to Philadelphia in the summer of 1775, unattended by his family, bringing this son with him: in pursuance of this, the primary and sole object of this visit, he rented a distillery in the Northern Liberties, which, until the spring of 1776, was conducted under his name; at which place the son received that instruction, which enabled him afterwards to carry on a distillery upon his own account. The father, during the whole of the time that he continued in Philadelphia, was a boarder in Strawberry alley, within the limits of the city, where he lodged and took his meals, spending much of his time at the distillery, where his business required his presence; in the space of ten or eleven months that he was so employed, he returned three times to New York, to visit his family, no part of which (his son excepted), ever came to Philadelphia, to remain or to live with him. In April or May, 1776, having accomplished the business which brought him here, he left Philadelphia, and never returned again into the state, to the knowledge of any one of the numerous witnesses who have been examined. His political character was that of a loyalist, although it does not appear that he ever was guilty of a single overt act, resembling treason against his country. He

was nevertheless arrested upon suspicion, by order of the commander-in-chief, and sent to Connecticut; where, after remaining three or four months, he was permitted to return to his family on Long Island, under parol of honour, to behave himself as a good citizen during the war. This promise, it does not appear from any witness, he ever violated. He continued quiet, inactive, and inoffensive, during the rest of the war, so far as we have received information respecting him, from the witnesses. We know much less of the history of his son. He continued to live in Philadelphia, after the departure of his father; and at different periods rented two distilleries in the city of Philadelphia, where he carried on the trade in which he had been instructed; not as an apprentice, but as a principal distiller. Whether he lived in the city, or Liberties, does not appear; but we find that he married in Philadelphia, some time in the year 1777; that he continued his residence in this place, until the approach of the British army. He went off in American uniform, and became a resident of the state of New Jersey. He was reputed a whig; yet we find, in November, 1780, that he was apprehended by a warrant from the supreme executive council of this state, upon a charge of having been guilty of traitorous practices; and in December of the same year, after a short confinement, was discharged. He was in a few days after again apprehended, upon a charge of treason, and again discharged, upon security for his good behaviour during the war. In March, 1778, the law passed, authorizing the supreme executive council of this state, to issue a proclamation, calling upon all persons, inhabitants of this state, or who have real estates within the same, and who now do, or shall hereafter adhere to the enemy, and join their armies; to surrender themselves on or before a certain day, before some magistrate of the state, and abide their legal trial, under pain of standing attainted, and forfeiting their estates as in cases of treason; and pointing out the mode of selling their estates. On the 22d of June, 1778, a proclamation issued, calling upon certain persons, by name, to surrender themselves, on or before the 5th of August following; and amongst others, "Joseph Griswold distiller," who is described as being "now, or late of the Northern Liberties township, and county of Philadelphia," and late or heretofore an inhabitant of this state, is named. No person answering to that description having appeared on the day fixed, the lands of Joseph Griswold the father, and amongst others, the land in question, was seized by the officers of government. Joseph, the son, hearing of this, presented on the 16th of August, 1778, a petition to the supreme executive council, praying for a pardon of his father, and assigning many reasons why it should be granted. Upon the report of Mr. Isham, to whom the petition was referred, unfavourable to the prayer, it was rejected, and the land was sold on the 21st of June, 1780, to certain persons from whom Mr. Thompson afterwards purchased. In August, 1780, Thomas Griswold, the brother of Joseph, the father having a subsisting term in the lands in question, laid his claim to the same, before the proper tribunal.

These are all the important facts in the cause, and it now becomes necessary to state the question which is to be decided. But previous to doing this, we must give an opinion upon certain legal points, which have been discussed, and which if determined in one way or the other, will most materially affect the question which you are to consider.

1st. What is the operation of the law of March, 1779, upon the rights of the plaintiff and defendant? 2d. Is the law of the 31st of January, 1783, inoperative or not, on account of the treaty of peace?

First. The sixth section of the act of 1779 declares, that if any attainder be reversed, or made void for error, or for any other cause whatever, it shall not operate against a bona fide purchaser, but against the state only; and the purchaser shall hold the lands discharged of all claims (other than those mentioned in the 8th section), and the injured party shall be indemnified out of the public treasury. The 8th section declares, "that nothing in this act, shall debar any person, but him who claims under the attainted traitor, from pursuing his remedy to recover his land, as if this law had never been passed."

It is contended, that the lessor of the plaintiff, claiming under Joseph Griswold, the father, who was attainted, and his land seized and sold; is barred of all remedy against the purchaser, and must seek indemnification from the state. This argument is built upon a begging of the question. The defendant asserts, that the father was the person attainted, which the lessor of the plaintiff denies. If the 6th section had stood unqualified, the argument would have been entitled to more consideration. But, the plaintiff claims the benefit of the exception; and if he brings himself within it, he is entitled to its protection. It is no argument, to say, that he is not within the exception, because the land of the father was seized and sold; for if this kind of reasoning would do, there could be no case on which the 8th section could operate. The case then stands precisely as it would have done, as to the point in dispute between these parties, if the 6th section had not been inserted.

Secondly. The next question respects the validity of the act of January, 1783, and we are to examine it in two points of view. 1st. Was it passed posterior to the treaty of peace, so as to be affected by it? And 2d, are the provisions of it, or any of them, a contravention of the treaty?

1st. The provisional articles of treaty were signed on the 20th of November, 1782; and the ministers who formed that treaty declared, "that the articles then agreed

upon, are to be inserted in, and to constitute the treaty of peace, proposed to be concluded between the two governments; but which is not to be concluded, till terms of peace are agreed upon between Great Britain and France; and Great Britain should be ready to conclude the same." These articles, then, did not merely form the basis of a treaty, subject to future modifications, but it was the treaty itself, agreed upon at the time it was signed; postponed only in its operation, until terms should be agreed upon between Great Britain and France, and Great Britain should be ready to conclude the same. So perfectly was this understood, that the definitive articles do not differ in any respect from those agreed upon at this time. On the 20th of January, 1783, terms of peace were agreed upon between Great Britain and France; the preliminary articles being signed, by the respective ministers of those governments, on that day. But it is contended, that this treaty can only be considered as made on the 3d of February following, when it was ratified; and in support of this opinion, it is stated, that, by its terms, it was suspended till ratification.[3] No evidence of this has been given; and from the substance of these preliminary articles, as detailed in the Annual Register for 1783 (for we have not seen the treaty itself), there is no reason to suppose, that this was the case. Certain days are fixed upon for the performance of certain things, most of which are to count from the ratification of the treaty. But this does not prove the fact, any more than it proves that the provisional articles between Great Britain and America, were suspended until the ratification; for the same provisions are made in that treaty, in the sixth article; and are common in all treaties. But even if this were the fact, as to this treaty; we do not think it would affect the case, because, when ratified, the treaty would relate back to the signing. The ratification is nothing more than evidence of the authority under which the ministers acted; and Vattel says, "that a government is bound to perform and observe a treaty, made by its minister, unless it can be made to appear that he exceeded his authority." But a ratification is an acknowledgment that he was authorized to make the treaty; and if so, the nation is bound, from the time the agreement is made and signed. I am constrained, then, to say, that terms of peace were agreed on between Great Britain and France, on the 20th of January, and consequently that the contingency, on which the treaty between Great Britain and the United States, was to take effect; happened on, and was binding upon, the two nations, from that day, if no sooner. Consider this case upon the reason and honesty of it. Great Britain, in the four first articles, makes what were deemed concessions on her part; in consideration of which, the United States stipulated to recommend to the states, restitution of confiscated estates, and engages, that no future confiscations should be made. Would it have consisted with good faith, that she should, during the suspension of the treaty, have produced, in the worst, a confiscation, so as to destroy the consideration which induced the stipulation on the part of Great Britain? Certainly not.

The opinions of our government on this subject, have been relied upon by both sides; and, the letter of Mr. Jefferson to Mr. Hammond, has been read in detached parts, to support the pretensions of the plaintiff and defendant. But, really, that letter has been so garbled, that it is impossible, without reading it throughout, to say which side can safely claim an advantage from it. I once read, approved, and admired it; but, I cannot recollect the course of argument upon this particular subject. Be this as it may, I have no hesitation in saying, that I cannot yield my own opinion, when coolly and deliberately formed, to that of any member of the government, not carrying with it the force of a law. Upon the whole, then, it is the opinion of the court, that the law of the 31st of January, 1783, is posterior to the treaty of peace, which is the supreme law.

The next question under this head is, does that law contravene the treaty of peace? The treaty declares, there shall be no future confiscations. The confiscations which had taken place, before the 31st of January, 1783, were complete and valid; or, they were not. If valid, then this law was inoperative and unnecessary: if not, then this law, by giving them validity, produces the confiscation, and is, therefore, a breach of the sixth article.

I come now to the question, which is, not whether Joseph Griswold, the father, was the person meant and intended by the proclamation; which would have been the proper question, had the act of the 31st of January, 1783, passed before the treaty took effect, and might have been a very perplexing question for the jury; but, is Joseph Griswold, the father, the person named in the proclamation? Was he truly described in it? This was the question in Lord Pitsligo's Case, Fost. Crown Law, 79, and in Buffington's Case [supra]. If Joseph Griswold, the father, had been apprehended after the 5th of August, and a suggestion filed against him, similar to that in Buffington's Case, and the same plea had been put in; would the jury have said, that he was the person named in the proclamation? If they would not, neither ought they, in this case;

[3] In the preliminary articles between Great Britain and Holland, this is expressly stipulated, viz. that as soon as they shall be signed and ratified, there shall be sincere friendship, etc. between the two nations, etc.

where the question, in fact, is the same, as affecting the forfeiture of his property. For, though we do not mean to decide upon the last point made by Mr. Lewis, because we deem it unnecessary; yet, we have no hesitation in saying, that the forfeiture, in this case, was the consequence of the attainder; and, if the latter cannot be supported, neither can the former. To determine, whether he is the person named in the proclamation; we must attend to the description. He is called, "Joseph Griswold, distiller." This is true, as to him; and equally so, as to his son. Perhaps he might be said to be of the Northern Liberties, since he carried on his business there; but, upon this point, we give no opinion; at the same time, if the description suited him, it also suited the son. He is described as being late, or heretofore, an inhabitant of this state. Now, this is not true. He never was an inhabitant of this state or province. He always resided and inhabited in the state of New-York, where he kept house, and had a family, which always remained there. He came to Philadelphia, and remained for a few months, for a special purpose; visited his family three times; and, having accomplished the business which occasioned this temporary visit, he returned to his dwelling in New-York, and to his family. His whole conduct furnishes complete evidence, that the animum revertandi always continued. He was no more an inhabitant of this state than I am, who spend one-third of each year in this city; or any other person, who comes here to transact a certain piece of business, and then returns to his family. This is not a captious objection. The falsity in the description, is important, in two respects. First, two classes of persons are contemplated by the law of 1778; viz. those who resided in the state, and owed allegiance to it; and those who lived out of the state, but who had real estate here. If the latter were intended to be named in the proclamation, they should have been described, either as inhabitants of the state in which they lived, or as having real estate here. In the next place, the description completely fitted Joseph Griswold, the son, in all respects; but, was repugnant to truth, as it respected the father, who never was an inhabitant of this state.

In the execution of a law so highly penal as this, the principles of law and of eternal justice required, that the person called upon to surrender himself, should be described with such certainty, that he might have notice, and be enabled to appear, and prove his innocence; if he could do so. Who will be found bold enough to vindicate the doctrine of taking away life and property, for an alleged crime, without giving an opportunity to the accused to be heard in his defence? And where is the difference between a notice, containing a false description, and the total want of notice? In Buffington's Case, the plea was supported. though the description used in the proclamation, could fit no other person. This case happened, flagrante bello, during the heat and fury of the Revolution; and shall we, at this day, be less humane or less just? God forbid! Upon the whole, then, we are of opinion, that, if you believe the facts, as above stated, and there is no conflicting evidence in the cause; then Joseph Griswold, the father, was not truly described, and was not the person named in the proclamation; and, consequently, your verdict ought to be for the plaintiff.

The jury were kept confined for six days and nights; and then found a special verdict, which was set aside.

[See Cases Nos. 6,980 and 6,982.]

Case No. 6,982.

HYLTON v. BROWN.

[1 Wash. C. C. 343.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

EJECTMENT — PRODUCTION OF PAPER TO DEFACE PLAINTIFF'S TITLE—WHAT PREVIOUS EVIDENCE OF DEFENDANT NECESSARY — PROOF OF WILL—ATTAINDER — RIGHT TO ATTACK IN COLLATERAL ACTION—OPERATION OF TREATY BEFORE RATIFICATION.

1. The court, upon the authority of an adjudged case, not cited in a former trial, admitted that the defendant had a right to insist upon the production of a paper, which went to deface the plaintiff's title, without fortifying his own; contrary to a decision in the former trial of this case.

2. Although a paper has been produced by one party on notice from the other, it does not become evidence, unless from its legal character it is entitled to be such.

3. An original will of lands, not proved according to law, cannot be read in evidence; although produced on the notice of the opposite party, as the will of the person named in it.

4. A party who claims lands against an attainder, the correctness of which he denies, could not, upon the principles of the common law, controvert the title of the purchaser under the attainder, in a collateral action; but would be compelled to reverse the attainder, and thus obtain a judgment of restitution.

5. The principles and provisions of the laws of Pennsylvania, in relation to attainders, examined.

6. The operation of a treaty, before ratification by the governing powers of the state, by whose agents it has been signed.

This cause, which was tried at the adjourned court, in January [Case No. 6,981], and in which a venire de novo was awarded, came on now to be tried again. The evidence was the same as at the former trial. The defendant, having stated and shown his possession and title, called for the produc-

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

tion of the will of Joseph Griswold, after proving a notice to the plaintiff to produce it, and also that it was in his possession. In addition to the cases formerly cited and relied on, Metcalf v. Hervey, 1 Ves. Sr. 248, was now read; in which Lord Hardwicke determined, that a defendant in possession, whether rightfully or tortiously, and being sued in ejectment, might call upon the plaintiff in equity, to set out his title, that it might be seen whether the title was not in some other person than himself. The plaintiff's counsel endeavoured to explain this case, by saying, that this only meant, that the defendant at law, might seek this discovery, to enable him, at the trial, to be prepared, and to show, if he could, that the title was out of the plaintiff. That, at any rate, the case did not authorize the defendant in this case, to compel the plaintiff to do more than he had already done, i. e. to set forth his title; but this was a different thing from compelling the plaintiff to exhibit evidence to defeat his title, without strengthening that of the defendant. They cited, in addition to the cases formerly read, the following: Hind, Prac. 36; Mitf. Eq. Pl. 52, 138, 100, 162, 215, 98, 160, 161; 2 Ves. Sr. 445; 2 Fonbl. 482, 484, 487; 3 Ves. 222, 243; 1 Wood. El. Jur. 207; 2 Ves. Sr. 189; 2 Atk. 393, 392. The defendant cited Mitf. Eq. Pl. 160, 161; Parker, 144; 1 Ves. Jr. 56.

PETERS, District Judge, thought, that upon reason and principle, the decision given on this point, at the former trial, was right; but he yielded to the express authority now read, of Metcalf v. Hervey.

WASHINGTON, Circuit Justice. The doctrine laid down in 2 Fonbl. 484, in the note, coincides entirely with my opinion on this point; but the case of Metcalf v. Hervey, is an authority binding upon us, and is too strong to be got over. The explanations, which have been attempted to be made of this case, are ingenious, but not satisfactory. That was to every purpose a bill of discovery, and was entertained as such by the judge; it was brought by a person not claiming title; and it called upon the defendant for a discovery, which could not be necessary to protect the possession of the defendant; but merely to defeat the claim of the plaintiff at law. If the heir of Mrs. Harmer should be found to be really entitled, the effect of the bill was merely to show, that the title was out of the plaintiff, and furnished the defendant with a defence against the plaintiff at law; but without affording validity to his title. What is the present case? The defendant calls upon the plaintiff to exhibit a paper in his possession, pertinent to the issue, in order to prove the title out of the plaintiff. There is no distinguishing the cases. But it is said, that the case only warrants the demand of what the plaintiff has already done; and that the bill was entertained in that case, to enable the defendant, to prepare himself for trial. But Lord Hardwicke could never mean to sanction so absurd a doctrine, as that the defendant, in every case, (for he lays it down as broad as possible,) might, previous to the trial of an ejectment, call upon the plaintiff in equity, to set out his title. If so, a bill of discovery, would be the necessary and constant companion of an ejectment; and why should the defendant have this advantage more than the plaintiff? But he clearly explains his meaning, by stating the purpose for which the discovery is compelled; i. e. that it may be seen whether the title is out of the plaintiff; not by any proof, which the defendant might be able to produce, but by the title set out by the plaintiff at law. None of the cases cited by the plaintiff, are so strong as that from Vesey; and I therefore feel myself compelled, by its authority, to yield my former opinion.

The plaintiff then produced a copy of Joseph Griswold's will, but insisted, that before the defendant could read, or have the advantage of it, he ought to make an affidavit, that he had not the original or a copy.

BY THE COURT. This is not necessary.

The defendant then objected, that the plaintiff must produce the original will. To this it was answered, that the notice is, to produce the will or a copy, and being in the alternative, he is at liberty to produce either; and as the copy now produced, was determined at the last trial not to be evidence, the original not having been proved in conformity with the laws of this state, it was objected, that, though produced, it could not now be read. In reply to this, it was insisted, and Peake's Evidence was cited, that the will coming from the hands of the plaintiff himself, it must be considered as the will of Joseph Griswold, without further evidence of its execution.

WASHINGTON, Circuit Justice. The difference is between a paper, the proof of which may be supplied by the acknowledgment of the party, who produces it, so as to make it available; and one which is inoperative, unless certain forms or proofs are pursued, or given, to establish it, and make it effectual. Thus a deed or letter may be established, by the acknowledgment of the grantor, or the person producing the letter. But all that can be inferred from the production of this copy, is, that it is a copy of the will of Joseph Griswold. What follows? This will not establish it, so as to pass land in this state, for to give it this effect, the will must be proved by two witnesses. Even if the plaintiff were to produce the original will, still it would not avail the defendant, unless the execution of it were proved, in conformity with the laws of this state; and as the defendant does not pretend that he can do this, it is unimportant whether the original, or a copy, is produced.

PETERS, District Judge, was of opinion,

that the will could not be used, without proving it as the law of this state directs.

The cause was argued upon its merits, much as formerly. On the subject of what constitutes inhabitancy, the following additional cases were cited by plaintiff: Burrows, Sett. Cas. 569, 529, 535, 536, 243, 129, 586, 825; 2 Burrows, Sett. Cas. 290, 291, 420; [Barnet's Case] 1 Dall. [1 U. S.] 152; [Taylor v. Knox] Id. 158; [Penman v. Wayne] Id. 246, 348; 2 C. Rob. Adm. 322. On the other side, 4 Bac. Abr. 753; 2 Strange, 924; 2 Inst. 702, 703; Cart. 119; 3 Burn, J. P. 12. As to the period when the treaty took effect, the defendant's counsel cited in addition, Vatt. Law Nat. bk. 2, c. 12, §§ 156, 157; 1 Abbe Mably, 113-217.

The charge was much the same as was delivered at the last trial, except as to the construction of the act of March, 1779, and the validity of the act of the 31st of January, 1783.

Lewis, Tilghman & Dallas, for plaintiff.

Ingersoll, Rawle & M'Kean, for defendant.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice (charging jury). The question is, what is the operation of the act of March, 1779, on the rights of these parties? It is contended by the defendant, that the lessor of the plaintiff, claiming under Joseph Griswold the father, who was attainted, and his land seized, and sold, he is barred of all remedy against the purchaser, but must look to the state for indemnification. But this argument is built upon a begging of the question. The defendant asserts, that the father was the person attainted, which the lessor of the plaintiff denies. If, in fact, he was the person attainted, and the only question was, is the attainder erroneous; then upon general principles, independent of the 6th section of this law, he, or those claiming under him, could not controvert the title of the purchaser in a collateral action; but would be compelled, first, to reverse the attainder, and then to obtain a judgment of restitution. This would have been the case, but for this section; which, upon reversal, prevents the judgment of restitution, as against a bona fide purchaser, and substitutes the state as bound to make reparation. In cases of attainder, under the law of 1778, there were three modes of proceeding to obtain redress, where an injury had been done to the person attainted, or to third persons, pointed out by law. First. Third persons claiming by deeds under or paramount; the attainted person might, within a limited time, interpose his claims to the land, or to satisfaction thereout of debts charged on it, which were to be decided in a particular way. This remedy did not extend to the traitor himself. Secondly. The attainted person himself, his heirs, executors, and administrators, or those who were prejudiced by the attainder, might, if it were erroneous, reverse it upon the principles of common law; and having succeeded, he would be entitled, not to a judgment of restitution against a bona fide purchaser, but to indemnity against the state. Or, thirdly, any person, other than the attainted traitor, or those claiming under him, might bring an ejectment to recover land, to which he has a title, which had been sold in consequence of an attainder. Now, in this case, the plaintiff does not complain, that there is any error in the attainder; but on the contrary, it is admitted, or at least nothing appears to the contrary, that Joseph Griswold, distiller, at the time of the proclamation, or theretofore, an inhabitant of the state of Pennsylvania, was correctly called upon and attainted; but he contends, that Joseph Griswold, whose land was sold, was not called upon, and therefore was not, and could not be attainted. If so, this Joseph Griswold could not have reversed the attainder, however erroneous it might be, because he was neither party, privy, nor was he prejudiced by it; and of course he could not make himself party to the record. If Thomas Griswold had been called upon and attainted, Joseph Griswold could not have brought a writ of error. The error complained of, is not in the attainder, but in the subsequent seizure and sale of Joseph Griswold's land, in consequence of the attainder. But, if on a judgment against A, the property of B is taken in execution, the execution is void as to B, and he may recover back his property, or sue the officer and party; but he could not sue out a writ of error to reverse the judgment to which he was neither party nor privy, nor which (judgment) had prejudiced him at all. The true distinction is this;—if a person be attainted under process, which is incomplete in describing him, as, if the proper additions be omitted; this is an error of which he may avail himself by writ of error; because, having been truly named, he is a party to the record, and may maintain the writ. But, if the description be repugnant to truth, as if he called by a wrong name, or trade, or if he be stated as being of a place, which is not true; then the description does not apply to him. He never was party to the record; if so, he never was attainted, and therefore he cannot reverse the attainder; but then he is not bound by it, and may consequently sue for his property, which has been seized or sold, in execution of the attainder, as if no such attainder had taken place. How was it in Buffington's Case? Did he attempt to reverse the attainder? By no means. He could not have done it, since he was not attainted. But when called upon to show why execution should not issue, he pleaded that he was not the person attainted; and this was the opinion of the court,

upon the ground, that he was described to be of East Bradford, instead of West Bradford township, and this, though there was no other person known, who answered the description. In Lord Pitsligo's Case, and in Gordon's, they did not attempt to reverse the attainder, but filed their claims upon the ground of a false description. If then Joseph Griswold has been falsely described, he is expressly within the 8th section of the law, and the plaintiff is not barred of his action.

The next question is, was the law of the 31st January, 1783, passed posterior to the treaty, or not? If it was, then Mr. Ingersoll has admitted it to be void, as being in contravention of the treaty. This question, I consider in two points of view. First, at what time does a treaty take effect, if no period is fixed in the body of it, or by the agreement of the ministers? Second, at what period did the treaty of peace between Great Britain and the United States take effect, from the terms of the provisional articles? Vatt. Law Nat. bk. 2, c. 12, §§ 156, 157, says: "That every promise made by the proxy, within the terms of his commission and his powers, is binding on his constituents. At present, to avoid all danger, princes reserve to themselves the power of ratifying what has been concluded by their ministers. The commission of the plenipotentiary is but a procuration cum libera. As princes cannot be compelled, but by force, to fulfil their engagements, it is customary to place no dependence on their treaties, till they have agreed to ratify them. Thus, as every agreement of the minister remains invalid, till sanctioned by ratification, there is less danger in giving unlimited powers. But, before a prince can honourably refuse to ratify a compact, made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons; and, in particular, to prove that his minister has deviated from his instructions." In this extract, I understand Vattel merely to state, that a government is bound to fulfil an agreement of its ministers, if made within the scope of their authority; but, if it refuses to ratify, it is not bound by the agreement; because, according to modern custom, the power of ratifying is reserved by the government, to avoid the inconvenience and danger, which might result from the minister exceeding his authority; and, if so, then the same author declares, that the sovereign is bound by the agreement, and, unless its operation is postponed by the terms of the agreement, to a particular day, it takes effect from the signature. The Abbe Mably does not contradict this, but merely contests the position of Grotius, that the treaty binds from the signature, whether it is ratified or not. Rutherforth is still more express: he says, vol. 2, p. 581: "That what a government does by their deputies, is their own act; and, consequently, in respect of the nation, it produces the same effect as if they had done it themselves. In public compacts, which sovereigns make by their deputies, the law of nations is the same as in promises which individuals make by proxy; what they do under the authority of their public commission, binds their principals, even though they should exceed some private instructions from their principals."

Second. When does the treaty between Great Britain and the United States take effect, from the terms of it? Answer; from the time that terms of peace are agreed upon between Great Britain and France, and Great Britain shall be ready to conclude the same. It is argued, that all this means, from the time the agreement is not only made and signed, but is ratified also. If this was the intention, why was it not so expressed? The ministers knew the full import of the expressions they used, and would never have expressed themselves loosely, when plain, unambiguous expressions were at hand. In the treaty between Holland and Great Britain, the effect of the treaty is suspended till ratification, by express terms. Whether the treaty between England and France was so suspended, does not appear; and it is not to be inferred, from the circumstance of certain periods from the ratification being fixed upon, when hostilities are to cease in particular places. But, be this as it may, the provisional articles between Great Britain and the United States being, by the terms of it, to take effect, when terms of peace are agreed upon between Great Britain and France, and Great Britain is ready to conclude the same. Let us examine these expressions, and see what they mean. "Agreed upon:" that is, when the ministers have come to an understanding, as to the terms of the treaty, and have reduced them to writing. "Concluded:" that is, when the agreement, thus understood, has received its last form, by being signed and duly executed by the minister. It is this which concludes all agreements, whether made by nations or by individuals. That this is the meaning of the word "concluded," is plain from the above quotation from Vattel, and from other expressions used by him in book 3, c. 16, § 238, speaking of truces, where he uses the words as importing a signature, either by the sovereign, or by his general. But it goes on, and says: "And Great Britain shall be ready to conclude the same." Now, when the treaty was signed by her ministers, she had shown her readiness to conclude it. That ratification was not considered as a necessary condition, is plain from the readiness to conclude, being applied only to Great Britain; and this further proves, that Great Britain and the United States would have been at peace, and yet Great Britain and France be at war. For, if Great Britain had concluded the

treaty, and even ratified it; yet, though France had refused, still the treaty would have been in force between Great Britain and the United States. If ratification had been meant, it would have provided for the exchange of ratifications, as, in most other treaties is common. The fact is, and we all know it as a matter of political history, that the United States were anxious to hasten, and France as much so to protract, the conclusion of the negotiations; and the ministers of the United States, did not think it prudent or necessary, to delay the completion of the treaty, after the terms of peace were agreed upon between Great Britain and France, and were finally concluded by the signature of their ministers.

Mr. Jefferson's letter to Mr. Hammond has been read, but so much in detached parts, that it is impossible to say which side may place most reliance on this authority; and it is impossible to do justice to his argument, without going through the whole of it. As a proof of this, look at what is said in the text, page 39, in which he speaks of the treaty being signed by the ministers of Great Britain and France, of which notice had been given to congress; and then adds: "The event having now happened, on which the provisional articles were to come into operation," &c. "Now happened," must relate to the signature, or to the notice. It cannot relate to the latter; because, in the notes, he cites authorities to prove, that the nation is bound so soon as the treaty is concluded, the people, from the time it is made public. He then must refer to the signature; and, if so, it is a complete authority for the opinion we hold. Yet, immediately after, he speaks of this very law of the 31st of June, 1783, as being out of view upon the subject of infractions of the treaty. If the United States were bound by the signature, so were the state governments, who stood in a very different situation from individual citizens; the former of whom could not be punished for contravening the treaty, as individuals might. Upon the whole, we are constrained to say, that the treaty between Great Britain and the United States, was in force from the 20th January, 1783; and, consequently, upon the admission of counsel, of what could not be questioned, the act of 31st January, 1783, is out of the question.

The jury found for plaintiff. Exceptions were taken, but no writ of error was prosecuted.

[See Cases Nos. 6,980 and 6,981.]

Case No. 6,983.

HYLTON v. BROWN.

[2 Wash. C. C. 165.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

ACTION FOR MESNE PROFITS — WHAT CAN BE RECOVERED.

1. Action for mesne profits. The plaintiff can recover mesne profits, in the nature of damages, only from the time of the ouster laid in the declaration, having proved no title prior thereto.

[Cited in Beverly v. Burke, 9 Ga. 440.]

2. The value of the improvements made by the defendant, ought to be first set against the mesne profits prior to the actual ouster, and after the title of the plaintiff accrued; and the balance, only, can be properly deducted from the rents and profits to which the plaintiff is entitled.

[Cited in Thrasher v. Tyack, 15 Wis. 258.]

Action to recover mesne profits, from the time of the ouster, laid in the declaration, to the time when possession was delivered under the habere facias possessionem, in 1806. The defendant gave evidence of improvements made on the land by the defendant, prior to the time of the demise laid, and of others subsequent to that period. Proof was given by the plaintiff of the value of the rents. The defendant held the possession some years anterior to the date of the demise.

Mr. Lewis, for plaintiff, read 3 Wells, 118.

WASHINGTON, Circuit Justice (charging jury). This is a claim for mesne profits in the nature of damages, the value of which you are to estimate. Against this demand, the value of the improvements when the plaintiff received possession, is a fair offset. But the plaintiff, having proved no title, except under the recovery in ejectment, can recover damages only from the time of the demise laid in the declaration of ejectment. The value of the improvements ought first to be set against the mesne profits received by the defendant, prior to that period, and after the plaintiff's title accrued; and the balance only, if any, may properly be deducted from the rents and profits to which the plaintiff was entitled subsequent to the demise.

Verdict for upwards of 2,000 dollars.

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

Case No. 6,984.

In re HYMAN.

[3 Ben. 28;[1] 2 N. B. R. 333 (Quarto, 107); 36 How. Pr. 282.]

District Court, S. D. New York. Nov. 30, 1868.

EXAMINATION OF BANKRUPT—POWER OF REGISTER.

The proceedings before a register, in bankruptcy cases, are under the control of the register, and should proceed without unreasonable delay. No inflexible rule can be laid down as to postponements or adjournments.

[In bankruptcy. In the matter of Louis Hyman.]

[By JOHN FITCH, Register:]

[2][In this cause now pending before me, the order to show cause why the discharge of the petitioner should not be granted, has been duly issued, the proceedings thereupon had, and appearance put in and specific objections filed by a creditor, as provided for by section thirty-one of the bankrupt law [of 1867 (14 Stat. 532)], the case duly sent to the district judge, who on the 21st day of July, 1868, made an order in this cause to take testimony therein. The attorney for the petitioner, and also the attorney for a creditor, each entered and duly served a copy of said order, and the cause was set down for a hearing on July 28, 1868, by an order made by me in this cause. Under the twenty-fourth section of the general orders in bankruptcy, it is the practice of the district courts to cause the trial provided for in said section to be held by the register having the case in charge; this I consider to be the correct practice, because it was evidently the intention of congress to give the register the same power as the district judge in the performance of his judicial duties under the bankrupt act, ("as an assistant to the district judge,") except he is not empowered to commit for contempt, or to hear a disputed adjudication on any question of the allowance of suspension of an order to discharge. In re Gettleston [Case No. 5,373]—opinion of Bates, affirmed by Hoffman, District Judge.

[It is my opinion, that the withholding by congress from the registers the power to commit for contempt of court, has impeded, delayed, and retarded the proceedings of the court in the administration of the bankrupt law, more than all other causes combined; the attorneys, as well as the registers, are well aware of this fact, and this is the main reason why the attorneys for the bankrupts consult their own convenience as to the time of the examination of a bankrupt, select their own house to do it in, consult their own business engagements, and in various ways make their cases in bankruptcy subservient to their causes in other courts, well knowing that the registers cannot compel them to proceed with their cases, and can only exercise a moral influence, which his own character and position have upon them. In this case, commencing with the 28th day of July, 1868, the attorney for the opposing creditor has applied, either in person, by telegraph, letters, or clerks, for adjournments, and up to the —— day of November, 1868, in each case asking an adjournment on the ground of sickness of family, absence from the city, or professional engagements in the state courts, or before some other register. The attorney for the petitioner requests these facts to be certified to the court. The time has arrived when it is absolutely necessary that the district court should make some rule in relation to the trial of causes before registers, as the register cannot enforce obedience to his own orders, but can only certify the facts to the district court.

[I certify to your honor that I granted many of the adjournments in this cause to the attorney for the opposing creditor, on the ground of his then professional engagements in another court. This I considered the correct practice under the decision of your honor in Re Mawson [Case No. 9,320]. But that the time has come when such adjournments can no longer be granted for the convenience of the attorney for the opposing creditor in this cause, without doing great injustice to the petitioner, as the creditor's attorney has had all the delays the law could possibly contemplate or justice demand. At the day last fixed for the hearing of this cause before me, the attorney for the creditor appeared by his clerk and asked for a further adjournment, on the ground that the attorney for the creditor had a hundred other cases, and he was then engaged in court. It is the rule of our state courts, having reference to the practice in this city, that where a lawyer is actually engaged either in a trial or argument of a cause in any court of record, it constitutes a sufficient reason for putting off a cause for the day in which the lawyer may be attorney of record in another court. Such rule has been greatly injurious in its effects, and retards the business of the courts.

[It is a well-settled rule in moral philosophy, that, when duties conflict, the most important should be observed; that rule applies to the lawyers in this city; they must select which of the courts they will practise in; they must either conform to the business of the court, or the courts must so arrange their business as to suit the convenience of counsel, which in this district cannot be done. As a specimen of the difficulties under which the registers in this district labor in proceedings similar to this, in a case pending before me, several creditors had appeared, by their respective counsel, on the day set for the hearing; by consent of all the attorneys no one of the counsel appeared for the creditors, but each sent

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

[2] [From 2 N. B. R. 333 (Quarto, 107).]

their respective excuses, namely—one was engaged before Justice Nelson; two before your honor; two before the general term of the supreme court; and one before Judge Sutherland, at the special term or chambers of the supreme court. In order to obviate the difficulty as far as I could, and yet do substantial justice between the parties, I have fixed (so far as I could) afternoons for the taking of testimony, but have been met with applications for adjournments, for the reasons the attorneys for the respective parties were engaged in trials before referees, which were trials pending in the respective courts. In order that your honor may fix a specific and definite rule as to the practice in the case I have specified, I hold: First, that the supreme court of the United States and its two branches, the circuit and district courts, are the highest judicial tribunals in the land, take precedence of all the state courts, and must be respected and obeyed accordingly; and that attorneys practising therein must give preference to causes pending in the United States courts and all the branches thereof, as against the causes pending in the state courts. Second, that the rules and practice of the state courts as to engagements in causes pending in the state courts, will not be considered by the United States courts "as good cause shown" why a cause pending in any branch of the district court should be adjourned, unless by consent, for the convenience of attorneys actually engaged in the state courts. Third, that when an attorney for an opposing creditor unreasonably delays the proceedings in a cause before a register, under section twenty-four of the general orders, such unreasonable delay is equivalent to an abandonment of the right to proceed under the orders, and it becomes the duty of the register to certify the proceedings to the court, with the usual certificate of conformity, similar to the practice of the state courts in dismissing a complaint for want of prosecution, as the bankrupt has rights in the matter which the courts are bound to respect.][3]

BLATCHFORD, District Judge. In this case, after objections to the bankrupt's discharge had been filed, the court ordered the testimony in the matter to be taken before the register. On such order proceedings were taken, and were several times adjourned, at the request of the attorney for the opposing creditor, on the ground of sickness or professional engagements elsewhere. On request of the bankrupt, the register has certified the facts to the court.

The proceedings before a register are to be conducted by him with the exercise of a proper legal discretion, and, subject to that rule, are entirely within his control. If a party unreasonably refuses to proceed in a matter, the matter must proceed without him, and the register must see that it proceeds in whatever manner may be proper. No new or further order or rule on the subject is necessary. The registers have ample authority in the premises, and should exercise it to prevent unnecessary and unreasonable delays. No general inflexible law can be laid down in respect to postponements or adjournments by them. Every case must be treated on its own merits, with the exercise of legal discretion, and according to the best judgment of the register.

[3] [From 2 N. B. R. 333 (Quarto, 107).]

Case No. 6,985.

In re HYMAN et al.

[18 N. B. R. 299.][1]

District Court, S. D. New York. July 2, 1878.

BANKRUPTCY—RESOLUTION OF COMPOSITION—WHAT PROVISIONS ARE BINDING.

1. A provision of a resolution of composition to the effect that upon the delivery of the composition notes all the property in the hands of a voluntary assignee of the bankrupts shall be delivered to them and the assignee discharged from responsibility is wholly nugatory so far as it purports to affect the assignee's responsibility; or the rights of creditors under the assignment, otherwise than as the confirmation of the composition and release of the creditor's claims by payment of the composition may necessarily affect them.

2. Confirmation of the resolution of composition does not give the assent of the court to what such provision vainly attempts to affect.

3. Confirmation of a resolution containing a provision that the proceedings in bankruptcy may be discontinued at any time after delivery of the notes does not bind the court to allow such discontinuance, unless sufficient grounds therefor are shown to exist when the application is made.

[In bankruptcy. In the matter of Solomon Hyman and Moses S. Hyman.]

B. F. Foster and Otto Horwitz, for motion.
Edward T. Bartlett, contra.

CHOATE, District Judge. Motion to confirm composition. I do not feel at liberty to reverse the decision of the great majority of the creditors in this case—that the composition is for the best interests of creditors—on any of the grounds urged by the learned counsel for the opposing creditors. The fifth resolution is objected to, which provides that upon the delivery of the composition notes all the property of the debtors which is or has been in the hands of the voluntary assignee of the debtors shall be delivered to the bankrupts, and the said assignee discharged from all responsibility under his office as assignee. This resolution is wholly nugatory so far as it purports to affect the responsibility of the voluntary assignee, or the rights of creditors under the trusts of that assignment, by the proceedings in this court otherwise than as the confirmation of

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the composition, and the release of the claims of creditors by payment of the composition may necessarily affect them. But this resolution is not a substantive part of the proposal of composition which the creditors have accepted, and the confirmation of the resolutions does not give the assent of this court to what the fifth resolution vainly attempts to affect. So the sixth resolution, which provides that any time after the delivery of the notes the proceedings in bankruptcy may be discontinued, does not, if the resolutions are confirmed, bind the court to allow such discontinuance, unless, when the same is applied for, sufficient grounds therefor shall be shown to exist. Composition confirmed.

Case No. 6,986.

In re HYMES.

[7 Ben. 427;[1] 10 N. B. R. 433.]

District Court, S. D. New York. Sept., 1874.

PRACTICE—REQUISITE NUMBER AND AMOUNT OF PETITIONING CREDITORS.

1. Under the 9th section of the act of June 22, 1874 [18 Stat. 180], where a debtor, against whom a petition in bankruptcy is filed, denies that the petitioning creditors constitute one-fourth in number of his creditors, or that the aggregate of the provable debts, owing to the petitioning creditors, amounts to one-third of the debts of the debtor so provable, the denial and the list of creditors filed with such denial should both be verified by the oath of the debtor.

[Cited in Re Currier, Case No. 3,492; Re Lloyd, Id. 8,429.]

2. On such denial being filed, it is proper to have a reference to ascertain whether the petitioning creditors do constitute one-fourth in number of the creditors whose respective provable debts exceed $250, and whether the aggregate of the provable debts of the petitioning creditors amounts to one-third or more of the creditors whose respective provable debts exceed $250.

3. On such hearing, the petition, the denial and list are to form part of the proceedings, the affirmative of the allegation is to be with the petitioning creditors, and the debtor is to attend and submit to an examination, if desired by the creditors.

4. At least ten days' notice of such hearing is to be sent to all the creditors named in the list, in analogy to the time specified in the 11th section of the act.

5. The proper number of creditors required to join in the petition is to be ascertained by computing one-fourth of the creditors whose respective debts exceed $250, and such additional number of them, that the aggregate of the debts of those computed will amount to one-third of the debts of the creditors whose respective debts exceed $250.

[Cited in Re Bergeron, Case No. 1,342; Re Broich, Id. 1,921.]

[In bankruptcy. In the matter of Jacob Hymes.]

R. Sampter, for petitioning creditors.

Busteed & Turk, for debtor.

BLATCHFORD, District Judge. In this case, five creditors, who set forth their aggregate debts at $2,262 57, join in a petition to put their debtor into bankruptcy. The petition alleges that such five creditors constitute more than one-fourth in number of the creditors of such debtor, and that the aggregate of the debts owing to them by such debtor, provable under the bankruptcy act, amounts to more than one-third of the debts of the debtor, so provable. The debtor files a written statement signed by his attorneys, and verified by an oath signed and sworn to by the debtor, declaring that such statement is true of his own knowledge, which statement sets forth that the debtor appears and denies that the petitioning creditors constitute one-fourth in number of his creditors, or that the aggregate of the debts owing to the petitioning creditors by said debtor, provable under said act, and the acts amendatory thereof, amounts to one-third of the debts of said debtor, so provable. The 9th section of the act of June 22, 1874 [18 Stat. 180], in amendment of the 39th section of the act of March 2, 1867 [14 Stat. 539], does not require that such statement in writing should be verified by the oath of the debtor, but, in the absence of any rule or form prescribed by the supreme court, indicating either that there is to be, or that there is not to be, such verification, it is proper to require such oath, to be signed by the debtor.

The debtor, at the same time, files a list, to which is appended a written oath, signed by him, setting forth that such list is a full and true list of all his creditors, with their places of residence and the respective amounts severally due them, to the best of his knowledge, information and belief. The 9th section of the act of 1874 does not prescribe that such list shall be verified by the oath of the debtor, but it is proper to require that it should be. It is to be the basis of further action, and should, therefore, be authenticated.

The list shows 17 creditors, the debt due to each of whom exceeds the sum of $250. By the list, the debts due to the five petitioning creditors amount, in the aggregate, to $2,224 67, instead of $2,262 57, as set forth in the petition. The aggregate, shown by the list, of the debts due to such 17 creditors, is $7,569 13. Therefore, while the petitioning creditors constitute more than one-fourth in number, according to the list, of the creditors whose respective debts exceed $250, the aggregate of the debts of such petitioning creditors does not amount to one-third, according to the list, of the debts due to such 17 creditors. Under such circumstances the 9th section of the act of 1874 requires, that the court "shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." The

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

object of notice to the creditors, that is, notice to the creditors named in the list, is, undoubtedly, to enable the petitioning creditors and others of the named creditors to show that the list is incorrect. The proper course to be pursued is, to enter an order referring it to the clerk of the court to ascertain and report whether the petitioning creditors constitute one-fourth, or more, in number, of the creditors of the debtor whose respective provable debts exceed $250, and whether the aggregate of the provable debts of the petitioning creditors amounts to one-third, or more, of the aggregate of the debts of the creditors of the debtor whose respective provable debts exceed $250; such ascertainment to be made upon such evidence as shall be introduced on the reference; the affirmative of the allegation and denial to be with the petitioning creditors; the petition, statement and list to form part of the proceedings on the reference; the debtor to attend on the reference and submit to an examination, if desired by the petitioning creditors, as to the matters embraced in the list or covered by the issue; and written or printed notice to be given by the clerk, by mail, postage prepaid, to all of the creditors named in the list, at the addresses given in the list, of the time and place of the reference, and of its object, at least ten days before the hearing, such notice to contain a copy of the list, with its names, places of residence and amounts. The period of ten days is named, because none of the creditors are set forth in the list as residing out of the city of New York, and it is in analogy to the time specified in the 11th section of the act, as the least time of notice of the first meeting of creditors.

The 9th section of the act of 1874 provides, that, "in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned;" also, that, "if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid." The list, in this case, sets forth the names of 29 creditors whose respective debts do not exceed $250, besides the 17 creditors whose respective debts exceed $250. The debts of those 29 creditors, as set forth in the list, amount, in the aggregate, to $2,525 42, the total debts of the 46 creditors being $10,094 55. It was suggested, on the part of the debtors, at the hearing on the return of the order to show cause, that the statute, in saying, that, "in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned," intended only, that, in the computation as to the question of one-fourth in number, creditors whose respective debts do not exceed $250 shall not be reckoned, but that, in the computation as to the amount of debts, the debts of all creditors must be reckoned, whether they exceed $250 or not. In other words, in this view, in the present case, while one-fourth of the 17 creditors whose respective debts exceed $250 would be sufficient in number, the petitioning creditors must have debts amounting to at least one-third of $10,094 55, or to $3,364 85. This is not a correct view of the statute, and I allude to the subject now, as a guide to the parties, on the reference, in determining the issue raised. The 9th section of the act of 1874 provides, that the debtor "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable." The petitioning creditors are to be "one or more" in number, but, whether one will suffice, or, if more are necessary, how many there must be, is to be determined by certain tests prescribed by the section. Still, the point to be determined is, what number of creditors must join in the petition, and such number must be determined by making a computation according to the rules laid down in the section. Those rules are, that the number of creditors joining in the petition must be, by personal numeration, at least one-fourth of the entire number of creditors, and must have provable debts amounting to at least one-third of all the provable debts, with the further rule, that, in computing the number who must join, in determining how many must join, whether "one or more," creditors whose respective debts do not exceed $250 are not to be reckoned. Everything that is to be done is, to compute the number of creditors "as aforesaid" who must join. In doing that the "creditors" whose respective debts do not exceed $250 are not to be reckoned. Those creditors are to be excluded. If they are excluded, it follows, necessarily, that, if only the creditors whose respective debts exceed $250 are included and reckoned, the proper number to join will be ascertained by computing one-fourth of such creditors, and such additional number of them, that the aggregate of the debts of those computed will amount to one-third of the debts of the creditors so included and reckoned, that is, one-third of the debts of the creditors whose respective debts exceed $250. This view is supported by the concluding sentence of the 9th section of the act of 1874, which provides, that, if there are no creditors whose debts exceed the sum of $250, or, if the requisite "number" of creditors holding debts exceeding $250, fail to sign the petition, the creditors having debts of a less amount shall be reckoned "for the purposes aforesaid." This shows, that, where credit-

ors having debts exceeding $250 are to be exclusively reckoned, they are to be reckoned for all the purposes mentioned in the section, that is, for the purpose of arriving at the proper number of creditors, which is to be a number having a certain aggregate of debts. Let an order be entered, embodying the foregoing directions.

HYNDMAN (ROOTS v.). See Case No. 12,040.

HYNES (PATTON v.). See Case No. 10,835.

Case No. 6,987.

The HYPERION'S CARGO.

[2 Lowell, 93; [1] 7 Am. Law Rev. 457.]

District Court, D. Massachusetts. Dec., 1871.[2]

MASTER'S LIEN FOR DEMURRAGE—ADMIRALTY—BILL OF LADING.

1. By the maritime law a master has a lien upon the cargo for demurrage, and such a lien may be enforced in the admiralty. This, although demurrage was not expressly stipulated for in the bill of lading.

[Cited in 275 Tons Mineral Phosphates, 9 Fed. 211; The Ferreri, Id. 471; The L. B. Snow, 15 Fed. 284; Houge v. Woodruff, 19 Fed. 137; Blowers v. One Wire Rope Cable, Id. 449. Quoted in Hawgood, v. 1310 Tons of Coal, 21 Fed. 684. Cited in The William Marshal, 29 Fed. 329; Bellatty v. Curtis, 41 Fed. 480.]

2. An ordinary bill of lading implies an agreement that the goods shall be received within a reasonable time after the arrival of the vessel at her port of destination.

[This was a libel in admiralty by James E. McDowell and others against Walter Donaldson and others for freight and demurrage.]

S. Wells, for libellants.

J. Nickerson, for claimants.

LOWELL, District Judge. The libellants' right to freight is not contested; but it is said that there can be no recovery for demurrage, because no express contract was made concerning it, and the law will not imply one against a consignee. Gage v. Morse, 12 Allen, 410, is cited as conclusive on this point. That case decided that a consignee, merely as such, does not, by accepting the goods, make an engagement with the master that he will receive them at any particular time, unless there is something on the face of the bill of lading fixing the time. Judge Betts came to the opposite conclusion in a case in which the consignee was the owner of the cargo. Sprague v. West [Case No. 13,255]. The case at bar resembles in its circumstances that before the court in New York; for I understand the title to this coal to have been in the claimants from the time it was loaded on board the Hyperion, if not before. But I am not concerned here with the question whether the claimants are personally responsible for demurrage, but with the liability of the cargo to such a demand. There is no doubt that the shipper of goods by an ordinary bill of lading impliedly agrees that they shall be received at the port of destination within a reasonable time after the arrival of the vessel, according to the usual course of the trade. By the common law the master has no lien upon the goods, as security for this obligation. In my opinion he has such a lien, or, more strictly speaking, such a privilege, by the maritime law, and that it may be enforced in the admiralty. It is a maxim of the general law-merchant that the ship is bound to the merchandise, and the merchandise to the ship. Pard. Droit Com. arts. 709, 961; Valin, Comm. bk. 3, tit. 1, arts. 11, 24; Bouch. Ins. Droit Mar. §§ 926–934. This reciprocal privilege appears to extend to all claims which may arise on the one side or the other out of the contract of affreightment. Thus article 308 of the French Code de Commerce declares that the captain is privileged before all creditors for the payment of his freight and the averages (avaries) that are due him. The word "avaries" I understand to include all damages which the master may lawfully demand in the premises. Indeed, the distinction between liquidated and unliquidated damages is unimportant in those jurisdictions in which the master's lien is a privilege to be enforced by the courts, and not a mere right of retainer; for the courts can deal as readily with the one kind of damages as with the other. I have found no exception of any class of charges or damages; and though the term "avaries" is the most common, yet "debts" and "expenses" and some other expressions are used, showing that "averages" has no technical signification. See Pardessus, note 6 to article 24 of the Laws of Oleron, 3 Pard. Collect. 345; Id. Code of Car. XI. of Sweden, 3 Pard. Collect. 158. Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he has his privilege for the freight even against the true owner of the goods, though they had been stolen (Pard. Droit Com. art. 961); and Valin says, that the contrary opinion is absurd (Valin, ubi supra). I quote this example to show that the privilege does not depend on any doctrine of agency, as well as to fortify my opinion that the merchandise is liable for whatever the shipper is liable for.

When the common law of England was modified by the introduction of many rules from the law-merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the goods, and had succeeded in repressing the only court that had the requisite modes of action; and was, therefore, obliged to say that it could not recognize the maxim, even when embodied

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

[2] [Affirmed in Case No. 3,985.]

in express contract, as it usually is in English charter-parties. Birley v. Gladstone, 3 Maule & S. 205; Gladstone v. Birley, 2 Mer. 401. From the time of those decisions to that of Gray v. Carr, L. R. 6 Q. B. 522, the history of this question in the courts of common law in England has been that of a struggle between ship-owners to create liens by stipulation, especially liens for demurrage, and of the courts to narrow the stipulations by construction. See Phillips v. Rodie, 15 East, 547; Faith v. East India Co., 4 Barn. & Ald. 630; How v. Kirchner, 11 Moore, P. C. 21; Tindall v. Taylor, 4 El. & Bl. 219; Bishop v. Ware, 3 Camp. 360. In nearly all those cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege, by whichever party this action may be invoked. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 162; The Belfast, 7 Wall. [74 U. S.] 624; The Maggie Hammond, 9 Wall. [76 U. S.] 450. Cases in which the cargo has been libelled for freight are numerous. The Volunteer [Case No. 16,991]; Certain Logs of Mahogany [Id. 2,559]; Poland v. The Spartan [Id. 11,246]; The Salem's Cargo [Id. 12,248]; The Eliza [Id. 4,347]. And so of a contribution for general average and other demands. Mutual Safety Ins. Co. v. Cargo of the George [Id. 9,981]; Bags of Linseed, 1 Black [66 U. S.] 108; The Convoy's Wheat, 3 Wall. [70 U. S.] 225. The only question of any difficulty is, whether the privilege extends to demurrage not expressly stipulated for in the bill of lading. Upon this point the cases at common law do not afford much aid; because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which, they say, cannot be conveniently exercised in support of a demand for unliquidated damages,—a point of no consequence in the admiralty. Sprague v. West [supra]. Nearly all salvage claims against cargo are unliquidated. We uphold libels against the ship every day in behalf of the merchant for unliquidated damages to his goods; and there is no reason for not doing so, on the other side, for damages in not receiving the goods in due season. My own conviction is that the privilege of the ship-owner in the admiralty is not limited by the master's lien at common law, but depends on the law-merchant, and that by the law-merchant the privilege extends to all charges, damages, and expenses arising out of the affreightment. [The privilege, indeed, is lost by an unconditional delivery of the cargo, and in this respect it resembles a lien at common law. This is a rule of convenience, designed for the protection of dealers, and in aid of the freedom of commerce.] [3]

The evidence in this case is plenary, that the cause of the delay at the wharf was the lack of cars to take away the coal; that it might easily have been taken out and received at the rate of one hundred tons a day, which is the rate usually agreed on in the trade, but that the consignees wished to receive it in the cars. They refused to receive it in any other way, and said they would pay the freight when it should all be out, but no demurrage. The master was justly angry at this language, and brought his libel. I am much inclined to think his action for the freight was premature; though not for demurrage, which accrues from day to day; but as the claimants admit a liability for the freight, and the libellants admit that part of the demurrage they now ask for was not due when the libel was filed, it seems to me just to give to the libellants their whole damages, but without costs. A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it. The Salem's Cargo [supra]; The Isaac Newton [Case No. 7,089]; Furniss v. The Magoun [Id. 5,163]. Here, as in the case before Judge Sprague, the cargo is now beyond the reach of process, and therefore the libel ought to be retained.

A specification of the libellants' damages, which was used at the trial, shows that they ask for twelve days' demurrage. Upon the evidence, it seems to me that the vessel was delayed at least that length of time by the want of cars, and I shall give damages at thirty dollars a day for the twelve days. Decree for libellants.

[For freight.....	$ 756 98
Demurrage	360 00
	$1,116 98
With interest from August 16, 1870, but without costs,—17 months and 1 day.....	95 14
	$1,212 12] [4]

[From this decree, the claimants appealed to the circuit court, where the decree of the district court was affirmed, with costs. Case No. 3,985.]

Case No. 6,988.

HYSLOP v. HOPPOCK et al.

[5 Ben. 447; [1] 6 N. B. R. 552.]

District Court, S. D. New York. Jan. 10, 1872.

SERVICE OF SUBPOENA IN EQUITY — RETURN OF SUBPOENA—JURISDICTION—RECEIVER.

1. A bill was filed by an assignee in bankruptcy against the bankrupt H. and his wife, and one B., to set aside conveyances made by H. to C., who, by his will, had bequeathed them to H.'s wife, on the allegation that the conveyances were fraudulent as against H.'s creditors. A subpoena was issued on the bill, returnable on the first Tuesday of the following month. An affidavit was thereafter filed of the service of the subpoena on H. and his wife, by

[3] [From 7 Am. Law Rev. 457.]

[4] [From 7 Am. Law Rev. 457.]

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

leaving copies thereof at their dwelling-house or usual place of abode, viz., 38 West Fourteenth street, in New York City, with a free white person, a member or resident in the family. This service was claimed to have been in accordance with the 13th rule in equity, and on it a rule was entered taking the bill as confessed, against H. and his wife. H. and his wife thereupon, not appearing generally in the cause, moved to set aside the subpoena because it was not made returnable on a rule day, and also moved to set aside the service and all subsequent proceedings, on affidavits showing that they had not resided at 38 West Fourteenth street for two years and more before the alleged service, but not showing where they did reside at the time of the service. The complainant also moved for the appointment of a receiver to take the rents and profits of the estate. *Held*, that there was no irregularity in making the subpoena returnable as it was, and the motion to set aside the subpoena must be denied.

[Cited in Romaine v. Union Ins. Co., 28 Fed. 636.]

2. As No. 38 West Fourteenth street was not the existing dwelling-house or place of abode of H. and his wife at the time of the alleged service, service by leaving the copies there gave the court no jurisdiction, and the affidavit of service, and all proceedings subsequent, must be set aside.

[Cited in Romaine v. Union Ins. Co., 28 Fed. 639.]

3. As the wife of H. was the person alleged to hold the property adversely to the plaintiff, and she had not been served with process, and as B. was not alleged to have received the rents and profits except as agent for others, the motion for a receiver must be denied.

[This was a bill in equity by Thomas Hyslop, assignee in bankruptcy of Ely Hoppock, against Ely Hoppock, Caroline Hoppock, and Erastus S. Brown, praying that certain conveyances made by the bankrupt be set aside as fraudulent, and that plaintiff be appointed receiver.]

Amos G. Hull, for plaintiff.

Charles Tracy, for Hoppock and wife.

BLATCHFORD, District Judge. The bill in this case was filed on the 5th of October, 1871. The prayer of the bill is, that a conveyance made by Ely Hoppock, the bankrupt, November 15th, 1867, of a lot of land on Thirteenth street, in the city of New York, to one Samuel Cary, and a conveyance made by said Hoppock, October 4th, 1867, of a lease of a lot of land on Fourteenth street, in said city, to one Walter Barnes, and which lease was assigned by said Barnes on the same day to Caroline Hoppock, the wife of the bankrupt, and assigned by her November 15th, 1867, to said Barnes, and assigned on the same day by the said Barnes and said bankrupt to said Cary, and the properties covered by which conveyances, lease and assignments, were devised and bequeathed by said Cary, by his last will and testament, made November 29th, 1870, to said Caroline Hoppock, may be decreed to have been fraudulent and void as against the creditors of the said bankrupt, and that such properties, and the proceeds thereof, and the right of action therefor, may be decreed to have vested in the plaintiff, and that the defendant Brown, who is alleged to be receiving the rents of the properties, may be decreed to account to the plaintiff for such rents from the 1st of May, 1871, and that the bankrupt and his wife may be enjoined from parting with or encumbering the properties, and from receiving the rents thereof, and that the plaintiff may be appointed receiver of such rents.

On the filing of the bill, a subpoena to appear and answer was issued, on the 5th of October, 1871, returnable on the first Tuesday of November, 1871, and directed to the defendants. On the 6th of October, 1871, the marshal, in writing, deputed Charles L. Clarke to serve the subpoena. In an affidavit sworn to by Mr. Clarke on the 7th of October, 1871, and filed on the 9th of November, 1871, and annexed to the subpoena, he deposes, that, "on the 6th day of October, 1871, he served the annexed subpoena on Ely Hoppock and Caroline Hoppock his wife, two of the defendants therein, by leaving copies thereof, for each of said defendants, at the dwelling-house or usual place of abode of the said Ely Hoppock and Caroline his wife, to wit, No. 38 West Fourteenth street, in the city of New York, with a free white person, a member or resident in the family." This service purported to be made under the provisions of rule 13th in equity, which is: "The service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family." On such service, a rule was entered, on the 9th of November, 1871, taking the bill as confessed against the defendants Ely Hoppock and Caroline Hoppock his wife, for want of an appearance. Those defendants now come into court, without appearing generally in the cause, and move the court that the order pro confesso, and the subpoena and its alleged service, and the affidavit thereof, and all subsequent proceedings of the plaintiff on the subpoena and order, be set aside, on the grounds, among others, (1) that the subpoena was not made returnable on a rule day, but was made returnable on the first Tuesday of the month; (2) that the place mentioned in the affidavit of service, 38 West Fourteenth street, was not the dwelling-house or usual place of abode of the defendants, or either of them.

It is satisfactorily shown, by affidavits, that neither of the two defendants has been personally served with a subpoena; that 38 West Fourteenth street, in the city of New York, was not, on the 6th of October, 1871, the dwelling-house or usual place of abode of either of them; and that 38 West Fourteenth street, in the city of New York, has not been the dwelling-house or usual place of

abode of either of them since the 30th day of April, 1868. Where the dwelling-house or usual place of abode of the defendants has been since June, 1868, or is now, is not shown, but it would seem to be indicated that it is now in Canada, if anywhere. Although the bankrupt may have fled from the jurisdiction of this court in bankruptcy, to avoid the consequences of frauds committed by him on his creditors, and although his wife, the recipient of the benefits of such frauds, may have accompanied him in his flight, and although he and she may be hiding just over the line in Canada, and venturing into this state, at Niagara Falls, only for the purpose of making an affidavit for the purposes of this motion, yet this court, sitting in equity, for the purposes of this suit, has acquired no jurisdiction of the persons of the defendants by such service of the subpoena as has been made. This court cannot, on the evidence, hold that 38 West Fourteenth street, in the city of New York, has been, at any time since the 30th of April, 1868, the dwelling-house or usual place of abode of either of the defendants. The rule does not permit the service to be made by leaving the subpoena at the "last" place of abode, as in the case of an order to show cause under section forty of the bankruptcy act [of 1867 (14 Stat. 536)], or at the "last usual" place of abode, as in form No. 57 in bankruptcy, but it is to be left at the existing, present dwelling-house, or the existing, present, usual, customary place of abode. I cannot hold that 38 West Fourteenth street, in the city of New York, was, on the 6th of October, 1871, the dwelling-house of the defendants, or of either of them, or the usual place of abode of them or of either of them, in the face of the facts shown, that neither of them has occupied the house 38 West Fourteenth street as a dwelling-house or place of abode since the 30th of April, 1868, although it is not shown where any dwelling-house or place of abode is situated which is now occupied by the bankrupt, or which has been occupied by him since the 30th of April, 1868, or where any dwelling-house or place of abode is situated which is now occupied by his wife, or which has been occupied by her since the 25th of May, 1868. The question is one of the jurisdiction which this court, as a court sitting in equity, in this suit, has acquired over the persons of the defendants in this suit, by process issued and served therein.

I see no irregularity in making the subpoena in this case returnable on the first Tuesday of the month, and not on the first Monday. There is a new term of this court on the first Tuesday of each month. There are but two or three terms of each circuit court in the year, and hence the general equity rules provide that the subpoena shall be returnable on a rule day, that the first Monday of every month shall be a rule day, and that the return day of the subpoena shall be the next rule day, or the next rule day but one occurring after twenty days from the time of issuing the subpoena. General order No. 32 in bankruptcy provides, that, "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy act, or of enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall be followed, as nearly as may be." I think the spirit of this general order and of those rules was sufficiently complied with in this case, in respect to the return day of the subpoena.

The motion must, therefore, be granted in respect to setting aside the order pro confesso, and the alleged service of the subpoena, and the affidavit of such service, and all subsequent proceedings of the plaintiff on the subpoena and order, and denied in respect to setting aside the subpoena.

The plaintiff also moves that he may be appointed receiver of the rents and profits of the said properties. Inasmuch as Mrs. Hoppock is the person alleged to hold the properties adversely to the plaintiff, and she has not been served with process, and the defendant Brown is not alleged to have acted otherwise than as agent for others in receiving the rents, the motion for a receiver must be denied.

[See Case No. 6,989.]

Case No. 6,989.

HYSLOP v. HOPPOCK et al.

[5 Ben. 533; [1] 6 N. B. R. 557.]

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

SUBSTITUTED SERVICE OF SUBPOENA.

1. On a bill in equity filed by an assignee in bankruptcy, a subpoena to appear and answer was issued, but could not be served on two of the defendants, by reason of their continued absence from the district. The assignee applied to the court to direct a substituted service, alleging that they had absconded to avoid service of process, and that they were in receipt of the rents and profits of the real estate which it was the object of the bill to reach, collecting them by means of their son, as their agent: *Held*, that the manner of serving a subpoena is regulated by the acts of congress, and the rules of the supreme court.

[Cited in Bowen v. Christian, 16 Fed. 731.]

2. If the defendants were inhabitants of the district, or found therein, the subpoena might be served as provided by rule 13.

[Cited in Romaine v. Union Ins. Co., 28 Fed. 639.]

3. If they were not such, there was no power in the court, under the acts of congress, to obtain jurisdiction over their persons.

[This was a bill in equity by Thomas Hyslop, assignee in bankruptcy of Ely Hoppock, against Ely Hoppock and his wife, to set aside certain conveyances as fraudulent. Service upon the defendants not having been

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

secured by reason of their absence from the jurisdiction, the plaintiff now asks for an order directing defendants to appear and answer, the order to be served by publication or otherwise, or that an order be made for service upon the son of defendants.]

A. G. Hull, for application.

BLATCHFORD, District Judge. The bill in this case was filed October 5th, 1871, to set aside certain conveyances of real estate, as fraudulent as against the creditors of Ely Hoppock, the bankrupt. A subpoena to appear and answer was issued, but cannot be served on the defendants Ely Hoppock and his wife, by reason of their continued absence from the jurisdiction of this court. Inquiry has been made at their last place of abode, but they cannot be found so as to be served with the subpoena, and it is alleged that they have gone out of the state, or otherwise absconded, to avoid the service of the process of this court. It is stated, that they are in the receipt of the rents of the property sought to be affected by the bill, and that their son, as their agent, receives the rents and transmits the same to them monthly. On these facts, the plaintiff asks that an order be made, directing said defendants to appear at a day to be named, and answer the bill, and that such order be served by publication or otherwise, or that an order be made for the service of the subpoena upon the said son of the defendants, for them, and that such service be deemed good service on them, and that thereupon an order be made directing an appearance to be entered for said defendants.

The ground on which this application is made is, that where the service of the subpoena cannot be made by ordinary means, a resort may be had to extraordinary means, such as service at the last place of abode, or on some other person; and that, by statute, in England, such substituted service on a receiver of rents is allowed.

I regard this whole subject, so far as service of the subpoena in this suit is concerned, as regulated by act of congress and by the rules established by the supreme court. Under the 11th section of the act of September 24th, 1789 (1 Stat. 79), if the defendants are inhabitants of the United States, this suit cannot be brought against them by any original process, in any other district than that whereof they are inhabitants, or in which they shall be found at the time of serving the process. If they are inhabitants of the United States and of this district, or are found within this district, the subpoena may, by rule 13 in equity, be served on them personally, or on the husband personally for the wife, or by leaving a copy at the dwelling-house or usual place of abode of each of them in this district, with some free white person who is a member or resident in the family. If they are not inhabitants of this district, and are not found within this district, I know of no statute conferring on this court the power of obtaining jurisdiction over their persons in this suit, by any service of process made otherwise than in accordance with rule 13, or the power to make any one of the orders applied for. In the absence of any statute, or of any rule having the force of a statute, conferring such power, I must refuse the application.

[See Case No. 6,988.]

Case No. 6,990.

HYSLOP et al. v. JONES.

[3 McLean, 96.] [1]

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

NEGOTIABLE INSTRUMENT—NOTICE TO INDORSER—HOW TO BE GIVEN.

1. A personal notice of the demand and refusal of payment of a note, to charge the indorser, may be served at any place. And if it be proved that it was given at one place or another, it is sufficient.

[Cited in Terbell v. Jones, 15 Wis. 256.]

2. Where the indorser lives in the city, the notice must be served on him personally, or at his place of business or residence.

[Cited in Manchester Bank v. Fellows, 28 N. H. 310.]

3. But a notice deposited in the post office, which was in fact received by defendant in due time, is sufficient.

[Cited in Manchester Bank v. Fellows, 28 N. H. 311; Cabot Bank v. Warner, 92 Mass. (10 Allen) 524.]

4. An averment in the declaration that the note when due was presented to the bank for payment, to wit, 23d of July, 1841,—the words from, to wit, &c., were held to be surplusage.

[This was an action at law by Hyslop and Hyslop against Jones.]

Douglass & Walker, for plaintiffs.
Mr. Jay, for defendant.

OPINION OF THE COURT. This suit is brought against the defendant as an indorser of two promissory notes. Mr. Wells, the notary public states, that the first note for one thousand dollars becoming due the 3d of July, 1840, was presented to the bank on that day for payment, and was not paid; and that he gave notice to the defendant personally, at his residence or at his place of business. The second note became due the 3d of July, 1841. The declaration averred that the note was presented at the bank when due, to wit, the 23d of July, 1841. After making demand of payment at the bank, the notary states that he hunted two hours for the defendant's residence in the city, but could not find it, nor his place of business; and he left the notice in the post office. Defendant on Monday ensuing saw deponent in the street, when they had some conversation on the subject.

Objection being made to the service of no-

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

tice of the non-payment of both notes; the court instructed the jury as to the first note, that the notice was sufficient. It was served on the defendant personally in due time, either at his residence or place of business. The service being personal, it is immaterial as to the place of service.

In regard to the notice on the second note, it was not left at the defendant's place of business or his residence, but in the post office. The leaving the notice in the post office of the city in which the indorser lives, is not sufficient. It must be served on him personally, left at his place of business or residence. But if by leaving the notice in the post office, the defendant, in fact, received it in due time, it is sufficient. And of this fact the jury must determine from the evidence. The words, "to wit, the 23d of July, 1841," in the declaration, the court considered as surplusage, and inconsistent with the preceding averment, that the note was presented when due.

The jury found for the plaintiffs.

I.

Case No. 6,991.

I—— v. The I. M. LEWIS and The ALINE.

[6 Chi. Leg. News, 304.]

District Court, N. D. Florida. 1874.

LIBEL FOR COLLISION—LIABILITY AND DUTY OF STEAM-TOW.

While the schooner Coffin was lying at her wharf, the bark Aline being towed by the steam tug Lewis, collided with the Coffin. It was contended by the claimant of the tug: 1st. That the tug was the servant of the bark, and entirely under the direction of the master of the bark. 2d. That the tug was, in all respects properly managed, committed no error in her rate of speed, nor in the manner, direction or nearness of her approach to the wharf and to the Coffin. 3d. That the bark was in fault in directing the tug to steer into the stream, and also in not putting her helm to the starboard, to prevent the collision. *Held*, under the evidence, that the Aline was guilty of no fault, and that the tug alone is liable to make good the damage; that a steam tow-boat, unless wholly under the command of the tow and implicitly obeying its orders, is bound to use all necessary care, foresight and skill to provide for the safety of the tow, or she will be held responsible.

[This was a libel by William G. I——, master of the schooner I. W. Coffin, against the steam-tug I. M. Lewis, and the bark Aline, for damages resulting from collision.]

FRASER, District Judge. The libel in this case is filed against the steam tug I. M. Lewis and the bark Aline, in a cause of collision, civil and maritime.

It is charged in the libel, admitted by the answers of the claimants of the tug and bark, and fully established by the evidence, that on the first day of December, 1869, the said schooner I. W. Coffin was lying securely moored at the wharf of Alsop & Clark's mill, in the city of Jacksonville, on the north bank the St. Johns river, in the district aforesaid, taking in a cargo of yellow pine lumber, her bow lashed to the wharf and her stern anchored in the stream when the collision took place, and that the said Coffin is not chargeable with any fault. The contest lies between the tug and the bark, as to which shall be made liable for the damage caused by the collision, each charging the other with the fault. It appears from the evidence that the consignees of the bark had employed the tug to tow the bark to the same wharf at which the Coffin was lying. That on the day mentioned the tug took the bark in tow astern with a hawser from forty feet to forty fathoms in length—the witnesses differing widely on this point. That the tug, with the bark in tow, steamed down the river to a point on the south bank, about a quarter of a mile lower down the river than Alsop & Clark's wharf, and then steered diagonally across in a northwesterly course toward said wharf, at a rate of speed at from three to seven miles an hour; though the witnesses in the main agree that her speed was about four miles an hour. As the tug came opposite to the Coffin, or a little above her, she sheered out into the stream, letting the swag of the hawser fall into the water, according to one witness, or all in a bight under the bottom of the bark, according to another, and leaving the bark to run at hap hazard, as stated by a third. Being thus left to her own control, the stern of the bark came in contact with the end of the Coffin's boom, which projected from five to seven feet over her stern, parted her hawser, and did other damage to the said vessel.

It is contended on the part of the claimant of the tug—1st. That the tug was the servant of the bark, and entirely under the direction of the master of the bark. 2d. That the tug was in all respects properly managed; committed no error in her rate of speed, nor in the manner, direction or nearness of her approach to the wharf and to the Coffin. 3d. That the bark was in fault in directing the tug to sheer into the stream, and also in not putting her helm to the starboard to prevent the collision.

As to the first point, the master of the Aline testifies that he was in command of his own vessel, but the tug took him wherever it pleased. John Mullins, master of the tug, testifies: "I did not take my orders from the captain of the bark Aline, except when

he told me to round her, and when he told me to let go the hawser." "No orders were given from the bark Aline except to round to and to cast off. No others were given." It would seem, then, that the masters of the tug and tow each managed his own vessel; that the tug was under the control of her master, and as the evidence shows, no order was given from the bark before the collision, but "let go the rope," which was misunderstood and not obeyed by the tug. The tug, therefore, if in fault in any particular, will be responsible for the damage.

At the time of the collision the tide was ebb, and the wind was from the southwest. The tide and wind were down the river, and the tug, with the tow, were heading across diagonally to the northwest, so that when the bark approached the wharf the wind and tide struck her, quartering on her bow, which set her in towards the Coffin. The wind and tide ought then to have been considered, and the bark ought not to have been towed so near that she had not abundant room to turn, nor at so rapid a rate of speed that she could not have dropped her anchor to bring her up. The tug was clearly in fault in these particulars, as the evidence shows. Besides, when she sheered out into the stream, heading to the southwest, she might have kept her hawser taut, and thus have turned the bark more rapidly and helped to avoid the collision. This she should have done, keeping the bark under her control and giving the required aid when the danger was imminent. But instead of doing this, she stopped, slackened her hawser, letting it fall, all in a bight, under the bark, letting the bark go at haphazard, at the mercy of the wind and tide, running at a too rapid speed, with such help only as her rudder afforded after the propelling power of the tug ceased. These facts show want of foresight, mismanagement and incompetency in the master of the tug. The first fault, then, was in the tug in steaming too fast; in not providing against the effect of wind and tides, and in bringing her tow so near before casting off that she could not provide for her own safety; and in not giving her the aid of his propelling power when her danger was apparent. Mr. Justice Wayne, in the opinion of court in the case of The New Philadelphia, 1 Black [66 U. S.] 76, says: "the rule of law is that when a third party has sustained an injury to his property from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion the result, the injured person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the incident, particularly so from the one of the two who had undertaken to convey the property with care and skill to a place of destination, and there shall have been, in so doing, a deficiency in either."

We must next inquire whether the bark is also in fault, and liable to participate with the tug in making good the damage caused by the collision. The master and mate of the Aline, both testify that when the bark got opposite the place where she should have gone, they told the captain of the tug to let go the rope. The master of the bark gave the order in English; the mate also, from the bow of the bark gave the same order, and the master waived his hat, and told the master of the tug to let go the rope, told him four or five times to do so. The master of the tug says that he stopped below the creek, and asked the master of the Aline where he wanted to drop his anchor—"this was about an eighth of a mile below Alsop & Clark's mill. I was going at the time about west, right up the river. I was about six or seven hundred yards from the shore at the time. The captain in answer to my question, made motion with his hand and told me to round her. I rounded according to his order; by rounding, I mean I brought the head round to the south'ard. At the time I stopped and spoke the captain of the bark, she came up within thirty feet of me; I obeyed the orders of the captain of the bark when he ordered me to round to. The distance between the Coffin and the I. M. Lewis, when I passed, was about two hundred and fifty feet. At the time I was heading to the southward, the bark was heading towards the northward—about northwest,—I commenced to round to before I got to the Coffin. The hawser at this time was all in a bight, under the bottom of the Aline; was not taut; the bark was going about three or four miles an hour through the water." The master of the tug must have been mistaken as to his course; for had he been six or seven hundred yards from the shore, and an eighth of a mile below Alsop & Clark's mill, according to a map of that part of the river made by a competent engineer, had he been running west when he arrived opposite the Coffin, he would have been as far out at least as he was an eighth of a mile below. It is also difficult to reconcile the statement that the steamer was running west and the bark northwest while in tow; such a statement seems absurd. The master of the tug must have misapprehended the order given by the master and repeated by the mate of the Aline, to let go the rope, which, had he obeyed, an eighth of a mile below Alsop & Clark's, the Aline, with the wind and tide against her, would have checked her headway enough to have made it safe to cast anchor. The master of the tug also says, the bark had got by the schooner before she let go her anchor. A little flood-tide was running. If it was flood-tide, and the bark had passed the schooner on her second turn, how was it possible for her to settle back into the schooner against the tide? The statements of this witness are made too carelessly and too much at random, to give them such verity as to overcome the evidence of witnesses entirely dis-

interested and standing neutral between the tug and the bark, as well as that of officers of the Coffin and the libelant, whose interest it is to hold the bark as well as the tug responsible. This witness also says, that the bark had her wheel a-port, though he could not see how her wheel was worked. But all on board the Aline, and those on shore who could see the wheel, testify that her helm was starboard. He further says, "I watched the management of the bark all the way round, and she did very well until the Lewis rounded to." Here is the difficulty. The tug brought the bark up too near—at too great speed for safety—and then rounded-to and left her to shift for herself; and then the witness says she was not properly managed because she went into the schooner. It seems, however, from the statement of the same witness, that had the bark continued on the same course she was running when the tug rounded-to, she would have run into the wharf at the speed she was going, and sunk. Now, when we consider—granting the hawser to be forty fathoms, and the tug to have been opposite the Coffin when she commenced rounding-to—that the bark did not have quite twice her length, against wind and tide, in which to head round from the northwest to the southwest, running at a speed of from three to four knots, we can but admire the promptitude with which she obeyed her helm; nor can we fail to discover that it was owing entirely to the skill and good management of the officers of the bark that she did not run directly into the Coffin and sink both vessels. We must conclude, then, that the Aline has been guilty of no fault, and that the tug alone is liable to make good the damage.

I have carefully examined the authorities which govern such cases, and it seems that the principle fairly deducible from them, and from the nature of the contract, is, that a steam tow-boat, unless wholly under the command of the tow, and implicitly obeying its orders, is bound to use all necessary care, foresight and skill to provide for the safety of the tow, or she will be held responsible.

Case No. 6,992.

The IANTHE.

[3 Ware, 126.] [1]

District Court, D. Maine. Nov. 10, 1856.

FISHERMEN—LIEN FOR WAGES—SHIPPING CONTRACT.

1. Fishermen who ship for a fishing voyage under a written contract, have a lien on the vessel for six months after the service is ended, and the fish sold for the value of their shares, which may be enforced by process in admiralty.

2. But the statute makes no provision for fishermen who ship without a written agreement, but leaves them to the rights which their contract by law gives them.

3. The act of 1790 [1 Stat. 131], which allows to seamen shipped without a written contract the highest rate of wages, does not apply to fishing voyages.

[Cited in The Grace Darling, Case No. 5,651.]

In admiralty.

T. J. Sewall and Geo. F. Shepley, for libellants.

A. Merrill, for respondent.

WARE, District Judge. This is a libel in rem for wages. The libellants shipped on board the Ianthe, a vessel engaged in the mackerel fishery, on the 22d of July, 1856, for a fishing voyage, and served until September 25, when they were discharged. No agreement in writing was made with either of them, and they now claim, under the statute of July 20, 1790, c. 29, § 1, the highest rate of wages. That act requires every master or commander of a vessel of the burthen of 50 tons, or more, bound to any foreign port, or to a port in any other than an adjoining state, to make an agreement in writing or print with every mariner, not an apprentice of himself or the owners, declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped, and in default of this, 'he shall pay every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months before the time of such shipping.' The act of February 22, 1803, c. 9, § 1 (2 Stat. 203), requires the master of every vessel bound on a foreign voyage, before the clearance of his vessel, to deliver to the collector of the port 'a list containing the names of his crew, places of birth and residence, as far as he can ascertain, and a description of the persons who compose the ship's company,' a certified copy of which, shall be delivered to him by the collector. The act of July 20, 1840, c. 48, §§ 1, 10 (5 Stat. 395), provides that 'all shipments of seamen made contrary to the provisions of this or any other act of congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at the time of his shipment.' These acts being in pari materia, and not conflicting with one another, may all be considered as equally in force, and a seaman shipped without a contract in writing or print, may quit the ship when he pleases—is not bound by the regulation, nor subject to the penalties and forfeitures of the act of 1790 (see section 1), and may demand the highest rate of wages paid within three months of his shipment, at the port where he shipped, or the highest wages paid to any of the crew. But these acts apply only to vessels bound either to a foreign port,

[1] [Reported by George F. Emery, Esq.]

or to a port in a state, other than an adjoining state. This vessel was bound to neither, but on a general fishing cruise. She is certainly not within the words of any of these statutes, nor do I see that she is within their general reasons or policy.

The fishing trade of the country is, and always has been, regulated by its own appropriate and peculiar system of laws. The first act of congress on the subject is that of February 16, 1792, c. 6 (1 Stat. 229). This was a temporary act, and expired by its own limitation at the end of seven years, and the end of the next session of congress. But it was continued in force by the act of April 12, 1800 (2 Stat. 36), for ten years longer. Then followed the act of June 19, 1813, c. 9 (3 Stat. 2). This appears to be, in substance, a re-enactment of the 4th and 5th sections of the act of 1792, omitting that part of the act which related to the bounties. The first section of this act requires the master or skipper of any vessel of twenty tons burthen or more, qualified for carrying on the bank or other cod fisheries, and bound from any port of the United States, to be employed in such fishery, before proceeding on the voyage, to make an agreement in writing or print, with every fisherman employed (except only an apprentice to him or the owners); that this agreement, in addition to such terms as may be agreed upon by the parties, shall express whether the same is to continue for one voyage or the fishing season, and also that the fish or proceeds of the voyage, which may appertain to the fishermen, shall be divided among them in proportion to the quantity taken by each, and that this agreement shall be countersigned by the owner of the vessel. It provides also, that if any seaman who shall have signed the agreement shall desert, he shall be subject to the same penalties as seamen are, deserting from the merchant service, and like them be liable to be apprehended on complaint and detained. The second section provides, when such an agreement is made and signed, and the fish taken have been cured and sold by the owner, that the vessel shall for six months after such sale, be liable for the skipper's and each seaman's share, and may be proceeded against as any other vessel may be for seamen's wages, and on such process the owners shall produce a just and true account of the sales and division of the fish, according to the agreement, otherwise the ship shall be answerable for the highest value of the shares demanded.

The act of May 24, 1828 [4 Stat. 312], merely provides for licensing vessels for carrying on the mackerel fishery, according to the licensing act of 1793 [1 Stat. 305], and applies to them all the provisions of that act. These are all the provisions of law that I find, which are applicable to this libel. If we suppose that the regulations for vessels engaged in the cod fishery may be extended to the mackerel fishery, as far as they are in their nature applicable, they will not reach the present libel. This act does not contemplate or provide for the case of a fisherman shipped without a written agreement, and by not providing for it, leaves the rights of the parties to be determined by the principles of law governing other parol contracts, that is, it leaves them just such rights as are secured by their agreements, and gives them no others. The act of 1790, allowing to seamen, shipped without a contract in writing, the highest wages, notwithstanding any parol contract, is confined to cases of vessels bound on a foreign voyage, or to a domestic port other than that of an adjoining state. It does not extend to the trade between ports of the same state, nor with them of an adjoining state, nor can it be made to reach an ordinary fishing voyage, without doing violence to the language or interpolating words which the legislature have not seen fit to use. My opinion is that the claim set up by this libel, cannot be maintained, and that the libellants can recover nothing more than is provided by their agreement.

Case No. 6,993.

IASIGI et al. v. BROWN et al.

[1 Curt. 401.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

PRODUCTION OF BOOKS AT TRIAL—PENALTY—BILL OF DISCOVERY AS BAR.

1. The 15th section of the act of September 24, 1789 (1 Stat. 82), empowering the courts of the United States to compel the production of books and papers in trials at law, has so far altered the common law as to inflict upon the party the penalty of a nonsuit or default, upon the nonproduction of a paper, instead of merely letting in the opposite party to parol proof.

[Cited in U. S. v. Youngs, Case No. 16,783; Exchange Nat. Bank of Atchison v. Washita Cattle Co., 61 Fed. 191.]

2. An order to produce may be applied for before trial, upon notice.

3. A prima facie case of the existence of the paper, and its materiality, must be made out, and the court will then pass an order nisi, leaving the opposite party to produce, or show cause at the trial, where alone the materiality can be finally decided.

[Cited in Gregory v. Chicago, M. & St. P. R. R., 10 Fed. 529; Kirkpatrick v. Pope Manuf'g Co., 61 Fed. 48.]

4. The fact that a bill of discovery has been filed and answered, but the papers not produced, is not a bar.

This was a motion, grounded on affidavit, to compel the production and delivery to the clerk of the court, of certain papers alleged to be material on a trial at law of this action. The existence of the papers and their materiality, were not denied. But the motion was resisted on the ground that the party moving had already filed a bill of discovery, covering many of the facts of

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

the case, and, among others, these documents; and though copies of them had not been annexed to the answer, yet their contents were described; and it was urged that, having resorted to this mode of discovery, the party must read the answer, and could not have the benefit of the order under the act of congress.

CURTIS, Circuit Justice. By the common law, a notice to produce a paper, merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery.

The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide before hand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen.

If the notice is made before the trial, the correct practice seems to me to be, after the moving party has made a primâ facie case, to enter an order nisi; leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause. I think such an order should be made in this case. The fact that a bill of discovery was filed, is not a bar. If the answer contained what it alleged to be copies of the papers, the party would still have a right to use the originals. He is not bound to act upon the assumption that the copies are correct; and, in some cases, correct copies are not equivalent to originals. Under the laws of the United States, both the remedy by a bill of discovery, and by an order to produce, are given. If a party chooses to go to the expense of both, the court cannot deprive him of one of them, unless it can clearly see that the other has been completely effectual, so that any further proceeding must be simply useless, or intended to harass the other party. That is not so here. The answer does not contain, or annex, even copies of the papers called for.

Let an order be entered to produce, at the trial, the papers described in the motion, or show cause at the trial why the same are not produced.

Case No. 6,994.

IASIGI et al. v. BROWN et al.

[16 Law Rep. 568.]

Circuit Court, D. Massachusetts. Oct. Term, 1853.[1]

REPRESENTATIONS OF CREDIT, &C. OF THIRD PERSON—ACTIONS ON—CONFIDENTIAL LETTER.

1. A person who receives a letter marked "Confidential," has prima facie no authority to exhibit it to any third person; and if so exhibited, no action can be sustained by such third person on account of any representations contained in the letter, as to the credit, &c., of another party, without other evidence to show authority from the writer to exhibit the letter.

[See note at end of case.]

2. As to evidence upon which a jury would not be warranted in finding such authority.

This was an action on the case brought by Messrs [Joseph] Iasigi and Goddard, of Boston, against Mr. James Brown, of New York, the senior member of the firm of Brown, Bro's and Co., bankers, in which the plaintiffs alleged that Mr. Brown had made certain false and fraudulent representations to them respecting the solvency of Messrs. Thompson & Co., and Orrin Thompson, of New York, and two factories in Connecticut, known as the Thompsonville and Tariffville Manufacturing Companies, by means of which the plaintiffs were induced to sell wool to a large amount (about $25,000) to these parties on credit, which sum the plaintiffs wholly lost by reason of the subsequent failure of the Messrs. Thompson and the factories. The alleged false representations were contained in a letter addressed by Mr. Brown to Mr. Thomas B. Curtis, the agent and correspondent of the defendant's house in Boston, which the plaintiffs averred the defendant intended should be exhibited to them for the purpose of inducing them to give a false credit to the said parties. The defendant contended that his letter was written in entire good faith, was addressed to his agent as a confidential letter, and that Mr. Curtis had no authority to exhibit, or the plaintiffs to read it. The evidence upon this point, which was the one on which the case was decided, was in substance as follows:

T. B. Curtis, called by the plaintiffs, testified that in April, 1851, he was the agent of the defendant's firm; that Iasigi came to him, stating that he had a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson; that Austin & Spicer, in New York, had recently failed, by

[1] [Reversed in 17 How. (58 U. S.) 183.]

which he thought the factories or Thompson or both, would lose money, and that he felt anxious as to the fate of the paper he held, that Iasigi said Brown was a friend of Thompson, and he had himself heavy dealings with him, and wished witness to write to the defendant and ask him about the standing of Thompson and his property; that witness accordingly wrote the following letter to Mr. Brown:

"Boston, April 5, 1851. James Brown, Esq. —Dear Sir,—I have your note of yesterday, but have had scarcely a moment to peruse it this morning. My object at the present moment is to ask your opinion as to any possibility of loss by selling largely to the Thompsonville Co. or Orrin Thompson. Whatever that opinion may be, it will be discreetly used by myself. I also want your views as to the unlooked for high exchange on England. To what cause is it attributable? Has the influence of gold from California any thing to do with it? Is the exchange likely to be lower? I am delighted with the success of the Baltic. Yours faithfully, Thomas B. Curtis.

"Please give me a line about the Thompson concern on Monday."

—A reply to which was received by him. The plaintiffs' counsel asked him to produce the letter. To this he objected, on the ground that it was confidential. The plaintiffs' counsel asked how he knew it was confidential, to which he answered that all he knew was by the writing itself and the circumstances; that all he said was that it was a confidential letter; that when he wrote to Mr. Brown he did not let him know the information was for any one else than himself. But the letter, of which the following is a copy, was admitted:

"Confidential. New York, 7 April, '51. T. B. Curtis, Esq.—Dear Sir,—With respect to Thompson & Co., and Orrin Thompson, I have to say that our house has done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company, and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austin & Spicer, they were unfortunately on their paper (received for sales of carpets for $183,000); this threw suddenly so heavy a burden on Thompson & Co., that Messrs. Hicks & Co. and ourselves looked into their affairs; and feeling that they had an abundance to pay every one, and have a handsome sum left if they continued their business, we jointly advanced the money to pay their indorsements as they came round, for which advances we have security. In order, however, to relieve them from the necessity of borrowing and needing more cash capital, to carry on the business comfortably, both the companies alluded to owing Messrs. Thompson & Co. each about $375,000, making together $750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for $750,000, to secure the payment of those bonds, which are payable in six, eight, and ten years. A gentleman goes over to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiation of these bonds and the securities held would pay off all the advances made by ourselves, Messrs. Hicks & Co. and W. S. Wetmore, who also made them some advances. From Mr. Thompson's statement of the business of the factory they are doing a good, nay a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run. If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother William to take from 60 to $100,000 for himself and for me, at whatever rate they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will also take some of them. Since the failure, Thompson & Co. have laid their hands on Austin & Spicer's property to the extent of $50,000, reducing the risk to $123,000, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth $400,000, any loss that can now occur by Austin & Spicer does not hurt him much. All they want is the negotiation of the bonds to make them move on with perfect comfort. I have no doubt the influx of California gold has been one cause of increased importations, and the gold must go to pay for them, &c. &c. (Signed) Yours truly, James Brown."

"The answer was due," Mr. Curtis stated, "on the 8th April, and on that day Mr. Iasigi came to me and asked if I had a reply. I told him I had a confidential answer. He begged me to let him see it, and persuaded me to do so, and I showed it to him. My reply to him was that I had a confidential answer; he said he hoped I would let him see it, and I showed it to him. There was no one with him at the time. * * * He then asked me to let him take the letter to show it to his friend Mr. S., with whom he said he always advised. I again said the letter was confidential, and that I could not suffer it to go out of my office. He then said, 'Will you let Mr. S. see it here?' repeating that he always advised with S. on matters of importance, and he wanted him to see it. On this solicitation I consented, and S. came with Iasigi and read the letter. * * * We were neighbors and friends. I was led to ask this information, and to communicate the result to him, in consequence of the friendly relations that had long subsisted between us; and further, because I

thought it would tend to relieve Mr. I.'s mind, and not with any view to future sales. If it had not been for that state of facts I should not have shown him the letter. * * * Mr. Brown never authorized me to exhibit the letter to any one. I don't know when Mr. Brown first knew that the letter had been shown to any body. Don't know that he knew it till after the failure of Thompson & Co."

In the month of May Mr. Iasigi relying, as he claimed and offered to prove, upon these letters, made sales to the factories for notes indorsed by Thompson to the amount of about $25,000, which he lost by their failure in the autumn of 1851. In June Mr. Curtis wrote the following letter to Brown, Brothers & Co., in relation to the Thompsonville factory, at the request of Mr. Patrick Grant, who had been applied to, to sell wool to that company, and had consulted Iasigi:

"Boston, 26th June, 1851. Messrs. Brown, Brothers & Co., of New York—Gentlemen: Your favor of the 25th inst. is received, and your remarks have my attention. Nothing in my letters from Liverpool to report. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Co.? I replied that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern? There being several among my friends here who have heretofore sold them wool and wish to continue to do so. Yours faithfully, (Signed) Thos. B. Curtis."

To which the following reply was received:

"New York, 27th June, 1851. Thomas B. Curtis, Esq., Boston—Dear Sir: We are in receipt of yours 26th inst.; contents noted. We continue to have a favorable opinion of the concern you allude to. No change in our views about exchange. We are your friends. (Signed) Brown, Bro's & Co."

R. F. Wyman testified that in April, 1851, he applied to Mr. Curtis in regard to this company. Curtis said he would make inquiries, and told him afterwards that he had made them, and they were considered good. Mr. Grant testified, that after the failure of the parties in Connecticut he went to New York, where Iasigi and himself had an interview with Messrs. James and Stewart Brown, in which the letters of April 7th and June 27th were the basis of conversation. Mr. James Brown did not say that the last was written without his knowledge or approbation. Mr. Grant said he went to see as to the failure of the Thompsonville Co., so far as he was concerned, and to show, as he hoped to do, to Brown, Brothers & Co., that there was a moral responsibility on their part to respond to these notes. The April letter was very fully discussed. Mr. Iasigi stated that he had applied to Curtis to know with respect to the Thompsonville and Tariffville Co's, and Orrin Thompson, to know what their credit was, and whether it would be safe to sell to them. He connected Grant with the April letter, although, as Grant now testified, he had nothing to do with that, but that he did not then state that to Mr. Brown. Iasigi then alluded to the letter written for Grant. Copies of the letters were there, but Mr. Grant thought they were not produced. Both were distinctly referred to, distinctly recognized and commented on, and their various parts distinctly discussed. Iasigi commented on his own and Grant's transaction, and said they had sold on the faith of these letters; and as all the property of the companies and Thompson had apparently been attached by Brown, Brothers & Co., they (the claimants) ought, in a moral point of view as to responsibility, to share part and parcel with those who had attached. Mr. Brown said the letter of April 7th was a guarded one, and that as to the second letter, that was nothing but a statement that "we continue to have a favorable opinion of the concerns." That the connection of his firm with Thompson has been of a long date; that they had had a great number of transactions together, and that at the time the April letter was written, that they had intended to carry Mr. T. through, but that Thompson had deceived them. He repeated several times that this was a guarded letter; and as it was written in entire good faith, and as they had lost much more than Iasigi and the others subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them. Stewart Brown said, "If you had called on us, gentlemen, and conversed with us instead of writing, you would not have sold this wool." That when the letters were written they intended to carry Thompson & Co. through; as they found they could not, the letters were guarded; that the parties ought not to have sold on them. He conveyed the meaning, that, if they had called personally, matters would have been explained more fully, and they would not have sold. The letters were written under the feeling that these people were not very strong. That inference was very plain, the witness said, from what he stated; and also, that he meant them to understand that the April letter was very guarded, and that they ought not to have sold on the faith of it. The moral responsibility of the firm was the particular topic when they said the letters were guarded. The principal conversation was on their moral responsibility as based on the two letters. The claim against them was put on the contents of the letters; and the accompanying facts that they had all the property. Mr. G. also said that no suggestion was made by any one at the interview, that the letter was confidential, or had been improperly shown.

The plaintiffs also offered to prove that certain statements in the letter of April 7th, material to show the property and credit of said Thompsonville Co., said Tariffville Co., and of Thompson, and the safety and expediency of selling them goods on credit, and to influence the judgment of one reading the letter in regard to such sale, were false, and known to the defendant to be so when the letter was written, and were then known to him to be material to show the credit and property of those parties, and the safety and expediency of selling to them on credit. Also, that in said letter the defendant did intentionally suppress and conceal facts which he knew and knew to be material to show their property and credit, and the safety and expediency of selling as aforesaid, and which would materially qualify and change the statements in the letter, and make them in material respects less calculated to influence the judgment in favor of crediting them; and that within thirty days before April 7th, the defendant alone and jointly with one Hicks, had taken conveyances in mortgage, or absolutely, of all Thompson's property, real and personal, with some small exceptions, to the amount of $188,000, as security for the debts and liabilities of Thompson & Co. to defendant's house and to said Hicks, amounting to over $509,000; also that defendant was largely interested, pecuniarily, to sustain the credit of Thompson and the factories, and to induce extensive sales to them on credit. And this evidence was offered generally in support of the action, and also to show that the defendant wrote the letter with the fraudulent intent stated in the declaration, and that it should be shown to other persons than Mr. Curtis, to induce them to sell to those parties on credit. And the plaintiff proved that he made the sales stated in his declaration, relying on and trusting to and in consequence of the letter of April 7th.

A great deal of testimony was put in, and the foregoing is somewhat condensed and transposed; but taken in connection with the opinion of the court, it is hoped that enough has been stated to present with distinctness the question of law raised in the case. Nor is it deemed necessary to give at length such portions of the evidence as appear from the opinion of the court, or were excluded upon any general principle which indicates their nature. The defendant contended that upon the plaintiffs' own evidence, which they had introduced and offered to introduce, the jury would not be warranted in finding that defendant ever gave any authority to Mr. Curtis to exhibit his letters of April 7th to the plaintiffs, or that he intended that it should be so exhibited to or read by the plaintiffs, or any other person than Mr. Curtis himself; that the jury consequently could not find that the defendant had ever made any representation to the plaintiffs, and therefore that the action could not be maintained.[2]

R. Choate and S. Bartlett, for plaintiffs.

C. G. Loring, and E. Merwin, for defendants.

SPRAGUE, District Judge. The questions presented in this case are important, and I am not surprised that the ablest counsel should differ widely respecting them. I have given to them all the consideration which the time has allowed during the progress of a jury trial, and will now state the conclusion to which I have arrived, and the reasons upon which it is founded. In the present position of the case, the question is first, what the jury would be authorized to find, by the evidence, as matter of fact, and secondly, whether the facts they would be authorized to find would be sufficient to sustain the action. And first: The action is founded entirely on the letter of the 7th of April, and the material question is, as to the authority of Mr. Curtis to exhibit it. It is not contended that Mr. Curtis did not act with entire good faith to the plaintiffs or other third parties. There is nothing in the evidence to warrant the jury in finding the contrary, for this rests entirely upon his testimony; and there is no evidence there certainly, that he did not act in entire good faith to the plaintiffs. The question then is this, whether Mr. Curtis did, in fact, have authority to exhibit this letter to the plaintiffs. It is admitted by the counsel that if the jury could find that he had, the cause must be put to them, and on the other hand, if the jury must find that he had no authority, then there was no ground to sustain this action. So, then, the inquiry really is, whether, upon the evidence introduced and offered, the jury could find, agreeably to principles of law, that Mr. Curtis had authority to exhibit the letter. And the first remark is, that all the authority conveyed to Mr. Curtis for the exhibition of the letter, is the letter itself. There is no evidence of any personal communication between Mr. Curtis and the defendant, or with another person as defendant's agent, or by any other means than the letter itself. And the question is, what authority did that letter give him to exhibit it? It is a question of the construction of a written instrument to be aided, undoubtedly, by surrounding circumstances; but the question is this, whether the letter, read by the light of all the surrounding circumstances, conveyed to Mr.

[2] It is proper to state in justice to the defendant, that while relying for the present upon the ground above stated, he alleged that he was fully prepared to prove that the letter was written in good faith by him, and that it was a candid statement of all the facts affecting the credit of these parties known to him at the time, and that he, relying upon their solvency, has made advances to them to a very large amount after writing the letter, which he lost by their failure.

Curtis any authority for its exhibition to another party. In the first place, look at the letter. And here as to the province, respectively of the court and the jury. It is equally the duty of the court not to withdraw from the jury any thing proper for their determination; and, on the other hand, not to throw upon them the responsibility of a question which it is the duty of the court to decide.

The general rule of law is—that written instruments are to be construed by the court and not by the jury. This is a written paper, and, by the general rule, to be decided upon by the court. But there may be extrinsic circumstances to be taken into view, in construing all such documents; there may be technical terms and expressions used by one or another class of persons, intelligible to such class, though perhaps not generally. In such case the facts bearing upon the construction are matters to be ascertained by a jury. But when there are no such extrinsic facts, or no such technical terms, then it becomes the duty of the court peremptorily to decide as to the meaning of the writing—its construction and effect. Questions may sometimes arise as to the mercantile or commercial meaning attached to terms of trade. But here there is no evidence whatever of any meaning of the words, different from the ordinary, usual one known to the community and presumed to be known to the court. It is argued for the plaintiffs that the term confidential, as between bankers, merchants, and the like, has a meaning different from the ordinary one, but no evidence has been offered to show that such is the case. There is evidence offered of extrinsic circumstances going to prove, as the plaintiffs aver, that Mr. Curtis had authority to exhibit this letter, and this will be examined hereafter. But let us, in the first place, proceed to consider the letter itself. It must be taken in connection with that of the 5th of April from Mr. Curtis. That, also, is a written paper, and its construction belongs to the court and not to the jury. In the letter of the 5th, Mr. Curtis asks as the defendant's opinion of the danger or risk of selling largely to those parties, and then adds, that whatever that opinion may be "it will be discreetly used by myself." In answer, the defendant immediately writes, beginning his letter with the word "confidential." He then goes into a statement of the relations and dealings between himself and the said concerns; states certain facts; and expresses an opinion as to their ability to pay, and the danger of loss by trusting them.

Now, the question before the court, in looking at the letters, is as to the force and effect of the word "confidential," in the letter of the 7th of April, as taken in connection with the first letter of the 5th of April, and the surrounding circumstances. It is written immediately after in answer to the inquiry of Mr. Curtis, and it will be observed that Mr. Curtis promises that whatever may be the opinion of Mr. Brown, it will be "discreetly" used by himself. This, if the word "confidential" were omitted from the reply, would leave the matter to Mr. Curtis's discretion, and it is argued that the use of that term does not necessarily restrict the letter to Mr. Curtis's own use. If it (the word "confidential") were left out, I do not think the letter would be restricted to Mr. Curtis's own private business, but the letter would be intended to be used by him discreetly in relation to questions regarding the solvency of the concerns spoken of. But the defendant does not content himself merely with the promise of Mr. Curtis to use the defendant's opinion discreetly, but superadds a restriction of his own,—he marks his letter "confidential," and the question is, what is the meaning of that word? I apprehend that it cannot be, as the learned counsel for the plaintiffs have contended, that it means that Mr. Curtis is to be discreet as to whom he shall exhibit the letter, for the defendant had that promise in the letter from Mr. Curtis; he was not content with that promise, but marks his reply "confidential." And now can it be said that a person receiving a communication bearing "confidential" on the face of it, is at liberty, at his own discretion, to show it to everybody or anybody? I think not. I think it would be a violation of the whole rule of correspondence and of the plain meaning of the term "confidential." The argument is, that it was intended to leave entirely to Mr. Curtis's discretion the exhibition or communication of the letter, or its contents. But that is the very thing which it seems to me the defendant intended expressly to prevent. He was not willing to leave it to his agent's discretion, but meant distinctly to restrain him as to the use to be made of his communication. The contents of the letter would not give a different force and effect to the word from that, because they give a detail, at great length, of the affairs of Thompson & Co., of their pecuniary arrangements, of their attempts to sustain their credit by the negotiation of bonds in England, and an opinion that T. & Co. had invested too much money in the factories, &c. These details, if they do not strengthen, certainly do not impair the effect and force of the word "confidential." Looking at the letters themselves, therefore, I cannot see on the face of them anything to authorize Mr. Curtis to exhibit the letter of the 7th April to Mr. Iasigi or others. And here be it remembered, that Mr. Brown did not know that Mr. Curtis wrote his letter at the request of the plaintiffs or any other party.

Now looking at the extrinsic circumstances or evidence of other facts, let us see if either court or jury can be authorized by them to give a different construction to the letter. The first evidence is that of Mr. Curtis, the first witness called for the plaintiffs. What

are the jury authorized to find from any facts he has testified to? His testimony in every part of it goes to show that he had no authority out of the letter itself, to exhibit it. He negatives the contrary altogether. He states that he considered it confidential, and not to be communicated. But if he had stated the reverse, his considering that he had the authority would not make it so. He says, that at the request of Mr. Iasigi he exhibited the letter to him, stating to him distinctly that it was a confidential letter. It has been contended in argument that the jury would be authorized not to believe this, because in the former deposition of Mr. Curtis he makes no mention of such statement. Perhaps this is not a material fact to inquire into now. But the moment the plaintiff put his eye upon the letter he saw at once that it was confidential on the face of it. He must have seen it, in the very first line. On Mr. Curtis's testimony, therefore, there is nothing to control the force and effect of the letter itself—as claiming to be confidential. The next evidence is that given by Mr. Grant, and here the same remarks apply. The jury have authority to find every thing he states as to the interview to be true. They may find every thing for the plaintiffs that the witness testifies to, but the court must decide what would be the force and effect of such facts. Now on his evidence it might be found that Mr. Iasigi, Mr. Grant, and Mr. Kendall, all creditors of Thompson & Co. or the factories, called on the defendant in New York, stating through Mr. Iasigi, that they had sold their merchandise on the faith of the letter of the 7th of April, and had come to claim from the defendant, a participation in the effects of the debtors, on account of the moral obligation the defendant was under, from his position with regard to all parties, to allow them to come in and participate. Thereupon a discussion was had; both letters were spoken of and referred to. Copies of the letters were in the possession of these gentlemen,—Grant swears that he had a copy,—and they must also be presumed to be known to the defendant, for they were alluded to by all parties, by Brown, the defendant, and by his partner, as well as by Iasigi and the others.

Now as to what was said or omitted to be said in this interview. It is argued for the plaintiffs, that the omission to claim that the letter of the 7th of April was confidential, and his silence on that subject was, in effect, an admission by the defendant that it was not confidential, and may be so taken by the jury. Let us look at that. The claim then made was only of a moral obligation—and the only expression of the defendant's relied on by the plaintiffs is his statement that the letter was a guarded one; the question of confidence was not mooted—not alluded to at all—and the question for consideration is, whether, if the defendant in conversation omits to state that the letter contains some thing which we find in it, that is an admission that the letter does not contain it; or, in other words, if, in a conversation held in October upon a letter written in the preceding April, the party omits to state that it contained a certain statement, he there by intended to convey that it did not contain such statement. It seems to me that the ground can not be maintained; that a party, conversing with another who has a copy of the letter in question and knows what it is, cannot, from an omission to cite any particular of that letter, be held to an admission that the letter does not contain such particular. Here was a claim urged upon a moral obligation; and so considering it, defendant might not have thought it necessary to advert to the confidential character of the letter, whereas he might well have done so had it been a question of legal liability. There is a difference between the two; and it may very well be that a party, in a conversation placed distinctly on the one ground should employ different terms from those he would have used, had he been called upon, on another or opposite ground. Taking the conversation as it was, it is in proof that the defendant declared the letter to be a guarded one. Now the plaintiffs contend that the meaning of this is, that the letter was carefully worded and guarded, so as to protect himself (the defendant). The plaintiffs say that the jury are entitled to draw this conclusion. Suppose it to be so; may not the making of the letter confidential have been one of the guards he had reference to in the conversation? May he not have intended it as such? But again, suppose that he was speaking of the contents of the letter. The plaintiffs' argument assumes that a person does not write a guarded letter, meaning and intending it to be a confidential one; but that when one writes a confidential letter, it will be a free statement of facts or opinions inconsistent with the import of the word "guarded." That is, that in this, or a similar case, the very declaration by the writer, that his letter was, or was meant to be a guarded one, overthrows the presumption that it was confidential. This suggestion may be of some force as to mere letters of friendship, but not as to matters of business. I see no inconsistency in declaring the letter to be guarded, and at the same time holding it to be confidential. A principal may be guarded in his statement to his agent and may write cautiously, in order that he may not be misled, but that does not show that it may not be also confidential. We next come to the letters of the 26th and 27th June; they also must be for the construction of the court. It is argued that the letter of June 27th shows of itself, in its language, that the other letter, of April 7th, was not intended to be confidential, but, on the contrary, was meant to be read or shown. Mr. Curtis, in his letter of June 26th, says:—"A

friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Co. I replied, that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool and wish to continue to do so." In answer to this, the letter of the 27th June, says:—"We continue to have a favorable opinion of the concerns you allude to." Now the question is whether that goes to show that the former letter was not meant to be confidential, and to show that Mr. Curtis had authority to exhibit it. There is no reference whatever in the letter of June to that of April, and can any body say, that this letter of the 27th of June says to Mr. Curtis, that when he received the letter of April 7th he was then at liberty to exhibit it, or is now at liberty to show it? It seems to me the merest conjecture to infer, that Brown, Bro's & Co's letter of June 27th had any reference to that of the 7th April, and still more, that it meant to convey any authority to Mr. Curtis, the agent, to show the first letter. The defendant had no reason whatever to suppose that, in point of fact, up to that time, Mr. Curtis had exhibited the first letter to any body. Nothing was said in any of the correspondence leading to such an inference on his part; and now, on this state of things, can it be, that this letter of the 27th of June gave him authority to exhibit the letter of April 7th? I cannot think that such would be a safe ground of judicial proceeding, in determining the rights of the parties.

I have thus considered all the evidence as yet put in, and now proceed to consider what is proposed to be proved. And this I deem of more importance and force than any thing to which I have before adverted. What is proposed is this—to show that in the letter of the 7th of April there were various statements going to sustain the credit of said parties, which were not true, and that the defendant at the time knew that they were not true, and that he omitted or suppressed facts which he knew to be material; and further, that when doing this, he, as a large creditor, had an interest to sustain the credit of Thompson & Co. and the factories, and to procure for them further credit in the community. From all this, if proved, the court or jury might doubtless infer that it was the intention of the writer to sustain the credit of the Thompsons, and that his letter should in some manner be operative to that end. But in what manner? The counsel for the plaintiffs insist that it must have been by exhibiting the letter to the third persons. Their argument assumes that this is the only mode in which the letter could operate to sustain the credit of the Thompsons. But is it the only mode? Is there not another? less effective indeed in giving a false credit, but still conducive to that end, and more safe to the writer, and more in accordance with his expressed purpose of withholding his name and shielding himself from responsibility to others. It is to be borne in mind that his letter was not volunteered. It was drawn from him by a direct interrogatory, put by the letter of Mr. Curtis. He was not informed that this was written at the request of any other person, or that Mr. Curtis would be under the necessity of saying to any one, that he had or had not received a communication upon this subject from the defendant. Mr. Curtis put the inquiry as his own, with an assurance that the opinion which might be given in response should be used discreetly by himself. This implied that it would be entirely within his control and discretion. If the defendant had refused to make any answer to Mr. Curtis, that might of itself have been injurious to the credit of the Thompsons. All that the occasion required, so far as he knew, was to satisfy the mind of Mr. Curtis, so that the credit of the concern should not suffer in his mind, or through the opinions that he might express; and this would be accomplished by a confidential letter to Mr. Curtis, stating such facts and opinions as would convince him, and at the same time prohibiting him from giving the name of the writer as his authority. The letter would thus be operative to sustain the credit of the concerns so far as Mr. Curtis should personally have business with them, and so far as he should express his own opinions to others. This was all that there was any apparent occasion for the defendant then to do, and if the statements in the letter were designedly false as the plaintiffs insist, and as we must for the purposes of the present question take them to be, that of itself might be a strong reason, why he should be unwilling that his name should be disclosed, and should prohibit this correspondent from subjecting him to responsibility to others.

Let us here recur to the main question. The court is called upon to give a construction to this letter, and to declare, whether it authorized Mr. Curtis to exhibit it to the plaintiffs. It contains language clearly prohibiting such exhibition. The plaintiffs insist that such prohibition is incompatible with extrinsic facts, and therefore to be disregarded. The burden is upon the plaintiffs to show the incompatibility. This they have not been able to do; on the contrary, it appears that all the facts which could be found by a jury, admit of a fair and rational solution, in perfect harmony with the language of the letter. There is nothing which can authorize the court to annul or disregard the distinct and positive prohibition which it contains. The exhibition of the letter therefore was not authorized by the defendant. Here another question may arise. It may be contended, that although the letter was not intended to be shown, yet that it was intended to give a false credit to the Thompson con-

cerns, by impressing Mr. Curtis with an erroneous opinion, and by his expressing such opinions to mislead others; and that the plaintiffs have in fact been misled, and given credit to their injury. To this it may be answered, in the first place, that although it may have been intended to have given a false credit, and that Mr. Curtis should express his own opinion to that end, yet this was not in fact done, and what was done was not authorized. No one can say that if Mr. Curtis had merely expressed his own opinion, the plaintiffs would have given the credit. When Mr. Iasigi went to Mr. Curtis, it was not for his opinion, but to obtain that of the defendant, because, as is expressly alleged in the declaration, he knew that the defendant was conversant with the Thompson concerns; and the plaintiffs have from the beginning relied solely on the exhibition of the letter, as the ground upon which they made the sales. They did not give credit upon any act authorized by the defendant. Whether if Mr. Curtis had done what he was authorized to do, merely expressed his own opinion, the plaintiffs would have given the credit, is mere matter of speculation and conjecture, which cannot be the basis of a judicial determination. In the second place, by the Revised Statutes of Massachusetts (chapter 74, § 3) it is provided that no person should be liable for any representation of the credit of another, unless such representation shall be in writing, and signed by him, or by some person by him lawfully authorized. Now if the plaintiffs had had only a verbal representation from Mr. Curtis, as the expression of his own opinion, the statute would have interposed an obstacle to the plaintiffs' recovery. The result is, that the evidence which has been introduced and offered is not legally sufficient to maintain this action, and the jury must be instructed to return a verdict for the defendant.

[NOTE. The case was then taken by writ of error to the supreme court, where the judgment was reversed in an opinion by Mr. Justice McLean, who said that it was for the jury to say whether the letter which was marked "Confidential" was intended for the exclusive perusal of the person to whom it was addressed. All facts which conduced to show that defendant acted in bad faith in writing the letter should be considered by the jury. Campbell and Curtis, JJ., dissented. 17 How. (58 U. S.) 183.]

IBIS, The (GRAND v.). See Case No. 5,682.

Case No. 6,995.

The ICONIUN.

[5 Adm. Rec. 287.]

District Court, S. D. Florida. Oct. 30, 1854.

SALVAGE.

[Five vessels, carrying 54 men, in nearly two days of almost incessant labor succeeded in floating a ship in ballast aground on Loo-Key Shoals, by discharging 130 tons of ballast, carrying out anchors, and straining on the cables. *Held*, that one third of the net value of the vessel, estimated at $14,500, was a reasonable allowance.]

[This was a libel in rem by John T. Lowe and others against the ship Iconiun for salvage.]

Winer Bethel, for libelants.
Wm. R. Hackley, for respondent.

MARVIN, District Judge. This ship, Turner, master, bound on a voyage from New York to New Orleans, in ballast, got aground on Loo-Key Shoals, on the evening of the 24th of October. The master, believing that the ship might be drove over the shoal, and in order also to keep her more steady, kept all sails standing for several hours, and until he discovered that the tide had begun to fall. He then took in his sails. He also threw overboard about thirty tons of ballast during the night. In the morning the wrecking vessels Relampago, Hawkins, Jane Eliza, Lavinia, and Olivia, carrying in all fifty-four men, arrived at the ship. The master employed them to assist him in getting the ship off. They carried out the Relampago's anchor astern, backed by an anchor from the Lavinia and Hawkins, with a good scope of chain, and commenced discharging ballast. The master, with his own crew, too, took down and sent on board the fore, main, and mizzen topgallant masts, with their sails and rigging, and all the yards, except the main topsail yard. The ship lay in 9½ feet and 7 feet water, she drawing 12 and 11 feet. The wreckers discharged ballast throughout the day and until twelve o'clock at night. The next morning they carried out the ship's best bower anchor, and continued throughout the day to lighten the ship by heaving overboard ballast. At about twelve o'clock at night of the second day they heaved the ship off by repeated heavy strains. About one hundred and thirty tons of ballast were discharged in all. The ship may be estimated in her present condition at the value of $14,500. In its chief features of merit, the case is like the cases of The John and Albert [Case No. 7,333], The Ella Hand [Id. 4,369], and The Abellino [unreported], and a similar compensation should be allowed. I think one third of the net value is a reasonable salvage to be allowed.

It is therefore, ordered, adjudged, and decreed that the costs and expenses of this suit, wharfage, storage, bills for labor, notary and surveyor's fees, and all other charges upon the said ship, except for repairs and taking in ballast, and the proctor's fee for defending this suit, be ascertained and allowed and deducted from the aforesaid $14,500, and that one third of the residue be allowed the libellants in full compensation for their services in saving said ship; and that upon the payment of said salvage,

costs and expenses and charges the marshal restore said ship to the master thereof for and on account of whom it may concern.

Case No. 6,996.

The IDAHO.

[4 Ben. 272.] [1]

District Court, E. D. New York. July, 1870.

STAYING PROCEEDINGS—INTERVENTION OF THIRD PARTY—VEXATIOUS PROCEEDINGS—POWER OF THE COURT.

1. A quantity of cotton was shipped on board the steamship Idaho, bound for Liverpool, by M., who received a bill of lading therefor, in the ordinary form, dated May 4th, 1869. On the same day an action of replevin was commenced by P., against the master of the steamship, to recover the cotton as his property. In that action, the cotton was seized by the sheriff, and was by him nominally delivered to P., the plaintiff, but was not taken from the steamship, and, by agreement between P. and the owners of the steamship, it was carried forward to Liverpool, and there delivered to the agent of P., who had agreed to indemnify the steamship against any liability by reason of such carriage and delivery to him. M. having assigned his bill of lading to H. & Co., a libel was filed in this court, on the 9th of June, 1869, by them against the steamship, to recover the value of the cotton not delivered according to the bill of lading. On the 19th of June an action was commenced in the court of exchequer, in Liverpool, by F., the agent of H. & Co., against the owners of the steamship, to recover damages for the non-delivery of the cotton under the bill of lading. After the filing of the libel in this court, H. & Co. were made parties defendants in the replevin suit on their own application. The answer of the claimants, in the suit in this court, set up the title of P. to the cotton as a defense against the claim of H. & Co. In this position of affairs P. applied to this court, on petition, praying to be admitted to defend in this action, and that the libellants be required to litigate with him their title to the cotton, or, if they would not stipulate to do so, that their further proceedings in the suit, in the English exchequer, be enjoined. The owners of the steamship also applied for a stay of proceedings in this cause, unless the libellants should elect to stay proceedings in the two other actions, and to proceed herein. *Held*, that the interest of P. in this suit arose solely from his having agreed to indemnify the claimants against the result of the litigation; and that that circumstance was not sufficient to give him the right to intervene in the action.

2. His application for a stay of proceedings in this action must be rejected for the reason that he was not a party to the suit, and did not pretend that there was any collusive use by the parties of the process of the court to deprive him of any substantial right.

3. It is competent for a court of admiralty to stay proceedings, in any case before it, to prevent injustice: no reason was apparent why the trouble and expense of the three litigations, each involving the title to the same property, should be cast upon the owners of the ship; and, on the application of the claimants, proceedings in this cause should, therefore, be stayed, unless the libellants should elect to stay proceedings in the other cases.

In admiralty.

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

BENEDICT, District Judge. This case comes before the court, upon a petition filed by one W. J. Porter, and also upon a motion by the Liverpool and Great Western Steamship Co., who are the claimants in this action. The action is brought by the owners and holders of a bill of lading of certain bales of cotton, to recover of the steamship Idaho the value thereof, by reason of the failure of the steamship to deliver the same according to the terms of the bill of lading.

The averments of the facts attending the shipment and delivery of this merchandise are as follows: The cotton was shipped on the steamship, in New York, by one Thomas W. Mann, to whom a bill of lading, in ordinary form, was issued, providing for a delivery to him or his assigns in Liverpool, and bearing date May 4th, 1869. On the same day an action in the nature of replevin, for this same cotton, was commenced against the master of the steamship by W. J. Porter, who demanded the cotton as his property.

In that action, according to the mode of procedure in such suits, the cotton was seized by the sheriff, and, the plaintiff having given an undertaking to indemnify the sheriff, the cotton was delivered to him. It seems, however, that in point of fact, the cotton was not disturbed in the steamer, but, after it was in form delivered by the sheriff to Porter, the plaintiff in replevin, the owners of the steamship and Porter agreed for its carriage to Liverpool, and delivery there to the order of Porter. The cotton, therefore, went forward in the steamship, and upon her arrival in Liverpool, it was so delivered to Porter or his agent, Porter having agreed to indemnify the steamship against any liability by reason of such carriage and delivery to him. The bill of lading of the cotton, which had been issued to Thomas W. Mann, the original shipper, and assigned to Henry Hentz & Co., being thus unperformed, Hentz & Co., on the 9th of June, 1869, filed their libel in this court against the steamship, to recover the value of the cotton not delivered according to the bill of lading, and on the 19th of June, James Finlay & Co., of Liverpool, also commenced a suit, in the court of exchequer, Liverpool, against the owners of the steamship, claiming to be entitled to the cotton as endorsees of the bill of lading issued to Mann, and that the owners of the steamship were liable to them for its non-delivery.

There are now pending, therefore, three actions for this same cotton—a replevin suit by Porter against the master in the supreme court of New York, a common law suit in the exchequer by Finlay & Co., against the owners, and this action in rem against the vessel by Hentz & Co. In addition to these proceedings it appears that, after the filing of their libel in this court, the libellants, as permitted by the laws of New York, presented a petition in the replevin suit to be allowed to litigate with Porter in that action, the question of ownership of the cotton, and

thereupon they were made parties defendant in that suit, which is now pending.

Furthermore, the claimants in this action having, in their answer to the libel of Hentz & Co., simply set up in defense the taking of the property by the sheriff in Porter's replevin suit, subsequently applied for leave to amend, by setting up in defense the title of Porter as against the title of Hentz & Co., and of Mann, the shipper of the cotton. This motion was opposed by Hentz & Co., on the ground that the claimants could not set up title in a third party, to defeat an action on their bill of lading; but an order was made, permitting the amendment, without prejudice to the question raised by the libellants, and subject to the final decree of the court upon the validity of such defense. The course of procedure has therefore been such that it may result, in case of a decision in this action that the title of the shippers of the cotton be here litigated by the claimants of the ship, that Porter, by reason of his undertaking of indemnity, will be compelled to pay to the owners of the ship the value of the cotton, notwithstanding he should be adjudged in the replevin suit to be the true owner of it.

In this posture of affairs Porter presents his petition to this court, and prays to be admitted to defend in this action against the vessel, and that the libellants may be required to litigate with him herein their alleged title to this cotton, or if they shall not stipulate to do so, that their further proceedings in the suit in the English exchequer, which it appears is brought by agents of the libellants for their benefit, be also enjoined. The owners of the steamship, who are claimants in this action, also come before the court, and move that proceedings in this cause be stayed, unless the libellant elect to proceed herein, and to suspend the proceedings in the two other actions.

I proceed first to dispose of the application made by Porter, the petitioner. His request to be made a party, cannot be granted. He makes no claim to a lien upon the steamer, nor does he pretend to any right, title, or interest therein, and moreover the steamer has been bonded by her owners, and of course she remains subject to all other liens except that of the libellants. The interest of Porter in this litigation, in this court, therefore, arises solely from the circumstance, that he has seen fit to indemnify the claimants against the result of that litigation, but that circumstance is not sufficient to give him the right to intervene in an action, in rem, like the present.

I am aware that in the English admiralty the old rule, in regard to intervention in suits in rem, has been relaxed (see The Regina Del Mare, Brown. & L. 315; The Innisfallen, 16 Law T. [N. S.] 71; Williams & B. Adm. Jur. 200); but I find no case in the English admiralty which affords authority for an intervention by a party situated like this petitioner. The cases in this country seem to be clearly adverse to such a claim. The Packet [Case No. 10,654]; The Boston [Id. 1,673]; U. S. v. 422 Casks of Wine, 1 Pet. [26 U. S.] 547. My opinion therefore, is, that the application of Porter to be permitted to defend in this action must be denied.

It follows, also, that his motion for a stay of the proceedings in this action must be rejected, for the reason that he is not a party to the suit, nor does he pretend to any collusive use, by the libellants or the claimants, of the process of this court, in order thereby to deprive him of any substantial right.

There remains to consider the application on the part of the claimants for a stay of proceedings in this action, unless the libellants shall elect to proceed here, and to stay their proceedings in the two other actions. In regard to such an application, it must be said, that it is unquestionably competent for a court of admiralty to stay the proceedings in any case before it, when the circumstances are such that injustice will result from proceeding, which the stay will prevent—and it will always discountenance vexatious and unnecessary litigation. The facts appearing here seem to me to present a case of unnecessary suits, some of which ought not to proceed.

As to suspending the replevin suit, it is said, that it is brought by Porter, and not by these libellants, and it would not be just to compel parties, holding a bill of lading, to forego their remedy in a maritime court against the vessel, and resort to a court of common law, because a third party has seen fit to sue the master for their goods at common law.

The answer is, that the defendants, by making themselves parties to the replevin suit, have become actors therein, and inasmuch as Porter tenders to the claimants a stay of the replevin suit, on his part, until the determination of this suit, the libellants are, in fact, the parties pressing that suit. They are in substance, then, suing the master for a delivery of this cotton in New York, and are also suing the vessel here for not delivering it in Liverpool, and by their agents in Liverpool, are suing the owners there also for not delivering it there.

I see no reason why the trouble and expense of these three litigations, in these courts, should be cast upon the owners of this ship. In cases somewhat similar in principle, both Dr. Lushington and Sir R. Phillimore have held that the proceeding, in rem, would be suspended, or the party put to his election as to which court he would have recourse to, and such appears to me to be my duty here. The claimants, may, therefore, take an order directing that further proceedings in this cause be suspended, unless the libellants elect to proceed here, and to consent to a stay of proceedings in the two other suits.

[See note to Case No. 6,998.]

Case No. 6,997.

The IDAHO.

[5 Ben. 280;[1] 14 Int. Rev. Rec. 134.]

District Court, E. D. New York. July 11, 1871.[2]

BILL OF LADING — COMMON CARRIER — FRAUD OF SHIPPER—MINGLING GOODS—DESPOILING EVIDENCE.

1. In April, 1869, at New Orleans, F. obtained a bona fide advance from W. J. P. & Co. on a bill of lading for 140 bales of cotton on the brig C. The cotton was not then on board the C. A few days afterwards, F. delivered it alongside of her, but before it was put on board, he removed it from her custody, and shipped it on the steamer L. for New York, with 25 other bales, taking one bill of lading for the whole, on which he got an advance from S. at New York, to whom he consigned the whole. The L. arrived at New York with the cotton, which was taken directly by S. to a warehouse, where S. caused the marks to be removed, and the bales re-marked with marks similar to marks on 35 other bales belonging to S., and the whole 200 were shipped in the steamship I. for Liverpool, the shipment being made in the name of third parties, who gave the receipts to M., a clerk of S., to whom a nominal sale had been effected. M. obtained from the I. a bill of lading for the cotton, and having made a nominal sale of the cotton to H. & Co., indorsed the bill of lading to J. F. & Co., of Liverpool, the agents of H. & Co. The steamship arrived at Liverpool, and delivered 35 of the bales to J. F. & Co., and delivered the other 165 to agents of W. J. P. & Co. H. & Co. filed a libel against the steamship, to recover for the failure to deliver the cotton as required by their bill of lading. *Held*, that, on the receipt of the 140 bales by the brig C., they became the property of W. J. P. & Co., and that the libellants had no better title to them than S., who had no title as against W. J. P. & Co.

[Cited in The Ferreri, 9 Fed. 471.]

2. The ship could prove this title of W. J. P. & Co., and a delivery to them of the cotton, as a defence against the claim of H. & Co.

3. As S. & Co. had mingled 25 bales of cotton of their own, with the 140 belonging to W. J. P. & Co., so that they could not be distinguished, the whole 165 became the property of W. J. P. & Co.

4. Everything is to be presumed against the despoiler of evidence.

In admiralty.

Emott, Hammond and Pomeroy, for libellants.

Owen, Nash & Gray and W. G. Choate, for claimants.

BENEDICT, District Judge. This is a proceeding in rem to recover of the steamship Idaho for the non-delivery of certain cotton, valued at some $25,000, which was shipped in that vessel on the 3d day of May, 1869, to be transported from New York to Liverpool.

The original shipment consisted of 200 bales, claimed to have been then owned by Thos. Man, who, on the day of the shipment, and before any bill of lading was issued, sold the same to Hentz & Co., the libellants, free on board. The bill of lading contained the ordinary contract to deliver the goods to the order of Man as the shipper. It was signed on the 4th of May, and Man then indorsed on it a direction to deliver the goods to James Finlay & Co., who were agents of the libellants in Liverpool. The steamer duly performed her voyage, and delivered her cargo; but of this shipment of cotton, only 35 bales were delivered to James Finlay & Co.; the remaining 165 bales were delivered to Baring Bros., acting as agent of W. J. Porter & Co. For this failure to perform the contract in the bill of lading, the libellants now bring this action.

It is necessary here to state but one of the defences set up by the ship, which is, that neither Man, who received the bill of lading, nor the libellants, to whom it was transferred, were entitled to the cotton, but that it belonged to Porter & Co., and that the delivery to the true owner on his demand constitutes a defence to this action. The facts material to this issue are as follows:

In April, 1869, at New Orleans, W. J. Porter & Co., in due course of business and in good faith, advanced to one Forbes a large sum of money upon a bill of lading, which set forth a shipment of 140 bales of cotton at New Orleans in the brig C. C. Colson. The bill of lading was in the ordinary form, executed by the lawful master of the Colson, but, in fact, no such cotton had been shipped at the time of its execution. Some few days after the date of the bill of lading, and after the acceptance of the drafts by Porter & Co., Forbes did, however, ship by the Colson 140 bales of cotton, as and for the cotton described in the bill of lading sent to Porter & Co. This cotton was duly delivered to the Colson, was receipted for by the officers of the brig, and although not then placed on board, was delivered to the vessel on the wharf alongside, and, in my opinion, duly shipped, as cotton to be transported and delivered according to the bill of lading which the master had already signed.

By this shipment the title to the 140 bales so shipped passed to Porter & Co., who had advanced upon the faith of such a shipment, and held the bill of lading which set forth the shipment in question. 12 Pick. 314; Halliday v. Hamilton, 11 Wall. [78 U. S.] 560.

Subsequent to this shipment, and on the same day, before the cotton was taken into the hold of the brig, Forbes accomplished its removal from the custody of the brig, and its shipment on the steamship Lodona, lying near and bound for New York. The previous shipment of the cotton on the Colson was unknown to the officers of the Lodona, and they as of course issued bills of lading in the ordinary form for the cotton they received.

Forbes, it seems, shipped in the Lodona

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

[2] [Affirmed in Case No. 6,998, and in 93 U. S. 575.]

25 other bales, and took one bill of lading for the whole 165, on which second bill of lading he obtained a large advance from the firm of Shaffer & Co., of New York, to whom he made a second assignment of the cotton.

An issue has been raised as to the identity of the cotton shipped in the Colson with that shipped on the Lodona. But the weight of the evidence is, that the same 140 bales delivered to the brig went to the Lodona, and were included in the bill of lading for 165 bales which was sent to Shaffer & Co. Were the direct evidence upon this point less conclusive than it is, I should still be of the same opinion, because of the dealing of Shaffer & Co. with the cotton after it was delivered to them from the Lodona in New York. It appears that the Lodona arrived in New York on the 29th or 30th of April. The 165 bales were taken directly to a warehouse by Shaffer & Co., who, on the 1st of May, engaged freight in the Idaho for 200 bales of cotton. On the same day, Saturday, Shaffer & Co. sent for one Corcoran, who went to Shaffer's house on Sunday, and was then directed, as he says, to remove all the marks and numbers from the 165 bales, and to re-mark them with marks similar to 35 other bales which Shaffer & Co. had stored in West street. Corcoran did this as well as the short time permitted, and on Monday, May 3d, the whole 200 bales—120 of them marked "S.A.L." and 80 marked "V.O.X."—were shipped in the Idaho. This shipment was not made in Shaffer's name, but while Corcoran was at work on the cotton, it was nominally sold to Man, a clerk of Shaffer's, and it was shipped in the name of Conklin & Davis, grocers, who permitted their names to be thus used, and indorsed the ship's receipts over to Man. On the 4th of May, Man applied for and received the bill of lading of the Idaho for the 200 bales on which this action is brought. Mr. Shaffer testifies, that on the 3d day of May a bill of sale of the cotton had been given to Man, which, however, is not produced, and it is clear on the evidence that any transfer to Man was merely nominal, for the purpose of obscuring the title of the cotton. On the same day Man sold the cotton to Hentz & Co. free on board, but this was also merely nominal. Hentz & Co. were told to ask no questions, and, on the 5th or 6th, gave their note for the cotton to Man, who paid it to Shaffer, who held it till maturity, and when Hentz & Co. paid the amount of it to Man, they obtained Shaffer's guaranty against loss. Man then paid the money over to Shaffer, who gave him a check for $897 36, as for a difference in price between the sales to Man and Man's sales to Hentz & Co.; and Hentz & Co. acted under the direction of Shaffer & Co. in bringing this suit.

The statement of these facts, with the additional one that Man, although alive and in New York, is not called as a witness, are sufficient to show the nature of the transaction; and the effort, together with the fact that a few of the original marks on the cotton, which, owing to the shortness of time, escaped Corcoran's knife, were still to be seen, affords support to the direct evidence of the witness who swears that the cotton, shipped on the Colson, was carted on his direction to the Lodona. Under such a state of facts, the presumption arises that the marks on the cotton, which arrived by the Lodona, would have proved its identity with that shipped on the Colson, otherwise why obliterate instead of carefully retaining them? Everything is to be presumed against the despoiler of evidence.

I find, therefore, as a question of fact, that the 140 bales of cotton shipped on the Colson, and transferred by bill of lading to Porter, formed part of the 165 bales received by Shaffer & Co. from the Lodona, and of the 200 bales shipped in the Idaho under the bill of lading on which this action is brought; and I find further, that the present libellants are at least chargeable with notice that they were dealing in respect to property, of which the title was in dispute. Indeed, the facts of the case, and the manner of the witnesses, satisfy me that Shaffer & Co. are the real parties in interest here. It is at any rate certain that the libellants title to the 140 bales is no better than Shaffer's, and Shaffer had no title as against Porter & Co., to whom the cotton had been shipped by the first bill of lading issued therefor by the master of the Colson.

I am thus brought to consider the question of law, which has been so earnestly discussed before me, and to determine whether the delivery of this cotton to Porter & Co., the real owners, is a good defence to the action of the libellants against this steamer.

In several cases, courts of common law have held, that a delivery by the carrier to the actual owner was a good defence to the action of a shipper, whose possession was acquired by fraud. Bates v. Stanton, 1 Duer, 85; Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; 98 E. C. L. 618.

I am unable to discover any real ground of distinction in principle between the class of cases referred to, and the present case. Fraud has been an important fact in these cases, because when proved it showed the shipper to be without title to the property; but the same result should follow, if it be shown in any way that the shipper has no title. The defence has been sustained by the courts in such cases, not for the purpose of punishing fraud, but because by reason of the fraud the shipper acquired no right to the property.

The sense and justice of things would seem to be that goods, held by a carrier, should be delivered to him who owns them, and such a delivery protected by the courts. It certainly would not be equity to compel a

carrier to withhold goods in his possession from the actual owner, and deliver them to one not the owner, simply because one not the owner had shipped them. A court of admiralty is a court of equity. It administers the law so as to work justice and advance commerce, and is not bound by technical rules nor embarrassed by questions as to the forms of action. And no equity requires such a court to hold, that the libellants can charge this steamer with this large sum, because she fails to deliver to them cotton, which, if it had been delivered to them, they could not have retained as against Porter & Co. who actually received it.

The libellants have sustained no damage by the nondelivery. Suppose no delivery of the cotton at all had been set up in this action, and the proceeds of the stipulation for value had been permitted to be paid into the registry under this very libel, it is doubtful whether the libellants could in that event have resisted successfully a petition by Porter & Co., that the value of the cotton be paid to them out of such proceeds, based on the facts here proved. I do not see why the claimants should be in a worse position, because they have undertaken to prove, and have proved Porter's right to the property. Another consideration has been urged, which seems to me entitled to weight, as bearing upon this question, which is, that every shipper of goods, by implication, warrants his right to ship the goods in the capacity which he assumes. Such a warranty is necessary for the ship, and accordingly a breach of it by the shipper may be set up in any action brought by him against the ship.

There are other general considerations, bearing upon the subject, sufficiently obvious indeed, but which may perhaps be mentioned. A rule which forbids a ship to dispute the title of a shipper, makes ships the unwilling but most convenient receivers of goods held by doubtful titles. It encourages holders of such property to endeavor to procure a title by the simple expedient of a shipment in a ship. It indicates a speedy and safe method of concealment for such goods, while in the country, and insures their prompt removal to foreign lands; and it places vessels, whose punctuality and dispatch have become indispensable to modern commerce, in positions of great embarrassment, against which they have no effective method of protecting themselves. The contrary rule works no injustice, for the burden of proof is upon the ship, and the lien, which by the maritime law attaches to her, always affords the shipper abundant security; and security for its value is all that the law is able to afford, in any case of disputed title to property of this description.

In accordance with these views, I must sustain the defence which the claimants have interposed. In the remarks which I have made, I have not intended to intimate that Messrs. Shaffer & Co. were in any way concerned with Forbes in his frauds, nor have I made it a ground of my decision, that they became a party to the fraud, by their subsequent acts in concealing the cotton in the way I have described. Shaffer & Co. undoubtedly advanced their money in good faith upon the bill of lading of the Lodona; but when they found a question raised as to their right to the cotton, they yielded to the temptation afforded by the rule which their advocate has sought to invoke; they obliterated the marks, mingled the bales with others, and caused its shipment in this steamer, in the hope thereby to place the cotton in a foreign port, where the bales could with difficulty be identified, and their right to it would be likely to pass challenge. In my opinion, they should take nothing by such action.

I have thus far treated this case, as if no other cotton was involved except the 140 bales shipped in the Colson. But the bill of lading, sued on, calls for 200 bales, of which only 35 have been delivered to James Finlay & Co.

The original transfer from Forbes to Porter & Co. was of 140 bales only. These bales had been marked and numbered before they were shipped on the Lodona, and with them, in the same bill of lading, were 25 bales, making the 165 bales consigned to Shaffer & Co. After Shaffer & Co. received the 165 bales, they so dealt with the marks, as to make it impossible to identify the 25 bales, which were added by Forbes to the bales shipped by the Colson. They also afterwards added 35 other bales, from cotton of their own stored in West street, making the 200 bales; and all again were marked with new marks. Upon the arrival of the 200 bales in Liverpool, by an agreement between the consignees of Hentz & Co., the agents of Porter & Co. and the steamer's agent, the shipment was divided, and 165 delivered to Forbes, and 35 to Porter.

By that arrangement all parties are bound, and the delivery and acceptance of the 35 bales must be held to be a performance of the bill of lading, so far as that number of bales is concerned. The libellants claim further however, that in any event they are entitled to a decree for 25 bales, inasmuch as Porter's title, derived from the shipment of the cotton in the Colson, was confined to 140 bales. On the other hand, the claimants say that Porter demanded and received the whole 165 as his property, and that they have proved a state of facts which they insist, made him the owner of the whole 165 bales, which came by the Lodona. Here again, I must decide in favor of the claimants. The fact is unquestioned that Shaffer & Co. purposely mingled the bales to prevent identification. They had possession of the 200 bales for three or four days in New York, and their agent removed the marks. It would have been easy for them, to have maintained the difference in marks, which

existed when they received the cotton, and then easy for them to have pointed out, what bales, other than those from the Colson, were shipped on the Lodona; but they never attempted to do so; on the contrary, they have sought to make the confusion of marks work in support of their possession of the goods, and now insist here that the bales cannot be distinguished, and therefore they claim a decree for all.

But the law declares that one who intentionally mingles goods of his own with another's, for the purpose of concealment, and to prevent tracing the property, must lose the whole. The acts of Shaffer & Co., in regard to the 25 bales in question, must be followed with the consequence which the law attaches to such acts; and I must hold, that when the 140 bales shipped by the Colson, and the additional bales, were confused and mingled, as they were, to prevent any identification, the whole became the property of Porter & Co., and they thereby acquired the right to receive the 165 bales which were delivered them by the steamer.

The libellants must therefore fail to recover for any portion of the cotton delivered to Porter & Co. in Liverpool, and a decree must be entered, dismissing the libel with costs.

This case was affirmed by the circuit court on appeal [Case No. 6,998, and 93 U. S. 575].

Case No. 6,998.

The IDAHO.

[11 Blatchf. 218.] [1]

Circuit Court, E. D. New York. July 2, 1873.[2]

DELIVERY OF GOODS—TITLE OF SHIPPER—DENIAL OF BY CARRIER—CONFUSION OF GOODS.

1. M. shipped, at New York, on a steamship, for Liverpool, 200 bales of cotton, and received from the vessel a bill of lading therefor, which he endorsed to the libellant, who had purchased the cotton. At Liverpool, the vessel delivered 165 bales of the cotton to the agent of P., who claimed to own the cotton. As to 140 bales, it was shown that P. was the real owner of them. As to the remaining 25 bales, it was shown that the libellant, who originally owned such 25 bales, had intermixed and confused them with the 140 bales, in an effort to obliterate the original marks on the 140 bales, so as to prevent their identification by other persons claiming them, and it did not appear that the 140 bales could have been identified, at Liverpool, so as to be separated out of the 165 bales, and the bales were of different grades or qualities, and different values: *Held*, that the delivery of the 165 bales to the agent of P., at Liverpool, was proper, and that the libellant could not recover the value of any of them from the vessel.

2. The rule that the carrier cannot dispute the title of the shipper of goods, is subject to two conceded exceptions—1st, where the true owner has compelled a delivery to himself by judicial proceedings; 2d, where the shipper has obtained possession of the goods by fraud or felony, and they have been delivered by the carrier to the true owner. Moreover, the carrier may defend himself by proof of actual delivery of the goods to the true owner, although without judicial compulsion. The true rule is, that the carrier cannot dispute the shipper's title, while retaining the possession of the goods; but he may, if he have actually delivered them to the true owner.

[See note at end of case.]

3. The master of a vessel signed a bill of lading for 140 bales of cotton, as shipped on board. The bill was endorsed to P., and he advanced money on the faith of it. No such cotton was on board of, or had been delivered to, the vessel, when the bill was signed. Seven days afterwards, the 140 bales were delivered on the wharf at which the vessel was lying, in the usual place of deposit for cargo to be taken on board, and were received by the mate of the vessel, on its behalf, and receipted for in the name of the vessel, by her proper officers, but were not put on board. Afterwards, and on the same day, the cotton was removed by the shipper: *Held*, that the cotton was delivered to the vessel, and that P. became its owner, as against all persons whose rights did not accrue prior to the delivery of the cotton to the vessel.

4. The rule stated, in respect to a confusion of goods.

[See note at end of case.]

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

In admiralty.

James Emott, for libellants.

William G. Choate, for claimant.

HUNT, Circuit Justice. This is a libel for the non-delivery of 165 bales of cotton. The district court dismissed the libel [Case No. 6,997], and the libellants appealed to this court. On the 4th of May, 1869, Thomas W. Man shipped, at New York, on the steamship Idaho, for Liverpool, 200 bales of cotton. Man received a bill of lading, and endorsed it to James Finlay & Co., Liverpool, at the request of the libellants, to whom he had previously sold the cotton. On arrival at Liverpool, 165 bales of the cotton were delivered to Baring, Brothers & Co., and 35 to the libellants, their demand for the residue being refused. The delivery to Baring, Brothers & Co. was upon the order of William J. Porter & Co., who claimed to own the cotton. The delivery of the cotton to the agents of Porter & Co. is justified on the grounds: 1. That Porter & Co. were the owners of the cotton; 2. That the cotton was taken from the vessel by the sheriff of New York, upon a replevin proceeding against the vessel, instituted by the direction of Porter & Co. If the first proposition is a sound one, and the facts fall within the principle, it will not be necessary to discuss the second one.

It is laid down in the books, that a carrier cannot set up, against the shipper, a naked jus tertii, or adverse title of a hostile claimant. Story, Bailm. §§ 266, 582; Ang. Carr. § 335. It is conceded, however, that, where the true owner has compelled a delivery to himself by legal proceedings, such delivery

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

[2] [Affirming Case No. 6,997. Decree of circuit court affirmed in 93 U. S. 575.]

is a defence to the claim of the shipper. So, it is conceded, that, where the shipper has obtained the goods by fraud or felony, the carrier may deliver them to the true owner. I am of the opinion, that this rule is subject to another qualification, to wit, that the carrier still holds the goods in his possession. A carrier receiving goods from A., for carriage, cannot, when called upon for the goods, which are still in his possession, defend himself by saying that B. is the true owner of the goods. But, if he have actually delivered the goods to B., and B. is the true owner of them, then, I conceive, he may so answer. Among others, two reasons may be given for this rule. The delivery to the carrier, and his undertaking to transport and deliver, are based upon the assumption and representation, by the shipper, that he is the owner of the goods, or, at least, that he has such title that he has a right to deliver them to the carrier, and to receive them on arrival at their destination. Thus, it is conceded, that, if the shipper has stolen the goods, or obtained them by fraud, he cannot enforce against the carrier the contract to deliver, although the carrier still retains the goods in possession. This is upon the theory that he never had title to the property, and that the carrier's contract was based upon the contrary assumption, which failing, his obligation ceases, and that he holds the property for delivery to the owner. If there be no title in the shipper, and the goods are already delivered to the real owner, the reason of the rule is still stronger. The carrier cannot relieve himself upon a theoretical idea of non-ownership in the shipper, unless where the goods are obtained by fraud or felony. Public policy will not permit him to hold the goods for his own benefit, and deny the title of his shipper. If, however, he is content to assume the burden of proving another to be the true owner, and to show that he has made delivery to such owner, he should be discharged of his contract to deliver to the assumed owner. Bassett v. Spofford, 45 N. Y. 387; Bliven v. Hudson River R. Co., 36 N. Y. 403; Rogers v. Weir, 34 N. Y. 463; Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; Finlay v. Liverpool & G. W. Steamship Co., 23 Law T. [N. S.] 251. Another reason for this rule is, that, in case of such delivery, no damage is sustained by the shipper. Not being the owner of the goods, he loses nothing to which he was entitled. The true owner, the party entitled to damage in case of a loss of the goods, has them. The position is the same as if the goods were delivered to the shipper, and at once recaptured from him by the true owner. The rule, that the carrier may deny the shipper's title, where he has delivered the goods to the true owner, is founded in justice, and does not seem to be liable to the same objections as where the goods are held by the carrier. It differs from the rule, that delivery under a judicial proceeding is a defence, only in the nature of the evidence that the goods were owned by, and have been delivered to, the true owner. The propositions are based upon the same principle. I think it is the true rule.

Whether Porter & Co. were the true owners of the cotton is a compound question of law and of fact. Porter & Co.'s title is based upon bills of lading dated April 1st, 1869, certifying to the shipment on board of the brig C. C. Colson, of 140 bales of cotton, with marks, and of certain weights, and signed by Julius Patt, as master thereof. Accompanying the bills of lading, and based upon them, were drafts to the amount of about $18,000, which were paid by Porter & Co., or credited to the account of the shippers. The title of the appellants was based upon an actual shipment on the Lodona, the forwarding of a bill of lading, and the delivery of the cotton in dispute. The facts in relation to the shipment to Porter & Co. are substantially as follows: When the bill of lading was signed by the master of the Colson, on the 1st of April, 1869, no such cotton as described in it was on board, or had been delivered to the vessel. The bill was executed by mistake or by fraud. It is said that the cotton was actually delivered on the 8th of the same month, and that the bill of lading became operative and effectual from the time of such delivery, no rights of other parties intervening before such delivery. Rowley v. Bigelow, 12 Pick. 314; Halliday v. Hamilton, 11 Wall. [78 U. S.] 565. This appears to be the law. Was there a delivery on the 8th of April, 1869? On the morning of that day, the 140 bales of cotton in question were drawn from the cotton press, and delivered to the Colson for shipment, in the manner testified to by F. M. Roby, the mate of the vessel. Another vessel laid next to the wharf. Close to her, and outside of her, laid the Colson. Mr. Roby says: "These bales were delivered at the wharf at which the Colson was then lying, upon which all cargoes intended for her were deposited. I received the cotton, as mate, on behalf of said brig, and it was not put on board. When received, the cotton was deposited on the wharf, within forty feet of the Colson. It remained there, in my custody, as mate, from some time in the morning of the 8th of April, 1869, when it was brought there, until the evening of that day, when it was carried away. * * * The tackling of the Colson did not reach to the place on the wharf where the cotton was deposited. * * * The wharf was the usual and only place to deposit freight, when delivered to the vessel to be taken on board. This cotton was deposited in the usual and customary place for cargo to be deposited for the Colson. * * * I gave receipts for 126 bales of cotton of the 140 bales, and Mr. Keenan, second mate, receipted for 14 of the bales." The receipts

mentioned were to the Shipping Press Co., from whence the cotton was sent to the Colson by the order of Forbes, the shipper, and were in the following form: "New Orleans, April 8, 1869. Brig C. C. Colson. Received, in good order, from Saul, Boyd & Co., Shippers' Cotton Press, * * * bales cotton, marked * * *. F. M. Roby." The cotton was removed on the evening of the same day, by Forbes. I cannot doubt that this constituted a good delivery of the cotton to the vessel, and that, from the moment of such delivery, the cotton was in the custody of the vessel, and was, in law, shipped on the vessel. It was a delivery to, and a receipt by, the vessel, for the purpose of shipment. It was the commencement of the liability of the carrier, which dates from the time the goods are received by him for the purpose of transportation. 1 Pars. Mar. Law, 132, note 1, where the cases are reviewed. The bill of lading attached from the receipt of the goods, and it was the duty of the officers of the vessel to have retained them, to answer to the claim of the holder of it. Whoever then and afterwards held the bill of lading was the owner of the goods. Their subsequent removal, while it might induce the successful perpetration of a fraud, did not affect his title. Bailey v. Hudson River R. Co., 49 N. Y. 70.

The statute of Louisiana, which prohibits and makes criminal the delivery of a bill of lading, except upon a receipt of the goods, does not affect the case. The bill of lading, when delivered, was of no effect, and the statute cannot make it more than void. What is the effect of a subsequent delivery, is not within the scope of the statute. There is no reason to suppose that the statute was intended to prevent the remedying of a mistake, or the reparation of a wrong, so far as it was in the power of the party to do it. The goods were shipped on the 8th of April, to Porter & Co., and, by such shipment, and the previous bill of lading, their title became perfect.

As the holders of this bill of lading, Porter & Co. were the true owners of this property. The carrier delivered it, in Liverpool, to their agents, and, according to the suggestions already made, such delivery discharged him from liability to a shipper who was not such owner.

The details of this case are extended. Numerous questions of law as well as of fact were argued by the respective counsel. They do not affect the main propositions hereinbefore stated. If I am correct in these, the case, in its general principle, was well decided below. I have not discussed the question of identification, as I am satisfied that the cotton delivered to the Colson is the same that was shipped on the Idaho, and the subject of the present suit. I have not discussed many points which were elaborately argued on both sides, nor have I attempted an analysis of the cases upon disputed questions. I have passed upon facts enough to justify a conclusion, and have referred to authorities so far as I conceive it to be necessary to sustain the positions taken.

In addition to the 140 bales of cotton, the agents of Porter & Co. received from the vessel 25 other bales, which were originally the property of the appellants. This has resulted from an intermixture and confusion of the goods by the appellants, in their efforts to obliterate the original marks upon the 140 bales, so as to prevent their identification by other claimants. If not in bad faith, the conduct of the appellants, in that respect, was unwise and unfortunate. It is possible, that, with great effort, the different parcels might have been separated, and the 140 bales identified, at Liverpool. I cannot say that this could have been done at all, certainly not easily. The bales were of different grades or qualities, and of different values. The setting apart of 140 bales would not certainly give to the owner the value of the cotton to which he was entitled. The difficulty of determining which were his bales and which were not, seems almost insuperable.

The rule on this subject is thus laid down by Chancellor Kent: "With respect to a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject, as tenants in common, if the intermixture was by consent. But, if wilfully made, without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. If A. will wilfully intermix his hay or corn with that of B., or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B. But, this rule is carried no farther than necessity requires, and, if the goods can be easily distinguished and separated, as articles of furniture, then no change of property takes place. So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity, and not the whole. This is Lord Eldon's construction of the cases in the old law. But, if the articles were of different value or quality, and the original value not to be distinguished, the injured party takes the whole. It is for the party guilty of the fraud to distinguish his property satisfactorily, or to lose it. No court of justice is bound to make the discrimination for him." 2 Kent, Comm. 364, 365; Lupton v. White, 15 Ves. 432, 440; Chedworth v. Edwards, 8 Ves. 46. I have had much doubt upon this branch of the case, but I am not able to say that the decree is erroneous.

The transactions in the courts of New Or-

leans cannot affect the question in litigation, which is simply as to the ownership of the 165 bales of cotton, when delivered in Liverpool to the agents of Porter & Co. If they were then properly delivered to them, the decree is right, and must be affirmed. The accounts of the parties, or any equitable claims arising from other transactions, must be disposed of in a suit to be brought for that purpose. The decree is affirmed, with costs.

[NOTE. The libellants then appealed to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Strong, who said that actual delivery by the bailee on the demand of the true owner, who has the right to the immediate possession of the goods bailed, is a good defense to the claims of the bailor. This is not confined to the two exceptions mentioned by the circuit court. The owner of goods who willfully and wrongfully mixes them with those of another of a different value and quality, so as to render them undistinguishable, is not entitled to any part of the intermixture. 93 U. S. 575. See Case No. 6,996.]

IDAHO, The (HENTZ v.). See Case No. 6,997.

Case No. 6,999.

The IDA L. HOWARD.

[1 Lowell, 2;[1] 27 Law Rep. 257.]

District Court, D. Massachusetts. May, 1865.

SALVAGE — DERELICT — CONSUMPTION OF SHIP'S STORES BY SALVORS—COMPENSATION.

1. Salvors of a derelict vessel have the right to retain possession until the salvage service is completed.

[Cited in The Cairnsmore, 20 Fed. 522.]

2. But if their own means are inadequate they are bound to accept additional assistance, if offered.

[See The Amethyst, Case No. 330.]

3. If, in such case, a steamer furnished by underwriters is offered the salvors free of charge, they cannot found a claim to increased compensation upon their acceptance and use of the steamer.

4. The use and consumption by salvors, in the course of their service, and for their necessary subsistence, of stores found on board a derelict, is proper, although they could have brought stores of their own on board without great inconvenience.

5. Salvage of derelict property is compensated by similar rules as obtain in respect to property not derelict. If the abandoned vessel lies in or near a frequented harbor, the chief ground of enhancement of salvage by reason of her being derelict is that the finders have all the responsibility of the enterprise without aid from the master.

[Cited in The Hyderabad, 11 Fed. 755.]

6. Where numerous salvors of a derelict vessel and cargo, stranded in Boston harbor, labored diligently during more than one day, and furnished lighters, and aided materially in the salvage, which however, would not probably have been successful but for the services of a steamer and some other appliances furnished them by the underwriters, they were allowed $2000 and expenses as salvage on a value of $12,000 saved.

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

In admiralty.

On the 15th of February, 1865, the schooner Ida L. Howard, of about one hundred and sixteen tons burden, owned in Portland, and bound on a voyage thence to Philadelphia, with a cargo consisting chiefly of barley in bulk, attempted to make the harbor of Boston to avoid an impending storm. At about eleven o'clock at night, while holding her course, as her master supposed, towards the harbor, she struck on what are known as the "Egg Rocks," near Boston light. After staying by her for some two hours, and about an hour before high water, the sea making fast, and the schooner being in imminent danger of going to pieces, the master and crew all left her in their only boat, taking with them most of their clothes and personal effects, and such other light articles of value as they had on board, and finding no safe landing at any nearer place, there being much ice floating in the bay, rowed to Boston, where they arrived at about eight o'clock the next morning, the 16th.

In the mean time the vessel had driven off or over the ledge on which she had originally struck, and had gone over to Point Allerton, about a mile distant, in a southerly direction, where she was stranded, on a rocky beach, going on apparently at or near high water, and was found by the libellants between seven and eight o'clock in the morning, hard aground, and somewhat heeled over to starboard. The libellants, thirty-six in number, were all inhabitants of Hull, and several of them experienced wreckers. They waded on board, through water and floating ice about three feet deep at the bow, the tide being ebb and within about an hour of low tide, and found that the schooner had all sails set, of which the main topsail and flying jib were considerably torn; that she was about one-third full of water, and that both pumps were frozen up. The libellants immediately took energetic and skilful measures for the relief of the vessel. They hauled down and made fast the sails, and thawed out the pumps. They sent to Hull, about a mile and a half distant, for an anchor, which was brought round by a small schooner belonging to the libellants. This anchor and two belonging to the Howard were carried out through the surf, with a good deal of difficulty and some risk, and hauled taut; and a steam tug-boat, the Dayspring, was telegraphed for to Boston, and came down, arriving some time before high water.

At high tide, in the afternoon, by heaving on the anchors, and with the aid of the tug, the libellants got the stern of the vessel round directly to seaward, and tried to push her off the beach, but failed, the tug parting two hawsers, and the schooner moving but slightly. During the morning the wind had moderated, and again

increased, blowing a whole sail breeze from the eastward, and the sea was very rough. In the afternoon the wind hauled to the northward, and moderated again, and so continued until the vessel was got off the next afternoon, and the sea gradually went down. In the forenoon, and some hours before this attempt was made to get the schooner off, her master came down, and being unable, as he testified, to go on board by reason of the surf, had a conversation with some of the libellants, who were in the little schooner Laurel, which had brought the anchor round from Hull. He told them who he was, inquired into the condition of the vessel, said he had not come to interfere with them, but that they were to go on and get the vessel off, and should be well paid if they succeeded, and asked where they should convey her if they got her afloat. The master then went back to Boston. A few of the libellants remained on board all night. Others came back with their schooner Thetis, after the tide had risen that night, and began lightening the vessel by taking off the deck-load, which consisted of eight wooden hay-presses, in pieces—a full deck-load. This work was continued by the Thetis, assisted afterwards by the schooner Malcom, belonging to the libellants, until the whole deck-load had been got off, which was not long before high tide in the afternoon. The libellants also carried out a fourth anchor. At an hour or an hour and a half before high tide, the Dayspring came down again from Boston, at the request of the libellants, to aid in the second attempt to pull the schooner off the beach.

At some time on the 16th of February, the underwriters of the cargo heard of the disaster, and engaged Mr. Tower, who is agent of the New York and Boston underwriters, and a commissioner of wrecks under the laws of Massachusetts, to look after the matter. The president of the office gave Mr. Tower a letter giving him charge, as he expressed it. He engaged the steamtug Starbuck, and a schooner with cables, &c., often employed by the underwriters, and early the next morning went down in the tug, and going as near the wreck as was prudent, had a conversation with one of the leading salvors, master of the Thetis, found that the barley was in bulk, and that the salvors had no bags, and went back to Boston for shovels and bags, and some other tools and implements which he thought necessary, and which he procured, and left Boston again some time after noon, and, in going down, overtook the master of the Howard with a mate and one man rowing towards the wreck, took them in tow and arrived there soon after the Dayspring, that is, an hour or more before high water. How many men came with Mr. Tower did not appear. From this point there was some little difference in the testimony, and a good deal in the legal inferences sought to be drawn from it on either side.

Either the master or Mr. Tower, or both, told the salvors that they had come with additional means and assistance, and demanded the right to discharge a part of the cargo, and to take the direction of affairs. The libellants refused to give up the charge of the vessel and to receive the assistance, except on terms. They offered to hire Mr. Tower and his men, which offer was indignantly refused. They at first declared that the tug Starbuck should not assist; but soon after, and before high tide, made a bargain with her master for her assistance upon terms agreed between them. The Starbuck and Dayspring made fast to the wreck, the libellants heaved on the anchors, and the vessel was hauled off the beach after an hour of severe labor. The tugs took the saved schooner, the salvors' schooners, Thetis and Malcom with the hay-presses on board, and the underwriters' schooner Kate in tow, and all proceeded together to Boston, where the Howard was safely moored and delivered to her master. An anchor and some chain cable, which was thrown over at the last moment, to lighten the vessel, were recovered by the libellants, and delivered on board of her the next day, and on that day, the parties being unable to agree on the amount of salvage, this libel was filed.

J. C. Park & J. M. F. Howard, for libellants, insisted that the schooner was derelict, and that the salvors were entitled to a moiety of the value saved.

F. C. Loring & J. Lathrop, for claimants.

LOWELL, District Judge. Salvors, strictly so called, are persons who undertake to save property in peril, at the request of the owners, or of their agent, the master; and if any definite contract is made, in any case, freely and fairly, they are bound by its terms. But if no bargain is made, still the salvors are under the direction and control of the master, and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation, if their lien is not endangered. Finders, on the other hand, take possession, primarily by right of discovery, and cannot be dispossessed afterwards by the owner or master. Again, finders being in possession under no contract, may, I suppose, abandon their enterprise at any time before other persons, either salvors or owners, who might have saved the property, if they had not, have intervened, or been ready to intervene; in other words, if their exertions have not diminished the chances of ultimate safety; and this without waiting for any such danger to life, or apparent hopelessness of the enterprise, as would alone justify salvors in such abandonment. On the other hand, both salvors

and finders are under an implied obligation to use good faith, honesty, skill and energy in what they do undertake. Their services are, at the present day, compensated upon principles substantially similar, and diminished or forfeited alike by want of due care and skill, or by positive malfeasance. I cannot, therefore, assent to the argument for the libellants, that if this is a case of derelict goods, the salvage compensation should be a moiety, or some definite proportion approaching a moiety of the value of the thing saved. Post v. Jones, 19 How. [60 U. S.] 150. The compensation, when we come to it, must be given on the general principles of salvage, with this element of merit, that the salvors have not, in a case of derelict or quasi derelict property, and had not in this case, the advantage and relief of the oversight and direction of the master of the vessel, who is presumed to be the most competent person, and the person most deeply interested in the proper direction of affairs, in such a calamity; and as oversight and responsibility are more highly paid than mere labor, their compensation should be enhanced accordingly.

When an abandoned vessel is found floating at large on the high seas, there is, of course, the consideration which, I apprehend, is at the foundation of much that has been said on the subject of derelict, that so far as any beneficial property of the owner is concerned, it is in the utmost peril; nearly as much so when it happens to turn out tolerably seaworthy, as if it were in very bad order, because, in any event, the chance of recovery must be very slight. But this does not apply to a wreck in the harbor of a town like Boston, where vessels are constantly passing and succor is always to be had. A fact which depends upon intent is often difficult to establish or to disprove. In this case, the master left his vessel to save the lives of the persons on board, at a time and under circumstances which render it doubtful whether he knew precisely where he was or could estimate very accurately his peril; he took with him, apparently, whatever was most valuable and portable. He went to Boston and noted a protest which has not been produced; he went down again, without his officers or crew, so far as appears, and without any means or intention to aid in the rescue of the valuable property which had been intrusted to him; he was afraid to go on board his vessel, for the surf; he told the salvors to go on and get the vessel off, and went back to Boston. It is disputed, and is almost the only fact that is disputed, whether he told the salvors that he thought he should go home to Portland; three witnesses swear that he did. He denies it. However this may be, it is clear that he might as well have been in Portland, for all the aid he gave by counsel or by act in saving the vessel and cargo at that time. His part of the affair appears to have been that of a disinterested spectator; surely a very singular position for the master of a vessel who had not abandoned her. There are two cases in which the abandonment was made under circumstances like those of the case at bar, and where the master's right was much stronger than in this, in which it was held that the salvors had a right to treat the property as derelict. The Sarah Bell, 4 Notes Cas. 147; The John Gilpin [Case No. 7,345].

Taking all the facts of the abandonment, and of the conduct of the master afterwards, I think the salvors' right of possession on the second day was superior to his.

It is said, that, whatever may have been the rights of the master, Mr. Tower, the commissioner of wrecks, had, by a statute of this state, the right of possession, whenever he chose to assert it; and I was urged to give a construction to this statute, which is said to be understood somewhat differently by the wreckers and the commissioner respectively. The present case, however, calls for no decision on this point, because Mr. Tower's evidence is very distinct, that he made no demand and assumed no authority as commissioner of wrecks. His office was well known to the wreckers, but for some reason, no doubt sufficient, he did not choose to assert it. He is agent of the underwriters as well as commissioner, and in the former character had a letter from the underwriters of the cargo which had not been abandoned, "giving him charge" of the property; but it is very clear, that neither those underwriters nor their agent could take charge of this wreck against the wishes of the salvors. But it is not, perhaps, necessary to rest the decision of this point solely on this ground. It is by no means entirely clear to my mind that the salvors understood that the demand of possession was made distinctly by the master, as master. He was there with Mr. Tower, and accidentally, so far as time is concerned; for, if Mr. Tower had not taken him in tow, he could hardly have arrived much before high water. Mr. Tower conducted the negotiations, and by his character, and by his having charge of the second tug and other appliances, though not by his official position, was the principal person; he showed the salvors his letter, he says, and reasoned with them. I am not clear that the salvors did not understand the demand, which they refused, to be that of the agent of the underwriters. The master's chief complaint, on this head, in his deposition, is, that they would not obey the agent; the agent, on the stand, appears to consider the master the person most aggrieved.

But whatever may have been the right of possession and control, the salvors were bound to accept the assistance offered them, if it was necessary to the ultimate success

of the enterprise, or would hasten that result in any material degree, as by saving a tide or the like. Upon this point, the libellants appear to have misunderstood their position. It was their duty to accept necessary assistance, even if offered by strangers; and they would reject it at their peril. If they could make no bargain for their aid, they must accept it without a bargain, and leave the owner or the court to adjust the compensation. Here it is evident that some part of the assistance offered by Mr. Tower was necessary. The event has shown that without the services of the Starbuck the vessel could not have been saved, at that tide, unless a part of her barley had been discharged, which the salvors could not do themselves, and refused to let Mr. Tower do. It is plain, on the evidence, that it required all the power of both tugs, working under a high pressure of steam, and even the jettison of an anchor and chain, to get her off, at the last moment that the tide remained sufficiently favorable. I cannot therefore justify the refusal of the libellants to accept her services. But they had an opportunity of repentance, and improved it; they engaged the services of the Starbuck, after a short delay, and by so doing saved the tide and their salvage. I am not curious to inquire whether their hesitation lasted for five minutes or for twenty-five; as the owners did not suffer by it, neither should the salvors. But, on the other hand, I do not think that the compensation of the salvors should be increased by their hiring the Starbuck, whose services were offered them, without charge by the underwriters. They were bound to accept those services, as I have already said, even if offered by strangers, leaving the salvage to be settled afterwards; but here was no question of salvage. Persons interested in the property tendered the gratuitous services of the tug. How then are the salvors to wait until they can make a bargain for what they were offered without price, and then adduce those services as something added to their own merit and "procured" by them, as they say in their libel? The Starbuck was not procured by them; and the question of their compensation must stand as if they had accepted her at once, as a salvor, if such had been her character, or as the underwriters' vessel, if such she were. In other words, the underwriters are entitled to the benefit of their own exertions and foresight; and the salvors are not to be paid for a foresight which they did not exhibit.

It remains to fix the compensation justly due to the libellants, a matter much more difficult than to ascertain either the facts or the law of this case, because it is one which has and can have no fixed scale of prices, and of which the principles, though well understood, are very general and difficult to reduce to computations. I take off nothing for the alleged embezzlement of clothing and provisions; because, resting solely on the evidence of the master, and that given some time after his first deposition was taken, and weighed by all the facts and evidence, I do not think the allegation is made out, except to this extent, that the salvors did make use of some of the vessel's stores and provisions, without plunder or waste. I am asked to say that such use is unlawful; and a brief note of a case before Judge Marvin, and found in his excellent work on Wreck and Salvage (section 105), is relied on. I have no doubt that decision was right; but as the case is not stated at all, it cannot be compared with this or any other case, and must be taken to have been decided upon its own circumstances, or upon some rule found to be necessary for the Florida wreckers, who form a distinct class or trade. It cannot be maintained, as a general proposition, that salvors are bound to find their own supplies, pending the salvage service. On the contrary, supplies so furnished, if of sufficient importance to be considered at all, form one of the items of the expenses which are to be refunded to the salvors. In this very case, if the libellants, some of whom staid by the vessel, continuously for two days, had brought their supplies from Hull, and carried them out to the vessel through the surf which the master was afraid to encounter, that fact would have been a proper one for compensation. It is rather for the advantage of the vessel that her stores were available for the purpose, and her owners can adjust the cost with any others who may be responsible to contribute, as readily in the one case as in the other.

I am satisfied, not only by the opinions of the libellants and their neighbors, but from a consideration of the state of the vessel with all her sails set, her position on the rocky beach, the amount and direction of the wind and surf, and the damage that she actually sustained, that she was in imminent danger of bilging when found by the libellants; and I think her safety from that peril is owing to their exertions. If she had bilged, the vessel and cargo would have been much more damaged than they were, if not destroyed. Besides this, the exertions of the salvors in pumping the vessel constantly, or as much as was necessary, in carrying out anchors through a surf which the master dared not enter, in removing the deck-load by night and day on board their own vessels furnished for the purpose, hauling on the anchors, and engaging the Dayspring, were energetic, meritorious, skillful, and well-directed services, and performed for the most part without the aid or advice of the master or any one else. These services have secured to the owners and underwriters a great part or all of a property valued at twelve thousand dollars; and though not completely successful, and not likely to have been completely successful at

that time without the aid of a second tug, yet they were essential, and the principal services in the salvage, and were continued for a long time, with some hazard in carrying out the anchors, with some exposure in wading on board, and by a large number of persons, most of whom, certainly, took an active and useful part.

As they are not entitled to credit for the Starbuck, I allow them one-sixth part, or two thousand dollars, and the money paid for tugs two hundred and seventy dollars, in all two thousand two hundred and seventy dollars. As it was said that the libellants were entirely agreed or could agree upon the division among themselves, and as their relations to each other are not such that any of them appear to need the protection of the court, no order is made upon that subject.

Decree for $2270 salvage.

IDA STOCKDALE, The (COMINGS v.). See Case No. 3,052.

Case No. 7,000.

The IDDO KIMBALL.

[8 Ben. 297.] [1]

District Court, S. D. New York. Dec., 1875.

DELIVERY OF CARGO—BILL OF LADING—NOTICE TO CONSIGNEE—FIRE.

1. A barque brought to New York from Savannah one hundred bales of cotton, under a bill of lading which excepted "the dangers of the seas and fire." The consignees filed a libel against her, alleging that she had delivered only eighty bales in good order, and about the quantity of seven more damaged by fire, and seeking to recover damages for the failure to deliver the whole in good order. The vessel arrived in New York on the 12th of October, 1865. The fire occurred on the dock on the 20th of October, about 11 a. m. A notice was published in a newspaper on the 13th of October, that the vessel would begin to discharge cargo that day. The consignees gave evidence to show that they went to the vessel every day, for several days before the fire, to get their cotton, and were on each day told that it would not be discharged on that day. On the part of the vessel evidence was given to show that all of the cotton which was delivered in good order, was discharged and taken away by the consignees before the fire: *Held*, that the evidence showed that part of the cotton was received and taken away by the consignees on the 17th or 18th of October.

2. Therefore, the consignees had notice to attend and receive the rest of the cotton as fast as it should be discharged.

3. Such of the cotton as came out on the day of the fire was separated on the pier so that it could have been readily taken away, and there was time to have taken it away before the fire.

4. There had been such a delivery of the cotton as to relieve the vessel from responsibility.

In admiralty.

W. Tracy, for libellants.

D. A. Hawkins, for claimant.

BLATCHFORD, District Judge. This libel is filed to recover the value of certain cotton in bales, being part of 100 bales, shipped by the libellants, at Savannah, Georgia, on the barque Iddo Kimball, for New York, on the 14th of September, 1865, under a bill of lading. The bill of lading excepted "the dangers of the seas and fire." The libel alleges that the barque arrived at New York on or about the 12th of October, 1865; that, on or about the 21st and 23d days of October, 1865, she commenced delivering said cotton to the consignees of it, but delivered to them only 80 bales of the cotton in good condition, and an equivalent quantity to about 7 bales in a bad condition and very much injured by fire; that the fire by which the same was injured was caused by the gross negligence and carelessness of the master and mariners of the barque, after her arrival at New York; and that the value of the cotton not delivered was $3,575.00 and the damage occasioned to the quantity delivered equivalent to 7 bales, injured by fire, was $240.00.

The answer alleges that the vessel, soon after her arrival at New York on the 12th of October, 1865, commenced delivering the cotton to its consignees; that she discharged and delivered to the consignees the whole 100 bales in as good order as received; that, after such discharge and delivery, a part of the 100 bales were, while lying upon pier 36, East river, where they had been discharged from the vessel, destroyed by a fire that occurred on the pier; that another part of the 100 bales, after they were discharged and delivered on said pier, were damaged by said fire; and that said fire was not caused by the negligence or carelessness of the master or mariners of the vessel.

The fire occurred on the 20th of October, 1865. The libel was filed on the 4th of November following, and the answer on the 28th of November following. The libel does not state when the fire occurred, nor does it state whether the 80 bales of cotton which were delivered in good condition, were delivered before the fire occurred. As the evidence is clear that the fire occurred on the 20th of October, and as the libel alleges that the vessel commenced delivering the cotton on the 21st of October, the import of the libel is, that none of the cotton was delivered until after the fire occurred. The answer alleges distinctly that the fire occurred after the whole 100 bales were delivered. The libellants admit that they received 80 bales in good order, and the question in dispute is as to who is responsible for the loss and damage by fire in respect of the 20 bales. The issue as to when the uninjured bales were delivered, with reference to the time of the fire, was made a prominent one on the trial, and is important on the point as to whether the consignees had notice that the

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

vessel was ready to discharge the cotton in question.

That the vessel arrived on the 12th of October is shown. A notice was published in a newspaper on the 13th of October, that she would commence to discharge her cargo on that day, at pier 37, East river. Mr. Savery, one of the libellants, testifies, in substance, that he went to the vessel every day for three or four days before the day of the fire, and saw each day the mate, who informed him each day that his cotton would not be discharged on that day; and that on the morning of the 20th he was told the same thing by the mate. The fire occurred soon after 11 o'clock in the morning. Wehn, the cartman of the consignees, testifies that he learned of the arrival of the vessel and that she had a berth, and then went to her at her pier and saw a man on board who was in charge of the cotton, and announced that he had come for the 100 bales in question; that he was told in reply that it would be a day or two before the cotton would be discharged; and that he went to the vessel and sent to the vessel daily for three or four days before the day of the fire, and was always informed that it could not be told when the cotton would be out. This testimony is adduced to show that the cotton which was on the pier at the time of the fire was the first of the 100 bales which had been discharged. On the part of the claimant it is contended, that, in fact, all of the 100 bales, except what was in the fire (and perhaps 3 other bales still on board), had been discharged on the pier and taken away by the carts of the consignees on a day or days prior to the day of the fire; that none of the 100 bales remained on the pier during the night previous to the day of the fire; and that all of the 100 bales that was in the fire had been discharged from the vessel on the morning of the day of the fire. If this be so, of course the testimony of Savery and Wehn must be incorrect.

Carman, one of the consignees of the vessel, testifies that the vessel began to discharge on the 14th, Saturday, and continued to discharge every working day; that the first of the 100 bales was taken away on the 17th or 18th, and more or less of it was taken away every day until the fire occurred; and that over 80 bales were taken away before the day of the fire. A receipt book is produced, which is so far proved as to show, I think, with reasonable certainty, that some of the 100 bales were received by the cartmen of the consignees as early as the 17th or 18th. If this was so, of course they had notice to attend and receive the rest of the cotton as fast as it should be discharged. The evidence is, that the discharge of the cotton on board (some 950 bales) was continuous; that such of the 100 bales as came out of the vessel on the day of the fire, were separated on the pier in such manner that they could have been readily taken by the cartmen of the consignees; and that there was ample time for them to have been taken away by such cartmen after they were so put on the wharf and before the fire occurred. I think that, on the whole evidence, it must be held that the lost and damaged cotton was discharged on the wharf in good order and in a proper manner, and with such notice to the consignees as to constitute a delivery of the cotton to them, so as to relieve the vessel from responsibility. The libel must be dismissed, with costs.

Case No. 7,001.

IDE v. PHOENIX INS. CO.

[2 Biss. 333; [1] 2 Chi. Leg. News, 310.]

Circuit Court, S. D. Illinois. June Term, 1870.

WAIVER OF CLAUSE IN POLICY — RECEIPT OF THE PREMIUM.

1. A local agent of an insurance company may bind the company to waiver of the clause in the policy requiring formal proof of loss and barring suits not brought in one year. Statements that the proofs were "all right," and that the company would pay, amount to such waiver.

[Cited in Thompson v. Phenix Ins. Co., 136 U. S. 299, 10 Sup. Ct. 1023.]

2. Receipt of the premium, by the agent binds the company, though the agent convert it, and a policy is never actually issued.

In equity.

The complainant, in the fall of 1863, applied to John W. Lathrop, the local agent of the defendant at Jacksonville, Ill., for insurance to the amount of one thousand dollars, for the term of three years, upon his dwelling house in Morgan county. The agent, who was personally familiar with the property proposed to be insured, offered to insure it for that period for the sum of $13.50. Ide accepted the offer, and immediately paid in cash to the said agent the sum of $13.50 for said insurance; Lathrop, who was a dry goods merchant, and then very busy in his store, received the money, and entered it in his cash insurance record or book; but, alleging that he was then very busy, asked and prevailed on Ide to call at a later date to get his policy. Ide frequently, during the next few months, called in person or by agent at the store of the insurance agent to get his policy, but failed to do so on account of the absence of the agent, or his pressing engagements, or for other alleged immaterial reasons; Ide soon after temporarily removed to the state of New York, leaving the insured house in the possession of a tenant, which fact was well known to the agent of the insurance company. In the fall of 1864 the house was burned by accidental fire, not within any of the exceptions of the policies of the defendant company, which neither before or after the loss ever issued a policy to

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

said Ide. Lathrop never remitted the insurance premium to the Phoenix Company, but converted it to his own use. Ide gave prompt notice of his loss to Lathrop, at Jacksonville, who, after making inquiries, or professing to have made them, said that he was satisfied that the loss was all right, and no formal written proofs of loss were ever made or required. It further appeared by the depositions of Ide and three other witnesses, that Lathrop constantly professed himself satisfied with the proofs of the loss, promised payment of it to the complainant or his agents on different occasions, from the fall of 1864 to September, 1866, and constantly assured the complainant, and third persons, that Ide's loss was "all right," and would soon be paid. He also told Ide that the policy had been made out by him before the loss, but had been mislaid or lost, and that he had remitted the premium to the company, notified them of the loss, and that it was all right. In September, 1866, Lathrop finally notified Ide that the company would not pay the loss, nor do anything whatever. At the March term, 1869, of the Morgan county circuit court, Ide filed his bill against the defendant, setting up the foregoing facts, praying for an interlocutory decree for the execution of a policy of insurance to him, and a final decree that the company pay the loss, interest, and costs. The defendant obtained a removal of the case to this court.

H. D. Atkins and Gen. McClernard, for complainant, cited Tayloe v. Merchants' Ins. Co., 9 How. [50 U. S.] 390, and cases there referred to.

H. E. Dummer and B. S. Edwards, for defendant.

TREAT, District Judge. Although the policies of the Phoenix Insurance Company all contain provisions requiring written and formal proofs of loss within thirty days thereafter, and barring all suits for losses not brought within one year after the happening of the losses, the agent of the company has sufficient authority to waive these formalities of proofs, and bind the company thereby; and the acts of Lathrop in this case amount to such a waiver. His acts and assurances in regard to the payment of the loss are also sufficient to bind the defendant, and to waive the clause barring suits not brought within one year after the loss.

The parol contract for insurance upon the complainant's house was valid, and could be enforced without a policy. The receipt of the premium by the authorized local agent of the company is a receipt by the company, and a failure to issue a policy after the payment of the premium cannot be taken advantage of by the company in a court of equity.

A decree will therefore be entered in favor of the complainant that the defendant pay to him within thirty days the amount of the policy contracted for, interest, and costs of suit.

NOTE. The condition that no action shall be brought on the policy after a year from the time the right of action shall have accrued is not binding where the insurers caused the delay by holding out hopes of a settlement (Grant v. Lexington F., L. & M. Ins. Co., 5 Ind. 23; Coursin v. Pennsylvania Ins. Co., 46 Pa. St. 323); or by promising payment after the expiration of the year (Ames v. New York Ins. Co., 14 N. Y. 253). Consult, also, Curtis v. Home Ins. Co. [Case No. 3,503]. Certain acts held not sufficient to constitute a waiver of proofs of loss. Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen, 297; Boyle v. North Carolina Mut. Ins. Co., 7 Jones (N. C.) 373.

IDE (TUTT v.). See Cases Nos. 14,275a and 14,275b.

IDELL (UNITED STATES v.). See Case No. 15,436.

IGINIA, The (MULLER v.). See Case No. 9,917.

IGLEHART (BANK OF CIRCLEVILLE v.). See Case No. 860.

IHMSEN (McLEAN v.). See Case No. 8,882.

ILEX, The (PAUL v.). See Case No. 10,842.

Case No. 7,002.

The ILLINOIS.

[5 Blatchf. 256;[1] 2 Int. Rev. Rec. 77.]

Circuit Court, S. D. New York. Sept. 8, 1865.

COLLISION — STEAMER AND SAILING VESSEL—SIGNAL LIGHTS.

When a steamer discovers the light of an approaching sailing vessel, and then loses sight of it, it is her duty to check her speed, and even to stop, if need be, until she again discovers the light; and, if she fails to do so, she will be held in fault, in case she collides with the sailing vessel.

[Cited in Hoben v. The Westover, 2 Fed. 93; The State of California, 1 C. C. A. 224, 49 Fed. 174.]

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

This was a libel in rem, filed in the district court, by the owners of the schooner Statesman, against the steamer Illinois, to recover damages for a collision which occurred between the two vessels, about a quarter or half past eight o'clock p. m., on the 18th of August, 1863, in the Chesapeake Bay, at the mouth of the Potomac river, a little to the northward and eastward of the light ship anchored off Smith's Point on the west side of the bay. The district court decreed for the libellants [case unreported], and the claimants appealed to this court.

Edward H. Owen, for libellants.

Washington Q. Morton, for claimants.

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

NELSON, Circuit Justice. The schooner was bound up the bay to Baltimore. The steamer was on her passage from Alexandria, Virginia, to the port of New York, with some 1,300 officers and soldiers on board. The wind was from the east, about east-north-east, blowing three or four knots the hour, with an ebb tide. The schooner was close hauled on her starboard tack, heading northwesterly, about north by west. The case as stated in the libel is, that, when the steamer was first seen, she was heading to the southward, towards the schooner, and struck her starboard bow, carrying away her bowsprit, jibboom, head-gear, and fore-rigging, and drove her bow around, bringing her starboard side against and under the port side of the steamer. The case made in the answer is, that, while the steamer was heading about south-south-east, a light was reported on the port bow, which, as arterwards appeared, was the schooner, and which bore from one and one-half to two points on the port bow of the steamer, the steamer then heading about south-east by south half south; that the steamer's course was then further changed one point, by porting her helm, so that she headed about south by east, and the light opened, so as to bear about three points on the port bow of the steamer; that, after the second porting of the helm, the light disappeared; that, soon after, and while the steamer was proceeding on her course, south by east, the light reappeared, about two points on the port bow, and closing on the steamer; that the steamer's helm was then put hard-a-port, and her engine bells were rung to stop; that the schooner immediately came into view, steering across the bows of the steamer, and heading about west, towards the light ship; and that the schooner's jibboom struck the steamer on her port bow, and the schooner then swung alongside of the steamer and damaged her port wheel.

There were three persons on board of the schooner, Nickerson, the master, Wiley, the mate and wheelsman, and Wilson, the look-out, who were in charge of her navigation, and witnessed the collision, and who concur in saying that when they first discovered the lights of the steamer, their course was north by west, and that it was not changed till the moment of the accident, when the master ordered the wheel to be starboarded, in order to ease the blow. It is also in proof, that the light of the schooner was discovered on board of the steamer in time to have taken a course which would have cleared her; that, afterwards, those on the steamer lost sight of the schooner; and that, when they again discovered her, she was crossing the bows of the steamer, according to the proofs on the part of the steamer. On the part of the schooner the testimony is, that the steamer was then coming into the schooner on her starboard bow.

There is considerable conflict of proofs as to the course of the vessels, but I concur with the court below, that the weight of it is decidedly in favor of the position of the schooner, that, from the time she first discovered the lights of the steamer, the course of the schooner was not changed till the moment of the collision, and then to lessen the effect of the disaster.

The fault of the steamer, and in respect to which there is no dispute as to the fact, was in not checking her speed, and even stopping, if need be, after she lost sight of the lights of the schooner, until she again discovered them. There is no excuse for this neglect. The duty has been repeatedly enjoined by the decisions of the courts, and is obvious to all persons of any experience in navigation. It would, in all reasonable probability, have prevented the disaster in this case. The evening was clear and starlight, and there was a bright light in the bow of the schooner. There could, therefore, have been no great difficulty in again making the light, after it had disappeared, if the proper steps had been taken by those on board of the steamer. The decree of the court below is affirmed.

Case No. 7,003.

The ILLINOIS.

[Brown, Adm. 13.] [1]

District Court, D. Michigan. March, 1857.

PRACTICE—SETTING ASIDE DECREES—RULE 40.

1. It seems a court of admiralty has no general power, at least after expiration of the term to set aside a final decree on the ground of oversight, inadvertence, or mistake.

[Cited in U. S. v. Leng, 18 Fed. 26.]

2. The ten days allowed by rule 40 for setting aside a decree, are restrictive, and a motion made after this time cannot be entertained.

[Cited in The Oriental, Case No. 10,569a; Allen v. Wilson, 21 Fed. 884.]

This was a motion by William Dixon, master of the propeller Illinois, to open a decree obtained by default, and for leave to answer. A libel for collision was filed against the propeller, September, 3d, 1855. The propeller was seized, and the usual stipulation given, to answer judgment, on the 15th of the same month. Certain depositions were taken in Cleveland on the 26th, and upon October 23d, no answer having been filed, although an appearance had been put in, a default was entered, and the cause referred to the clerk to assess damages. On October 25th he made his report, and on the 29th a final decree was entered for $1,926 and costs. An appeal was taken from this decree, November 6th, and in the following June the appeal was dismissed by the circuit court. On August 26th, 1856, this motion was made upon affidavits of merit, and a further showing that claimant's proctor was absent from the city when the time given to answer had expired and

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

the decree was taken, and that he had taken the appeal supposing the case could be reheard upon the merits. An answer was also tendered.

James V. Campbell, for the motion.
John S. Newberry, contra.

WILKINS, District Judge. Upon the return day of the process in this case, twenty days were taken by claimants to answer. At the expiration of this time, his counsel being engaged in the trial of a cause at Monroe, which had been unexpectedly prolonged, his default was taken, and a final decree was entered, October 29, 1855, for $1,926. Claimant's counsel returned from Monroe a few days after the decree was entered, and at once took an appeal to the circuit court. This appeal was, however, dismissed upon the ground that an appeal would not lie upon a decree taken by default. He now moves the court to open the decree, and for leave to answer. Under general admiralty rule 29, the court may, in its discretion, set aside a default, and admit the defendant to answer at any time before final hearing and decree, upon payment of costs. This rule obviously has no application to cases where a final decree has been entered. Under rule 40, the court may, in its discretion, upon motion of defendant and payment of costs, rescind a decree by default and grant a rehearing, at any time within ten days after the decree has been entered. The material point to be determined in this case is whether the court has power thus to rescind a decree not only after the ten days have expired, but when a whole term has intervened between the rendering of the decree and the making of the motion. Aside from the rule, I have very grave doubt whether a court of admiralty ought to open a final decree, particularly after expiration of the term, upon the ground of oversight, mistake, or forgetfulness on the part of defendant or his counsel. The English authorities are unanimous in holding that a final decree cannot be opened upon this ground.

In the case of The Vrouw Hermina, 1 C. Rob. Adm. 163, 168, a decree was rendered, January 27, 1799. On the 7th of February the counsel moved to open it, on the ground of a mistake on his part. The court (Sir W. Scott) says, "I will not go so far as to lay it down universally, that it is not in the power of the court to reconsider its decrees on very particular occasions." Speaking of the case then before the court, he says: "As a precedent, it would be a practice highly dangerous, and the liberty of reviewing its decrees, if it exists, which I do not affirm, is a liberty which the court would exercise with very great caution; because I foresee that, were applications of this sort to be easily admitted, they would be very frequently made on reasons much less sincere than those which are now offered to the court." "Without discussing the power of reviewing a sentence," he rejects this application. In the case of The Elizabeth, 2 Act. 57, application was made to rescind a decree condemning the cargo, on the ground that there had been an understanding that upon the production of certain affidavits consent should be given to a rescission of the decree—and these proofs were now produced—and the counsel cited a case, to show that the court would rescind its decrees. But the court (Sir John Nicholl) says: "As far as I recollect that case, it rather proved the rule that this court does not rescind its decrees. The motion to rescind was made upon a reference to the registrar and merchants; but was refused, as it was said it was not the practice of this court to rescind its decrees, and open the matter anew, whatever other redress the parties might obtain by an application to the court, should it be proved they were materially aggrieved,"—and the application was refused.

The case cited by the counsel above was that of The Geheimirath [2 Act. 58, note], decided in 1798, in which it was represented to the court that since the decree the proofs upon which the decree had been rendered had been impeached, and shown to be fraudulent, and a motion was made to rescind and allow evidence to be given of that fraud. "But the court refused, and said, their decree being final, it would be contrary to their practice to rescind it and open the subject anew; nor where even it appeared a fraud had been practiced, they could not go out of the order of their practice; the parties, however, might apply to the court in another shape, if they could satisfactorily prove they were aggrieved." In the case of The Fortitudo, 2 Dod. 58 (June, 1815), the libellants commenced one action on a bottomry bond—then dismissed it, alleging the claim was settled. Shortly after they commenced a new suit, on the same bond. The defendants moved to dismiss the latter suit, on that ground—and the court granted the motion, with costs, and demurrage. The court (Sir W. Scott, p. 70), after commenting on the affidavits, says: "They do not, in my apprehension at least, render it necessary that I should inquire how far the permission again to open a case which has been once closed comes within the range of that large discretion with which this court is by its commission intrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be reopened. But it certainly would not do so unless there existed very strong reasons to show the propriety of the measure. I feel no hesitation in saying that mere negligence, or oversight, would not be a sufficient ground for such an extraordinary interposition of the authority of the court. A direct case of

fraud, or something equivalent to it must be made out, before I can suffer such a step to be taken." And then he says, in regard to the affidavits, "Let us see, then, whether there be any such ground in the present case. There has been no fraudulent concealment or withholding of documents. The master has sworn, and it is not denied that he produced all the papers and delivered them over to the (libellant, who) must be presumed to have examined and scrutinized them. They cannot now be heard to say that they acted improvidently and without due caution. If they did so in point of fact, they must abide by the consequences of their own negligence."

A case relied upon by the defendant's counsel is that of The Monarch, 1 W. Rob. Adm. 21, decided in 1839. An interlocutory decree had been pronounced by Sir John Nicholl, deceased, after a hearing on evidence, it being a case of collision, declaring both parties in fault, and referring the cause to the register to take accounts, &c. A question of costs was afterwards raised, and a motion made to alter the decree in that particular; and a decision made in the house of lords, in 1824, was cited to show that in such a case the costs should have been (as a matter of law) decreed differently. Doctor Lushington, who heard the motion, refers to that case, and says that if that case had been brought to the notice of Sir John Nicholl he would unquestionably have varied the decree to conform to it, as regards the costs, if it had been in his power. He then goes on to consider whether he would have had the power, according to the practice of the court. He says (page 26): "If it was a frequent practice to alter the decisions of the court, much evil and inconvenience would doubtless ensue in consequence. At the same time, it is to be observed that great injustice may be occasioned if this court has not such a discretionary power of varying its decrees as is possessed by other courts of this country. The court of chancery, before enrollment of a decree, may, and often does alter, vary and amend it, &c." This case does not sustain the defendant. In the first place, there had been no final decree at all—and the case was still before the court, standing on a mere "interlocutory" decree of reference—and yet the court hesitated much about granting the motion. In the second place, the amendment which was allowed was one of law entirely, and not of facts. It was a case of an error of the court, as to the law—an error apparently of record. Again, it was an amendment, merely, and not a rescission—still less a re-opening of the case for new proofs. Judge Conkling (2 Adm. p. 367), commenting on this case, says: "It seems very clear that the learned judge entertained no notion of any power in the court analogous to that exercised by courts of equity upon a bill of review, or of any power to grant a rehearing upon questions of fact." "The error to be corrected in the case before him was an error of law,"—and he says that this is the only case that contains, so far as he has discovered, an explanation of the views entertained by the high court of admiralty on this point.

These cases, extending over a period of sixty years, show that negligence, inadvertence, oversight, mistake of counsel or party, are no grounds for rescinding decrees, on motion, whatever other mode there may be. Fraud, or its equivalent, is the only ground, and in one case even that was held not to be good ground. The courts of admiralty in this country apparently follow the same practice. In the case of The Avery [Case No. 672], a decree had been rendered, condemning as prize a British vessel and cargo; afterwards a claim was presented by certain merchants of Morocco, alleging the property to be theirs, and asking that the decree be rescinded. The court refused. And Judge Story says that in cases of prize, a reasonable time is allowed for neutral claimants to interfere, "and if no claim is interposed within that time, condemnation follows of course, in poenam contumaciae. Nor is this a mere arbitrary regulation. It is to be found in analogous cases in the common law, &c.," "at all events, it is a part of the admiralty law which this court is bound to respect, and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule. Stare decisis is a great maxim in the administration of the law of nations." "This court can have no more jurisdiction to revive or review the cause, or to sustain the present application, than it can have to adjudicate upon any other cause which has been determined within twenty years." "It is utterly incompetent in this court, sitting as such, to grant an appeal in a cause which is no longer within their cognizance."

The case of The Martha [Case No. 9,144], decided in 1830, is in point, and the court, Judge Betts presiding, lays down the doctrine and its reasons at full length. In this case, a decree had been pronounced, dismissing the libel, with costs; afterwards, and in the following term, a motion was made to vary the decree as to the costs, and the motion was heard and granted. But on another motion being made for a decree against the sureties for those costs, the matter again came up, and the court vacated the last order, the judge observing he had supposed, when he made that order, that the case was still open. He says: "I should certainly never have allowed the argument in this cause to proceed, unless I had supposed that the whole case was under the control of the court, and that the former decree stood suspended until a decision could be had upon the question of costs." "The proposition now before the

court is, whether a court of admiralty, after hearing and definitive decree, can, of its own authority, rehear the cause or nullify the decree at any time subsequent to the term in which it is rendered." "The proceeding in this case had all the effect of a rehearing—the case had been disposed of." He alludes to the practice in the English admiralty and ecclesiastical courts, and in the French courts. As to the latter, he says: "In the French practice, which conforms very closely to the civil, the judgment becomes perfect as soon as it is pronounced, and the judge cannot correct it after the rising of the court, and after the register has entered the judgment upon the minutes as it was given." Cites Poth. Civ. Proc. c. 5, art. 2. He says that courts of chancery allow a rehearing upon sufficient reasons, at any time before decree enrolled, "but this practice has never been introduced into the courts of common law or admiralty." The judge then gives the reasons for this rule, as derived from "the character of the suits usually prosecuted here." "Usually it is of the last importance to suitors here to have an immediate dispatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark, that whether in the instance or the prize courts, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be obtained, and that when it is adverse to him, he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from courts of admiralty of the practice referred to, and I concur in the sentiments of the eminent men sitting in the English admiralty and consistory courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this court without the free consent of all parties to be affected by it."

In the case of The New England [Case No. 10,151], a petition, in the nature of a libel for a rehearing, or of a libel of review, had been filed. In deciding whether such a libel was admissible in admiralty practice, the court (Judge Story) refers to the case of The Fortitudo, above cited, and then says: "But I am not aware that after the decree has been enrolled or entered on record, and the term has passed, that any court of admiralty at least in this country, has ever entertained an application for rehearing. In the high court of prize commissioners in England, it is said to be the practice never to rescind a decree after it is passed, or to open the subject anew. But at the same time it was, by implication, admitted that another mode of redress might be adopted, meaning, I suppose, that a libel in the nature of a bill of review in equity might be sustained, &c." A libel of review is, of course, very different from a "motion." These cases in England and America settle this point, it would seem, beyond controversy, that courts of admiralty cannot, on motion, rescind a decree. There may be another form of remedy, but what that is we are not here called upon to discuss. Judge Story seems to think a libel of review would lie, but the present is a mere motion. In this respect (of not rescinding a decree after the term is passed) other courts follow the same rule.

In Hudson v. Guestier, a question was decided in the supreme court of the United States, at February term, 1810 (6 Cranch [10 U. S.] 281). At February term, 1812, a motion was made that the case be reheard (7 Cranch [11 U. S.] 1), but the court say, "that the case could not be reheard after the term in which it had been decided." This case is a leading one. It is cited by Judge Story in The Avery, above cited (1815); by Judge Betts in The Martha, 1830 [supra]. In Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 355 (1816), the court say: "A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." In Sibbald v. U. S., 12 Pet. [37 U. S.] 491 (1838), the court say: "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake —from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review in equity, and writs of error coram vobis at law, are exceptions which cannot affect the present motion." In Wash. Bridge Co. v. Stewart, 3 How. [44 U. S.] 425 (1844), the court say: "The want of power in this court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question."

In the circuit court of the United States the same rule prevails at law and in equity. In Albers v. Whitney [Case No. 137], a motion to amend a judgment by inserting "John," instead of "James," which had been inserted in the writ by mistake, was refused. Judge Story alludes to the United States statute of jeofails (Judiciary Act 1789, § 32

[1 Stat. 91]), and says it provides for amendments in form only—that by it "no authority is given to the courts of the United States to make any amendments in judgments, except as to defects and want of form," and this he says is not a matter of form, and there is nothing on the record to amend by. He further says: "It is plain that at common law, no judgment was amendable after the term at which it was entered, and amendments could be made in the process, &c., only while the cause stood in paper, and before judgment. The authority to amend them, even in England, in cases of this sort, is dependent upon and limited by statute." In Wood v. Luse [Case No. 17,950], a motion was made, after judgment rendered and the term elapsed, to set aside certain proceedings in the case. The court say, "If the motion was not objectionable on other grounds, it is clear that the proceeding on the original suit, and the notes on which it was founded, could not be revised in this manner." Referring to the New York practice, he says: "But by the common law, the judgment of a previous term cannot be set aside on motion; and this is the doctrine of the supreme court,"—"a clerical error in the entry of the judgment will be corrected at any time, but judgments cannot be set aside on motion, after the term at which they were entered." In Doggett v. Emerson [Id. 3,961], a motion was made (in equity) to vary a decree pronounced, but not actually entered, at a previous term. The motion was refused, and Judge Woodbury says: "But as an entry is necessary to complete their operation and give them full effect, like an enrollment of a decree, or a signature of it by the chancellor in England, it is in the power of the court to make changes in them before that is done, and probably before the term closes at which the entry is made." But after it is once pronounced and communicated to the parties, it would be, he says, "altogether destructive of judicial consistency and firmness to do so, unless made upon good and urgent cause, on a full rehearing by both parties." "There must be shown some obvious mistake of law or fact, or some new matter since discovered;" and he cites The Avery, above cited, as holding that the court will not grant a rehearing after the term has ended. In Jenkins v. Eldridge [Case No. 7,269], the court refused to vary a decree in chancery on petition. The judge says, "a decree is usually considered final after the end of the term at which it was rendered"—but may be before, as it was in this case. After it is final, a mere clerical mistake in figures or form, may be corrected on motion or petition, "but nothing done which goes to its merits and to the principles or orders themselves that have been made by the court." "In states where no statutes exist expressly remedying such cases, it is very questionable whether any power exists at common law to re-open or change, in a material part, any final judgment." He refers to the case of Cameron v. McRoberts, above cited [3 Wheat. (16 U. S.) 591], and says, that though in that case "some years had elapsed, the principle is the same whether it be days or years, if the judgment has gone from the waste book and minutes, and been entered up as perfected." And he also refers to a case not reported (Dixon v. Lewis), before the supreme court, at January term, 1845, in which the circuit court had suspended a final judgment by default, on motion of the defendant, on the ground that he had been prevented from appearing by mistake as to the term of the court. The majority of the supreme court held that the court below had no power to suspend that judgment—but the case went off upon another ground.

In the state courts the same rule prevails. In Miller v. Hemphill, 4 Eng. (Ark.) 488, in chancery, an order was made, October 10, 1845, dismissing a cause for want of prosecution. On the 10th April, 1846, on motion and affidavits, the cause was reinstated. On appeal, it was held that that order "was clearly coram non judice, inasmuch as at the term next preceding, the cause had been dismissed for alleged want of prosecution." See, also, Smith v. Stinnett, 1 Pike, 501. In Hill v. Richards, 11 Smedes & M. 194, 199, a bill in chancery was dismissed in 1842, on account of the failure of complainant to give security for costs, as required by a previous order. In 1846, a receiver, who had been appointed, and had acted in the case before its dismissal, applied by petition to the court for an allowance, which was granted. On appeal the court say, "a petition, in many respects, very nearly resembles a motion, &c. Either one or the other is proper only when a case is pending," or when a court of chancery has jurisdiction on petition by express statute. "After the dismissal of the bill in 1842, the original cause was no longer in court, the parties were no longer before it, and its jurisdiction was at an end." This case was approved and same point decided in Starke v. Lewis, 1 Cushm. 151. In Deeds v. Deeds, 1 G. Greene, 394, a decree was granted in June, 1847, divorcing the parties, and giving the custody of children to the father. Afterwards a petition was presented to set aside the latter provision, and granted. On appeal, held erroneous. The appellate court say that part of the decree "is absolute, and cannot be changed, altered or reversed by any court except an appellate court," or by bill, &c., impeaching it for fraud, or matter arising afterward. In Burch v. Scott, 1 Gill & J. 393, the court of appeals held that "a decree signed and enrolled could not be reheard on petition," and that it would be considered as enrolled when signed by the chancellor and the term ended. In Pfeltz v. Pfeltz, 1 Md. Ch. Dec.

456, that case is cited and approved, and the same point decided. The court say, "it is clear that if an application were made by petition to open the enrollment and vacate the decree, it must be refused." The decree in this case was by default or pro confesso. In Thompson v. Ware, 8 B. Mon. 26, the court say, a decree can only be set aside for error or fraud. In the former case only by appeal or writ of error, or by bill of review —in the latter, only by an original bill. In Com. v. Shanks, 10 B. Mon. 304, the court below, after the end of the term, varied a judgment at law as to the costs. On appeal, held, "the order or judgment made at the November term was a final order—nothing was left open for the future action of the court, and no power was reserved to change or modify the judgment. If an execution had been issued not authorized by the judgment, the court could, at a subsequent term, have quashed it, &c., or quashed the taxation of costs, if improperly made by the clerk, but they had no authority to correct their final judgment, after the close of the term at which it was made." In Ashby v. Glasgow, 7 Mo. 320, a motion was made to set aside a judgment for costs made at a previous term—refused. On appeal, held, "when the term is past, then the control of the court ceases, and no alteration or amendment can be made but such as is authorized by the statute of jeofails and amendments." In Lindell v. Bank of Missouri, 4 Mo. 228, judgment was rendered, November term, 1825, against the bank. The record stated that the parties "appeared by their attorneys." In 1833 the bank moved to set aside the judgment, on the ground that there had been no notice or lawful process served. Motion granted. On error to the supreme court, the court say: "The only question to be considered is, whether the court could, contrary to the record, receive proof that the parties were not rightfully in court. The record says the bank appeared by attorney. This must stand as true; at all events, it cannot be contradicted by affidavit. If this were allowed, then every judgment rendered in a court of record would at all times be subject to the same proceeding; no property would be safe, the sanctity of a record would be lost, and with it all security for right. It may be, if the attorney who appeared for the bank, did so by mistake, this mistake, if discovered, might be corrected during the term, but hardly afterwards." In Lampsett v. Whitney, 3 Scam. 170, a motion was made at December term, 1841, to rehear a cause decided at December term, 1840—refused. The court say: "One term has intervened, &c., and it is now too late to make it. The court conceives it has no power over the case." "It is believed that in no instance has the court entertained a petition for a rehearing after the lapse of a term."

From these cases it appears that it is not in admiralty courts alone that this rule prevails. It may at first view seem harsh, and in some cases it may operate hardly. Yet it is the only safe rule that can be followed. Any other practice would destroy the sanctity and conclusiveness of records, open the door to endless litigation, unsettle rights of property and person, cause delay, expense and ruin—"Interest reipublicae ut sit finis litium"—it would accumulate and clog the business of the courts, and render it impossible to get through it. As the rule now is, parties understand their rights and duties, and it becomes them to be vigilant and prompt, and not to sleep upon them. Now what effect does rule 40, of which we have spoken, have? It does alter the general practice, so far as to allow a decree by default to be opened, on good cause shown, after the decree is rendered, and even after the term is ended, in cases where the term ends before the ten days are expired. But the privilege thus given is expressly limited to the ten days specified, and unless applied for within that period, no benefit whatever can be derived from that rule. The rule carries with it no power or force beyond its express terms. The court, in making that rule, evidently had in view the general admiralty practice, which forbids, as we have shown, any interference with a decree after it is once rendered. In a spirit of liberality, the court saw fit to relax that general rule to a certain extent, and no more. The fact that it did so relax it does not authorize this court to relax it still more. The fact that it fixed the limit and the boundary is evidence that it intended that that limit should not be passed. The rule is to be construed as if it were a law, and it has all the force of a statute. This appears from the history of its adoption.

Congress, on the 23d of August, 1842, passed an act (section 6, 5 Stat. 516) authorizing the supreme court to adopt rules for the government of the admiralty courts. In pursuance of this act, the supreme court, at January term, 1845, adopted these rules. The rules so adopted were in effect adopted by congress itself, the supreme court being but its agent for that purpose. In the state courts of Michigan it is held that their rules, adopted in a like manner, have the force of statutes. But whether they are to be considered as a statute passed by congress or not, yet they are prescribed by the supreme court, and are the law of this court, which is a subordinate one, and bound to obey the requirements of its superior. So far as this court then is concerned, they are, at all events, "a law," and to be considered as such. There are many authorities which hold that a rule, even of its own making, is a law of the court—and that the court has no discretion to depart from them. Ram, Leg. Judgm. 33; Ogden v. Robertson, 3 Green [15 N. J. Law] 124; Rex v. Mann, 2 Strange, 755; Dunbar v. Conway, 11 Gill & J. 92; Wall v. Wall, 2 Har. & G. 79; Thompson v. Hatch,

3 Pick. 512. A fortiori, this will apply to a rule prescribed by a superior court. A rule may be extended on application beforehand, but when once the period prescribed by a rule is passed, rights have vested which the court cannot take away.

Now then, construing this rule as a law, what operation is to be given to it? Dwarris (on Statutes, 641) says: "It is a maxim, generally true, that if an affirmative statute which is introductive of a new law, directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." Again: "If a new power be given by an affirmative statute to a certain person by the designation of that one person, although it be an affirmative statute, all other persons are in general excluded from the exercise of the power, since inclusio unius est exclusio alterius. Thus, if an action founded on a statute be directed to be brought before the justice of Glamorgan, in his sessions, it cannot be brought before any other person, or in any other place." Again, at page 667, he says: "An act of parliament sometimes directs the manner in which a defendant shall be entitled to take advantage of the enactment, as by pleading the statute in bar; in such cases the party must pursue the remedy pointed out, or if he do not avail himself of it at the proper time, and in the manner and form prescribed, he cannot take advantage of it afterwards."

At 6 Bac. Abr. 383, 384, the following rules for the construction of statutes are laid down. He says we must consider the old law, the mischief, the remedy, and the reason of the remedy. He says: "The best construction of a statute is to construe it as near the rule and reason of the common law as may be." "When a statute directs a thing to be done generally, and does not appoint any special manner, it shall be done according to the course of the common law." "In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the parliament had had that design they would have expressed it in the act." Again: "If a new remedy be given by statute in any particular case, this shall not be extended to alter the common law in any other than that case." Again: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." Again, at page 391: "Every statute ought to be construed for the preventing of delay as much as possible." "If the meaning of a statute is doubtful, the consequences are to be considered in the construction; but where the meaning is plain, no consequences are to be regarded, for this would be assuming a legislative authority." "A statute creating a new jurisdiction ought to be construed strictly."

Let us apply these rules to the present case: This rule 40 gives a new remedy—it is an innovation on the common law of admiralty (so to speak)—it gives a new jurisdiction to the court. It is, therefore, to be construed strictly—as near the common law rule as possible. It is not to be presumed the rule was intended to alter the common law rule "farther or otherwise than it expressly declares." This rule is calculated to cause delay. It must be so construed as to prevent delay "as much as possible." But the important point is, that the remedy given is to be sought in a special manner, and at a special time, and it cannot be done in any other manner. The words of Dwarris, at page 667, are expressly applicable. This principle is a plain one, and is acted upon every day. For instance, the statutes of Michigan authorize the defendant to redeem land sold under execution at any time within twelve months. No one has ever claimed that that statute gave him any privilege beyond its express letter, or that he could redeem an instant beyond the time fixed. Again, it is a principle that applies to contracts and statutes both, that the express enumeration or adoption of certain things is an exclusion of all others. Judge Leavitt, in the case of Ward v. The Ogdensburgh [Case No. 17,158], commenting on Adm. Rule 15 (which allows, in cases of collision, a suit either against the ship and master, or against the ship alone, or against the master or the owner alone in personam), said that inasmuch as this rule expressly enumerated those classes of suits, it was in effect a prohibition of all others; and he held that an action against the ship and owners could not be sustained; and he cites several cases to sustain his decision; and his decision on this point was not reversed on appeal, the point being abandoned by counsel. In Marbury v. Madison, 1 Cranch [5 U. S.] 174, a question arose as to the extent of the original (contradistinguished from appellate) jurisdiction of the supreme court. The constitution declares that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, &c. In all other cases it shall have appellate jurisdiction." It was insisted that as the clause giving original jurisdiction contained no negative word, the congress could by statute give it in other cases than those enumerated. But the court held otherwise, and said, "affirmative words are often in their operation negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all." Judge Story (1 Com. Const. § 448) says: "There are certain maxims which have found their way, not only into judicial discussion, but into the business of common life, as

founded in common sense and common convenience. Thus it is often said that in an instrument a specification of particulars is an exclusion of generals, or the expression of one thing is the exclusion of another. Lord Bacon's remark, that 'as exception strengthens the force of law in cases not excepted, so enumeration weakens it in cases not enumerated,' has been perpetually referred to as a fine illustration." Again: "There can be no doubt that an affirmative grant of power in many cases will imply an exclusion of all others. As for instance, the constitution declares that the power of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd as well as useless, if a general authority were intended."

In the present case, to give this court power to open a decree at any time within ten days, would be useless, if the supreme court meant or understood that they had the same power without the rule, or that they had it after the ten days expired. The affirmative grant, I think, of the ten days' limit, is an exclusion and prohibition of all other time. Again, Judge Story, speaking of the constitutional powers of the government, says (1 Com. Const. § 426): "On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the people may remedy it." If they do not choose to do so, the presumption is, that the mischief done by a restriction of power, is less than would arise by its extension. It is a choice between two evils, choosing the least. The same remark will apply to grants of judicial power; the grant is not to be extended by construction beyond its fair terms. If mischief ensues in individual cases, it is better to bear that than the greater evil of extending the power.

If I am correct in the foregoing views, then, inasmuch as the ten days allowed by the rule elapsed before this motion was made, it cannot be entertained. It will undoubtedly operate harshly upon the defendant in this case; but I am satisfied that if he is entitled to any relief, it must be obtained by some other proceeding. Motion denied.

Case No. 7,004.

The ILLINOIS.

[Brown, Adm. 497; 6 Chi. Leg. News, 398; 1 Cent. Law J. 454.] [1]

District Court, E. D. Michigan. Aug., 1874.

PLEADING—NECESSARY AVERMENTS IN LIBEL—ACT OF 1845.

1. A libel sufficient under the general maritime law is sufficient in cases arising upon the lakes, and no averment is required to bring it within the act of 1845 [5 Stat. 726].

2. It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed.

The libel was in personam against the respondent as owner of "the barge Illinois, her boats," etc., for supplies. There was no other or further description of the vessel set up in the libel than that quoted. The grounds of demurrer were: 1. That it was not alleged in the libel that the vessel was of 20 tons burden or upward; 2, nor that the vessel was enrolled or licensed for the coasting trade; 3, nor that the vessel was employed in the business of commerce and navigation, or was capable of being so employed; 4, nor in any manner that the vessel, her boats, etc., were of such a maritime character as to entitle the court to entertain jurisdiction in the premises.

F. H. Canfield, for respondent.

H. B. Brown, for libellant.

LONGYEAR, District Judge. The libel is in the usual form of libels in personam under the general maritime law. 2 Conk. Adm. 478 et seq., 482, 488; Ben. Adm. 484, No. 83. The allegations, the absence of which constitute the first three grounds of demurrer, were necessary in order to confer jurisdiction under the act of congress of February 26, 1845 (5 Stat. 726), entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same" (2 Conk. Adm. 491, and note a). But the supreme court in the case The Eagle, 8 Wall. [75 U. S.] 15, adopting the only logical conclusion from their earlier decision in the case of The Genesee Chief, 12 How. [53 U. S.] 443, authoritatively decides that general admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the navigable waters connecting them, and hence that the act of 1845 was inoperative and ineffectual, with the exception of the clause which gives either party the right of trial by jury when requested. Since that decision the limitations as to jurisdiction imposed by the act of 1845, have had no existence, and the necessity of inserting in the libel the allegations in question has ceased; and consequently, a libel which is sufficient under the general maritime law is now sufficient in cases upon the lakes and their connecting waters. See The General Cass [Case No. 5,307]. The first, second and third grounds of demurrer are therefore not well taken.

As to the fourth ground of demurrer, I find no adjudications or opinions of text writers upon the point; but judging from the forms adopted and universally used from an early period in admiralty jurisprudence down to the present time, it seems to have always been considered sufficient to describe a vessel in a libel, whether in rem or

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

in personam, as the ship, bark, sloop, schooner, steamboat, steamer, barge, or as the case may be, giving her name, without further specification or qualification. See 2 Conk. Adm. 490, note a. These terms seem always to have been considered sufficient to denote the maritime character of the subject. In their ordinary meaning they signify maritime things, and, independently of the consideration of long usage, the use of those terms alone is no doubt sufficient to confer jurisdiction without further description or qualification. The rest follows by necessary implication. If the fact be different, it must be taken advantage of by way of special allegation, and cannot be by way of demurrer. The fourth ground of demurrer is, therefore, also not well taken. The demurrer must be overruled, with costs of the demurrer to libellant, with leave to respondent to answer the libel, on condition of payment of the costs of the demurrer, including a counsel fee of $10. Demurrer overruled.

ILLINOIS, The. See Case No. 4,376.

Case No. 7,005.

The ILLINOIS.

The A. J. WHITE.

The G. W. CHEEK.

[2 Flip. 383; [1] 11 Chi. Leg. News, 237; 4 Cin. Law Bul. 170.]

District Court, W. D. Tennessee. April 3, 1879.

MARITIME LIENS FOR NECESSARIES — REMEDY TO ENFORCE LIEN—WAIVER OF LIEN—CONDITIONAL ACCEPTANCE OF DEED OF TRUST — C. O. D. CLAIMS NOT LIENS—BAR LEASES NOT LIENS—INSURANCE PREMIUMS — MORTGAGE — PRIORITY — REPUDIATING TRUST DEED.

1. Contracts for necessaries furnished at the home port, are a lien for ninety days, under Code Tenn. § 1991, and it is not essential, under the statute, that credit should be given to the ship. The lien attaches to all contracts for the supplies, without reference to the fact whether the credit was given to the vessel or the owner.

[Disapproved in The Samuel Marshall, 4 C. C. A. 385, 54 Fed. 402.]

2. The remedy for the enforcement of the lien given by sections 3550 and 3562 of the Tennessee Code, whether valid or invalid, does not defeat the lien or the jurisdiction of the admiralty court to enforce it.

[Cited in Louisville & N. R. Co. v. Railroad Com. of Tenn., 19 Fed. 712; Lighters Nos. 27 & 28, 6 C. C. A. 493, 57 Fed. 666.]

3. The taking of notes for the debts does not waive these liens. Nor does the taking of the deed of trust to one of libellants waive them.

4. The acceptance of a trust, conditional on its acceptance by other creditors, which they fail to do, excuses the trustee, and he will not be held to have forfeited his lien. Contra, Baxter, J. (on appeal).

5. Bills of lading, "C. O. D.," are not a lien on the boat to secure payment of the money collected from the consignee on delivery of the goods, and will be disallowed.

[Cited in Re Insurance Co., 22 Fed. 115.]

6. The bar leases, or contracts for rent of the bar privileges, are not secured against breach by a lien on the boats, and where the boats were seized before the time expired, the allowance for the money paid in advance will not be preferred over other general creditors.

7. Premiums of insurance are a lien and will be so allowed.

8. A mortgage will be paid after lien claims and before general creditors.

[Cited in The J. E. Rumbell, 147 U. S. 557, 13 Sup. Ct. 502.]

9. Supply liens, under the statute, belong to same class as maritime liens for supplies, and will share with them and be paid in preference to the mortgage. Insurance premiums on policies issued prior to the mortgage will be preferred to it, but those on policies issued since the mortgage will be postponed till it is satisfied.

10. The packet company cannot repudiate their deed of trust, and general creditors may claim its benefits by petition against the remnants.

[11. Cited in Dillard v. Paton, 19 Fed. 624, to the point that regulations prescribed by merchants to define and control the usages or customs which shall prevail in their intercourse with each other have not the effect of positive statutes, and the courts do not particularly favor them.]

The Memphis and Vicksburg Packet Company was duly incorporated under the laws of Tennessee, having its home office at Memphis. Three steamers belonged to it: The Illinois, the G. W. Cheek, and the A. J. White. They were duly enrolled in the custom-house in that city. The plan was (afterwards carried out) to run these vessels from Memphis to Vicksburg, making regular trips, also, to Helena and Napoleon, Ark., and stopping, as occasion required, at the different landings. The proof showed that the company had a large credit and had used it in the purchase of supplies, making repairs, etc., without any serious question on the part of creditors until the fall and winter of 1876–1877. The vessels were supposed to be worth between $50,000 and $60,000, at that time. Becoming somewhat pressed for money, certain creditors, especially one N. M. Jones, offered to aid the company, and advised the drawing up of a deed of trust, in his favor as trustee—being, as he then declared, of the opinion that he could so manage the vessels as to pay off the debts. Accordingly, on the 16th day of November, 1876, such a deed was made to him, as trustee, for the purpose of securing all creditors. He accepted the trust, and began the running of the boats, and so continued for about one month. The deed was registered in the office for registration of deeds in Shelby county and, also, in the custom-house. This not only embraced the boats, but other property not belonging to the steamers, such as office furniture, books and accounts due to the company, an iron safe, etc., etc. For years prior to the making of this deed money was borrowed, repairs made and supplies

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

purchased under the direction of George W. Cheek, who was one of the principal owners of the boats and superintendent of affairs. The owners lived in Memphis, where the general business was transacted. Prior to the deed of trust to Jones, the M. & V. P. Co. had made a mortgage on the Illinois to secure J. C. Neely and Louis Hanauer, who, at Cheek's request, had indorsed the company's note for $5,000, which they eventually had to pay.

The facts seemed to point to Jones, trustee, etc., as the party who instigated the filing of the libels. The mate, the engineer of, and a seaman on, the G. W. Cheek, caused that vessel to be seized by process prayed for and duly issued on the 13th day of December, 1876. A tug belonging to Brown and Jones brought the marshal alongside of this vessel, where the attachment was executed. Turner, one of the libellants just named, was paid off by Jones, trustee, within three hours after his libel was filed. He swore that Captain Darragh, one of the captains under Jones, requested him to swear it out and promised that he would be paid the amount of his claims, if he would do so. The deed provided that G. W. Cheek should be paid $50 per week for his services, and if Jones did not pay off the debts by the 1st day of August, 1877, on the request of any creditor, it became his duty to sell off one or all the boats. Another provision in the deed was, that Jones, "as said trustee, was to take charge of, manage and run said steamboats in the trades in which they are respectively engaged, so long as paying rates can be obtained, and the business in his judgment be made profitable, with full power and control of the same, and authority to repair, insure, and do other things necessary to preserve the value and efficiency of said boats, and also to employ officers, agents," etc. On December 13, 1876, Karr filed his libel in the district court against the A. J. White, following those of the engineer, mate and seaman. Monaghan filed a libel against the G. W. Cheek, on the 21st day of December, 1876; Karr, against the Illinois, on the 13th day of December, 1876, and at same time and within a few days thereafter the other libels (intervening) were filed. Jones (the trustee), as surviving partner of Brown & Jones, filed his several libels against each of the vessels, on the 20th day of December, 1876, claiming, as did other libellants, the right to proceed against the vessels under the maritime and state laws to enforce liens for supplies and materials furnished, and setting forth particularly his separate claims, such as occurred within three months prior to the filing of the same, under the provisions of the state law. There was no allegation in the libels that the company, at the time of furnishing supplies, was in such an unsatisfactory condition, financially, as that no prudent man would give it credit, nor that the boats required credit. Some of them did allege that credit was given to said boats by saying that the items were charged to them. There was no allegation in any of the cases of a special contract made with the master or owners of the boats that supplies were to be charged to them, by reason of the fact the furnisher or furnishers of such supplies were unwilling to give credit to the company. Nor did any of the libels allege that there was a necessity for credit to be given to the boats. One of the libellants alleged that Cheek said he should charge, in one particular case, the bill to one of the boats, naming it; while to another he said he should so charge the supplies furnished in that case, because C. wanted to keep the accounts of each boat separate. The company had abundant credit. In fact, there was no evidence introduced to show that it had been refused that at any time. Karr, one of the original libellants, in giving his testimony, stated that he always charged supplies to the boat. In answer to the question, whether, when the parties purchasing lived in Memphis and were responsible, he was in the habit of looking to the owners of the boat for pay, he said he had never, in any instance, given credit to the owner instead of the boat. He, as all other libellants, seemed to go upon the idea in all cases that, whether the owners were responsible or not, all they had to do was to charge the goods to the boats; and all the articles furnished were so charged in each case, according to the books and accounts which were brought forward, without any reference whatever to the solvency or insolvency of the owners. The lien of the state was declared on in Karr's and other libels, as follows (the same form as adopted by many others): "Libellants further allege and propound that, by the statute laws of the state of Tennessee, they have a positive, express and declared lien on the said steamer, for all supplies, materials, articles, repairs that appear from the said accounts—herewith filed—to have been furnished said steamboat within the period of ninety days of filing of these libels, which they hereby specifically state and charge," etc. Two of Karr's amended libels were filed March 14, 1877; another February 26, 1877. The only charges of insolvency were made in his amended libels. They did not allege that as an existing fact at the time credit was given, nor was there any proof in the record to that effect.

Jones, the trustee, on the 21st day of December, 1876, presented his petition in the district court, praying for an immediate sale of said vessels already libelled, in which, among other things, he stated that he was "willing to yield up his trust, so far as he is concerned, if necessary to the purposes of this court, but not to affect or prejudice the rights or claims of any of the creditors herein, and he reserves his title to said property, if necessary, under said trust, to sustain the same, and claims possession." He alleged that it was necessary to the interests of all

parties that the boats should at once be sold, as the business season was passing away rapidly. To this petition he filed, as an exhibit, the following paper (addressed to the district judge): "Your petitioners, the undersigned creditors of the steamboats A. J. White, Geo. W. Cheek, and Illinois, have carefully read and examined the petition of N. M. Jones, trustee, under the assignment of the Vicksburg & Memphis Packet Co., heretofore made. We do hereby earnestly advise that the said steamboats be immediately sold upon such terms and in such manner as the honorable court may decree correct and proper. The amounts opposite our names indicate and show the total sums of money due us from said steamboats. We are urged to invoke the immediate action of the court in this particular, on account of the rapidly increasing charges and costs of keeping said boats. Experience shows that the longer such property is allowed to remain unused and idle the more the value of the same depreciates." Reference was then made to the shortness of the business season, and in conclusion, they asked "that an immediate sale be made." This paper was signed by Karr and several other persons and firms who had filed libels. The amount placed opposite Karr's name was $11,147.57, and the sum found following the name of each signer of the paper, represented the amount due him, without reference to that by him stated in his libel, in which he endeavored to reach what had fallen due within the three months preceding the filing of the same. Karr, himself, in his own, did not claim above $2,500. The libels in the main were brought to enforce liens for supplies, repairs, etc. But there were several other classes of claims, which were sought to be enforced as liens. H. Luhrman and John Long claimed the right to proceed against the vessels by reason of the fact that they had leased and rented, for the term of one year, running from the 10th of June, 1876 to the 10th of June, 1877, * * * the bar privileges on the decks and cabins. Besides these, there were a number of libels filed by insurance companies, claiming liens on the boats for unpaid premiums. There were other claims on which libels were filed, called C. O. D. claims. Many goods were delivered by the steamers at landings on the river for the shippers, the understanding being that the boat taking them would collect the money on delivery thereof, and on its return pay it over to the shipper; but this last-named agreement was not expressed in the bills of lading. Davis, a witness, who was clerk on one of the steamers, testified that, as a general rule, the boats charged per centage for collections, but in the particular case in which he testified, nothing was demanded for such service, as the shipper was a good customer. It was insisted that these were contracts of affreightment. The bar leases, it was alleged, were charter-parties.

It was further urged by Neely and Hanauer, who intervened by petition, that they had a prior lien on one of the boats—the Illinois, by virtue of their mortgage, at least, as to all supplies furnished subsequent thereto. Several other petitions were filed by general creditors, claiming proceeds under 43d rule.

The claimants by their answers denied that under the state or general admiralty law, any lien was given libellants for supplies, because the credits were not given to the boats in strict admiralty sense, nor was any necessity alleged or shown for such credits. Captain Darragh, one of Jones' captains, purchased one of the boats, and the other two, claimants alleged, were bought in by parties acting in the interest of Jones, though there was little or no proof on this latter point. The vessels brought $22,900 at the sale. The claims proven amounted to $27,386.

The United States district attorney intervened for the government, claiming liens for hospital dues; and there were claims also for wharfage. There was proof to show that the company, by Cheek, the superintendent, was in the habit of making notes to different persons furnishing supplies and repairs, for articles so furnished, and that the same had been so taken. The proof tended to show that the company was in the habit, now and then, of borrowing money out of bank, and that in good seasons the boats did a large and profitable business. During the season of 1876–1877 it was not good; the navigation of the river being interrupted by ice, was one of the reasons.

On the 24th day of February, 1877, without a trial of the questions, it was referred to a commissioner to take and state an account of the amounts due different parties, and to report not only what was due libellants, but the character of their claims, and also their priorities under the admiralty law. This report was made and filed February 4, 1878. The commissioner reported the sale of the boats under a former order, and the rank of priorities. He allowed, 1st, seamen's wages (these had already been paid), the bar leases and hospital dues; 2d, C. O. D. claims; 3d, material men and supplies furnished in home port. The fund was nearly exhausted after paying these, else (as stated by him) he would have allowed, as next claim, the mortgage of Neely & Hanauer, and afterwards the general creditors. To this report many exceptions were filed by different parties on various grounds. Judge TRIGG heard the argument on the exceptions in the spring of 1878, but after the lapse of nearly a year made no decision upon the matter. The questions in dispute were then brought before Judge HAMMOND. The state boat act is referred to and quoted word for word in the opinion of the court.

The claimants were represented by Cal-

vin F. Vance, W. W. Murray, and Wm. S. Flippin.

The following proctors appeared for other parties: H. C. Warinner, R. D. Jordan, Thos. W. Brown, O. P. Lyles, Humes & Poston, Wat. Strong, Pierce & Dix, Weatherford & Estes, Harris, McKisick & Turley, Adams, Dixon & Adams, L. & E. Lehman, Gantt & Patterson, D. M. Scales, S. S. Garrett, John B. Clough, Ass't Dist. Atty., and Myers & Sneed.

Mr. Jordan argued, that libellants stand before the court as supply and material men, seeking by a proceeding in rem in admiralty to enforce a lien, given by the statute law of Tennessee, for articles furnished and delivered in the home port to the steamboats libelled and seized within the ninety days prior to the filing of said libels. These supplies consisted of coal, ship stores, furniture, repairs and other articles needed on the three steamers, furnished upon a contract with the masters thereof. These were beyond doubt maritime contracts. See The Lottawanna, 21 Wall. [88 U. S.] 580–598, and The St. Lawrence, 1 Black [66 U. S.] 522, that in all cases where the local law gives a lien courts of admiralty will enforce the lien upon the ship in rem. The Gen'l Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; The St. Lawrence, 1 Black [66 U. S.] 522. Unquestionably, it is the local law that gives the right, and such right is administered according to that law. That was so under the former rule of 1844. Unless there be ambiguity or doubt, these liens will be so found; otherwise, according to the principles of maritime law. 2 Pars. Adm. 324, and cases cited in note; The Young Sam [Case No. 18,186]; 1 Conk. Adm. 7–19, 201; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The St. Lawrence, 1 Black [66 U. S.] 522; The Lottawanna, 21 Wall. [88 U. S.] 579. And see Code Tenn. § 1991, which is very clear and does not admit of a doubtful construction. Proceeding under this statute, we have only to allege and prove that, under a contract with the master or owner of the vessel, the materials or articles were furnished for or toward the repairing, fitting, furnishing or equipping said vessels. The allegations and proof show that the articles were furnished and the repairs were done on the credit of the vessel. I insist that this, however, is not necessary in the case of material men enforcing a state lien against a vessel in her home port, for articles and repairs furnished and done in her home port. The only attempt at authority for such a position, is an obiter dictum in The Lottawanna, 21 Wall. [88 U. S.] 579 et seq. The new 12th rule does not require that it shall be alleged and proved that credit was given to the boat, nor does it require that we should allege and prove that the owners were insolvent, and the supplies and repairs were necessary. Unless it should appear that supplies were enormous in amount and the repairs unreasonable, the presumption of law is that those things, which appear to be furnished to a vessel under that head, are necessary, and the burden of proof rests on the claimants to show otherwise. It nowhere appears in any way, shape or form, that Brown and Jones accepted the trust deed. This trust deed is void: First, by reserving on its face a benefit for the makers; second, it unreasonably prolongs the time of sale, as against the rights of parties secured by express statute. Being void, there could be no legally binding acceptance under said trust deed by any one—not even by Jones. Burrill, Assignm. 255–257, 345, 346. In the absence of proof that the general creditors accepted under the trust deed, the presumption is that a trust deed being for their benefit, they accept the terms of it and take their rights under it. But as to those libellants, who furnished supplies, materials and repairs within the ninety days prior to the date of the deed, it was against their interest, and a positive injury, for they were a favored class of creditors under the state law. The presumption arises in their favor that they did not accept.

(Mr. Warinner, who argued all the questions elaborately, though requested so to do, failed to furnish the reporter with a brief, and no others were handed to the reporter, except the ones mentioned herein.)

Mr. Vance dwelt particularly upon the effect of the trust deed taken by Jones. He said: Jones not only received a delivery of the deed but acted under it for a month. He never declared an abandonment of the trust but had a sale of the boats made under it by the court, and only declared that, if necessary, he would declare an abandonment of the trust. He never, to this day, filed a deed to the property to any one. In whom did the property in these steamboats vest by the conveyance in trust? In N. M. Jones. And the power was coupled with an interest which, in the language of our supreme court, is irrevocable. Wilburn v. Spofford, 4 Sneed, 699. Could the estate divest by his mere unwillingness to act? The law says that he could not rid himself of the trust he had assumed without the consent of the cestuis que trust and the decree of a court. Jones v. Stockett, 2 Bland, 409; Cruger v. Halliday, 11 Paige, 314; Breedlove v. Stump, 3 Yerg. 257; 4 Ves. 100; 1 Atk. 18; 1 Jac. & W. 689. In Maxwell v. Finnie, 6 Cold. 434, our supreme court decide that, in a proceeding to remove a trustee, all the parties interested must be made parties to it, the debtor, as well as the creditor and trustee. And so particular are the courts as to the appointment of new trustees, that, in Watkins v.

Specht, 7 Cold. 595, the court held that a court could not appoint one, where the original trustee died; the heirs of the dead trustee not being made parties to the proceeding. Evidently, the provisions of our Code show that a trustee can neither resign his trust nor be removed, without the interposition of a court.

Mr. Flippin.

If the position which counsel assume is correct—that material men have a lien irrespective of any other consideration, by virtue of the state statute giving a lien (conceding for the sake of argument that it does give such a lien) then a state lien is higher than a maritime lien in a home port. Yet how anomalous this would be, for the courts decide that liens of material men, claiming under the general maritime law, are to be preferred over—what are by some called—quasi maritime liens under state statutes. The John T. Moore [Case No. 7,430]. To state the proposition is to refute it.[2] Counsel ask of what benefit is it for them to go into the admiralty court, if the law is as I contend. The answer is easy. A sale of the vessel under the state law gives no good title; besides, it is necessary to apply by petition to the circuit judge to obtain permission to have an attachment to issue, which he will only grant upon good cause shown. This of itself involves delay, whereas in the admiralty all that has to be done is to draw a libel, give security, and the process issues. And this is what Judge Bradley means when he speaks of "obstructions and embarrassments" arising under the state liens. The Lottawanna, 21 Wall. [88 U. S.] 579. The new 12th rule gives its own meaning in clear language. No intention is manifested to put home and foreign ports in the same rank. Nor to make liens, enforceable in home ports, equal to admiralty liens, but simply to provide that, as in a foreign port a libel may be filed if according to the rules of the maritime law, the same thing may be done in the home port when conformable to admiralty rules. No other change was intended. The presumption of credit was not altered, nor the necessity for the same. Need it be said that if congress was by act now to place home and foreign liens on a basis of equal rank, that the rules of the admiralty as to credit and necessity for credit would still apply? Congress may regulate liens, the supreme court may provide rules, but the general admiralty law is and will continue to be part and parcel of any system that may be adopted. Liens will never be given where no necessity for credit exists. These libellants had a right under the state law to seize these boats—no one questions that; but they give credit only to the owners in such cases and not to the boats. See case of Waggoner v. St. John, 3 South. Law Rev. No. 4, 10 Heisk. 503, where Judge Freeman puts his decision on the ground that the state proceeding is not in rem, but against the owners of the boat, citing The Hine v. Trevor, 4 Wall. [71 U. S.] 556; The Moses Taylor, Id. 424; and The Belfast, 7 Wall. [74 U. S.] 624; and showing wherein our statute differs from other state acts which recognize proceedings in rem under state statutes. According to our statute in state practice, after judgment had against the owner, an execution issues against his property, and can be levied upon the boat attached, or anything else the owner has. See 10 Heisk. 503. In the admiralty such liens, as we have already said, cannot be enforced unless the credit is given to the boat, and not to the owner. The rule is, whether there is a lien capable of being enforced or not, the owner is always bound, but the ship is a distinct person and cannot be bound at all, unless credit is given to that, and not to the owners. Taylor v. Commonwealth [Case No. 13,787], per Miller, J. This same judge (same case) gives the test of credit. He says: "That is determined by the intention of the party at the time of giving it." Acting upon this rule, and referring to the libels and proof, it will be readily perceived that none of the articles furnished were upon the credit of the boats in the admiralty sense. For many of these notes were taken, while in others there is no allegation of credit being given to the vessel, and certainly no proof. The allegations of credit, when made, rest simply upon the fact as to how the charges were made upon the books. Liens are discouraged, and are in no case acquired, by material men, when the owners are present, unless the former are insolvent, or the credit necessarily is given to the vessel. [Pratt v. Reed] 19 How. [60 U. S.] 359; [People's Ferry Co. v. Beers] 20 How. [61 U. S.] 393; [Roach v. Chapman] 22 How. [63 U. S.] 129; [Beaubien v. Beaubien] 23 How. [64 U. S.] 193; and Taylor v. Commonwealth [Case No. 13,788]. It would seem that these principles are too well settled to admit of argument. If it were shown that the Mem. & Vicksburg Packet Co. was insolvent at the time the supplies were furnished and was refused credit, or was in such financial difficulties that no prudent man would credit it, such fact

[2] See what is said in The E. A. Barnard, 2 Fed. 721. Speaking of priority as between maritime and state liens, Butler, J., says: "They, the latter, are quasi maritime, have uniformly been so considered by the courts, and are recognized and allowed only after all maritime liens proper are paid. The creditors holding them are citizens of the state, and it is provided to direct the order in which their claims shall be paid. To allow state legislation a greater effect would be to concede the right to alter and change the maritime law of the nation in a most material respect. The right to so change and alter has been most emphatically denied (as in principle it must be) whenever the subject has been mentioned. The Lottawanna, 21 Wall. [88 U. S.] 580; The St. Lawrence, 1 Black [66 U. S.] 522; and other cases therein cited.

would go far towards making out a case against the vessels. But no grounds like these are alleged in any of the libels, unless the exception be in the amended ones of Karr, filed February 26 and March 14, 1877, which declare that the company was insolvent at the time the supplies were furnished; but they do not allege this as a ground for necessity of credit. It was clearly an after thought, and the ninety days had already barred nearly all the items of the account. Neither was there proof that such insolvency existed, nor of any necessity for credit at that time. Credit must be given to the boat before the lien attaches. And this ought to be the law for the plainest reasons. If it were otherwise, unscrupulous creditors could make out and present unjust bills, and if not settled upon the spot, threaten the boat with a libel; or becoming offended with the owners for some petty difference, such as a transfer of their custom to another house, or for some other interested motive, would have it in their power just at the moment of sailing, to seriously embarrass the movements of a vessel. More than that—if some shrewd person should ingratiate himself into the confidence of a few larger creditors, he might compel an assignment at almost any time, as that would be deemed better by the owners than to be libelled at an inauspicious moment with ruin staring them in the face. I contend that this state gives at least only a doubtful lien. And this court, not the state court, is to construe that lien. In this particular case, in the absence of other reasons, it becomes necessary. Judge Turley declared in 5 Sneed, 391, that the proceeding contemplated by the statute is against the boat, * * * it is required to be against the owners of the boat * * * but not for the purpose of enforcing satisfaction of the debt by a judgment against them personally. A state cannot execute a process in rem by proceeding against the boat as a boat, for that contravenes the doctrine in The Hine v. Trevor, The Belfast, and The Moses Taylor [supra]. Judge Freeman's construction of this statute has already been given, the opposite of that of Judge Turley. According to, the former ruling the statute would, in effect, amount to concurrent jurisdiction with the admiralty court, while in the latter the proceeding would be a mode of simply bringing the owner into the state court for the purpose of compelling him to give security for his debt. It will be seen that it would be unsafe for the admiralty in causes of this kind to accept the construction of the supreme court of the state. Having exclusive jurisdiction it has the exclusive right to construe this class of statutes, and should not abandon that prerogative. It is to fix the limits of state action with reference to its own jurisdiction, and not for the highest court of the state to do that for itself. While this court will follow the interpretation of a local statute given by the supreme court of a state, it never follows such laws, or the construction of laws in a state as interferes with its own jurisdiction or with the general law. And this applies to cases in common law, equity and admiralty equally. See [Chicago v. Robbins] 2 Black [67 U. S.] 418; [Williamson v. Berry] 8 How. [49 U. S.] 495; [Swift v. Tyson] 16 Pet. [41 U. S.] 1; [Carpenter v. Providence Washington Ins. Co.] Id. 495; [Miller v. Austen] 13 How. [54 U. S.] 218; [Foxcroft v. Mallett] 4 How. [45 U. S.] 358; Watson v. Tarpley, 18 How. [59 U. S.] 517; Sandford v. Portsmouth [Case No. 12,315]. The construction of an old English statute by a state court does not bind this court. Construction of the statute of limitations by the highest court of a state does bind, but where the statute of 21 Jac. 1, c. 6, is only partially altered, the construction of the statute by the state court as to the altered parts binds, but not as to the general terms of the statute. This court is bound only by constructions of state courts as to local laws, but not by constructions of laws or statutes which are in general acceptation. Clearly, therefore, the construction of a state court as to the words "fitting," "furnishing," and "equipping," when applied to boats, does not bind this court, for these are words that peculiarly and exclusively pertain to commerce and navigation.

Now it is not insisted here that the state can give the statutory lien upon any other than a maritime contract. The first part of the statute, fixing a lien upon "building," etc., does not figure here. The contention is, what do the words immediately following mean? "Materials or other articles furnished, for or towards the repairing, fitting, furnishing or equipping such boat." It includes evidently such materials or articles as are used in furnishing, fitting, or equipping the boat at the beginning of its career, and afterwards such materials as are used in repairing it. See Roach v. Chapman, 22 How. [63 U. S.] 129 (and Edwards v. Elliott, 21 Wall. [88 U. S.] 532), where it is ruled that furnishing an engine—or fitting the boat with an engine—was not a maritime contract. Materials towards fitting, furnishing or equipping a boat are clearly not maritime contracts, for these relate exclusively towards finishing the boat. They are simply land contracts. If the libels, founded on the statute, are good for anything, only those which are for repairs and material therefor fall within the favored class. "Equip," when applied to a ship, means to dress it, to furnish it with a complete lot of articles necessary to it, qua ship. "Furnish," is in this connection, to fit up, to equip. "Fit," refers in nautical language to furnishing a ship with men and necessary tackle, equipage, etc. In certain cases "furnish" may mean more; not so here. But to settle this matter beyond dispute—the cap-

tion to the act of 1833, carried into the Code (section 1991), is as follows: "An act for the benefit of mechanics." If it is still the law that the caption of an act is a part of it —if that is the key to unlock and disclose the intent of the legislature—then it is plain that only builders and repairers and materials for repairs were to be favored. The original act is repeated almost word for word in section 1991. That reads as follows: "Whenever a debt shall be contracted by the master, owner, agent or consignee of any steam or keel boat, within this state, by and on account of any work done, or materials or articles furnished for, or towards the building, repairing, fitting, furnishing, or equipping such steam or keel boat, shall be a lien," etc.,—the rest of the section precisely as in section 1991. The word "consignee" is left out, but the sense, idea, and intention are the same as in the original act. When we look at the Tennessee act we see that there is no intention to establish a lien in favor of maritime contracts, nor a lien of a maritime nature, but its object is simply and solely to secure any one who might perform work on a boat and furnish materials or articles towards building, repairing, fitting, furnishing or equipping any keel or steam boat, or for supplies or wages due to hands. The legislature did not intend to give these parties any priorities over common law liens, as is clearly manifested by the eighth section of the act. Here is in fact a distinct announcement that such a provision or lien does not possess the characteristics of a maritime or quasi-maritime lien. And it would be difficult to enforce such a lien against boats under the new 12th rule, it falling in that class of state liens which could with great difficulty be enforced, and, perhaps, not at all, in some cases, in the admiralty.

The bar leases are in no sense maritime contracts. They are not charter-parties, no particular part of the ship being specified; nor are they contracts of affreightment, because such are made to take goods on at a certain place to be delivered at a certain other place. They have no necessary connection with commerce or navigation. Besides these leases were assigned, and the lien is personal. See 14 Am. Law T., April, 1877; Morris v. McCulloch [83 Pa. St. 34]; Patchin v. The A. D. Patchin [Case No. 10,794]; Reppert v. Robinson [Id. 11,703]; Sturtevant v. The George Nicholaus [Id. 13,578]; Logan v. The Aeolian [Id. 8,465]; Rusk v. The Freestone [Id. 12,143]; Pearsons v. Tincker, 36 Me. 384-386; 23 Me. 282; 40 N. H. 511; 5 Eng. (Ark.) 411. There are only two cases looking the other way: The Boston [Case No. 1,669] and The General Jackson [Id. 5,314]; but very peculiar circumstances surrounded them.

The conclusion is reached that there are no liens—neither maritime nor state—that can be enforced here by the libels, and therefore they should be dismissed with costs. If, however, the court should think the giving of credit to the vessels was not necessary in order to charge the vessels—still the state lien does not cover more than the repairs—say $1,500. Unpaid premiums of insurance are not, upon principle, liens, but if it shall be thought proper to follow the ruling in The Dolphin [Cases Nos. 3,973, 3,974],—approved with a reservation to hereafter differ,—by Judge Swayne, there would be a charge on the registry of $1,500 more. The C. O. D. claims are not liens. They somewhat resemble contracts falling within the express business, but lack certain constituents. Perhaps they may be more properly classed under the head of banking or collecting—certainly, they are not purely maritime, or necessarily connected with commerce or navigation. Under the authority of Kemp v. Coughtry,[3] 11 Johns. 107, the owners would be clearly liable at common law, but not so the ship. Had the master signed a bill of lading covenanting to return the money when collected, there is no doubt the vessel would have been bound because this would have been within his authority, but not so as to collecting the money. He had no authority for that to bind the ship. He entered into no agreement to do either the one or the other.

The claim of Neely and Hanauer is a legal lien. They have come in by petition under the 43d rule, claiming proceeds in the registry to the amount of $5,000, which arose from sale of the Illinois. They are entitled to that sum, and the claimants willingly agree that it shall be paid. This with the two other claims, if allowed as liens, will swell the amount to be taken out of the registry to $8,000.

I have not gone into the question of priority between mortgagees and material men, because I do not think the latter here have any lien. The authorities are conflicting, but the weight seems to be in favor of the material men. The Norfolk [Case No. 10,297]; The Skylark [Id. 12,928]; The St. Joseph [Id. 12,229], denying The Grace Greenwood [Id. 5,652]; Francis v. The Harrison [Id. 5,038]; The Circassian [Id. 2,721]. But while they have priority over a lien under the state laws, it does not relate back so as to give that priority. See The St. Joseph [supra]; The Paragon [Case No. 10,708]; Marsh v. The Minnie [Id. 9,117]; 27 Ohio, 350; Scott's Case [Case No. 12,517]; The G. C. Morris [Id. 5,204]; and see The Mary [Id. 9,186]. There are other cases to the same point. This is no court of bankruptcy or insolvency, and it is decided in The Lottawanna, 20 Wall. [87 U. S.] 221, and The Edith, 94 U. S. 519, that the proceeds arising from the sale, if unaffected by lien, become by operation of law the absolute property of the owner, citing Brown v. Lull [Case No. 2,018]; [Sheppard v. Taylor] 5 Pet. [30 U. S.] 675;

[3] And see 6 Johns. 160, and 10 Johns. 1.

Brown. & L. 87-91; Fitz v. The Amelie [Case No. 4,838]; [The Amelia] 6 Wall. [73 U. S.] 30. The admiralty court is invested with no jurisdiction to distribute such property of the owner any more than any other property belonging to him. Where there is an application under the 43d rule for remnants, and the owner does not oppose, such may be paid out—not otherwise.

Messrs. Humes & Poston.

On a correct construction of the Tennessee statutes creating this lien, the priority between a mortgage and home claims for supplies, materials, etc., is determined by the order of time in which the registration of the mortgage and the creation of the home claims occurred. Claimants under the state lien were not intended by the legislature to have priority over common law liens, which is shown by the eighth section of the act, providing "that where there are prior liens on said boats by judgments obtained by the general creditors of the owners, it shall be the duty of the sheriff to attach such boat, subject to such prior liens, and only the surplus over such prior lien shall be paid into court for distribution." The requirements of this section unmistakably show that the legislature did not intend to create a lien of the nature and character of a maritime lien, for here they expressly make the lien they are creating subject to a judgment lien of general creditors of the owners in a common law court. An express negation of this lien possessing the nature of a maritime lien is contained in the statute. The statutory lien is given by the same terms to builders, material men, and mariners (hands), and puts them all on the same footing, not preferring mariners' wages as a court of admiralty, but compelling them to share pro rata with builders and all others entitled to the statutory lien. The lien given by the state statute is to be enforced in accord with the construction of the statute by a local law. The Lottawanna, 21 Wall. [88 U. S.] 578; The Edith, 94 U. S. 518.

On preference between mortgagees and material men and waiver the following cases were referred to and discussed: Scott's Case [Case No. 2,517]; Dudley v. The Superior [Id. 4,115]; The Grace Greenwood [Id. 5,652]; The Skylark [Id. 12,928]; The Kate Hinchman [Id. 12,620]; The Alice Getty [Id. 193]; The St. Joseph [Id. 12,229]; 2 Pars. Shipp. & Adm. 152; The Nestor [Case No. 10,126]; [The Palmyra] 12 Wheat. [25 U. S.] 611; 2 Hagg. 136; [Peyroux v. Howard] 7 Pet. [32 U. S.] 345; [The St. Lawrence] 1 Black [66 U. S.] 532; [Andrews v. Wall] 3 How. [44 U. S.] 573; Stapp v. The Swallow [Case No. 13,305]; 1 New. 186; 7 Heisk. 612; Id. 617; 2 Humph. 248; 2 Head, 128; 3 Humph. 616; Mart. & Y. 309; 9 Pa. St. 203.

HAMMOND, J. The first question in this case arises out of the claim to a lien by those parties who have furnished supplies, materials, and repairs at Memphis, the home port. The lien is claimed under a state statute, which reads as follows; "Any debt contracted by the master, owner, agent, or consignee of any steam or keel boat, within this state, on account of any work done, or materials or other articles furnished for or towards the building, repairing, fitting, furnishing, or equipping such boat, or for any wages due to the hands of the same, shall be a lien upon such boat, her tackle and furniture, to continue for three months from the time said work is finished, or said materials or articles furnished, or said wages fall due, and until the termination of any suit that may be brought for said debt.' Thomp. & S. Code Tenn. § 1991.

There may be incongruity in the doctrine that, an admiralty court possessing under a grant in the constitution of the United States exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction (Rev. St. § 563, subsec. 8), shall find any rule of conduct in a statute of a state; it is not, however, anomalous when we consider that the federal courts often find themselves in other departments of the law, administering rights and rules of property having no other foundation than state statutes or local custom. But whether incongruous or not, it is now the settled law of this court that "so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation." And, "the district courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws." The Lottawanna, 21 Wall. [88 U. S.] 558, 580; Norton v. Switzer, 93 U. S. 355, 366. And it is just as well settled by the same cases and prior adjudications that for material men furnishing necessaries to a vessel in her home port by the general maritime law of the United States there is no lien, other than such as is given by the local law. Id.; The Edith, 94 U. S. 518.

This is now a principle of our maritime law too firmly established, whether correctly or not, to admit of further controversy in the inferior courts. It would be profitless to follow the perplexities of this subject by any attempt to reconcile the cases, or the criticisms that have been made upon them. 5 Am. Law Rev. 581; 7 Am. Law Rev. 1; 9 Am. Law Rev. 638; The Hina v. Trevor [4 Wall. (71 U. S.) 555]; 7 Am. Law Reg. 513; 14 Am. Law Reg. 593; 18 Alb. Law J. 191. Nor need we consider any difficulties which may arise in practice as having any influence here to limit the rule laid down for our government in the matter. Until congress does legislate, the courts

must wrestle each with the demon of its own distraction, and follow that of the supreme court whithersoever it shall go, deciding each case as it arises according to its own circumstances. The Theodore Perry [Case No. 13,879].

It is argued by the learned counsel for the claimants, with great confidence, and the argument is pressed with the earnestness of conviction, that, because by the general maritime law no lien for supplies exists, whether in a home or foreign port, unless credit be given to the vessel, it is not competent for the legislature of the state to expand the lien and give any more enlarged right. It is said that this state statute must be construed as if it read, "any debt contracted by the master, etc., and when the credit is given to the vessel, shall be a lien, etc."

Much proof has been introduced by both sides. On the one hand to prove that credit was in fact given to these vessels, and on the other that it was not. The result of it all is, that if it is necessary to the existence of the lien to show that credit was given to these vessels in the sense of the general maritime law, I have no doubt the proof falls short of such a showing, and that it does show that this company had abundant credit at home, where the supplies were furnished, to have procured them without reference to any lien. The presumption of law is that they were procured on the credit of the owner when furnished in the home port, and I think the proof does not rebut that presumption. At all events, I shall assume, for the purposes of this judgment, that such is the state of proof.

But I do not think it at all essential to the lien that the credit should have been given to the vessels. The statute does not say so, and it would be an interpolation to attach any such condition to it. Ordinarily it would seem clearly within the power of a legislature, authorized to legislate on the subject of maritime law, to exercise the same freedom of enactment that it possesses over other subjects, and prescribe the limitations of the statute according to its will. If the states have left to them any power of legislation (and this we cannot now doubt), having for its object the security of maritime contracts by providing liens for them, it necessarily follows that there is no limitation to the power except such as is found in the state or federal constitutions. That it may create a lien is manifest, for in this very class of cases, it having been determined that by the general law there is no lien, the narrow one insisted on by the claimants here is as much a creation as the broader one claimed by the libellants. It will not do to look to the continental maritime law of Europe, or other countries, to find limitations on the power of the legislature of the state of Tennessee. Granted that by that law no lien exists for supplies unless credit is given to the vessel, non constat that a lien may not be created by competent legislative action, which dispenses with the limitation as to credit, or rather creates a lien without reference to that fact. It would not be denied that the legislative authorities of Continental Europe, from which it is said this lien is derived, might alter it and declare a lien in cases where credit was given to the owner; then why may not the legislature of Tennessee do likewise, particularly since it has been finally determined that, as to this lien, the general maritime law is not in force in this country? Not being recognized here, it seems to me we cannot regard it as furnishing in its limitations any principle of construction for our own laws, and that we may regulate the lien as we please.

But this is said to be a jurisdictional question, and that the necessity for construing this statute as giving a lien only where credit is given to the vessel arises out of the constitutional restriction of our jurisdiction to "cases of admiralty and maritime jurisdiction." Const. U. S. art. 3, § 2. It is argued that unless credit is given to the vessel it is not a maritime lien, and therefore not within the constitutional grant.

This is the question over again which has become chronic in the courts of admiralty, namely, whether we are confined to the maritime law as it existed when the constitution was adopted, or may expand the jurisdiction to meet the wants of commerce and navigation, and so keep pace with the growth of civilization. The supreme court have time and again ruled that this clause in the constitution is not to be so strictly construed as to defeat the capacity for expansion, and that we are not limited to either the maritime law of the civilians or that of our mother country. Ex parte Easton, 95 U. S. 70.

The development of this view of admiralty jurisdiction, in the face of much prejudice, is one of the most interesting examples of the elasticity of our laws in accommodating themselves to the exigencies of our progress as a people. See 18 Alb. Law J. 191, and 5 Am. Law Rev. 581, where the cases are grouped, and The Hine v. Trevor, 4 Wall. [71 U. S.] 562.

There is no limitation of the legislative power to be implied from this restriction on the judicial power. Whether legislative control of the subject is vested in congress or in the state legislatures, concurrently in both, or partly in one and partly in the other, it is absolute; and whether we look to the one source of legislation or both in a given case, the judicial power is competent to afford a remedy to enforce whatever rights it may be found the legislature has created. It is sufficient for our purpose here that the highest court, having charge of the jurisdiction, has said that, as to this lien,

by whatever name you call it, which secures a maritime contract, the states may legislate and this court enforce the legislation. Ex parte McNiel, 13 Wall. [80 U. S.] 236–243; The Lottawanna, supra; Norton v. Switzer, supra; and the cases cited in 5 Am. Law Rev. 614. It seems to me not inappropriate to call any lien which secures a maritime contract, whether given by the "venerable law of the sea" or by a statute passed to create it, a maritime lien, and in this sense it would satisfy the terms of the constitutional grant, and proceedings to enforce it would be a case of "maritime jurisdiction." 5 Am. Law Rev. 603, 613; 4 Am. Law Reg. 599. But as I understand it the jurisdiction does not depend upon the lien, whether maritime or statutory, but solely upon the character of the contract itself, irrespective of the lien. If the contract be maritime, this court has jurisdiction to enforce it, proceeding either in personam or in rem, as the case may require. It is true that in the case of Edwards v. Elliott, 21 Wall. [88 U. S.] 556, the court say that "state legislatures have no authority to create a maritime lien; nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practiced in the admiralty courts." And this formula is repeated in Norton v. Switzer, 93 U. S. 356, and elsewhere in the cases. In the first case the court decided that the contract was not a maritime one, being a contract to build a ship, and, therefore, while it was competent for the state legislature to create and enforce any lien in reference to it deemed expedient, it was not such a lien as a court of admiralty could enforce. In the second case the contract was that of a master to superintend repairs, and it was held no lien existed except in cases where the lien is created by statute, and the case reasserts the doctrine of The Lottawanna. It would seem from these cases and others that the court does not treat the lien for supplies at the home port, given by the state legislature, as a maritime lien, and this would seem to militate against the idea that it should be a maritime lien in order to render the statute valid. They treat it as a statutory lien, or lien by local law, and claim the jurisdiction only because the contract is maritime. 5 Am. Law Rev. 581, 603, The Orleans, 11 Pet. [36 U. S.] 175, 184; and other cases cited above. In the case of The St. Lawrence, 1 Black [66 U. S.] 522–529, it is said that "the right to proceed against the property in rem is a mere question of process and not of jurisdiction." And the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed in rem in the admiralty court to enforce it: but where the supplies are presumed by the maritime code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person and not against the vessel. In either case the contract is equally within the jurisdiction of a court of admiralty. This would indicate very clearly that the supreme court did not conceive the idea that the lien must be maritime in the sense that credit must be given to the vessel where the party relies on the local law, or that it is only competent for the local law to give the lien in cases where the credit is given to the vessel. Again: inasmuch as this alleged restriction on the legislative power arises out of the limitation supposed to be found in the federal constitution, it is as fatal to the power of congress to create a lien where there is no credit given to the vessel as to the state legislature, because congress can no more enlarge the judicial power beyond the constitutional grant than the legislature; and we have as the product of the argument, that no legislative power exists to advance us one step beyond the law of one hundred years ago; and it must be supposed, contrary to what was said in The Lottawanna, 21 Wall. [88 U. S.] 577, that the framers of the constitution did "contemplate that the law should remain forever unalterable."

Nor do I find it quite correct to say that by the general maritime law this element of credit to the vessel was essential to the existence of the lien given by that law. The lien for supplies attached ipso facto when they were furnished. But it was a lien easily displaced and was considered to be waived whenever the credit was in fact, or presumably given to the owner either in the home or foreign port. Mr. Justice Clifford in The Lottawanna, passim. It seems that this element of credit given to the ship, as an essential condition precedent to the attaching of the lien, is the result of the modifications of the maritime law and acts of parliament. Id.; The Albany [Case No. 131]. And while it must be admitted that wherever the lien finds its origin in the maritime law of our own country this feature of credit to the ship is indispensable, I do not think there is any want of power in the state legislature or congress to provide a lien for a maritime contract which does dispense with it, capable of enforcement in the admiralty courts. What has been said in support of this position is more in deference to the very earnest arguments of able counsel than from any conviction of doubt as to the proper ruling on the point.

The chief difficulty I have had with this statute proceeds from the construction given by the supreme court of Tennessee in the case of Waggoner v. St. John, 10 Heisk. 503. It will be observed that the Code of Tennessee (section 3550 and following) provides a statutory proceeding to enforce the lien given by the section above quoted (section

1991). In order to sustain the jurisdiction of the state courts over this lien the supreme court of Tennessee is at great pains to demonstrate that it is not an admiralty lien, at all, but simply a remedy against the owner with ancillary attachment process to enforce a judgment against him. In the case of The Edith, 94 U. S. 518–523, it is said by the supreme court of the United States that similar statutory provisions for enforcing the lien in the state of New York had been adjudged invalid because beyond the power of the state legislature. And, say the court, "if they are invalid, it may be doubted whether all the provisions purporting to give a lien are not also invalid, because inseparable from the prescribed means of enforcing it." But the point is not decided, and the court ruled against the lien in that case only because it had expired by limitation of the statute itself. It is to be carefully observed that while this case was finally decided in 1876, it arose before the promulgation of the admiralty rule 12 of 1872, and what is quoted above doubtless refers to the law as it was understood under the prohibitory rule 12 of 1859. Whether the courts of the United States would decide these statutory provisions for enforcing the lien, given by the Tennessee Code, to be beyond the power of the state legislature or follow the supreme court of the state in construing them, is not a question now presented for determination. See Weston v. Morse, 40 Wis. 455. If it be admitted that the ruling in Waggoner v. St. John, supra, is correct, or whether correct or not, binding on the federal courts as a declaration of local law to which we must look for the determination of the rights of the parties as to the character of this lien, the question is, "are the means prescribed for enforcing a lien given by the statute so inseparable from the provisions of the statute creating the lien that they become a part of it, and serve to so characterize the lien as to altogether defeat the jurisdiction of the admiralty court." By the section 1991 a lien is given in terms broad enough to include any character of lien whatever, for there is absolutely no qualification to it, nor is it in terms described to be of any particular kind of lien. All the contracts, which it is given to secure, are maritime contracts, except of building boats or furnishing materials for building them; and as we have already seen, the contracts being maritime, this court, except as to the two non-maritime contracts above mentioned, has jurisdiction to enforce the lien as thus provided. Nothing can be argued from this separation of the sections (3550–3562) which prescribe a remedy to enforce this lien in the state courts from that which creates it, for they are all parts of the same act of 1833, c. 35. How does the fact that the legislature has provided a remedy to enforce in the state courts a lien created by statute (which we have seen need not in itself be maritime in any other sense than that it secures a maritime contract to give this court jurisdiction to enforce it) preclude this court from taking notice of the lien? If the jurisdiction here does not depend on the character of the lien, but only on the nature of the contract, I cannot see that we should be so precluded. Nor do I see any objection whatever to satisfying the debt in either court to which the creditor may choose to resort. He has a security—created by statute—called a lien, which practically is nothing more or less than a right to seize and sell the boat by judicial process for the satisfaction of his debt. It is so defined in Dupont v. Vance, 19 How. [60 U. S.] 169. Cumulation of remedies is not anomalous, and creditors often have choice of several with distinctive advantages or disadvantages for each. Liens may be and are variously denominated as equitable, statutory, judicial, common law, maritime, or by some other description drawn from the connection they have with a particular subject, but it is in my judgment wholly misleading to found upon these distinctions any restrictions which take them out of the category of intangible privileges and erect them into substantial landmarks of jurisdiction. They possess no such quality, but on the contrary are mobile, wholly without inherent characteristics of their own, and dependent upon extrinsic circumstances for distinctive names. Mere securities for the performance of obligations, always the creatures of law, or contract of the parties, they take just such forms as are impressed upon them by the will of the parties or the law-making power. A lien is a right—jus ad rem, or jus in re—to be enforced by remedies such as may be ordained by the law, and never the source of these remedies. Liens do not create remedies and are generally wholly independent of them, one remedy serving to enforce different characters of liens oftentimes; sometimes the lien does not depend on the remedy but springs out of it; in cases like this they are so independent that they may be created by state statute and the remedy by federal law. Hence, it seems to me the lien provided by this statute, may, if the creditor resorts to a proceeding in rem in the admiralty court, take on the form and be called an admiralty or maritime lien because attached to a maritime contract, just as a mechanic's lien is so called because attached to a mechanic's contract (although the name is wholly immaterial), or if he resorts to the state court, takes the form and character of an attachment lien as described by the supreme court of Tennessee. The state court has jurisdiction (if it has) because the legislature, by its act, has authorized it to take hold of the property of a citizen in a particular way and satisfy the debt, and not because it is a lien of any particular description. And we have jurisdiction here—because congress has vested us with jurisdiction of maritime contracts and authorized us to take hold of the property in a particular way and satisfy the lien, and not because it is a par-

ticular kind of lien. It is not the lien that gives us jurisdiction; it is the contract. The particular way of the state court, that is, a proceeding by summons and attachment is not within our jurisdiction, nor is our particular way, that is, a proceeding in rem, within their jurisdiction; not because in either case of any inherent nature of the lien, but because in the one case the state court has not had granted to it the power to proceed irrespective of the ownership in invitum against the res as the offending thing for a decree of sale, which will bind all the world and give a good title to the purchaser; and in the other this court has not had granted to it the power to adopt a peculiar statutory remedy found in the statutes of the state; but has had a grant of power to look to the statute of the state to see whether any security has been given upon a maritime contract, which so attaches to a vessel engaged in maritime commerce, her tackle, apparel and furniture that it can be enforced by admiralty process. If so, we will resort to that process to satisfy that security whenever the contract is maritime, and never otherwise.

I have no doubt that if the lien sprung out of the process of seizure pointed out by the statute and depended for its existence upon the issuance or levy of that process, or, in other words, if it were a lien similar to that of a levied execution, this court could not enforce it for the obvious reason that it would be the creature of a process this court could not issue. But it is not such a lien; it is the creature of the statute, attaching by virtue of the issuance or levy of the process. Some of the contracts to which the lien attaches are maritime and some are not, as we have seen, but they all depend upon the contract and not the remedy. It is the subject matter of the contract in all of them which determines the question of lien or no lien, and not the fate of the process. Whether the process is served or levied, or not, the lien continues to exist. It is more analogous to a judgment lien for the enforcement of which the execution is only a proper process, and it exists as independently of the process issued to enforce it as does a judgment lien. And this is all, I think, the courts mean when they say, as in the case of The Edith, supra, that the lien must be separable from the means used to enforce it to be cognizable in a court of admiralty. Now, when the state courts come to provide the means to enforce a lien on ships engaged in commerce, given by state statutes, they must be careful not to invade the exclusive domain of the admiralty jurisdiction and undertake to sue the res, or to give their decrees the force and effect of a court of admiralty in such cases. They may seize the vessel as the property of the owner, but not as itself the defendant; they may, by their decree against the owner and order of sale, divest all persons of any interest which they claim by common right, but cannot divest any one of his rights under the maritime law against his will. Whether the proceedings are of this nature or not depends upon their own individuality, and not upon that of either the lien or the contract. The existence of the lien does not necessarily depend upon the question whether the proceedings are valid. If the security, or lien, that is, the right of satisfaction out of the proceeds of the sale of the vessel, depends on or grows out of the proceedings themselves in the manner I have indicated, of course, this right must stand or fall with the proceedings. But if these failing, this right of satisfaction out of the thing still exists, whether there be any adequate remedy to enforce the right or not, it still has a potential existence as a right of property, and if given to a maritime contract this court will, by virtue of its admiralty power, afford a remedy either in personam or in rem according to its practice.

Because it is a lien attached to a maritime contract the states are not forbidden to provide non-maritime remedies to enforce it in their courts. They can provide no remedies for the admiralty courts, nor any for their own which amount to such as the admiralty courts use—but as to all others they are free to use them. Irrespective of those used by the state courts the admiralty courts will proceed in their own way to enforce whatever right of satisfaction out of the res may be found in the statute which is independent of any of the remedies available to the creditor. I think the judgment I now give, as expressed in this opinion, is the logical result of Ex parte McNiel and The Lottawanna, supra, and the action of the supreme court in abrogating the rule of 1859 and establishing that of 1872. Whenever the supreme court declared it to be an axiom of our national jurisprudence, as it did in Ex parte McNiel, that "a state law may give a substantial right of such a character that it may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law," and in applying it to cases of admiralty jurisdiction directs us to the maritime character of the transaction itself as the sole test of jurisdiction, whether it took a new departure or not, it has cut loose from the confusion of the past, and started us upon a more hopeful basis for the administration of admiralty jurisdiction in cases like this than we had before.

It is in proof that about one month prior to the filing of these libels the corporation owning these boats conveyed them in trust to one N. M. Jones, for the general benefit of all the creditors, authorizing him to continue running them in the packet trade in which they were engaged, and if still unable to pay the debts, to sell them and distribute the proceeds pro rata. Jones went into the possession of the boats and did run them until seized in these suits.

It is argued that he instigated the libels,

not from any proof of the fact but because he is on the cost bonds and paid the same after the libels were filed and before the sale. I think this is not material and do not see that any one was injured even if he did instigate the libels. Creditors were threatening suits, and it was apparent the scheme to work out the debts through the trust had failed.

It is very earnestly insisted by the general creditors that these supply-lien creditors have waived their statutory liens by taking notes and accepting this deed of trust, and that except as to the mortgages sanctioned in the trust deed all the creditors must share the fund equally; and they seek to claim the fund as remnants because of the lien of this trust deed. It is now too well settled to need much citation of authority that neither the taking of a note, nor other security is a waiver of the implied lien or the statutory lien unless it was so intended. The St. Lawrence, 1 Black [66 U. S.] 522, 532; The Kimball, 3 Wall. [70 U. S.] 45; The Bird of Paradise, 5 Wall. [72 U. S.] 545-561; The Napoleon [Case No. 10,011]; Fitzgerald v. The H. A. Richmond [Id. 4,839]; The Eclipse [Id. 4,268]; The A. R. Dunlap [Id. 513]; The Theodore Perry [Id. 13,879]. To constitute an abandonment of a right secured there must be a clear, unequivocal and decisive act of the party, an act done which shows a determination in the individual not to have a benefit which is designed for him. Breedlove v. Stump, 3 Yerg. 257-276. No one is ever presumed to abandon a security the law gives him. The H. B. Foster [Case No. 6,291]. The burden of showing this intention to waive the lien is on the party who asserts the waiver. The James Guy [Id. 7,-195]. I should perhaps hold, if there were any proof in the record showing that these lien creditors had accepted this deed of trust, or, knowing of it, acquiesced in it, that prima facie their acceptance of it was from the nature of it a waiver of their liens, unless, by other proof, they should show that it was not so intended. But there is absolutely no proof whatever to show that any of them had accepted it, or knew of it, except Jones. It is said in argument, that the acceptance of the beneficiary will be presumed because the trust is for his benefit. It does not appear in the case that the trust was beneficial to the lien creditors. However, this presumption is only indulged in favor of the beneficiary, and not against him, and in the face of his protest against being bound by the trust. The presumption from the assertion here of the liens is that the trust was never accepted, until the contrary appears by proof.

As to Jones, he unquestionably did go into possession of the boats as trustee under the assignment, and the proof is clear that he was willing to accept it. Whether only as collateral to his statutory liens or in satisfaction of them, does not appear, but I think it clearly inferable from the circumstances that his acceptance of the office of trustee was in the hope of a successful experiment by which the debts should be paid. It was essential that all the creditors should acquiesce and go into the scheme of operating the boats through a trustee on their own account. This failing, I do not think he should be bound by his conduct to stand to the trust deed and be held to have waived his lien under the statute. The assent of a creditor to an assignment of this kind is coupled with the implied condition that other creditors shall also agree, and adversary proceedings by one of them would discharge him from his engagement. Hays v. Heidelberg, 9 Pa. St. 203. Nor does the fact that the creditor is trustee prevent him from surrendering the property and relying on his original contract. In re Saunders [Case No. 12,371].

The result is, that all the claims for supplies will be allowed as liens under the statute wherever they come within the ninety days limitation prescribed in the statute. But all claims for supplies not covered by the statute will be disallowed because they are not liens, and it has been expressly held that the time limited in the statute is binding as part of it. The Edith, 94 U. S. 514.

C. O. D. Bills of Lading.

These boats respectively issued many bills of lading, of which the following is a specimen:

"Shipped in good order and condition by W. & S. Jack & Co. on account and risk of whom it may concern, on board the good steamboat Illinois, whereof —— is master for the present voyage, the following packages or articles, which are to be delivered without delay, in like good order, at the port of Mound Place Landing (unavoidable dangers of the river and fire only excepted) unto Indon & Haxter or their assigns, he or they paying freight for said goods at rate of —— and charges—C. O. D. $18.10.

"1 bbl. crockery, marked ——.

"Signed, Priddy, Clerk.

"Dated Memphis, Tenn., Oct. 24, 1876."

It is proved by the testimony of witnesses that the letters "C. O. D." mean collect on delivery," and that the masters made these contracts with the assent of the owners. It is further proved that the understanding was that the goods were not to be delivered to the consignee until the consignor's price was collected from him on or before delivery, and that the money was to be then brought back to the consignor by the boat and paid over to him; that the usage and custom of the line was to envelop the money, seal the package, and mark the name of the consignor upon it, which said package was delivered to the secretary of the company at Memphis for delivery to the consignor. The money sued for was never paid over to the parties, but it

does not appear when or by whom it was appropriated or used. The libels in these cases were filed December 13, 1876, and the "C. O. D." bills of lading bear date from the beginning of the season, as far back as July or before, on to the date of the libels; and the aggregate amount allowed by the commissioner is $3,709.70. Hence it appears that it was not the custom to pay over or deliver these several sums of money, which it is claimed were shipped as so many packages of freight to the consignees thereof, namely the original consignors of the goods; and it appears that these consignees were not very prompt in enforcing a delivery of their said consignments. I infer from these facts that the parties did not really treat the money as shipped to the merchants' part of the cargo, but rather as collections made for them. It is not usual to break open packages and appropriate articles belonging to the cargo, to the extent this was done, either by the officers of the boat or by the warehousemen with whom they are stored.

It is argued that the contract, as thus proved, is a contract for the affreightment of the money as well as the goods, and its breach gives the consignor a lien on the boat. It is objected by the claimants that this parol proof is not admissible to alter the contract, as expressed in the bill of lading. Undoubtedly, ambiguities appearing in a written contract may be explained, and the letters "C. O. D." have come to be used as an abbreviation for "collect on delivery," and to authorize the carrier to receive payment for the merchant. At common law I doubt not that such authority would imply a contract on the part of the carrier to be responsible for the money. The implication would not arise on the words "collect on delivery," but out of the contract of agency. Those particular words are an authority to the agent to receive from the debtor the money due the creditor, and an agreement with the agent that he will not deliver the goods until they are paid for by the vendee. This is all that can be implied from them, and when the words are written in this bill of lading it is no longer ambiguous. After they are filled in, to go and add a contract that the money shall be shipped as cargo, and that for its safe delivery the owner, master and ship shall be liable as on a regular bill of lading, such as would be taken if money were in fact shipped as merchandise, seems to me to be altering this written contract in very important particulars. If this was the contract of the parties, why was it not so written in full? It is not only the parties who are interested in having contracts written out which are to bind the vessel, but all who deal with her. This bill of lading, except as to these three letters, is in the usual form, a form sanctioned by centuries of use, and every word and sentence in it has become settled, and the liabilities created by it are as well understood as a common law deed to real estate. Even if it is competent for shippers to make the kind of contract, which it is insisted this is, it should be, when they undertake to reduce it to writing, included in the writing, and not left to implication. It is a wise rule which forbids parties after they have reduced their contract to writing to alter it by parol proof. "The bill of lading," says Valin, "is conclusive against the assured, and nothing can be admitted against its tenor." 2 Valin, Comm. 139, cited in The Phebe [Case No. 11,064].

"Although as a receipt, a bill of lading is subject to explanations and can be affected by parol proof, in so far as it is a contract this rule does not apply. The transfer of goods shipped, by indorsement of bills of lading, has become so common that the interests of commerce require that such instruments should not be controlled by parol evidence." Per Miller, J., in The Wellington [Case No. 17,384]; and see the note for other cases. Says Mr. Justice Story, in The Reeside [Id. 11,657]: "I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages and customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law." This case is often cited and approved by the supreme court, and it seems to me the rule which forbids the introduction of parol proof to vary written contracts should be the more rigidly enforced where its effect is to create a right of property, such as a maritime lien for breach of contract of affreightment. I have therefore concluded to rule in this case that the parol evidence, which is offered to convert this contract into a formal contract for the affreightment of the money, is inadmissible.

If admitted, I would rule also, that it does not constitute such a contract as creates a lien under the maritime law. I have examined carefully all the cases cited in support of the doctrine and am of opinion that it is a clear innovation on the maritime law. The custom is one of modern date, which secures the merchant the price of his goods by sending them under an agreement that the carrier shall not deliver them until the price is paid. It is merely a conditional sale for the security of the contract price. The carrier becomes the agent of the creditor for the collection of the debts, and whatever may be the common law liability of the carrier as to his personal responsibility for the money collected by his agents, I shall not, until the supreme court settle the question, be prepared

to hold that there arises out of the contract, when the carrier is a vessel engaged in commerce, a maritime lien which can be enforced by a proceeding in rem. I have examined many cases to discover the principle upon which the doctrine rests that the merchandise is bound to the ship and the ship to the merchandise, and I do not see that it can be applied to contracts like this, in which the merchant, having sold his goods to his customer for convenience of collection and security, authorizes him to pay the price to the master of the vessel, and authorizes the master to collect it for him, or in default of payment to return the goods. I do not doubt but that the parties may by contract pledge the ship to the performance of the agreement including the safe return of the money collected, as is sometimes done in covenants inserted in a charter-party or bill of lading; and, perhaps, a court of admiralty might enforce the lien by proceedings in rem, as in those cases; but that is not the question here. Admit all the proof, and it is not even claimed that it goes to the extent of a contract pledging the ship in terms. The question is, does a lien arise by a tacit hypothecation of the ship on such a contract, under the maritime law? I think not. Any covenant outside the ordinary contract of affreightment would be secured only by a special contract for the purpose. The faithful performance of this contract of agency cannot be said to be secured as if it were an ordinary contract of affreightment for the money. Money may be shipped as merchandise, and on such a contract the liability of a contract of affreightment would attach. Here the master has no authority over the money except by reason of his instructions to collect it, and he is empowered to hold the goods till paid. The transportation of the money is not the object of the contract. It does not advance the argument to invoke the common law liability of common carriers. An express company would be personally liable, perhaps, under the strict rules of law governing common carriers for the misappropriation of the money on a "C. O. D." bill of lading, but there would be no lien on the cars or other vehicle transporting the goods or money; and so the owners of these boats would be personally liable at common law, but it is another thing to say that the maritime law gives a lien against the vessel which transports the goods.

The personal liability of the owner is not an element in the maritime law. The owner can, in cases where that law gives a lien, abandon his property in the ship, as in cases of salvage, for example, and relieve himself as to that law, from all personal liability whatever. The maritime law of the middle ages, we are told, imported into the ancient law of the sea the common law doctrine that the master is the agent of the owner, and may bind within the scope of his authority to a personal liability co-extensive with all his property in cases of contract certainly, and to a more limited extent in cases ex delicto; but when the master binds the ship itself by tacit hypothecation his authority, as agent, is not co-extensive with his authority in that capacity to bind the owner personally. The ship may be bound as a part of the property of the owner, like his other property, but it does not as a contracting thing, so to speak, become liable through a lien in all cases where the owner is liable personally. To earn freight is the highest duty of the ship acting through its master, and he may pledge its credit to that contract; he may bind the ship—if duly authorized—by special contracts of lien, but the lien is the product of the special agreement that it shall be a lien, not the product of the maritime law as a tacit hypothecation or pure maritime lien. We cannot overlook this distinction in determining the influence of the common law doctrine of agency as connected with the power of the master to bind the owner, and to bind the ship, and reach a conclusion as to whether a given transaction is within the scope of his authority. He may have authority, as agent, to bind the owner personally, and even to pledge by contract that the ship shall be liable for certain specified covenants in a charter-party or bill of lading, but it may not be within his authority as master to fasten to his ship a tacit lien for the security of extraordinary covenants, not specifically expressed in his contract, but implied necessarily from it. Judge Ware, of whom the supreme court say his opinion in matters of maritime law is entitled to the highest respect (Ex parte Easton, 95 U. S. 76), calls our attention to this distinction in the case of The Waldo [Case No. 17,056]. He cites the leading common law case, relied on here, of Kemp v. Coughtry, 11 Johns. 107, and points out that it is not an authority on this question; and I think the case is a very satisfactory authority against this lien, not so much as an adjudication but in the enunciation of a principle which must be of controlling importance. The cases cited in The Ann Elizabeth (Dupont De Nemours v. Vance), 19 How. [60 U. S.] 162, at page 169, are instructive on this subject, and open up abundant authority for the position taken here, that there are necessary limitations to the rule that the ship is tacitly bound to the merchandise for contracts of affreightment.

In The Volunteer [Case No. 16,991], it is said that the right to proceed in rem against the ship for breach of contracts in the charter-party, is founded on a stipulation in the contract that it shall be so, and not out of any tacit hypothecation, such as I am asked here to imply. The Rebecca [Id. 11,619] states most clearly the principle on which the ship is held bound. And The Phebe [Id. 11,064] points out that the master

can only specifically bind the ship when acting within the scope of his authority as master. It speaks of a contract of sale "disguised" under a contract of affreightment. These cases are a guide to many more, which will illustrate the distinctions. The cases cited, in argument, of Mosely v. Lord, 2 Conn. 389; Emery v. Hersey, 4 Greenl. 407 (cited in The Waldo, supra); Harrington v. McShane, 2 Watts, 443; Pierce v. Milwaukee & St. P. R. Co., 23 Wis. 387,—are all in the same category that Judge Ware puts Kemp v. Coughtry, supra. The Hardy [Case No. 6,056] is only a syllabus, and the opinion not being given, is not convincing. Monteith v. Kirkpatrick [Id. 9,721] only holds that where the transportation was partly on waters not within admiralty jurisdiction, the contract was entire and not severable. The Argyle Worthington, 17 Ohio, 460, was under a statute of Ohio giving a lien in such cases, and perhaps, like supply liens in home ports, it is within the power of the legislature to create such. The case of Zollinger v. The Emma [Case No. 18,218] is directly in favor of the lien, and against the views here expressed, but with all my deference for the venerable and learned court, I am constrained to dissent from it and follow the ruling in this circuit to the contrary by the late Judge Emmons in the cases of The Liberty and The Commercial, not reported, but cited by him in The Williams [Id. 17,710], by the name of The Robinson [Id. 6,128]. It has always been a matter of regret that the learned judge did not write, as he intended, his opinion in that case. It is ingeniously urged that this case is a better case for the lien than the one decided by Judge Emmons, and that the defects in the proof of that case have been supplied here. I was of counsel in that case for the liens, and I feel quite sure the learned judge would have decided this the same way. But whether so or not, I am content to take the broad ground that nothing less than a covenant to bind the ship to the faithful performance of the master's contract of agency in collecting the money for the shipper will create a lien in favor of such contracts, unless they are bona fide contracts of affreightment for the money as merchandise, which I do not think they are. These claims on the "C. O. D." bills of lading are disallowed.[4]

The Bar Leases.

When these boats commenced the season's business the owners made contracts for the bar privileges in the form of indentures, and they are called in the record "leases." In the case of the Illinois, the price paid was $3,500 cash, in consideration of which "the parties of the first part hereby lease and rent to the party of the second part for the term of one year running time from the 10th of June, 1876, to the 10th of June, 1877—time to be * * * by the portage book—the bar privileges, deck and cabin, of the Illinois, the said steamer belonging to the Memphis & Vicksburg Packet Company, and is now running between Memphis and Vicksburg." "It is agreed that there shall be but three barkeepers and tenders, and in case the party of the second part shall not keep as good liquors as in other boats of the line or shall make themselves obnoxious to the detriment of the boat, the company reserves the privilege of re-entering, taking and retaining possession of the bar or bars at their option, unless the wrong is corrected and notice given, etc.; and in such case the party of the second part forfeits all moneys paid on said bars and all rights to further privileges of the same." And it makes provision that the keepers or tenders shall be under command of the officers. Similar contracts were made as to the other boats in the line.

Being seized under the process here before the time expired, these libels are filed to recover back the money paid for the unexpired time, as damages for breach of the contract, and the commissioner has allowed an aggregate sum of $5,052 as such damages, and as a preferred claim of the first class. There is no proof introduced to show what is meant by a bar privilege. I am asked to take judicial notice that a certain space in the cabin or on the deck is set apart as a "bar," and it is then argued that this is a charter-party or contract for the hiring of that part of the boat known as the "bar," and the failure to keep the charterers in possession is a breach of the contract of charter-party, for which the vessel is liable and a lien attaches.

This illustrates the tendency of all manner of claimants to relegate their claim to some form of contract, which shall carry a lien on the boat, and the capacity for expansion of these liens seems never to be wanting in time of need.

It will be observed that no space measured by metes and bounds, or quantity of ton-

[4] Using the first edition of the Revised Statutes while investigating the point, I came to the conclusion that Rev. St. § 4281 did not affect the "C. O. D." bills of lading, because the section did not apply to the rivers. See section 4289 (1st Ed.). But since the act of Feb. 18, 1875, c. 80, (18 Stat. p. 320; Rev. St. § 4279, 2d Ed.), it probably does apply, and is a complete answer to the libels, since it is not pretended that that section was complied with. The original act of March 3, 1851, § 2, 9 Stat. 635, was limited by the 7th section of that act so that it did not apply to rivers, and the first edition of the Rev. St. § 4289, so limited it. Now, by act of Feb. 18, 1875, c. 80, 18 Stat. 320, this section 4289 is itself limited to the same preceding sections, which do not include section 4289; and it seems that section does now apply to rivers. The act of 1871, c. 100, § 69, without referring to the act of March 3, 1851, c. 43, § 2, enlarges that act as to articles enumerated, but otherwise repeals it in haec verba. Section 41 of the act of 1871, in terms applied the act to all vessels navigating the rivers. This section is carried into the Revised Statutes at section 4400. On the whole it is clear the section 4281 exempts these vessels from liability, even if this were a contract of affreightment for which the owners and vessel could be made liable.

nage or aliquot part of the carrying capacity of the boat, is designated as the part let to charter. It is said, however, that by a well-known usage the locus in quo is fixed by the term "bar." It will be also seen that the instrument is not drawn on the theory that it is the charter of a part of a vessel for the purpose of carrying freight. But it is said that the charterer need not fill his space or use it for storing freight. He may, paying for it, let it go empty. This is so, yet it is plain that the leading idea of a charter-party is that the vessel or a part of her is hired for the purposes of commerce, carrying goods as freight, or passengers, or otherwise put to some use incident to commerce and navigation. And it is to encourage such commerce and navigation the lien is allowed for its breach. If a charterer lets his vessel or part thereof go empty, he may have to pay the charter money, but the vessel could not be liable to him for any breach, as none could probably occur.

I think this contract is just what it purports to be, a common law contract, for the sale of the privilege of selling liquors on the boat to three persons travelling on her. I think it just as well to treat it as a contract of affreightment for the liquors and barkeepers, as was suggested and argued, as a charter-party, and that in no proper sense can it be treated as either. It is a mere license. The apple-woman, the newsboy, the book-peddler and lunch-vender, who have leave to ply their trade among the passengers while the vessel is afloat, or at shore; or the barber, who travels with her, may as well claim to be charterers as these barkeepers. No case holding that a breach of such contracts is a lien has been produced.

But it is said, it has been ruled so in the cases of The Liberty and The Commercial, supra, in this court. So it was, so far as confirming a report, wherein it was allowed is a ruling. It is true that an exception was filed, and the case being appealed, Judge Emmons heard argument. He kept the cases under advisement, and my recollection is, when he returned he expressed no opinion on this bar-lease question but delivered an elaborate oral judgment on the main controversy in these cases, which was the question of C. O. D. bills of lading, and, that being an arrangement of counsel, the report was confirmed; each getting allowances excepted to and all satisfied in the general average. It was in this way the bar-lease question passed sub silentio. I have verified my recollection of the circumstances by that of other counsel not engaged here, and I do not understand that it is insisted that Judge Emmons gave an opinion, but only that on exception and after argument the point was ruled in favor of the lien.

Where no reasons are given, I do not think in a case like that, or this, where many exceptions are filed and numerous points ruled, that such rulings should stand for precedents. Unless they come nearer to my own judgment than does this, I do not feel bound by them. These claims are disallowed.

Insurance Premiums.

Certain underwriters have filed claims for insurance premiums for which some notes had been taken—which are tendered back—and it is claimed these premiums are a lien by the maritime law. The objection that these notes are a waiver of the lien, or that the taking of Jones' note as trustee is such waiver, has already been disposed of in considering the question with reference to the supply liens. Such securities are not a waiver unless so intended, and there is no proof of such intention here.

The question as to whether these premiums are a lien under the maritime law has not been decided by the supreme court and the rulings are not in accord in the other courts. In The John T. Moore [Case No. 7,430], Judge Woods decided against the lien, and there are perhaps other rulings the same way. But in The Dolphin [Cases Nos. 3,973 and 3,974], Judge Brown, of the Michigan district, decided that they were a lien, and his opinion was approved by Mr. Justice Swayne, the circuit justice of this circuit, on appeal. This is binding on me as authority, and I rule, therefore, in favor of the lien, and the claims will be so allowed.

The Mortgage.

It appears that A. J. White & Co. were indorsers on the notes of the packet company, which had been discounted in bank, and being unable to renew, application was made to J. C. Neely and Louis Hanauer, who indorsed the renewed paper and took a mortgage to secure the indorsement on one of these boats for the amount of the note, which was $5,000. They intervene by petition and claim a paramount lien. The mortgage was duly registered both under the act of congress and the state registration laws. It does not appear for what special purpose the original money was lent to be used, but that it was used in the business of the company in running these boats may be admitted. If it be conceded that he who advances money to procure supplies would stand in the same attitude as the furnisher of supplies, and that it would be such a maritime contract as would support the jurisdiction of this court to foreclose the lien of the mortgage given to secure it by proceedings in rem, it would not apply to this case. The original money was advanced by the bank on commercial paper, with A. J. White & Co. as indorsers. This debt was paid by proceeds of the loan secured on Neely & Hanauer's indorsement, and it would be carrying the doctrine very far to consider this last loan as an advance of money for necessary supplies. The money actually had for that purpose was paid, and I think this was not a maritime contract, and this court would have no jurisdiction to enforce it as such. It is only a common law

mortgage, and it seems that the only right in this court such a mortgage has is to claim the res by award, as owner sub modo, or petition under the 43d rule as against the proceeds of sale. The John Jay (Bogart) 17 How. [58 U. S.] 399; The Angelique (Schuchardt v. Babbidge) 19 How. [60 U. S.] 239; People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393; The Lottawanna, 20 Wall. [87 U. S.] 201, 222; S. C. 21 Wall. [88 U. S.] 583. The rules of admiralty pleading should be strictly complied with. McKinlay v. Morrish, 21 How. [62 U. S.] 343, 347.

I think, therefore, the objection to this libel is well taken, but it should have been taken in limine, and the practice of allowing such objections to be taken to a pleading at the final hearing on exceptions to the report of the commissioners is intolerable, and I shall therefore now allow the mortgagees to convert, by amendment, their libel [5] into an answer and claim of the res, or into a petition under the 43d rule, as they may elect. I think the act of congress regulating mortgages is only a registry act and does not give the court jurisdiction to treat this mortgage as a maritime lien under maritime law. But it is a lien, which this court can enforce in the way above suggested.

Priorities.

I am informed by the learned circuit judge of this circuit, that he has established the rule for this circuit, that liens for supplies under a state statute take precedence of mortgages like this, and rank in the same class and share pro rata with supply liens under the general maritime law. This is binding on us here, and the liens here allowed of that class will be first paid. See, also, Zollinger v. The Emma [Case No. 18,218]; The Alice Getty [Id. 193]; The Unadilla [Id. 14,332]; The St. Joseph [Id. 12,229]; The Paragon [Id. 10,708]; 6 Am. Law Reg. 551; Id. 328.[6] The Theodore Perry [Case No. 13,879]; The Grace Greenwood [Id. 5,652]; The Kate Hinchman [Id. 7,620]; In re Scott [Id. 12,517]; Francis v. The Harrison [Id. 5,038].

The authorities put liens for insurance premiums in the lowest class of maritime liens. I do not see, if they are maritime liens, why they should not take precedence of common law mortgages, except where they have become due on policies taken out since the date of the mortgage. In that case, being only for the benefit of the owner's interest and not being in any way beneficial to the mortgagee, I think they should not be allowed to displace the mortgage. All premiums on policies taken out prior to the mortgage will be first paid; all since will be postponed to it.

General Creditors.

I think the company cannot repudiate the Jones deed of trust, and that its provisions are a lien for the benefit of general creditors, which they may enforce under the 43d rule. Only two I believe have filed such petitions. Ordinarily, I would not allow after the hearing any others to come in to their prejudice. But these only came in under that rule at the hearing, and I shall now allow all creditors to prove their claims as under one general petition. I do this because of the awkward practice adopted in this case of leaving questions of pleading to be determined at the hearing. This Jones deed of trust will inure to them as a lien against remnants. The Edith, 94 U. S. 518–523.

Costs.

The creditors whose claims have been allowed as liens will be allowed their costs. Those whose claims have not been allowed will pay their own costs.

Circuit Court of United States, Western Tennessee,

April 16, 1881.

Neely and Hanauer, the mortgagees, having appealed from the decree of the district, to the circuit, court, the same was heard this day by the Hon. JOHN BAXTER, Mr. Humes appearing for the appellants and Mr. Warinner and Mr. Jordan for N. M. Jones, surviving partner, etc. The court "reverses the decree below in so far as it allows the demand of N. M. Jones, surviving partner, etc., to be paid in priority of the mortgage claims of the said J. C. Neely and L. Hanauer, when, in fact, the said N. M. Jones, surviving partner, etc., had waived said lien so far as said J. C. Neely and L. Hanauer, mortgage creditors, are concerned."

NOTE. It will be noticed that Judge Hammond does not discuss one of the points made by counsel, which is that under the Tennessee boat act all liens stand on an equal footing, and as some of the articles or contracts for which a lien is given, are not maritime in their nature a difficulty of a serious character towards their enforcement or partial enforcement in an admiralty court was suggested. See the language of Judge Taney in The St. Lawrence, 1 Black [66 U. S.] 530, 531, with reference to the difficulties of enforcing state liens in admiralty. The principal point, however, on which the case was made to turn was, that a lien in the home port would be enforced if the contract was maritime, and if the state boat act covers it, irrespective of other considerations. It will be remembered that counsel refers to The Young Sam [Case No. 18,186]. Judge Brown, in The General Burnside [3 Fed. 228], refers to the same case, and also to 2 Pars. Shipp. 154 (which quotes that case), as authority for the doctrine that no necessity for credit in the home port need be shown, but that the lien is conferred by the state statute "whenever the supplies are furnished." Perhaps, this is the only one seemingly applicable. The Young Sam [supra] was decided twenty-five years ago. The curious reader, it is believed, will readily discover that the statement, quoted as law, is mere dictum. It will be observed that the only question before the court was, whether under the statute of Maine, giving parties who furnish supplies towards the building of vessels a lien, included a vessel generally, or whether it alone covered the case of a vessel

[5] Mistake of counsel and court. It was a petition.
[6] [See Case No. 9,117.]

particularly named. The judge ruled that if the vessel were sought to be held under a given name, the lien would be enforced (according to several different rulings in that circuit), but as the supplies were furnished to build a vessel not described by name, he would refuse to enforce it. Now that was all there was before the court or in the case. And the court's views on the first proposition have long since been repeatedly repudiated upon the ground that supplies furnished towards the building of ships are, not maritime, but land contracts, and therefore are entitled to no lien under the state boat acts. The Antelope [Case No. 482]; Foster v. Ellis [Id. 4,968]; People's Ferry Co. v. Beers, 20 How. [61 U. S.] 400; Roach v. Chapman, 22 How. [63 U. S.] 129; Hardy v. The Ruggles [Case No. 6,062]; Smith v. The Royal George. [Id. 13,102]; and Edwards v. Elliott, 21 Wall. [88 U. S.] 532. It is stated in The Young Sam that the lien exists by virtue of the state act alone, but does the principle of this dictum go far enough? The essence of all liens lies in the necessity for credit—else why a lien? The party who buys material or incurs repairs or makes contracts under the state boat acts needs credit; otherwise he would pay cash. So that though under these acts it may not be necessary, when attempting to enforce such a lien in a state court, to show the necessity for credit, it is still presupposed or fully presumed. It is only in this sense that the dictum may be true. But when the attempt is made to enforce such contracts in the admiralty, the authorities seem to require that such necessity should be fully shown.

The leading case on this subject, Taylor v. Com. [Case No. 13,788], though reversed by Miller, J., on appeal [Id. 13,787], appears on the matter of lien to have been approved by him. The first decree was by the learned judge of the Eastern district of Missouri, Treat. It was ruled: 1st. "That while in foreign ports the presumption of necessity for relying upon the credit of the vessel for repairs, arises from the necessity of repairs to enable the vessel to prosecute the voyage; in home ports the presumption of a necessity for relying upon the credit of the vessel does not exist." 2d. "That in a foreign port the master, as performing the duties of that officer, has authority to bind the vessel and her owners for the necessary expenses of the boat; but in the home port he has not that right." 3d. "That while in a foreign port the necessary repairs are restricted to such as will enable the vessel to pursue her voyage with safety, the repairs in the home port, where they may be ordered by the owners, are not of such necessity restricted within such narrow limits." 4th. "Those, who in a home port, furnish repairs and supplies must show affirmatively, in order to have a lien on the vessel, that it was necessary to rely on the credit of the vessel; or, in other words, that the credit of the owners was not such as would justify a prudent man in furnishing repairs or supplies solely on their personal credit. Many persons in home ports have been accustomed, in consequence of the state boat acts, to suppose that repairs and supplies furnished there at the instance of the master gave a lien irrespective of all other considerations; but as they—so far as they trespass upon admiralty jurisdiction—are void, it is important that material men in home ports should bear in mind the distinction above stated, and the elements out of which a lien in a home port arises. If the owners are in good credit there is no necessity for relying upon the credit of the vessel, and consequently no lien is created."

This decision was made after the new 12th rule, but before The Lottawanna decisions, and what adds force to it is the fact that both Judge Treat and Justice Miller believed at the time, under the new rule, that libels in rem for repairs, supplies, etc., could be filed in the home as well as in the foreign port. The reason given for the lien in the foreign port is that the owners have no credit, or no funds. And the presumption of want of credit is easily overturned if the owner is present or has an undoubted credit, as was the case in The Sultana (Pratt v. Reed, 19 How. [60 U. S.] 359), where Nelson, associate justice supreme court, delivered the opinion. The same rule is laid down by Clifford, J., in The Lulu, The Kalorama, and Gen'l Custer, 10 Wall. [77 U. S.] 200.

We now come to The Lottawanna, 21 Wall. [88 U. S.] 558, where it clearly appears that "credit to the ship" has not been dispensed with under the new rule. Says Bradley, J., "It is true the inconveniences arising from the often intricate and conflicting state laws creating such lien, induced this court in December term, 1858, to abrogate that portion of the 12th admiralty rule of 1844, which allowed proceedings in rem against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings in personam only in such cases. But we have now restored the rule of 1844, or rather we have made it general in its terms, giving to material men, in all cases, their option to proceed either in rem or in personam. Of course, this modification of the rule cannot avail where no lien exists; but where one exists, no matter by what law, it removes all obstacles to a proceeding in rem, if credit is given to the vessel." It will be seen from this extract that the general rules of admiralty were in the mind of the court, and especially of the judge (Bradley) who delivered the opinion. When he speaks of the failure of the party claiming a lien to record his privilege, and adds, "had the lien been perfected * * * the principles that have heretofore governed * * * would have undoubtedly authorized the material man to file a libel against the vessel or its proceeds," he must be understood to include the general admiralty rules.

In an able review of the Lottawanna decision (21 Wall. [88 U. S.] 558), the following language is used: "It may be remarked, however, in passing, that the English and American law in denying the lien in question (in the home port) violated no recognized principle of the general maritime law. It is conceded that a lien is not implied in all cases, even of supplies furnished to a foreign vessel. Now it may be argued as a legal inference, a presumptio juris, that supplies furnished to a vessel in her home port, where she cannot be in distress, where she is under no exigency of completing her voyage and getting home, are not necessaries in any legal sense, and are furnished on the credit of the owner and not on that of the ship. This view of the subject reconciles the general principles of maritime law." The allusion to "credit of the owner himself and not that of the ship" shows that the writer understands Judge Bradley as upholding the foregoing construction of his language.

And Judge Clifford, in [The Lottawanna] 20 Wall. [87 U. S.] 219, thinking, as did Judges Miller and Treat, that the new rule put home and foreign ports on a like footing so far as filing libels by material men, maintained that the rule of credit being given to the ship still governed, in order to the creation of a lien. The reasoning of the painstaking and learned district judge, who penned the opinion in this case, whether the reader assents to it or not, must be acknowledged to be both ingenious and able. In The Dolphin [Case No. 3,973], something was said about the continental law on the subject of unpaid premiums of marine insurance being a lien on the vessel. The following information has, since the publication of 1 Flippin, been received relative to the law of different European states:

The law of Belgium (article 23, Code of Commerce) provides: "L'assureur a un privilége sur li chose assurée. Ce privilege est dispensé de toute inscription. Il prend rang immediatement apres celui des frais. Il n'ex-

iste quelque soit le mode de payement de la prime que pour une somme correspondant a deux annuities." "The underwriter has a privilege on the thing assured. This privilege (or lien) takes rank immediately after legal costs or expenses. Such preference, no matter how the premium is to be paid, exists only for an amount corresponding to two annual premiums."

The law of Portugal, for which the reporter is indebted to the U. S. consular agent at Oporto, is as follows: "The underwriter has a lien on vessels for unpaid premiums of insurance, if the policy, on account of which the premium is due, has not expired."

Through the courtesy of Chapman Coleman, Esq., second sec'y of the legation U. S., at Berlin, the following statement of the German commercial law on the subject has been received. The same was furnished by Baron Judge Diepenbroick-Gruter, president of the senate of the kammer court (the highest tribunal in Prussia.) "The German Commercial Law Book (Hendelsgesetzbuch), article 757, designates under ten heads the persons, who for certain claims, are entitled to the rights of creditors of a vessel (Schiffs-Glaübiger); i. e., who have a lien against the vessel as against a third party. Article 758. Assurers, as regards claims, do not belong to the category enumerated; nor is there any other provision of law which gives a lien of the character in question. As against a third party no such claim can therefore be enforced."

According to the law of Holland (letter received from D. Eckstein, Esq., consul at Amsterdam), "there is no Dutch law giving underwriters a lien on vessels for unpaid premiums of insurance."

Christian Bors, Esq., consul of Sweden and Norway at New York, writes, "that, according to the laws of Sweden and Norway, underwriters have a lien on vessels for unpaid claims; certain other claims, such as seamen's wages, etc., have, however, preference."

From the U. S. consulate (Henry B. Rydert, Esq.) at Copenhagen, the law of Denmark is ascertained to be: "The underwriter has no more lien for unpaid premium on a vessel than any other person." "The insurer, or the party who insures for another party, is liable for the premium." "The premium is payable immediately on entering or signing an agreement for insurance. If the premium is not paid immediately the underwriter has the option of cancelling the agreement for the time the premium is unpaid, provided the policy has not been handed over with a clause that the same is in force, whether the premium is paid or not."

Section 285 of the Italian maritime law reads as follows: "Privileged debts on vessels, their tackle, apparel and furniture are the following, (and the same are entitled to the priorities in which they are placed in this section.) * * * 10. Premiums of insurance on a vessel, her tackle, apparel and furniture for the last voyage, or on a time policy, and for steamers navigating at stated periods and insured on time policies the premium corresponding to the last six months and the adjustment and contribution of mutual insurance associations during the previous six months, are liens on vessels as above."

The Austrian law follows the French law. "Codice Commercio francese. Artic. 191.—Sono privilegiati i debiti indicati qui appresso secondo l'ordine in cui sono collocati. (1, 2, 3, 4, 5, 6, 7, 8, 9.) 10. L'ammontare dei premii d'assicurazione fatta sul corpo, chiglia, attrezzi, arredi, e sull' armamento e corredo del bastimento dovuti per l'ultimo viaggio." "The debts which follow are privileged (have a lien) according to the order in which they appear." "10. The amount of the premium of insurance made on the hull, keel, rigging, furniture, apparel, outfit (or armament, armamento) and equipment."

The Spanish law (section 598 of the Code of Commerce) reads as follows: "Privileged liens on vessels, in their order, are the following: 1. Debts to the state. 2. Judicial expenses. 3. Tonnage, anchorage and port duties. 4. Expenses of keeping vessel in repair—sanctioned by the competent commercial court. 5. Wages of captain and crew. 6. Debts contracted during the last voyage to meet the exigencies of voyage and crew. 7. Debts for the construction of the vessel. 8. Debts for provisioning vessel. 10. Premiums of insurance. 11. Other liens and debts. Para gozar de la preferencia que en su respectivo grado se marca á los creditos de que hace mencion el articulo 596, se han de justificar éstos en la forma siguente: 1. Los creditos de la Real Hacienda * * *. 2. Las costas judiciales * * *. 3. Los derechos de tonelados, * * *. 4. Los salarios y gastos de consevracion del buque * * *. 5. Los empenôs y sueldo del capitan y tripulacion * * *. 6. Los deudas contraidos para cubrir las urgencias de la nave durante el ultimo viage * * *. 7. Los creditos procedentes de la construccion ó venta del buque * * *. 8. Los provisiones para el apresto * * *. 9. Los prestamos a la gruesa * * *. 10. Los prêmios de seguros, por las polizas y certificaciones de los corredores que interveniaron en ellos."

Though making endeavors in that regard the reporter was not able to procure satisfactory information as to what is the law, on this point, in Russia, Greece or Turkey.

Case No. 7,006.

ILLINOIS v. CHICAGO & A. R. CO.

[6 Biss. 107; 6 Chi. Leg. News, 316; 1 Cent. Law J. 340; 10 Alb. Law J. 36; 9 Am. Law Rev. 151; 6 Leg. Gaz. 252.] [1]

Circuit Court, S. D. Illinois. June 18, 1874.

REMOVAL OF CAUSES—JURISDICTION.

The United States circuit court has no jurisdiction of a writ of certiorari to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873.

Motion to quash a writ of certiorari. The state of Illinois commenced in its own name by the attorney-general, in the circuit court of Sangamon county, a prosecution against the defendant [the Chicago & Alton Railroad Company], a corporation chartered by the state, for violation of the act of legislature, of May 2, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same," etc. Rev. St. 1874, p. 816. After the action was commenced, the defendant in vacation, filed a petition, verified by affidavit, with the clerk of this court, which alleged in substance that the railroad company claimed rights, privileges and immunities secured by the constitution of the United States, and that, under the color of the act of this state above mentioned, the company was subject to be deprived of the same, and asking for a writ of certiorari to the state court, where the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 10 Alb. Law J. 36, and 9 Am. Law Rev. 151, contain only partial reports.]

action was pending. The clerk accordingly issued the writ of certiorari, requiring the state court to send to this court the record and proceedings in the cause.

Corydon Beckwith, P. S. Edwards, and Milton Hay, for the company.

James K. Edsall, Atty. Gen., J. Milton Palmer, and William M. Springer, for the State.

Before DAVIS, Circuit Justice, DRUMMOND, Circuit Judge, and TREAT, District Judge.

DRUMMOND, Circuit Judge. The question now made is whether the court has jurisdiction of the case. It is claimed to exist under the first section of the act of congress of April 20, 1871, 17 Stat. 13, which is as follows: "Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, shall—any such law, statute, ordinance, regulation, custom or usage of the state to the contrary notwithstanding—be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress: such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866 [14 Stat. 27], entitled, etc., and the other remedial laws of the United States which are in their nature applicable in such cases."

It is insisted by the counsel of the railroad company that the language of this section includes all persons of every class within the jurisdiction of the United States; that it comprehends any rights, privileges or immunities secured by the constitution, and any one of the amendments, and that the corporation is a person representing and acting for all the members of which it is composed, and for the rights, privileges or immunities secured to them as such. Now, if it be admitted that this is the true construction of the act of April 20, 1871, and if it be conceded, further, that the state was prosecuting an action of debt for a penalty which could not be imposed without causing the company to be subjected to the deprivation of rights, privileges and immunities granted by the constitution, the question is whether the cause could be removed from the circuit court of Sangamon county, so as to authorize this court to take jurisdiction.

The reason urged is that the act of the legislature under which the penalty is sought to be imposed impaired the obligation of the contract which the state made with the company by its charter. If this were so, has congress authorized the transfer of a case from the state to the federal courts in such a contingency? It must satisfactorily appear that this has been done.

There can be no doubt that congress can vest any jurisdiction, authorized by the constitution, in the federal courts, either originally or by transfer from the state courts. But prior to the act of April 20, 1871, that clause of the constitution which prohibits a state from passing any law impairing the obligation of contracts, when involved in a suit pending in a state court, and the decision of the court was in favor of the validity of such a law, could only be construed by the federal courts by writ of error under the 25th section of the judiciary act [1 Stat. 85]. Has the act of April 20, 1871, changed this? If so, it must be by express words or by necessary implication. The first section of the act of 1871 declares that the person doing the injury under color of the state law shall be liable to an action at law, suit in equity or other proper proceeding for redress. It will be observed that then the words "action at law and suit in equity" are omitted, and the language is "such proceeding to be prosecuted in the several district and circuit courts of the United States." There can be no doubt that the action at law and suit in equity referred to are original actions and suits to be commenced in the district or circuit courts, and it would seem not an unfair construction to hold that "other proper proceeding" should follow the principal words used, and should also be referred to any original proceeding other than such as might be properly termed an action at law or suit in equity; and when they were prosecuted in the district or circuit court they were to be subject to the same right of appeal, review upon error, and other remedies in like cases provided under the act of April 9, 1866, and other remedial laws in their nature applicable in such cases.

Now the argument is that because in some of the statutes here referred to provision is made, under certain circumstances named in each case, for a transfer of the case from the state to the federal court, this cause can, therefore, be transferred. We are not prepared to admit the conclusion. On the contrary, we think that if the first section of the act of 1871 were intended to authorize the transfer, more explicit language would have been used. Undoubtedly that section in the case named intended to confer on the circuit and district courts original jurisdiction, but full effect can be given to the section by applying the words used to original "actions at law, suits in equity, or other proper proceeding;" and "like cases," may well mean cases originally brought in such courts, namely, the district and circuit courts of the United States. The case is not then within the rule already stated. See Gaughan v. Northwestern Fertilizing Co. [Case No. 5,272.] The transfer of this case to this court is not authorized by express words or by necessary implication. We think, therefore, this court has no juris-

diction of the case, that the writ should be quashed, and the suit remanded to the Sangamon circuit court. Cause remanded.

NOTE. In case of Chicago & A. R. Co. v. Wiswall [23 Wall. (90 U. S.) 507], involving same question, supreme court of United States dismissed an appeal on the part of the company on the ground that the proper remedy was by mandamus and not by appeal. Since the rendering of above decision congress has enlarged the jurisdiction of the federal courts. Act March 3, 1875 [18 Stat. 470].

ILLINOIS, The (The ELLEN HOLGATE, v.). See Case No. 4,376.

ILLINOIS, The (McFADDEN v.). See Case No. 8,784.

ILLINOIS, The (NALL v.). See Case No. 10,005.

ILLINOIS & MISS. TEL. CO. (GILMAN v.). See Case No. 5,443.

ILLINOIS & ST. L. BRIDGE CO. (MORGAN v.). See Case No. 9,802.

Case No. 7,007.

ILLINOIS & ST. LOUIS RAILROAD & CANAL CO. v. ST. LOUIS et al.

[2 Dill. 70;[1] 5 Chi. Leg. News, 49; 4 Leg. Gaz. 355.]

Circuit Court, E. D. Missouri. Sept., 1872.

PROPERTY DEDICATED FOR PUBLIC WHARF—USES—MUNICIPAL CONTROL OVER—GRAIN ELEVATORS THEREON—BY WHOM AUTHORIZED—MUNICIPAL CONTRACTS — PUBLIC MUNICIPAL POWERS CANNOT BE SURRENDERED OR ABRIDGED.

1. A municipal corporation may, unless specially restricted, make an irrevocable dedication of property to the public for the use of a public wharf.

[Cited in Matthews v. Alexandria, 68 Mo. 119; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 408; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 201, 13 S. W. 822; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 334, 16 N. E. 624; Littler v. City of Lincoln, 106 Ill. 363.]

2. Where property within the limits of a municipal corporation and along the bank of a navigable river is dedicated to the public for the use of a wharf, and where the municipal authorities are invested with the regulation and control of the uses of the property thus dedicated, they may, unless specially restricted, authorize, under an ordinance not otherwise objectionable, the erection of a grain elevator thereon to facilitate the handling of grain at the wharf.

[Cited in Barney v. Keokuk, Case No. 1,032.]

3. The uses to which property dedicated or acquired for a public wharf may be put, discussed.

4. An ordinance by which the municipal authorities undertake, without express legislative authority therefor, to surrender to a private corporation or person their control over the public wharf for a fixed period, as, for example, an ordinance giving to private persons the right to occupy a portion of the public wharf with a grain elevator for fifty years without reserving the right to resume possession and regulate charges, is void.

[Cited in Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 127; Wiggins Ferry Co. v. East St. Louis U. Ry. Co., 107 Ill. 452.]

5. It is only in virtue of special and individual injuries that private persons can apply for relief in equity against public nuisances; and to justify such relief, it must appear that the remedy at law is inadequate.

[Cited in Julia Building Ass'n v. Bell Telephone Co., 88 Mo. 261.]

6. This principle applied, and the plaintiffs held not entitled to an injunction against the erection of a grain elevator on the public wharf at St. Louis.

This cause is, at present, before the court on the motion of the complainant for the allowance of a temporary injunction, to prevent the erection by the elevator company, under an ordinance of the city of St. Louis, of a grain and package elevator upon a portion of the public wharf of the city. The complainant is a corporation created by the state of Illinois for the purpose of mining and selling coal, with authority to construct and operate a railroad from its mines to a point in that state opposite St. Louis; and with authority, also, to establish and maintain a ferry from its lands in Illinois to the city of St. Louis, for the transportation from shore to shore of the products of its mines, and also of other property, and of teams and travelers. The bill sets out that the complainant is the owner of several duly licensed and enrolled boats and vessels of more than one hundred tons burden, propelled by steam, and which are used by it in transporting coal and other property, as well as persons, to the city of St. Louis, making for this purpose at least six round trips per day. The bill alleges the regular payment, by the complainant, and by the owners of other vessels, to the city, of wharfage fees or taxes, under the ordinance (No. 7,097) of January 14, 1870, establishing the "harbor department" of the city, and avers that the receipts by the city from this source have resulted in a surplus, after paying for the public wharf and its maintenance and repairs; and the complainant claims, that by reason of such payment, it is entitled to the use of the public wharf as a place at which to land its boats, and to load and unload the same, subject to reasonable municipal and police regulations. The bill avers, that since January, 1870, the complainant has been accustomed, by the direction and designation of the city authorities, to load and unload its boats at and upon a portion of the public wharf, which the city, by the ordinance presently to be mentioned, has undertaken to grant to the Pacific Elevator Company, for the erection of an elevator thereon; that it has paid the city therefor, as wharfage, at the rate of $300 for every term of six months, and that it has so paid up to the 1st day of July, 1872, the bill in the case having been filed

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

April 10, 1872. It is alleged that this portion of the wharf is the nearest, most natural, and convenient for the business of the complainant, as its road terminates nearly opposite thereto, on the Illinois shore; that no other portion of the wharf has been pointed out to the complainant for his use, and that the remainder of the wharf in and about the business portion of the city is already fully occupied by boats and vessels, and otherwise, and that by reason of the action of the city in the adoption of the ordinance in favor of the elevator company hereafter named, the complainant has been injured, and a cloud cast upon its right as a part of the public, to the use and enjoyment of the wharf. The bill then sets forth, in detail, the history of this wharf, with a view to show that the property was specially dedicated either by the proprietors, or by the city, or both, to be used, and used only, as a public wharf. The bill then avers that the Pacific Elevator Company is a private stock corporation, organized under the general incorporation laws of Missouri, for the purpose of erecting, maintaining, and operating within the city of St. Louis, in connection with railroads and river, or either, one or more elevators for the handling of grain and other produce; and that its business is intended to be largely, if not altogther, with the Pacific Railroad Company, and with manufacturers of flour in the city of St. Louis; and that its connection with boats and vessels is but secondary and incidental. The bill then sets forth the ordinance of the city, of February 6, 1872, numbered 7,925, which is as follows:—

"An ordinance authorizing the construction of a public grain and package elevator by the Pacific Elevator Company, and providing for the management of the same.

"Be it Ordained by the City Council of the City of St. Louis:—

"Section 1. For the purpose of better facilitating the loading and unloading of grain and other articles of merchandise landed on the public wharf of the city of St. Louis, the Pacific Elevator Company, upon the conditions and subject to the regulations hereinafter set forth, are hereby authorized to erect, and for the full period of fifty years from the date of the acceptance by them of this ordinance, to maintain a grain and package elevator and appurtenances, with the necessary appurtenances and surroundings thereto, upon that portion of the public wharf of said city included within the following boundaries and description, to-wit: Beginning at a point where the north line of Chouteau avenue produced intersects the east line of the wharf, thence on said line running westward one hundred and fifty feet, thence northward six hundred feet, on a line parallel with the east line of the wharf, and thence eastward one hundred and fifty feet, to the east line of the wharf, and thence southward along said east line of the wharf six hundred feet, to the place of beginning.

"Sec. 2. The elevator hereby authorized shall be erected upon pillars or piers of iron or stone, built to a height sufficient to bring the lower floor of said elevator for eighty feet from the east front as high as on a level with the surface of the wharf at the west line of that portion of said wharf described in the first section of this ordinance; and said piers or pillars shall be placed in regular order not less than twenty feet apart, parallel with the east line of the wharf, so as to afford at all times a free water and passage-way under the said elevator, except so far as the same may be obstructed by the beforementioned piers or pillars. The work of constructing said elevator and appurtenance shall be commenced within six months of the approval of this ordinance, and shall be prosecuted with all practicable speed to completion, at a cost of not less than two hundred thousand dollars, and said elevator shall fairly represent that sum in character and capacity, and shall be fully completed within two years from the approval of this ordinance; and in case the said Pacific Elevator Company shall neglect or fail to commence the work of constructing the same within six months from the approval of this ordinance, or having so commenced said work shall neglect or fail to complete the same in the manner prescribed within said two years from the date of the approval of this ordinance, then, and in either cases all privileges granted under this ordinance shall wholly cease. The city engineer shall exercise a general supervision over the construction of said elevator, appurtenances and approaches, so far as may be necessary to protect the interest of the city, and the plan of the elevator and approaches shall be submitted to, and be approved by, him before any work shall be commenced in constructing the same; and it is especially understood that the city of St. Louis does not part with or grant away its right to regulate and control any part of the wharf and river front occupied or used by said Pacific Eevator Company, and said company shall be subject to such general rules and regulations as the city of St. Louis may prescribe from time to time.

"Sec. 3. The elevator hereby authorized shall be used only as a public grain, produce and package elevator, for the storage, loading, and unloading of all grain and merchandise, which shall be tendered, without discrimination, subject only to such reasonable regulations, requirements, and just charges and compensation as said company may deem necessary, not in conflict with the ordinances of the city. Said Pacific Elevator Company shall keep that portion of the wharf described in the first section of this ordinance, as, also, twenty-five feet on the northern and southern sides thereof, at all times clean and in good order and repair, at

their own proper cost and expense; and shall remove all sediments deposited both north and south of the above-mentioned lines and boundaries that may have been caused by the erection and maintenance of said elevator on the wharf; and shall, for and during said full term and period of fifty years, render and pay to the city of St. Louis an annual wharfage tax of six hundred dollars, payable semi-annually, on the first day of April and the first day of October of each year.

"Sec. 4. In case the privileges and requirements of this ordinance are accepted by the said Pacific Elevator Company, the said company shall file a written statement of such acceptance with the city register within twenty days from the approval of this ordinance; otherwise they shall be deemed and held to have declined such acceptance, and the privileges hereby granted shall cease; and upon the filing of such acceptance within said time the city register shall give said company a certificate that such acceptance has been so filed according to the requirements of this ordinance.

"Sec. 5. The city of St. Louis makes no guarantee in this ordinance of any privilege herein proposed to be extended, and shall in no way be held responsible or in danger for what may result from anything herein contained.

"Approved February 6, 1872."

It is alleged that the elevator company have taken actual possession of that portion of the wharf, have enclosed the same, and are preparing to erect within the space thus inclosed a large and permanent building under and in pursuance of the terms of the ordinance just mentioned, and which, it is charged, will be a public nuisance.

The prayer is that the ordinance in favor of the elevator company be declared null and void; that the obstructions already made on the wharf be declared nuisances, and ordered to be abated; that the defendants be restrained from further holding exclusive possession of the said portion of the wharf, and from erecting thereon any building or structure which shall not leave the wharf open at all times, to all persons, and for general relief.

A stipulation signed by the parties is filed, admitting that the complainant "by virtue of the facts alleged in the bill has up to the 1st day of July, 1872, such special interest as will authorize it to institute this suit, if in fact the elevator proposed to be erected under ordinance 7,594, would be a public nuisance." The stipulation also admits that "it is the intention of the Pacific Elevator Company to erect and carry on an elevator strictly in pursuance to the ordinance; and the questions submitted to the court are whether the said ordinance is valid; and whether, if the said elevator is erected and conducted strictly in pursuance of the said ordinance, it would be subject to be abated as a public nuisance." It is also stipulated "that the receipt and shipment of grain in bulk enters largely into the commerce and trade of St. Louis, which is constantly increasing both by river and rail, and that elevators are an economical and expeditious method of handling such grain, but were not in general use at the time the wharf was dedicated or opened."

John W. Noble, for complainant.

Geo. E. Leighton and Sharp & Broadhead, for defendants.

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

DILLON, Circuit Judge. The ordinance of the city of St. Louis, adopted February 6, 1872, the validity of which presents the main question for consideration, in terms describes the place upon which the elevator building therein mentioned is to be erected as a "portion of the public wharf of the said city." It is material to understand with precision what is meant by the public wharf in St. Louis. The history of the acts of the city in respect to the wharf appears in the papers and documents on file. On March 1, 1851, the mayor was authorized by joint resolution to make arrangements to perfect the title of the city to the entire wharf, or to any portion thereof. On the next day (March 2) the city, by ordinance (No. 2,596), established the eastern and western lines of the wharf, from Plum street to the southern limits of the city—these lines being 265 feet apart; and subsequently the wharf was extended to the northern boundary line of the corporation.

In 1851, also, the owners in old blocks 43 and 44, claiming to be riparian proprietors, and to own what are now known as blocks 855 and 856 (in front of which the elevator is authorized by the ordinance of February 6, 1872, to be erected), executed an instrument by which, "in consideration of the benefit which will accrue to us and the sum of one dollar," they "authorized the city of St. Louis to locate and construct on any lands claimed by us, a wharf two hundred and sixty-five feet wide, as established by the ordinance of the city (No. 2,596, supra)." The instrument then proceeds: "And we do hereby dedicate and appropriate the said lands so taken to the use of a public wharf, to hold the same as established in said ordinance No. 2,596, for the use of a wharf, to be under the entire control and management of said city; said wharf to be constructed, repaired, taxed, and wharfage therefrom applied as the city may deem expedient."

The city also claims title or right to the wharf property by quit claim from the public schools, which was expressed to be for the wharf as established, and also under an act of the legislature in 1864–5, and also under an act of congress of June 12, 1866, granting to the city all the interest of the

United States in and to all wharves, etc., within the limits of the city corporation. It is not material in this case to determine what rights to the wharf property came from the one source or the other. So far as the right comes through the instrument made in 1851 by the proprietors of blocks 43 and 44 or 855 and 856 (see Board, etc., Public Schools v. Risley, 40 Mo. 356; Schools of St. Louis v. Risley, 10 Wall. [77 U. S.] 91), the dedication is expressly for a public wharf. If the city in any way ever owned the fee to what is termed the wharf, the ordinances produced to the court satisfactorily show an irrevocable dedication thereof by it to the use of the public as a wharf. A city corporation, like any other proprietor, may, unless specially restricted, make such a dedication; and when the rights of the public have attached the dedication cannot be recalled. Dill. Mun. Corp. § 498, and cases cited. After what the city has done with respect to the wharf property, no court would allow the corporate authorities to regard it as private and sell or otherwise dispose of it as such.

The counsel on both sides have treated the property as having been dedicated to public use as a wharf, and the authority over it to be such as exists in the city by virtue of its powers under its charter, and not in virtue of any ownership of it, present or past. We shall accordingly assume the wharf property upon which it is proposed to erect the elevator to be property which, either by the former proprietors or by the city, or both, has been effectually dedicated to the public for a wharf, and that the public may make every use of it, under the control and regulation of the city authorities, or of the legislature, which falls within, but no use which falls without, the scope and meaning of such a dedication.

The reference to the history of the wharf, so-called; its location on the bank of the river; its width and its length, extending along the whole water line of the city, embracing in the phrase not only the improved, but unimproved portions of the bank, will be seen to be material, when we come to consider the question as to the nature of the uses which it is allowable to make of property dedicated for such a purpose.

The legislature, in the charter of the city, has conferred upon the mayor and city council a great variety of powers, and, among others, the following: "8. To construct all needful improvements in the harbor; * * * to erect, repair, and regulate public wharves and docks; * * * to regulate the stationing, etc., of vessels within the city; to charge and collect wharfage," etc. After a detailed enumeration of the various legislative powers granted to the city, the charter proceeds: "17. Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, manufactures," etc. None of the other provisions of the charter, cited by counsel, seem to have any direct bearing upon the power of the city over the wharf property. It will be perceived, therefore, that there is no express legislative authority to the city to erect buildings, or to authorize the erection thereof, upon the property known as the public wharf.

And here the complainant takes the position which we shall now consider, that without direct legislative sanction (if, indeed, with it), it is not competent for the municipal authorities themselves to erect, or, under an otherwise unobjectionable ordinance, to authorize the erection of an elevator building upon the wharf, to be used for handling grain arriving at or to be shipped from it. The argument in support of this position is, that the property is dedicated to be used for a particular purpose, viz; for the purpose of a wharf, and that the occupation of it by a permanent structure of any kind, though its design, purpose, and effect may be to facilitate the receipt and transfer of grain or merchandise at the wharf, is an unauthorized use of the property. In other words, it is insisted that it is a perversion of the use for which the property was acquired or dedicated, to allow the erection thereon of an elevator to facilitate the receipt and shipment of grain in bulk at the wharf; and, consequently, that such a structure would, if built, be a public nuisance, and liable to be proceeded against and abated as such. This makes it essential to consider what are legitimate uses of property dedicated for a public wharf; and this must depend, in the absence of controlling legislative enactment, or of special limitations imposed by the dedicator, upon his presumed intention, to be gathered from the nature, situation, and location of the property, and the wants of the public. In 1851, when the city began to take steps to provide more adequate wharf accommodations, it was already possessed of an extensive trade and commerce, mainly carried on by the river. Wisely contemplating the future, it set apart a space along the whole water boundary, and termed it, whether improved or not, the public wharf. What was the purpose in setting apart property thus acquired and to be acquired for a wharf? Clearly, it was to make provision that rafts, boats, and vessels of all kinds could effect a landing in front of the city, and have a place upon which to discharge or from which to receive wares, merchandise, and cargoes of all descriptions. This was to be done upon the bank or margin of the river, which, whether improved or not, was compendiously styled the wharf—the public wharf. This is fully shown by the ordinances of the city in relation to this subject.

Both under the dedication referred to and

by its charter, the city is authorized to regulate the public wharf. Its right to appropriate different parts of the bank, called the wharf, to different uses of a proper character, admits of no doubt. It may set apart a portion exclusively for steamboats, and require them to land there, and not elsewhere. So it may require rafts, woodboats, coalboats, grainboats, etc., to land at specified and separate parts of the wharf; and such is shown by its ordinances to be the practice of the city in regulating the use of the bank of the river. The parties have stipulated that the receipt and shipment of grain in bulk enters largely into the commerce and trade of St. Louis, which is constantly increasing, both by river and rail, and that elevators, by means of the mechanical contrivances within them, afford an economical and expeditious method of handling grain arriving in this condition. Formerly grain was carried almost wholly in sacks, and was deposited on the wharf or levee preparatory to its transfer to vessels on the one hand, or to drays or other vehicles, on the other, and, in this shape, arriving in small quantities, it was easily protected from rains by means of tarpaulins, or in some similar manner. Can it be questioned, however, that the city authorities, if they had deemed it expedient, might not have erected, at various places, structures on the wharf to shelter grain in this condition? That they may not have found it necessary is no test of the measure of the right, and no evidence that every use of the wharf is illegitimate which contemplates the erection of a structure upon it. But now grain reaches St. Louis in bulk, and how shall it be handled? Must the owners incur the expense and delay of putting it into sacks or of transferring it by shovels into wagons, while the rest of the world freely make use of cheaper and improved modes of handling it?

A single elevator, occupying a small portion of the wharf, may be made to handle one hundred thousand bushels or more of grain per day, at a trifling cost per bushel, while the handling of the same amount in sacks or wagons would require a much larger space of the wharf, and be attended with delays and with increased expense, both to the owners and the public.

The dedication of the property was perpetual, and for the benefit of the public. The extent of the dedication, its scope, remains the same, but the mode of using property dedicated for a wharf may change from time to time as the wants of commerce or the public may require, and this the dedicator is presumed to contemplate when he makes the dedication.

What benefit is it to the dedicator to insist when grain reaches St. Louis in bulk that it shall be sacked or hauled away in vehicles? What right has the owner of a steamboat plying the river and not constructed with a view to carrying grain in bulk, to insist that the old methods shall be continued? If the city, under the powers conferred upon it before mentioned, should see fit to set apart a portion of the wharf for the landing of boats carrying grain in bulk, and to erect thereon artificial contrivances to facilitate the loading and unloading of such vessels, it has, in our judgment, the clear right to do so; and since grain in this condition requires to be effectually protected from the weather, proper structures to afford such protection may be erected by it on the wharf, the same as it might make any other improvement germane to the purposes of a wharf and within the scope of the dedication.

A wharf differs in many material respects from a street. The latter is primarily intended for the purposes of passage or travel, and any erection in it, without legislative authority, is a nuisance; but a wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels or awaiting shipment may be laid or deposited; and it would seem that structures or appliances of any kind intended, and which have the effect to facilitate the handling and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful and within the purposes for which the wharf property was acquired or dedicated.

We do not say that the municipal authorities could use the wharf property for mere warehouse purposes, though we have no doubt that it would be competent for them to erect, or authorize the erection thereon, of such structures for the receipt and shipment of goods by water, as they might deem expedient in order to promote the trade and commerce of the city.

And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall without the scope of dedication, and such a structure would not, therefore, be a public nuisance.

We have not met, nor have the counsel cited, any adjudications upon the precise point; and we have, therefore, been compelled to decide it upon principle, and have felt that it was due to the importance of the question to set forth our views, as we have done, with considerable fullness.

The next question is, whether the ordinance of February 6, 1872, authorizing the elevator company to erect, maintain, and carry on the elevator upon the wharf, is valid. One effect of this ordinance, if valid, is, in my opinion, to set apart and surrender to the exclusive use of the elevator company, for the full period therein named, one hundred and fifty by six hundred feet of the pub-

lic wharf. This ordinance, when accepted by the company, as it is alleged it has been, constitutes a contract between it and the city; and if it be a valid contract, and shall be complied with by the company on its part, it must continue in force and be binding upon the city for the next fifty years. Whatever may be the changes in the condition and wants of the city, or of the public, within that period, the hands of the municipal authorities are effectually tied by this contract, and the elevator company has the right to maintain the structure and to retain possession of this portion of the public wharf. If it should become, in the judgment of the mayor and city council, positively detrimental to the welfare, trade and commerce of the city, or if the space it occupies should, in their opinion, be more urgently needed for other purposes, still this structure must remain.

The ordinance, if valid, places the property occupied by the elevator beyond the control of the city authorities. Nay, more: if it is a contract (as it is, if valid), it possesses all the legal attributes of a contract, is within the protection of the national constitution, and the elevator company may not only hold possession of this portion of the wharf, and carry on its business there against the will of the city corporation, but equally against the will of the legislature, which is the supreme guardian of the public rights in all public places.

In the light of these grave consequences, we shall inquire presently, whether the corporation of St. Louis has been clothed by the legislature with the power, not only to disable itself, but also to disable the legislature, except by the exercise of the eminent domain, for half a century from full and unrestrained control over the public wharf and its uses.

Another effect of this ordinance, in my opinion, if valid, is, that the city has no control over the charges which the elevator company may make for its services in handling and storing grain and other property. Counsel argue that the power was expressly reserved by the city; but on careful consideration of the provisions of the ordinance, my judgment is otherwise. The language of the ordinance in this respect is this: "It is especially understood that the city of St. Louis does not part with or grant away its right to regulate and control any part of the wharf and river front occupied or used by said Pacific Elevator Company, and said company shall be subject to such general rules and regulations as the city of St. Louis may prescribe from time to time. The elevator hereby authorized shall be used only as a public grain, package, and produce elevator, for the storage, loading and unloading of all grain and merchandise which shall be tendered without discrimination, subject only to such reasonable regulations, requirements, and just charges and compensation as the said company may deem necessary, not in conflict with the ordinances of the city."

Without any reservation whatever, the legislative and police power of the city over this structure, except so far as controlled by the contract, would remain. The language that the city does not part with its right to regulate and control the portion of the wharf used by the elevator company, can be true only in a qualified sense; for, as above shown, it has parted, on the assumption that the ordinance is valid, with its right to control the use of it for fifty years. The special reservation is, that the company shall be subject to such general rules and regulations as may be prescribed by the city—not special rules and regulations for this particular elevator, even if the general language "rules and regulations" would embrace the right to fix tariffs and prices.

Assuming that the use of the wharf for an elevator is a legitimate use, and this ordinance granting the right to the elevator company thus to use it, is valid, I cannot find any provision of the ordinance which fairly admits of the construction that the company has parted with its right to fix its own prices and agreed to abide by those fixed by the city, or by which the power of the city over the prices to be charged by this elevator company is any greater than over the prices to be charged by others. In the absence of a concession of the right, the elevator company would, of course, have the unqualified power, as against the city, to prescribe its own prices. If it be claimed that it has surrendered this right, the onus lies on the party advancing the claim to establish it. The point is one of great consequence, and how easy and how natural it would have been, if such had been the intention of the parties, to have said, in terms the city may regulate prices.

This conclusion finds some support, also, in the fact that the company pays the city an annual compensation for the use of the property; and in the further consideration that it is not to be presumed, nor upon doubtful grounds held, that the company have agreed to expend at least $200,000, and have the value of that investment depend upon the uncontrolled action of the city authorities.

I attach less importance, however, to this point, because, if mistaken in respect to it, my opinion would still be, that the ordinance is invalid, on the ground first suggested, viz: that the city cannot, under the powers given in its charter before mentioned, thus surrender the control over the use of the wharf property.

The only powers delegated to the city by the legislature in respect to wharves have been before mentioned, and they are, in substance, to erect, repair, and regulate them, and to pass ordinances to promote the welfare, commerce, and trade of the city. These are public or legislative powers, in-

capable in their nature of delegation or of surrender by the municipality. It is too plain for argument, that under these general powers, the city could not sell or alien any portion of the wharf property, whether acquired by dedication or condemnation. It is equally plain, that they do not authorize it to make a lease of the property to private individuals for a fixed period incapable of determination by the city at its will. If the city may, by a binding contract, surrender its control over six hundred feet of the wharf property, it may, on the same principle, equally surrender its control over six thousand feet. If it may surrender its control for fifty years, it may equally for ten times fifty years, and what is the practical difference between that and an absolute alienation?

It is to be borne in mind that the supreme or ultimate control over the uses of public places is in the legislature, and that the only powers in this respect possessed by the city are derivative and rest upon legislative grant. The only grant is of the power to regulate the wharf, and this falls far short of conferring upon the city the power to surrender for a fixed period its exclusive use to private persons or corporations. Such authority must rest in a plain grant from the legislature.

These principles are not new. On the contrary, it has been decided time and time again that powers conferred upon municipal corporations for public purposes cannot be either delegated to others, or surrendered, or renounced. Such corporations may adopt by-laws or make authorized contracts, but they have no power as a party to enter into contracts or pass ordinances which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing at all times their public duties. The reports are full of cases establishing this salutary doctrine; and, for the protection of the public, it is of the first importance that it shall be maintained by the courts in undiminished efficiency. See cases cited in Dill. Mun. Corp. § 61; Id. §§ 542, 567.

One instance will suffice to illustrate the principle. The city of New York possessed by its charter the general power to open, alter, repair, and regulate streets. Under this power, without any express authority from the legislature, the corporation of the city undertook to confer by resolution upon an association of persons the exclusive right to construct and maintain for a term of years, a street railway in Broadway. The judgment of the court was against the validity of the resolution, and rested upon the sound principle that the powers of the corporation in respect to the control of its streets cannot be surrendered or delegated by contract to private parties; and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets. "Taking the whole ordinance together," says Comstock, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad or any railroad in Broadway, can be beneficial to the public, but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by the voluntary surrender—in effect in perpetuity—of its own powers. On this ground the ordinance is void." Davis v. Mayor, etc., of New York, 14 N. Y. 506, 532.

This view was subsequently approved by the same court: Milhau v. Sharp, 27 N. Y. 611. And the same principle is asserted in Goszler v. Georgetown, 6 Wheat. [19 U. S.] 593, 597, where, in the language of Chief Justice Marshall, it is held that a municipal "corporation cannot abridge its own legislative power."

The doctrine is unquestionably sound, and it is decisive against the validity of the ordinance under consideration. It is scarcely necessary to observe that an attempt to surrender the control over a street or public wharf for fifty years is just as objectionable in principle as where the surrender is without limit as to time. The principle is, indeed, the same.

My Brother TREAT concurs in the principles of law which have just been stated, but he differs with me on the question of the validity of the ordinance. In his judgment, applying to the ordinance the well known principle that public grants are to be construed strictly against the grantees and liberally for the public, he thinks that by the proper construction of the powers reserved in the ordinance to the city authorities they have the right at any time, if necessary for wharf purposes, both to resume possession of the portion of the wharf on which the elevator may be built, and to regulate the charges which the elevator company may make for their services. In this view of the reserved powers of the city under the ordinance I can not concur. I am clearly of the opinion that if the elevator company complies with the ordinance, it was the intention to give it a right "to maintain" the elevator "for the full period of fifty years," and I strongly incline to the opinion that the regulation of tariffs is also beyond municipal control.

We agree in opinion, however, that under the charter as it stands, it is essential to the validity of the ordinance that the municipal authorities shall at all times have the right to resume possession of the ground occupied by the elevator, and to control and regulate the prices which may be charged thereat, and that these powers, certainly without plain legislative authority to that effect, can not be surrendered or bargained away for any fixed or definite period. The only point of difference is, whether under the ordinance in question the city has reserved the right at any time during the fifty years, to regain possession of the property, and at all times to regulate the compensation and charges of the elevator company; if it has we would concur in the opinion that the ordinance is valid, and if it has not, that it is void.

The next and only remaining question is whether, if the foregoing views be sound, the plaintiffs are entitled to an injunction to restrain the erection of the elevator. They ask it on the ground that if erected it will be a public nuisance, because the structure can derive no legal sanction from a void ordinance.

We need not inquire what right the state would have to abate an elevator or other structure erected on the wharf without legal authority, for the state or its officers are not parties to the present bill. Equity, it is well known, will enjoin or relieve against a public nuisance where there is imminent danger of irreparable mischief before there can be an effectual remedy at law, when its jurisdiction is invoked in behalf of the state or the public. But in order to justify equitable interference in behalf of private parties, it must appear that they are in danger of suffering individual and special injuries beyond those suffered by the public at large, and of a nature for which the remedy of a private action for damages would be inadequate.

It is only in virtue of special and individual injuries that private persons can ask for equitable relief. Mississippi & M. R. R. Co. v. Ward, 2 Black [67 U. S.] 485; Georgetown v. Canal Co., 12 Pet. [37 U. S.] 91; Wheeling Bridge Case, 13 How. [54 U. S.] 518; Spooner v. McConnell [Case No. 13,245.]

Upon these principles, it is plain, admitting the substantial averments of the bill to be true, that no case is made out by the plaintiffs for an injunction to restrain the violation of their individual or private rights. It is not shown that they have now any right to land or to insist upon landing at, or to use that portion of the wharf, on which it is proposed to erect the elevator. On the contrary, it is manifest that they have no such right; but that it is competent for the city authorities to require them to land their boats elsewhere, and to prohibit landing them at the place where the elevator is to be built, unless laden with, or designed to carry, articles or merchandise for which that portion of the wharf is set apart.

There is no claim that the city authorities have sought to deprive the plaintiffs of the right to land at or do business upon the wharf; and to justify an injunction in their behalf, it should appear that they have a right to land upon this particular portion of the wharf where the elevator is to be built, or that its erection there will, in some other way, be specially injurious to them, and so injurious as to require relief in equity. No such case is shown. And it would seem difficult to make such a case when it is clearly within the lawful power of the municipal authorities to prescribe where the plaintiffs and all other persons shall land, and how and under what regulations, reasonable in their character, they are entitled to use the wharf.

We concur in holding that the motion for a preliminary injunction in the plaintiffs' behalf to restrain the erection of the elevator must be denied. Injunction denied.

NOTE.—This decision was acquiesced in by the parties. That the legislative powers and public trusts conferred upon municipal corporations cannot, without express or plain authority from the legislature, be bargained away, or surrendered, or abridged, either by contract or ordinances, is a doctrine which has been often decided and is settled law. Such corporations must at all times retain the full possession of their legislative powers, so as at all times to be able to discharge their public duties. An interesting recent illustration of this doctrine in a case analogous in principle to the one decided above, will be found in Gale v. Kalamazoo (1871) 23 Mich. 344, relating to a municipal contract respecting a market house for the city. See, also, People's Railroad v. Memphis Railroad (1869) 10 Wall. [77 U. S.] 38, 50; Louisville City Railroad Co. v. Louisville (1871) 8 Bush (Ky.) 415; Brooklyn v. Brooklyn City R. Co. (1872) 47 N. Y. 475; Milhau v. Sharp (1863) 27 N. Y. 611; Presbyterian Church v. Mayor, etc., of N. Y. (1826) 5 Cow. 538, followed; Stuyvesant v. Mayor, etc., of New York, 7 Cow. 588; Western Saving Fund Soc. v. City of Philadelphia, 31 Pa. St. 175; Ex parte Mayor, etc., of Albany, 23 Wend. 277; New York & H. R. Co. v. Mayor, etc., 1 Hilt. 562, 568; Martin v. Mayor, etc. (1841) 1 Hill, 545; Goszler v. Georgetown, 6 Wheat. [19 U. S.] 593; Sedg. Const. & St. Law, 634; State v. Graves (1862) 19 Md. 351, 373; Branson v. City of Philadelphia, 47 Pa. St. 329; Cooley, Const. Lim. 206; In re Albany St., 6 Abb. Pr. 273; Dingman v. People, 51 Ill. 277; Brimmer v. Boston (1869) 102 Mass. 19; Johnson v. Philadelphia, 60 Pa. St. 445; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, 295; Mayor, etc., of City of Jackson v. Bowman (1861) 39 Miss. 671; Oakland v. Carpentier (1859) 13 Cal. 540, opinion of Baldwin, J.; Smith v. Morse, 2 Cal. 524. Compare Attorney General v. Mayor, etc., of New York, 3 Duer, 119, 131, 147; Davis v. Mayor, etc., 14 N. Y. 506, 532; Costar v. Brush, 25 Wend. 628.

ILLINOIS CENT. R. CO. (BARRON v.). See Cases Nos. 1,052 and 1,053.

Case No. 7,008.

ILLINOIS CENT. R. CO. et al. v. MISSISSIPPI CENT. R. CO. et al.[1]

District Court, N. D. Mississippi. Dec. 13, 1876.

RAILROAD BONDS—ISSUE UNDER LEGISLATIVE AUTHORITY—MORTGAGE TO SECURE SAME—VALIDITY WITHOUT RECORDING—FORECLOSURE—RIGHTS OF JUNIOR MORTGAGEE—RECEIVER—OUSTER—TRUSTEE UNDER MORTGAGE.

[1. Bonds issued by a railroad company under legislative authority constitute a debt against the corporation, and a mortgage given to secure the same is valid, between the parties to it, without registration.]

[2. Where a prior mortgagee of a railroad fails to take possession, a junior mortgagee, whose rights are in danger by reason of the mortgagor's possession, may in a suit to foreclose, on sufficient cause shown, have a receiver appointed; but such appointment is without prejudice to the prior mortgagees, whether so stated in the order of appointment or not.]

[3. When a receiver so appointed takes possession, his possession is that of the court, and he cannot be ousted except by its order.]

[4. When trustees under prior railroad mortgages take possession of the mortgaged property, and undertake to execute the trusts prejudicially to the subsequent incumbrancers, a court of equity may restrain the improper execution of the trust, or take possession from such trustees, and appoint a receiver.]

[5. The legal title of the trustees to the property of the corporation is only for the purpose of executing the trusts, and a court of equity, having like power of execution, will not surrender possession unless it is apparent that the trustees can better execute the trust in justice to all parties.]

[6. Where a receiver of a railroad has been appointed on foreclosure of a junior mortgage covering the whole road, and the senior mortgages cover but a portion of the road, for the purpose of execution of the trusts by the court in such prior mortgages the property covered thereby should be separated from the whole, and another receiver appointed for that portion.]

The question now presented for decision arises upon the motion of Jacob Thompson et al., trustees under the first mortgage, and a portion of the bondholders under that mortgage, to have J. B. Alexander, the receiver heretofore appointed by this court, removed from said receivership, and the property held by him and covered by said mortgage delivered and turned over to said trustees, to be used and employed by them in payment of the debt secured by said mortgage, which motion is resisted by the complainants. To a proper understanding of the questions raised by the motion it is necessary to give a brief statement of the facts as presented by the record. The Mississippi Central Railroad Company was duly and legally incorporated by the act of the legislature of the state of Mississippi, and afterwards amended by various acts, for the purpose of constructing and operating a railroad from Canton on the Mississippi to the Tennessee line. To raise means to carry out this enterprise said company, in pursuance of authority vested in them by said acts of the legislature, issued a large number of bonds with interest coupons attached, payable at different dates. To secure the payment of these bonds, with interest, said company, on the 1st day of November, 1854, executed to Jacob Thompson, Charles Butler, and Azariah C. Flagg, a mortgage, a trust deed, conveying said railroad, with all its rolling stock and other appurtenances, and property then owned by said company, or which might thereafter be acquired, and providing that upon the nonpayment of these bonds or the interest thereon as the same might fall due, demand thereof being first made, and default for the space of sixty days, the persons holding such bonds or interest coupons might apply to said trustees to take possession of said railroad and its property, and operate the same, and, after applying the proceeds, as far as necessary, to the payment of the necessary expenses for operating the road, apply the residue to the payment of such due and unpaid indebtedness. This mortgage was duly recorded according to the provisions of the statutes in such cases. Said Mississippi Central Railroad Company afterwards, for the same purpose, issued what are known as "second mortgage bonds" to a large amount, to secure the payment of which, with the interest coupons attached, a mortgage or trust deed was executed to trustees therein named with similar powers. Afterwards said Mississippi Central Railroad Company leased said railroad with all its properties to H. S. McComb et al. for a term of years. Said lessees were afterwards incorporated by an act of the legislature of the state under the name of the Southern Railroad Association. To provide for the extension of said railroad, which had before that time been consolidated with that portion of said railroad from the state line to Jackson, Tenn., under a corporation created by the laws of Tennessee, from Jackson, Tenn., to Cairo, Ill., and to provide for the payment of the bonds theretofore issued, before mentioned, said Mississippi Central Railroad and said Southern Railroad Association on the 1st day of May, 1872, issued what are known as the "third mortgage bonds," to secure the payment of which, with interest, said Mississippi Central Railroad Company and the Southern Railroad Company executed a mortgage or trust deed to the trustees therein named, with like powers and conditions named in the first and second mortgages. That on the 13th day of April, 1874, by acts of the respective state legislatures through which the New Orleans, Jackson & Great Northern Railroad and the Mississippi Central Railroad, as extended by said Southern Railroad Association, from Canton to Cairo, were consolidated under the name of the New Orleans, St. Louis & Chicago Railroad Company. That the complainants, the Illinois Central Railroad Company being the own-

[1] [Not previously reported.]

ers and holders of a portion of the series of third mortgage bonds and coupons which had become due and payable, demanded payment thereof which was denied. The said New Orleans, St. Louis & Chicago Railroad Company, under the term of said consolidation, agreed and promised to pay the amount due upon all of the bonds, with interest coupons thereon, secured by all the mortgages. The Illinois Central Railroad Company, as the holders of the bonds stated, filed their several bills of complaint in the United States courts through which said consolidated railroad runs, charging that said railroad companies and association are insolvent, and praying that the said road, with all its properties, might be delivered to the trustees named in said third mortgage, to be operated for the purpose of paying the amount due upon said third mortgage bonds. None of the trustees or bondholders under the first or second mortgages were made parties to this bill. The application to have the railroad, etc., turned over to the trustees has been denied, but J. B. Alexander, without objection, was appointed receiver, from Jackson, Miss., to the Tennessee line, by the United States courts of the several districts through which the same passes, who is now operating and managing the same. On an early day of the present term of this court, A. M. Clayton and other holders of the first and second mortgage bonds applied to be made party defendants to this cause, which application was granted; and for leave to answer, and also to file a cross bill, which leave was also granted. The answers were filed on the 17th of this month, and time given complainants to file exceptions; also time extended for filing cross bill. At the same time the motion now under consideration was filed.

HILL, District Judge. The facts above stated appear from the pleadings and papers on file, and for the purpose of the motion will be considered as true. I will first consider some of the positions argued by counsel against the proceedings appointing the receiver, and for which it is urged the motion should be sustained.

First, it is urged that complainants have not shown by their bill that their mortgage was recorded, and that without which it is insisted it is void. In reply to this objection it is insisted that, as between mortgagor and mortgagee, the recording of the mortgage is unnecessary. Such I understand to be the law of this state, but the mortgage was not necessary to the validity of the bonds; it is only a means to secure payment. The bill alleges that the bonds were issued under legislative authority, and, if so, and no other objection is shown against their validity, they constitute a debt against the corporation that issued them; and the mortgage security given was valid between the parties to it without registration.

Secondly, it is insisted that the order appointing the receiver was irregular, if not void, as against the prior mortgagees, unless they had been made parties, or it had contained a provision that their rights should not be affected by the appointment. Quite a number of authorities have been read and commented upon by the learned and experienced counsel on both sides upon this as well as all other points raised, but, when considered together, in my judgment establish the rule that when a prior mortgagee fails to take possession of the mortgaged property, a junior encumbrancer whose rights are likely to be injured by the property remaining in the possession of the mortgagor, may file his bill, and, if sufficient cause is shown, may have the property placed in the hands of a receiver without making prior encumbrancers parties; and whether the order appointing receiver contain the provision that it is without prejudice to the prior encumbrancers or not, it is without such prejudice. But when the receiver takes possession under his appointment he holds as the officer of the court, and, being in the possession of the court, it cannot be taken out of the possession of its officer only by order of the court, whose duty it is to protect and enforce all the rights of parties to the property then or afterward appearing, or who may be brought before it. I am satisfied that this objection to the order appointing receiver is not maintainable.

The record and papers now before the court show that a portion of the first mortgage bonds, with interest, are now due, and that payment has been demanded and default made for more than 60 days, and that the trustees have been requested to take possession of the mortgaged property under the powers contained in the mortgage, and that they are willing to take possession and execute the trust. The case, as at present presented, shows that there is a large amount of indebtedness due upon the first and second mortgage bonds, for which the property now in the hands of the receiver, covered by these mortgages, is liable, before the complainants can enforce their security or demands; and that this property and its income should and must be applied first to the debts secured by the first mortgage, then to those secured by the second mortgage, then to those secured by the mortgage under which complainants claim, and the residue, if any, to the mortgagors. As at present presented, the only question is as to how this property can best be used and applied so as best to secure and enforce these rights. The property is the property of the mortgagors, subject only to the encumbrances in their order of priority. The mortgagees are only securities. The power conferred upon the trustees to take possession, operate, and sell, if necessary, is a mode provided by contract for the execution of

the trust without the aid of the court; and were the trustees under either of these prior mortgagees to take possession of the property, and undertake to execute the trusts, in a manner prejudicial to the subsequent incumbrancers, a court of equity, upon application, would restrain such improper execution, either upon its restraining orders upon the trustees, or take it out of their possession, and place it in the hands of a receiver. In other words, it is a duty of a court of equity, when properly applied to, to see that trust property is so managed and disposed of as to secure and protect the rights of all parties having an interest therein, according to their priority. This court, as I believe, has properly possessed itself of the property for the benefit of those who may show themselves entitled to it, and will, as far as its judgment will permit, see that it is used, controlled, and disposed of so as to secure the rights of all parties in it. It is insisted upon the part of the trustees that they have the legal title to this property, and that this court, as a court of equity, has no right to hold it from their possession. It is true that they have a legal title, but this is only for the purpose of executing a trust, which, if the circumstances require, this court, as a court of equity, has the power to execute; and the court, having possession of the trust property, cannot be called upon to surrender it, unless it is shown that the trustees can better execute the trust in justice to all parties than the court, through its orders and decrees, executed by its officers. This, to my mind, has not been fully shown, and I might, without saying more, for this reason overrule the motion now insisted upon. But as the questions in this cause have been very fully and ably presented by the distinguished counsel on both sides, and as the case is one of unusual importance, not only to the parties immediately concerned, but to the public, whose means have been contributed to the building of this great thoroughfare, and from which no return has been or ever will be made, except the incidental advantages enjoyed, I hoped to be pardoned to consider in anticipation some of the questions involved.

The property now under control of the receiver extends from New Orleans to the Tennessee line. The property covered by these first and second mortgages embraces only the railroad and its appurtenances from Canton to the Tennessee line, and the rolling stock, etc., wherever it may be. That for the purpose of executing these trusts this property should be separated from the balance of the property now in the hands of the receiver, and managed and controlled by a receiver or other agent, subject to the orders and control of one court, if it can be done, I think must be apparent to any disinterested mind understanding the present complications surrounding the cases. At present some 40 miles of the railroad is subject to the orders and decrees of the circuit court for the Southern district of this state, and must remain so until released by the order of that court, or one of its judges, upon proper proceedings at chambers. As the process of this court extends to that district, I submit whether it will not be best to take such steps as will give to the one court or the other the control, so far at least as the present management is concerned. No long delay need take place. Those making this motion have obtained leave to file a cross-bill, which I presume will be done in a short time; and upon that proceeding, and within a short time, any needed steps may be taken to place the road and property covered by the first and second mortgages under the separate control of the one court or the other, under the trustees as receivers, if they shall be deemed best qualified, or under some other competent person or persons, so as fully to secure the rights of all. Or, if the complainants prefer, they may pay off or otherwise secure the debts secured by the first and second mortgage, and let the property remain under the control of the present receiver as now managed by him.

In stating my views on the questions presented I have not referred to and commented upon the numerous authorities read and commented upon by counsel, but have considered the rule thereon stated, and applied them to the facts to this case according to my best judgment. Nor have I considered the question as to whether the motion is properly made to obtain the relief sought by the motion, as I am of the opinion that there is not sufficient cause shown for placing the property in the possession of the trustees, otherwise than as receivers under any form of proceeding. I am, however, satisfied that the cross bill prepared to be filed is the more appropriate mode.

ILLINOIS CENT. R. CO. (TURRILL v.). See Cases Nos. 14,270–14,272.

ILLINOIS CENT. R. CO. (UNITED STATES v.). See Case No. 15,437.

ILLINOIS CENT. R. CO. (WOODWARD v.). See Cases Nos. 18,006 and 18,007.

ILLINOIS CENT. RY. CO. (YORK MANUF'G CO. v.). See Case No. 18,143.

ILLINOIS MANUF'G CO. (ADAMS v.). See Case No. 54.

ILLINOIS MANUF'G CO. (DANE v.). See Case No. 3,558.

Case No. 7,009.

ILLINOIS MASONS' BEN. SOC. v. BOOTH et al.

[12 Chi. Leg. News, 151; 9 Reporter, 165.[1]]

Circuit Court, N. D. Illinois. Nov. 24, 1879.

CONSTRUCTION OF POLICY—BILL OF INTERPLEADER.

This was a bill of interpleader filed by the insurer for the purpose of determining to whom

[1] [9 Reporter 165, contains only a partial report.]

the insurance money should be paid. The money was claimed by the widow of deceased, by his son, and by a foreign administrator. The court discusses the rights of the respective parties, but without deciding as to which one of them is entitled to the money, orders it to be paid to the foreign administrator on his giving adequate security to hold the same for the benefit of whom it may concern. Upon failure to give such security the court will order the society to hold the money until letters of administration are taken out in this state.

[This was a suit by the Illinois Masons' Benevolent Society against Adaliza Booth and others, representatives of Moses K. Booth, deceased.]

DRUMMOND, Circuit Judge. This is a bill of interpleader, filed by the plaintiff against various defendants, representing the estate of Moses K. Booth, for the purpose of determining to whom a certain sum of money, admitted by the plaintiff to be due to the estate, shall be paid. Booth was a member of the society during his life, and it issued to him a certain certificate, by which it agreed with him, his heirs, executors, administrators and assigns, that it would pay to his wife, naming her, or his legal representatives, a certain sum of money, to be ascertained in the mnaner pointed out in the certificate upon notice and evidence of Booth's death. After the certificate was given by the society, the wife of Booth died and he married again, and on November 1st, 1877, died, leaving a widow and one son born of the first marriage, both of whom are parties defendant in this case. The present administrator of the estate is a citizen of Colorado, and has taken out letters of administration there, Booth having died intestate. He is also a party defendant in this case. The son claims the whole of the money due from the plaintiff to the estate, as the sole heir of his father. The widow claims a part of the money as being entitled under the law of this state, to a certain proportion of the personal estate of her deceased husband, and the administrator claims the whole of it as the general representative of the estate, and as coming within the meaning of the clause in the certificate which declares that it is to be paid to the first wife by name, or to Booth's legal representative, the administrator insisting, she being dead, he is the legal representative of the estate. At the time of Booth's death, which was while he was a citizen of Colorado, he owed debts which the proceeds of his estate arising from other sources than this sum of money in controversy, would not discharge, and the payment of which will absorb what is due from the plaintiff; and the real question in this case is, substantially, whether the money due from the plaintiff should go to the son and widow, or to the administrator, to be distributed to the creditors of the estate. It is proper to say, that after the death of Booth's first wife, and after his second marriage, and only a few months before his death, he seems to have resolved to cause the certificate which he held to be made payable to his son, and wrote the society for the purpose of ascertaining whether or not the certificate could be changed so as to accomplish that in the event of his death. The society wrote him that it could be done, and if he desired it he should forward his certificate of membership. This is all we know of his purpose to make the claim due at his death payable to his son. He did not forward the certificate of membership, and as far as we know, he did nothing further to comply with the terms of the society, and no change was made in the certificate. Whether it was in consequence of a change of purpose, of course we are ignorant. There were payments made of the amounts due according to the terms of membership, from time to time, by one or more persons; but there is no satisfactory evidence that at the time of his death whatever had been paid had not been reimbursed by him, so that there does not seem to be any special equity arising from the fact of other persons having advanced money which was unpaid at the time of his death.

The questions in the case are: First, whether the court can assume that the true construction of the certificate is that the money due at the time of his death should be paid directly to his widow and to his son, in proportions as provided by the law of this state; or, whether the court will direct it all to be paid to the administrator as the general representative of the estate on such terms as that it shall be held by him and properly secured, so as to be distributed in conformity with an adjudication of a competent court of this state of the rights of the parties.

As to the first question, it seems clear that the son would not be entitled, even on the assumption made by his counsel, to the whole of the money due by the plaintiff to the estate. The certificate shows clearly, and such is the general scope of the policy of the society, that the object was to provide as well for the wife as for the children, or representatives of the husband, and the wife named in the certificate having died, and another having been taken, now the widow of Booth, it would seem as though the true purpose of the certificate and of the society would only be accomplished by regarding her rights as well as those of the child surviving, and so there could not be a payment of the whole amount to the son. And as the plaintiff is a corporation, acting under the law of this state, and as this contract was made in this state, it seems to be nothing more than fair that the courts of this state should determine what is the legal construction of this contract, and whether it is one which, under the facts of the case, would entitle the widow and the son, or the creditors of Booth in preference to them, to the payment of the amount due. In this

case the company agrees with Booth, his heirs, executors, administrators and assigns, to pay to Sarah M. Booth, his wife, or the legal representatives of Booth, the amount which may be due. Various cases have been cited, which, it is claimed, have a bearing on what is the true construction of this contract. In the case of Kentucky Masonic Mut. Ins. Co. v. Miller, 13 Bush, 489, the language of the contract was that the company would pay to the heirs of the deceased, a member of the company, the amount which might be due, or as he might direct in his will. He gave no directions in his will, and the question was, whether the amount should be paid to his widow, he having left no children, or to the administrator, to be distributed as a portion of his estate. The court decided that the money should be paid for the benefit of the widow, but the decision was made mainly on the ground that the laws of Kentucky in relation to the company, provided that the money should be paid for the benefit of the widow and children of the deceased member, and that the clear intent of the legislature was that it should not be a fund for the payment of debts. The decision, it will be seen therefore, was placed mainly on the ground of the special legislation of Kentucky applicable to the case. In the case of Loos v. John Hancock Mut. Life Ins. Co., 41 Mo. 538, the life policy provided that in case of the death of the insured the amount should be paid to his heirs or representatives, and the question raised in that case was, whether the language of the policy should be construed so as to make the money payable to the administrator or to his daughter who brought the suit against the company as sole heir, to recover the amount due on the policy. The court held that the plaintiff as the only child and sole heir of the insured, was entitled to the payment of the money, and that the use of the word representatives in the policy could not divest her title, or divert the money to another source.

In the case of Wason v. Colburn, 99 Mass. 342, where the language of an endowment policy was, that the company agreed with the assured to pay the sum named in the policy to him, or in case of his prior decease, to his heirs or representatives, the court held that the money was payable to his administrator and not to his son. The opinion of the court is very brief, and some stress seems to have been laid upon a particular statute of Massachusetts, referring to a case of a policy effected by one person on his own life or that of another, when made for the benefit of a third person, and which, when made, would entitle the person to the amount due on the policy against the creditors and representatives of the person effecting the same. Also some stress was laid upon the fact that it was an endowment policy, and was made primarily for the benefit of the assured himself. But it will be observed that the terms of the policy in this case were the same as those in the case from Missouri already cited. It was payable to the heirs or representatives of the assured. The case from Missouri was cited in the opinion of the court in Massachusetts, and some distinction is attempted between the two cases; and it is also stated that the term representative legally indicates administrator, but nothing is said about the word "heirs," as giving significance to the word representatives, and certainly ordinarily heirs do not mean administrators. These two cases seem to be somewhat in conflict with each other, and they are the only cases which have been cited having a special bearing upon the subject of controversy. In the case of Gauch v. St. Louis Mut. Life Ins. Co., 88 Ill. 251, the policy was for the benefit of and payable to the legal heirs and assigns of the assured. The assured bequeathed the policy to his children by his last will and testament, and died leaving a widow and children. The court held that the children were entitled to the entire amount called for by the policy, although the widow under the law of this state had renounced her right under the will, and elected to take her dower and legal share of the estate. In New York Life Ins. Co. v. Flack, 3 Md. 341, the agreement in the policy of life insurance was, to pay the amount to the legal representatives of the insured, with a memorandum that if an assignment was made notice was to be given to the company. It was held that the term legal representative was to apply only to a case where the party died without having previously assigned the policy.

The law is well settled that it is competent for a party, when he obtains a policy of insurance, to provide that the money shall be paid to any particular person, either by name or by description of the person; and the question in this case is, whether, by describing the person to whom the money was to be made payable as "his representative," it was the intention of the party that it should be paid to his widow, if he had one, or to his children, if any survived him, in preference to an administrator. Undoubtedly Booth could have provided by his will to whom the money should be payable, and unless the question of indebtedness should arise, the terms of the will would be conclusive upon the company. No will having been made in this case, and the first wife named in the contract having died, the question is whether by the term legal representative the contract means his wife or child, one or both, or the administrator. I have looked into the by-laws of the society to determine whether there is anything which shows what was the meaning of the clause in the certificate, and I must confess that the question is not made much clearer by the examination. The second article of the by-laws declares that the business and object of the society shall be to afford financial aid

and benefit to the widows, orphans and heirs or devisees of deceased members. There seems to be a limitation, and if that limitation were entirely consistent with the clause of the certificate, and if that were all there was in the by-laws, then we might derive some aid from them. The terms "widows, orphans, heirs and devisees," are the only terms used and the only persons described to whom the aid of the society was to be afforded. The eighth article of the by-laws declares that upon the death of a member of the first division the directors shall pay the amount due to the heirs or legal representatives of the deceased member. "Heirs," may or may not be "legal representatives." Sometimes they are, and sometimes they are not: Morehouse v. Phelps, 21 How. [62 U. S.] 294. The second section of the article declares in the same language, that upon the death of a member the society shall pay the amount to the heirs or legal representatives of such deceased member, and the first proviso uses the same language; but another proviso declares no money shall be paid to the heirs of any deceased member of the society until the assessments are made, leaving out the words, "or legal representatives.' In the amendment to the by-laws it is declared, "provided that no money shall be paid to the heirs of any deceased member of the society until the assessments shall have been made." Now, it will be recollected that the language used in the certificate is, that the society is to pay the money to the legal representatives of the said M. K. Booth. His first wife having died, the alternative provision comes in, and the language of the certificate would read, "that the society should pay to his legal representatives;" or if we substitute in the place of "his deceased wife," "his widow living at the time of his death," then the construction would be that it should be paid to his widow—if one could be substituted for the other, or for "his legal representatives." Unfortunately there is not in this case as there was in the Kentucky case, that clear legislation about the terms of the contract to show that it was the intention of the society and of the member, that the money should be paid in the case of his death either to wife or to child. It is easy to see that very complicated and difficult questions might arise on that assumption. Suppose, for example, there was no wife or child living. Suppose there were none but distant collateral relatives surviving him. In such a case as that, there might be a question whether it was the intention to limit the payment only to a widow and children as the legal representatives. I apprehend the society could not successfully resist a claim that might be made by those collateral relatives, however remote, through the administrator of the estate for the payment of the money that might be due at the time of his death. And then there is another question. We must not assume that in all cases the party dying will be insolvent. He may have other property independent of the sum which may become due from the society, and this therefore may be only a portion of his estate. If that were the case, then of course it would not be so important to determine whether it was the child or the legal representative of the estate generally, as the administrator, who would be entitled to the money, because there would then be money enough to pay the debt, and perhaps to give to the children, if there were children, or the widow, the share of the estate which the law would give to each, whether it were taken from this fund, or the other portion of the estate. So that it will be seen the difficulties which surround the question in this case are very numerous and complicated, and the authorities are not at all conclusive, and in view of the fact that this is simply an interpleader filed by the society for the purpose of determining to whom the money shall be paid, without any special application on the part of the widow, I shall direct the money to be paid to the administrator, but upon condition only that he furnishes satisfactory security to hold it for the benefit of whom it may concern. The law in this state seems to provide that where a person has obtained administration of the estate of an intestate in any other state, he may prosecute suits to enforce claims of the estate of the deceased in this state, upon producing an authenticated copy of the letters of administration in the manner prescribed by the laws of congress, provided letters of administration have not been granted in this state; and the law declares that where a suit is commenced by a foreign administrator, and during its pendency an administrator is appointed in this state, the latter must be substituted for the former to control the suit.

In view of the particular circumstances of this case, I think it the duty of the court to provide that before the money is paid by the society to a foreign administrator, adequate security should be given in this state that the money should be held for the benefit of whom it may concern. Rev. St. 1874, p. 112, §§ 42, 43. If I were clear in my own mind that the money ought to be paid to the widow and child, I would direct it so to be done. I am of the opinion the safer course is that it should be paid to the administrator of the estate, and if this administrator will not comply with the order of the court, then I shall direct the society to hold the money until letters of administration are taken out in this state. Ordered accordingly.

ILLINOIS MIDLAND RY. CO. (HERVEY v.). See Case No. 6,434.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ABATEMENT.

Page

Where there is not concurrent jurisdiction, the pendency of an action at law cannot defeat a suit in equity..... 912

Accord and Satisfaction.

See "Payment."

ACCOUNT.

A person who has changed the marks on goods of others, and mingled them with his own so as to prevent identification, must lose the entire amount.....1157, 1160

ACTION.

A schooner at anchor slipped her cable to avoid collision with a steamer drifting in an ice field with a disabled engine, and both anchor and cable were lost. *Held*, that the vessels were each liable for a moiety..... 549

Where the connection in a joint adventure terminates with the sale of the property, and one party appropriates the proceeds, an action on the case will lie by the other for his portion; but where the connection is not thus terminated, account render is the proper form of action..... 593

Instead of consolidating actions for trespass to the person and for trespass to property, arising out of the same transaction, the court directed that they be tried at the same time and to the same jury..... 422

ADMIRALTY.

See, also, "Affreightment"; "Average"; "Bills of Lading"; "Bottomry and Respondentia"; "Charter Parties"; "Collision"; "Death by Wrongful Act"; "Demurrage"; "Marine Insurance"; "Maritime Liens"; "Pilots"; "Pleading in Admiralty"; "Practice in Admiralty"; "Salvage"; "Seamen"; "Shipping"; "Towage."

Jurisdiction—Waters and places.

The admiralty jurisdiction extends to a salvage suit for services rendered from the land in completion of services rendered by other salvors at sea..... 996

The admiralty jurisdiction extends to a salvage suit by a city fire department for services rendered from the land to a burning vessel brought to the city's wharves... 996

—— Persons and property.

Admiralty will take jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where the voyage is completed or broken up or the seamen are wrongfully discharged..... 24

—— Rights and controversies.

A contract for the transportation of goods on the high seas is of maritime jurisdiction. 984

A bond executed as an hypothecation of a vessel, but not upon the principles which govern such security, cannot be enforced in admiralty 1017

Where a debt of a seaman to the master or owner did not arise out of or was not connected with his employment, it cannot be allowed against his claim for wages.... 805

Allowances may be made to the master or owner by rebatement of wages in compensation of losses or injuries caused by negligence or fault of the seaman in the performance of his duties..... 805

Admiralty will not enforce the equitable title of one to whom a yacht was sold in the presence of the builder by one for whom she was built against the legal title which never passed from the builder by deed or absolute delivery..... 150

—— Torts.

The jurisdiction over marine torts depends upon the locality of the wrong, and not upon its extent or character, or the relations of the person injured..... 138

Procedure.

The acts of congress adopting state statutes abolishing imprisonment for debt do not apply to process of arrest in admiralty. 270

ADVERSE POSSESSION.

See, also, "Ejectment."

The possession of a purchaser at a tax sale is not to be considered under claim and color of title until the tax deed is actually executed 330

AFFREIGHTMENT.

See, also, "Admiralty"; "Bills of Lading"; "Carriers"; "Charter Parties"; "Demurrage"; "Shipping."

The master of a whaler wrecked on a desert island, and escaping in a small boat to Oahu, purchased a brig by means of a draft on the owners of the wrecked vessel, and rescued the crew and oil left on the island. *Held*, that the drawee of the draft, on its acceptance and payment, became the owner of the brig, and was entitled to compensation for such service over and above his expenses and risk..... 331

The master's liability as a common carrier ceases when the cargo is unladen on a wharf, by direction of the consignee..... 736

The receipt by the consignees of part of the cargo on one day is notice to attend and receive the rest as fast as it should be discharged, and where it is burned on the pier after it is unloaded and ready for delivery, the vessel is not liable.....1167

A custom of a vessel to land and store goods without notice of the consignee is not applicable where the carrier transships the goods by rail without notice to the shipper. 659

The freight is not due where the cargo is not carried to its destination. If voluntarily accepted at any other port freight pro

Page
rata is due, but if received by compulsion no freight is due.....1050
Where the contract of shipment is made with the master he may sue for freight in his own name.....1051
The vessel is liable where damage to cargo is due to the defective and obsolete construction and arrangement of her bulwarks and stanchions..... 655
The owner of the cargo may recover for a loss caused by the capsizing of the vessel due solely to improper loading..... 267
The vessel owner is not liable for the loss by sea perils of goods laden on deck with the shipper's consent, in the absence of culpable neglect or misconduct..... 132
A shipper of money is entitled to reimbursement where it is surrendered by the master of the vessel to prevent her capture and burning by a privateer..... 954

Agency.

See "Principal and Agent."

Aliens.

See "Courts"; "Removal of Causes."

APPEAL AND ERROR.

See, also, "Bankruptcy"; "Collision."

An appeal will not lie from a decree pro forma in admiralty..... 200
Appeals in admiralty on questions of mere fact will be discouraged..... 155
The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient. There must be independent evidence of his responsibility..... 267
After a judgment against defendant in the supreme court on appeal on demurrer, he will not be allowed to amend..... 284
After reversal, on error to the supreme court, of an order sustaining demurrers to the plaintiff's petition, further demurrers cannot be filed..... 224

APPEARANCE.

See, also, "Removal of Causes."

A party may appear in person or by counsel at any time in the course of the action.. 142

APPRENTICE.

An entry on the minutes of the orphans' court "that A. B. be bound apprentice to C. D." does not constitute a lawful binding... 204

ARBITRATION AND AWARD.

See, also, "Reference."

The administrator of a deceased partner may submit to arbitration the question as to the value of his interest in the partnership..... 766
A mistake by the referees in a point of law need not appear on the face of the award, to induce the court to set it aside..1028
On such examination into the award, new evidence cannot be admitted.....1028

Army and Navy.

See, also, "Prize"; "War."

ARREST.

See, also, "Admiralty"; "Bail."

A party to a cause depending for trial is privileged from arrest during the continuance of the court at which the trial will take place.....1019
Such privilege will prevent his arrest when coming to and returning from court, and while at his lodgings.....1019

ASSIGNMENT.

See, also, "Mortgages."

A debt due on a single contract or obligation cannot be split up by assignment so as to give a right of action by each assignee.. 860
An assignment of a debt carries with it all the accessory obligations by which the debt is secured..... 860

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy."

A stipulation for a release, and that the dividends of creditors refusing to become parties shall be paid to the assignor, does not render the assignment fraudulent and void on its face, by the law of Rhode Island 87

ASSUMPSIT.

See, also, "Contracts."

Advances made for a person after his death cannot be recovered in assumpsit against his executor..... 593
Assumpsit will lie for money due upon a special contract.....1112
A promise to account for the proceeds of a bill of exchange "as soon as the fate of the bill is decided" *held* a promise to pay, conditional upon the bill being paid.....1101
A promise to pay a claim out of the proceeds of a bill of exchange is not enforceable where the bill is protested for nonpayment 1101

Attachment.

See, also, "Bankruptcy"; "Garnishment."

ATTAINDER.

Evidence of the political character and conduct of a person is admissible to show that he was not the person intended by a proclamation under the attainder laws.....1123
A person claiming title to land cannot controvert in a collateral action the title of a purchaser under an attainder.....1129
Operation and effect of the attainder laws of Pennsylvania.....1123, 1129

ATTORNEY AND CLIENT.

Where several attorneys appear for defendants, the attorney's fee in the bill of costs will be equally divided between them.1027

AVERAGE.

Where a vessel captured by a privateer was detained until security should be given that the cargo would not be carried to the port of destination, the expenses of the detention are subjects of general average....1047
The contributory value of freight to a general average is ascertained by a deduction of one-third of the gross freight..... 876

BAIL.

The affidavit to hold to bail must show that the debt was due at the time of issuing the capias..... 174

Page

Bail are discharged by an amendment adding a cause of action which could not be given in evidence upon the original declaration, or which is not contained in the affidavit to hold to bail.....1121

Bailment.

See "Carriers"; "Pledge."

BANKRUPTCY.

See, also, "Assignment for Benefit of Creditors"; "Insolvency."

Operation and effect of bankruptcy laws and of proceedings thereunder.

The bankrupt law of 1841 is inoperative as to transactions occurring before the date when it went into effect..... 537

A petition by a partner of a dissolved firm against his copartners will be dismissed where it appears that the firm was dissolved by judicial decree, and all its assets transferred to a receiver..... 492

Cases pending under state insolvent laws when the bankrupt law came into operation are not affected thereby..... 401

A prior general assignment for the benefit of creditors, valid under the state law, will not be sustained against a valid adjudication of bankruptcy..... 269

Contempt proceedings in a state court for failure to appear for examination on proceedings supplementary to execution will not be stayed by the bankruptcy court..... 149

A suit commenced in a state court before bankruptcy, in which the title to the property surrendered by the bankrupt is in controversy, will not be abated by the bankrupt proceedings 71

A party arrested on a ca. sa. from the state court, before petition filed in bankruptcy, cannot be released from custody on the order of the bankrupt court, where the creditor did not prove his debt..... 541

The circuit court has power to enjoin the prosecution of an action of trover in a state court against the marshal, for seizing the property of a third person under his warrant in bankruptcy..... 814

A state court cannot, by its process, take property surrendered by a bankrupt from the possession of his assignee in bankruptcy 71

An assignment in bankruptcy will dissolve an attachment issued and levied two days before the filing of the petition in bankruptcy 596

The dismissal of the bankrupt's appeal in the state court on its being called in its order, which would have been ineffectual, so far as the assignee is concerned, had it been successful, *held* not a violation of the order of court forbidding further proceedings to enforce plaintiff's claim..... 211

Jurisdiction of courts.

Where the want of jurisdiction appears on the petition, the consent of the parties cannot give jurisdiction, and the court, of its own motion, should take notice of the point 492

Commencement of proceedings—Voluntary bankruptcy.

A fraudulent transfer by the petitioner will not prevent his being declared a bankrupt under the act of 1841..... 586

The jurat is not essential in a petition under Act 1841..... 586

A demand for a trial by jury, where the petition under Act 1841 is dismissed, must be made at the term at which the decision was made..... 950

The register, at the instance of the bankrupt, cannot inquire into the authority to

Page

act, of an attorney who appears for the creditors 144

—— Involuntary bankruptcy.

A firm may be declared bankrupts, although one of its members may have already been adjudicated on a creditor's petition 930

For the purposes of petitioning, a partnership is held to subsist so long as there are oustanding debts against the firm, or assets, undistributed, belonging to it..... 930

A debt contracted prior to passage of the act of 1841 is within its operation, and will support a decree..... 853

"Insolvency," as applied to involuntary proceedings, means the bankruptcy of the debtor as known to the court as a ground for proceedings. (Act 1841.)..... 853

A promissory note, overdue on its face at the time the petition is presented, is sufficient to support the proceedings. (Act 1841.) 149

A debt merged in a judgment which is clearly a fraudulent preference cannot be the foundation of a petition by the judgment creditors, unless the preference is surrendered 900

The rule for computing the requisite number and amount of petitioning creditors....1136

A denial by the debtor that the requisite number and amount of creditors have joined in the petition, and the list of creditors filed therewith, must be verified by oath of the debtor.....1136

On such a denial a reference will be ordered, to ascertain the fact, on 10 days' notice to all creditors, on which reference the creditors have the affirmative of the issue 1136

A petition against a married woman, grounded on nonpayment of her notes, dismissed, where it did not appear from the notes, or by allegation, that they were given for the benefit of her separate estate, or in course of trade..... 727

If neither the petition nor the deposition of the act of bankruptcy are signed by the petitioner, the defect is fatal..... 930

The jurat subscribed by the commissioner need not contain a venue, when it appears from the deposition itself that the oath was administered where the officer resides 149

The answer of the debtor need not be in writing. It is sufficient if he appear in court, and deny the truth of the facts set forth in the petition..... 86

The court may allow amendments where defective averments in the petition resulted from misapprehension of counsel..... 149

The decease of one partner prior to adjudication upon the question of bankruptcy is not legal cause for dismissing the petition 930

Creditors alleged to have been fraudulently preferred may appear and contest the allegations of the petition..... 70

A creditor at large may suggest suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted 490

Acts of bankruptcy.

Insolvency is the inability to pay debts in the usual course of business..... 335

"In contemplation of bankruptcy" (Act 1841) means simply in contemplation of a state of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage in business.....1079

An assignment, by one apparently insolvent, of his stock of goods, in payment of a debt to a firm of which his father-in-law was a member, *held* a preference made in contemplation of bankruptcy..... 597

A general assignment with preferences, made after the passage of the act of 1841,

Page

but before it was to go into operation, is an act of bankruptcy.....1079
An imprisonment for but seven days, exclusive of the first day, is not sufficient to support an adjudication..... 930
A mortgage to secure prior advances is not in the usual course of business, and is prima facie fraudulent and evidence of an intended fraud..... 335
The suspension of payment of commercial paper must be fraudulent, and must continue for 14 days, to be an act of bankruptcy 381
Such suspension or nonresumption of payment is fraudulent where, liability not being bona fide disputed, it is done purposely, and not by accident or mistake..... 381
But it is not an act of bankruptcy where there was a bona fide denial of liability. (Act July 14, 1870.)..... 12
"Commercial paper" means paper, which, by the law governing the contract, has the ordinary qualities and incidents of negotiable paper, in the sense of the law merchant 381
A life insurance company is a business corporation, within section 37, Act 1867.... 12

Schedule.

The statement of the sum due the creditors, with the date of the debt or judgment, *held* sufficient..... 144
Debts of the bankrupt, purchased by his father at a discount, are properly listed in the schedule at their full amount..... 587
An inventory of the personal estate, failing to set forth the separate items, is defective, but may be amended..... 144
The register's certificate as to the correctness of the inventory of debts is not conclusive 144

Adjudication.

An adjudication made after the return day, but upon petition and appearance, will be sustained in a collateral inquiry..... 269
After the amendment of June 22, 1874, an order of adjudication in involuntary proceedings cannot be entered nunc pro tunc on a direction made before the passage of the act..... 148

Meeting of creditors: Notice.

A variance in the middle letter of the bankrupt's name, in the notice, is not material 144
The marshal's return as to the service of notice is not conclusive..... 144
Sixty days from the date of the warrant for the first meeting of creditors *held* a reasonable time, where all the creditors resided in Germany 91
No creditor has a right to be heard in opposition to any of the proceedings until he has proved his debt..... 144
No objection to any proceedings can be considered an opposition to the discharge until application is made for a discharge.. 144

Assignee—Appointment and removal.

A notary public cannot take the acknowledgment of a creditor to a power of attorney to vote for the assignee..... 127
The register cannot take proof of a claim for the purpose of determining the right of the alleged creditor to vote for the assignee. 54
A mortgage creditor, who, after the adjudication, sells the mortgaged premises, and himself becomes the purchaser, cannot vote on the deficiency as an unsecured creditor 902

—— Rights, duties, and liabilities.

One who pays a debt to the bankrupt, in the usual course of business, after the petition is filed, but before the adjudication, and without actual notice or knowledge of the pendency of the proceedings, is liable to the assignee therefor 639
An assignee appointed upon the adjudication of a member of a firm upon his individual petition, whether the firm be existing or dissolved, acquires no title to its property.. 800
A foreign assignee may sue to collect the assets of the bankrupt in a federal court in New York to the same extent as the bankrupt could have sued if no bankruptcy had taken place 924

Property of bankrupt—What constitutes.

A cestui que trust may have a trust declared in trust moneys deposited by the bankrupt (who was a trustee) in a bank with his own, in his own name..... 260
Money deposited with a banker to pay a note and mortgage of the depositor when they should be sent to him is not held by the banker in a fiduciary capacity..... 540
Money given by a reinsuring company to the original insurer, for delivery to the insured, who had suffered a loss, and retained by the assignee in bankruptcy of the original insurer, may be reached by a bill in equity charging the assignee as the trustee of an express trust..... 543

—— Custody and control.

The court cannot, under a provisional warrant, order the seizure of any property except such as belongs to and was in possession of the debtor on the filing of the petition 338
The marshal to whom a warrant is delivered in involuntary proceedings is the proper person to have custody of the bankrupt's property, and the register must deliver up the writ to him on demand..... 712
Rights of joint occupants of leased premises on the bankruptcy of one of them, who was in debt to the others for his share of the rent 548
Where the bankrupt elects to occupy his farm and cultivate the crops until harvested, he must secure to the assignee a reasonable rental 1052
The assignee in bankruptcy of a mortgagor, under the Indiana law, is entitled to rents of the property, for the benefit of the unsecured creditors, until the mortgagee takes steps to have them applied to his debt, for insufficiency of the security..... 955
The bankrupt court has power to order a bankrupt to pay over to the assignee sums which apparently are in his hands..... 621
The district court, in an involuntary case, may issue an injunction to prevent the disposal of property by a person to whom the debtor has transferred it..... 338

—— Exemptions.

Exemptions created by a state statute are void as to creditors whose debts were contracted previous to the passage of such statutes 68
The exemption by Const. Ark. 1868, art. 12, § 1, of personal property of the value of $2.000, is self-executing, and its provisions are exclusive, and not cumulative..... 92
Growing crops are exempted under Rev. St. Me. 1871, c. 81, § 59.....1052
The individual partners are not entitled to exemptions out of the firm assets..... 832
The title to exempt property, on the death of the bankrupt, passes to his legal representative 68

—— Wife's claim.

The widow of a bankrupt dying after the issuing of the warrant *held* entitled to dower in land owned by him at the time the petition was filed, where the state statute theretofore passed restored the common-law right of dower on repealing the statutory provision 68

—— Liens.

The landlord's lien for rent, under a state statute, on goods seized by the marshal, is valid 251

Page

A lien on land *held* not affected by the taking of a mortgage on personal property to secure the same claim.....1094

Where a seat in a stock exchange can be transferred only on approval of the board, and is subject to payment of the claims of other members on the insolvency of the holder, his assignee in bankruptcy has a right only to the surplus after the payment of such claim.....1114

A levy upon the stock of goods in the bankrupt's store, where the sheriff put a custodian in charge, but did not close the store, *held* valid..... 833

The lien of process issued upon a judgment obtained in attachment proceedings relates back to the service of the process, as between judgment creditors, and Rev. St. § 5044, has no application thereto..... 806

Where the goods of a debtor are in the possession of the sheriff under an attachment, an execution in favor of another is a lien thereon from its delivery to the sheriff as against the assignee in a subsequent bankruptcy, though the attachment be vacated by the bankruptcy proceedings..... 858

The sheriff who has attached goods of the bankrupt has a lien for fees accruing up to the time of the filing of the petition in bankruptcy 596

After proceedings in bankruptcy commenced, a mortgagee cannot take possession of property under his mortgage, or foreclose the same in the state court, where the assignee objects 1076

A sale made after, but under, an execution levied before the petition was filed, may be set aside or confirmed, in the discretion of the bankruptcy court..... 819

—— Sale.

The court, against the protest of a receiver appointed by a state court, will not summarily order a sale of property forcibly taken by the marshal from his possession.. 869

It is imperative, under the statute, that notices of all public sales shall be published for three consecutive weeks..... 951

The register may designate the newspaper for advertising notices of sale. Sufficiency of designation 188

A mistake in judgment by the assignee as to the proper place and notices of a sale will not invalidate the sale, in the absence of fraud or collusion..... 188

An assignee need not adjourn a sale to give a bidder time to search the title..... 188

Creditors who have full notice cannot complain, where they failed to exercise proper diligence to protect their interest.. 188

A creditor who, with full knowledge of the circumstances of a sale, accepts a dividend from the proceeds, and silently allows the purchaser to sell the property, cannot avoid the sale for fraud and collusion..... 188

A sale by the marshal, as messenger, under a special order, prior to the appointment of an assignee, is to be considered as in the nature of a sale made by a provisional assignee 247

Where the marshal sells, as movables, articles which really passed on a prior sale to another, as fixtures, the purchaser may file a claim therefor against the assignee.. 247

Proof of debts—What is provable.

A debt against which the statute of limitations has run, but which is included in the debtor's schedules, is provable..... 59

Rent, and damages for nonperformance of covenants in a lease, accruing after petition filed, are not provable..... 819

The loss of rent after the bankruptcy of the lessee, on a reletting by the landlord, who terminated the tenancy under the terms of the lease, for a breach of covenant, cannot be proved..... 584

A judgment for deficiency on a sale under foreclosure in the state court, permitted by the bankrupt court, cannot be proved.. 43

A person to whom notes are sent for discount, who fails to pay drafts drawn against the proceeds in favor of an indorser of the notes, cannot prove his claim on the notes against the bankrupt payee of the drafts 628

Notes signed by the bankrupt for the accommodation of the maker, and transferred to the holder after maturity, *held* not provable 463

In the case of negotiable paper, nothing short of actual payment, or a present right to receive a dividend, from the maker's estate, will operate to reduce the creditor's right to prove against the indorser's estate. 113

The holders of a note, who have received a dividend from the estate in bankruptcy of the maker, can prove only the balance against the estate in bankruptcy of the indorser 625

A joint and several note, signed individually by three partners, and by others as sureties, cannot be proved against the joint assets of the firm..... 317

A joint and several note, given for money borrowed by a firm, and signed in the firm name, with other names following, may be proved against the joint assets of the firm. 317

The bankrupt partner's proportion of the debts of the firm cannot be proved by his copartner unless it appear that the latter had paid such debts..... 69

The father of the bankrupt, being assignee of his estate, under a voluntary assignment, cannot purchase debts owing by the bankrupt, at a discount, with the trust funds, and hold them, as against other creditors, for their face value.....586, 587

The assignee under a general assignment for creditors without preferences is not prohibited from proving his debt in bankruptcy 536

—— Secured debts.

Where a preference is received on account of several debts, the creditor must surrender the entire preference, to prove any of his debts; otherwise where the preference is separate as to separate debts..... 337

Security given by the bankrupt to a surety must be surrendered or applied before he proves his debt against the assets of the principal 317

The mortgagee must release or surrender the mortgaged property, or agree with the assignee as to its value, before he will be allowed to prove his debt, or any part of it. 133

A joint debtor, having security on the separate estate of one of the creditors, may prove his entire claim against both estates, but is not entitled to greater dividends than, in the aggregate, amount to his debt..... 625

A creditor of a firm holding security from one partner may prove against the joint estate without surrendering, selling, or valuing his security..... 317

A mortgage securing a note is not extinguished, by proving the note as unsecured, but the assignee is subrogated to the rights of the holder..... 213

—— Set-off.

A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for, and payment pro tanto of, his liabilities to the bank, by the operation of the law of mutual credits 564, 653

A liability as indorser, where the principals are solvent, cannot be set off..... 653

A court of equity may disallow a set-off of a claim against the bankrupt, when it would work injustice.....231, 237

A court of equity will not aid a debtor to a bankrupt's estate to set off against his debt, debts of the bankrupt, bought upon a speculation of probable dividends..... 916

Page

A debt of the bankrupt, purchased immediately prior to the filing of the petition in bankruptcy, to offset the purchaser's indebtedness to the bankrupt, is protected.. 604
The assignee of a claim against an insolvent insurance company for loss under its policies, assigned after notice of insolvency, cannot set it off against his previous indebtedness to the company.....231, 237
Otherwise where the claim was purchased before the filing of the petition in good faith and for value, and without notice of insolvency 231, 237
One who purchases a negotiable note after a commission of bankruptcy has issued may prove the same, subject to all legal setoffs existing at the time of the bankruptcy.. 875

—— **Procedure.**
A proof of a claim, which has been postponed by the register until after the election of an assignee, is then to be treated as if it had not been tendered before the election of the assignee..... 53
Where proof of a debt was made under a mistake of law or fact, the creditor will be permitted to withdraw it, but only where all parties will be restored to their original position 775
Where a creditor, without any fraudulent intent, has, in ignorance of his rights, proved a secured claim as unsecured, he will be allowed to amend by setting up his security 487

Payment of debts: Priority: Dividends.
Attorney's claim for services in preparing the petition and schedules, and for disbursements, *held* not entitled to priority..... 212
If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment..... 42
A judgment against partners and others jointly is a several claim, as against the bankrupts, and cannot receive a dividend from the joint estate..... 42

Examination of bankrupt, etc.
The debtor, at the instance of contesting creditors, may be subjected to an examination in relation to his indebtedness to the petitioning creditor..... 70
The bankrupt cannot be attached for contempt for the disobedience of an order for examination served on him without the jurisdiction of the court..... 281
The bankrupt will be compelled by the court to answer all proper questions propounded 428
A receiver appointed by a state court, against whom a suit by the assignee is pending for the possession of the bankrupt's books, is not privileged to refuse to produce the books and testify before the register.. 869

Costs: Fees: Disbursements.
Costs may be awarded the prevailing party in a proceeding to annul a discharge, brought under Rev. St. § 5120..... 335
Unless an attachment dissolved by bankruptcy could not have been effectual to preserve the property for the general creditors, the costs may be paid out of the fund.. 392
An assignee's account for counsel's services will be submitted to a meeting of the creditors, to act thereon..... 791
A counsel fee will not be allowed out of the general fund where the services were rendered for the benefit of a special fund of a class of creditors..... 488
The fees of the register incident to a second general meeting called by a trustee appointed under section 43, Act 1867, are not chargeable against the estate..... 207
The register's fee for taking and certifying a deposition in proof of debt is $1, and is a charge on the fund..... 588
A fee for a letter or power of attorney by a creditor is not a charge on the fund.. 588
An assignee who examines the bankrupt under section 26 must pay the register's fee, whether he has assets of the bankrupt or not 829
If the examination is for the benefit of the creditors, under section 28, the expenses must be advanced or secured by the creditors 829
If the examination is one of the steps preliminary to the bankrupt's discharge, he must advance or secure the expenses... 829
The expenses of an examination of the bankrupt do not include any compensation to the assignee..... 829
The assignee should pay from the assets the rent of a store occupied by him, from the filing of the petition to the date of surrendering possession..... 819
A landlord's claim for use and occupation of premises used by the marshal for keeping and storing the goods, and costs on reference to adjust the amount, are to be paid as expenses of administration..... 251

Discharge—Proceedings to obtain.
The bankrupt need not apply for his discharge within one year from the adjudication, where debts are proved, and assets come to the hands of the assignee. (Rev. St. § 5108.)..... 402
The proceedings are under the control of the register, and should proceed without unreasonable delay.....1134

—— **Proceedings in opposition.**
Claims against a bankrupt cannot, as a matter of course, be proven to bar his discharge on a date subsequent to the day fixed for the creditors to show cause against the discharge 69
It is discretionary with the court to permit opposition to the discharge after the return day of the order to show cause, where the proceedings have been adjourned for other purposes..... 589
A general charge of fraud against the act is too vague..... 146
Specifications stating that the bankrupt has placed his property in the hands of his wife, and withheld his books, papers, and documents, *held* too general, unless intended to apply to all his property, books, papers, and documents..... 146
After specifications of objection are filed, further proof may be taken, if desired, by a reference to the register..... 146
Where the bankrupt has taken the oath required by section 29, act 1867, the creditor has the burden of showing that he has forfeited his right to a discharge..... 146
Where a creditor opposes the discharge, the register must make a certificate of his proceedings, and return the papers into court 829
The fact that the assignee has reason to expect that he may receive money for the estate is no ground of denying a return, under Form 35, when requested by the bankrupt 829
A petitioner under the act of 1800 was discharged on taking the prescribed oath, after the making of an order that the clerk should execute an assignment in trust for the creditors generally of his interest in a certain legacy 873

—— **Acts barring.**
A fraudulent sale of property before the passage of the bankrupt act will preclude a discharge.....1073
The giving of preferences before the passage of the bankrupt act, which would be fraudulent thereunder, will not bar the discharge 346
Where the husband's equitable interest in his wife's property has been sold on execution, it is not a false swearing for him to state that he has no interest or estate in such property..... 871

Page

The concealment denounced by section 29, Act 1867, embraces a concealment of title to property, as well as the hiding from view of the property itself.....1073

Bankrupt doing business in his wife's name *held* guilty of fraud in placing property in her name, where it appeared that she was without means when he married her, a few years before, and had inherited no property 147

—— Scope and effect.

A discharge granted on consent in writing by the majority in number and value of creditors whose debts were contracted after January 1, 1869, operates as to debts contracted both before and after that date.. 57

The discharge of a partner upon his individual petition, and without any proceedings by or against the firm, does not discharge him from partnership debts..... 800

—— Vacating: Setting aside.

Discharge set aside within two years on petition of creditors alleging fraud in the bankrupt's omission of their names from his schedule, where they had no knowledge thereof until after the discharge was granted. 41

Prohibited or fraudulent transfers.

A note and mortgage given to creditors to induce them to come into a composition on apparent equality with other creditors is a fraudulent preference..... 707

Warrants of attorney given to a creditor with knowledge that the debtor is insolvent are fraudulent, though given more than two months before petition filed. (Act 1874.) 40

The validity of a transfer procured by a warrant to confess judgment is to be determined at the time when the judgment is entered and execution issued..... 456

A bank holding the note of the bankrupt received from him, in payment, with knowledge of his insolvency, a check on the bank, covering the amount of his deposit and a payment in cash. *Held*, that only the payment in cash was a fraudulent preference 564

Where a debtor utterly insolvent, and without reasonable prospects of being able to pay his debts, passively permits certain creditors to appropriate all his assets to their debts, an action will lie against the creditors to recover the amounts received.....1106

A sale made by a person contemplating bankruptcy is not ipso facto void..... 898

A mortgage of an entire stock in trade and book accounts to secure an antecedent debt is prima facie fraudulent, and the burden to show that it was made in good faith is on the mortgagee.....1014

A mortgage given by an insolvent within four months of bankruptcy proceedings, to secure a pre-existing debt, to one who had reasonable cause to believe the debtor insolvent, is void.....1014

Suits and proceedings in relation to the estate.

The bankruptcy court will not entertain a petition by the bankrupt to have real estate set apart as a homestead, and for an injunction to restrain a creditor from selling the same on execution issued before the bankruptcy; the remedy, if any, being in the state court..... 902

Property held by the bankrupt to secure him as surety for another cannot be reached by the creditor by summary petition against the assignee, but only by a plenary suit...1044

Where the vendee purchased in good faith, without knowledge of the bad faith of the vendor, and is financially responsible, the court will not settle the question of the validity of the sale upon motion..... 898

A bill in equity will lie by the assignee to recover shares of stock purchased by a third

Page

person with funds of the bankrupt, fraudulently put into his hands.....1106

The assignee is not entitled to any greater rights in respect to recovering back money, or other property under section 39 than under § 35, Act 1867..... 776

The assignee cannot recover back money paid with a view to give a preference, unless he show that the preference was given within four months before the filing of the petition in bankruptcy..... 776

The fact that a conveyance by the bankrupt was made more than six months before the commencement of the proceedings in bankruptcy will not prevent its being set aside where it was fraudulently made and intended to cheat and hinder creditors....1113

The bankruptcy court has jurisdiction to determine the question of lien, on petition by a chattel mortgagee, though he has not proved his debt in bankruptcy..... 133

Testimony of neighbors as to a person's reputation for solvency is entitled to but little weight to negative the knowledge of a mortgagee who was informed that the mortgagor could not pay his debt, which had long been overdue.....1014

Review.

An order made by the district court in the exercise of its summary jurisdiction may be reviewed in the circuit court by petition, or on bill filed in a plenary suit, the former method being favored.....1044

Arrangement with creditors: Composition.

The petition for a composition must set forth its nature and terms, and the belief of its acceptance by two-thirds in number and one-half in value of the creditors..... 393

A general order requiring meetings to be held before a register *held* prospective in its operation, and not to affect a pending meeting presided over by the deputy clerk..... 393

The presiding officer at the meetings has power to regulate the form and order of proceedings, and to decide questions that arise, subject to review by the court..... 393

The proceedings must be recorded, and the examination of the debtor should be conducted like that of a witness in court.. 393

A vote should not be taken so long as creditors are prosecuting inquiries to aid in determining whether the composition proposed shall be accepted..... 393

On such inquiries the debtor's books must be produced, if desired, and a reasonable time allowed for their examination..... 393

Pending the composition the court may enjoin a creditor from suing on an unsecured debt; otherwise after the time for paying the composition has passed..... 207

The debtor *held* not estopped, by the amount at which a debt was fixed for voting purposes, from questioning the amount on which the percentage of the composition should be calculated on its payment..... 396

In composition cases, in which no assignee has been appointed, the debtor stands in the position of the assignee, in respect to set-off 653

A provision of the resolution of composition that upon delivery of the composition notes the assignee shall deliver all the property in his hands to the bankrupt, and be wholly discharged, is nugatory, and is not validated by a confirmation by the court...1135

A resolution of composition is not effectual to discharge the debtor until the dividend is in fact paid to the creditor.....1020

Payment in an indorsed promissory note is a payment of money, under the statute.1020

The surplus funds in the hands of the assignee after settlement of the estate are to be paid to the bankrupt on petition on oath showing that further debts will not be proved 760

Page

The court can enforce in a summary manner only the executory provisions of the composition, under Act June 22, 1874, § 17. 207

The court cannot summarily compel a creditor to take the money and notes provided for by the composition..... 207

A creditor who receives a composition with full knowledge of all facts cannot afterwards require a set-off to be enforced by a court of equity, which he had opportunity to assert at the time the composition was made 916

Composition not set aside after two years, as procured by preferences to certain creditors, where the debtor had entered into new business relations, and the creditors had failed to move promptly after knowledge of the wrong..... 18

Repealing acts.

The repealing act of March 3, 1843, must be considered as being in force from the first moment of that day..... 715

BANKS AND BANKING.

See, also, "Bills, Notes, and Checks"; "Corporations."

The implied contract between the owner of a note and the bank with whom it is deposited for collection does not follow the note into the hands of a second bank, and the owner has no remedy against it.....1110

A national bank *held* bound, under the local law, to recognize a transfer of its stock by a foreign executor duly appointed in another state, when not in conflict with its by-laws or articles of association..... 265

BILLS, NOTES, AND CHECKS.

Validity.

Collusion between the captors of a Spanish vessel and an American citizen, by which she was wrecked within the territory of the United States, and the cargo landed and duties regularly paid, is no bar to a recovery on bills of exchange given by the American citizen on purchase of the cargo. 522

Negotiability.

A note which, during four of the five years it has to run, may, at the maker's option, be paid in buggies at wholesale prices, is not negotiable..... 707

A note which, in addition to interest, provides for the payment of taxes whose amount is uncertain, is not negotiable.... 707

A stipulation to pay attorney's fees if a suit be instituted on the note does not affect its negotiability..... 710

Indorsement and transfer.

A deed conveying a number of negotiable instruments of various kinds will not be considered as a negotiation of the paper on mercantile principles..... 504

A contract of guaranty indorsed on the note can only be enforced between the parties to it..... 622

The acceptor of a bill which came into his hands after it was put in circulation is presumed to be the owner, and he may recover thereon against the maker..... 956

The holder of a negotiable note taken as security for a pre-existing debt is a holder for value, unaffected by equities subsisting between the original parties..... 798

Where a note, after indorsements to others, is indorsed to the first indorser, who reindorses it, the intermediate indorsers are not liable thereon..... 710

Demand: Notice: Protest.

The day of the date is excluded, in computing the time when a note without grace is due..... 174

Page

The usage of the banks in the District of Columbia to make a demand on the fourth day of grace only applies to notes negotiated by the bank..... 174

Notes left for collection in the bank are due on the third day of grace, under the general commercial usage..... 174

A state of war between the countries in which the drawer and drawee respectively reside will excuse notice of nonpayment and protest to the drawer until within a reasonable time after the impediment is removed 504

Notice of nonpayment and protest is unnecessary where the drawee, having a trifling balance due to the drawer in his hands, gave notice that bills would not be honored. 504

Notice of dishonor need not be given to parties who are not liable on account of the dishonor, and can look to no person on the bill for indemnification, or for payment of it 1101

A notice to an indorser, who is a member of congress, then in session, left in the post office of the senate or house of representatives, is not sufficient..... 174

A personal notice, to charge the indorser, may be served anywhere.....1142

Where the indorser lives in the city the notice must be served on him personally, or at his place of business or residence....1142

But if deposited in the post office, and in fact received by him in time, it is sufficient 1142

Actions.

A judgment and execution against the drawer of a bill of exchange is no bar to a judgment against the indorser..... 286

It is no defense to a suit against the maker of a note, by one to whom it was assigned after it was dishonored, that it was given to pay for land which had not been conveyed, where defendant has not demanded a conveyance..... 439

Property received collaterally, and not in payment of a note, cannot be set up, in an action on the note, by way of set-off..... 445

A plea, in an action on a note, that the payee received another note and mortgage to be applied to the note, to be good, must aver the receipt of proceeds, etc..... 445

In an action against the indorser of a foreign bill of exchange, for nonpayment, it is not necessary to produce a protest for non-acceptance 286

An acknowledgment of indorsement of a draft drawn by defendant, which was not produced, *held* prima facie evidence of indorsement in a suit against the drawer...1121

An averment of an indorsement to "Hyer and Burdett, survivors of Bremner," *held* not supported by an indorsement to "Messrs. Hyers, Bremner, and Burdett."..1121

BILLS OF LADING.

See, also, "Admiralty"; "Affreightment"; "Carriers"; "Demurrage"; "Shipping."

The title of a person who makes a bona fide advance on a bill of lading of cotton subsequently delivered alongside the vessel is not affected by the removal of the cotton by the owner from the custody of the vessel, and shipping it in another vessel under a new bill of lading.....1157, 1160

The master of the vessel is not liable for a greater quantity of cargo than that actually laden on board, though less than that stated in the bill of lading, where the weighing was done by the shipper..... 497

The time allowed for delivery will be determined by the usages of the port, where the bill of lading is silent in regard thereto. Evidence of an oral contract as to the time is inadmissible..... 131

Page

Where the bill of lading is silent as to the place of delivery, the vessel is obliged to discharge the cargo at the shipper's wharf according to the usages of the port..... 131
The usage of the port in such case is binding as a maritime contract on both parties. 131
Brokers by whom a shipment is made may bind the owner to the usual stipulation limiting the carrier's liability.....1051
The carrier is liable for loss of oil by leakage caused by the casks not being properly wet, where the bill of lading stipulates for such wetting, notwithstanding a clause, "Not accountable for leakage."..... 895
During heavy weather a noise was heard below, and, on the hatches being opened, several casks of wine, which had been well stowed, were found broken. *Held*, that the vessel was not liable under the exception of sea perils, or insufficient package.....1051
A strongly-built ship, loaded with wheat, whose bins were properly constructed, and pumps properly arranged, when a few days out from Baltimore, met heavy weather, began leaking, and shipped water, and, her pumps becoming choked with wheat, was obliged to put in to St. Thomas. *Held* a peril of the sea..... 475
The burden is on the shipowner to show that the loss of the cargo was caused by perils of the sea, within the exception of the bill of lading..... 475
Where casks of hardware, shipped in a tight, staunch, and well-manned steamer, arrived in a damaged condition, *held* that the burden of showing that the damage was within the exception of dangers of navigation was sustained by proof that the vessel encountered a storm, shipped water, and leaked 904

BONDS.

See, also, "Counties"; "Municipal Corporations"; "Principal and Surety"; "Railroad Companies."

A railroad mortgage coupon bond, payable to bearer, containing a condition "to make the scrip preferred stock attached to this bond full-paid stock" upon surrender of the bond, *held* valid in the hands of a bona fide purchaser for value, where it was stolen from the owner, and sold with the certificate detached..... 554
In a several action against one of the obligors in a joint and several bond given for duties, it is no objection that a co-obligor has been taken in execution on a judgment on the same bond. and discharged under Act June 6, 1798, c. 66..... 948
Interest is recoverable on interest coupons payable to bearer after their maturity.... 352

BOTTOMRY AND RESPONDENTIA.

The master cannot hypothecate the vessel for a pre-existing debt, but only for advances to enable him to complete the voyage...1017
Where money is advanced for repairing a vessel on the credit of the owners, a bond given therefor by the master is invalid.... 951
A consignee having cargo and freight or funds in his hands cannot take a bottomry bond from the master for advances made by him.....1017
A bottomry bond may be held good in part and bad in part, or the maritime interest may be moderated..... 951
A bill of exchange on the owners for the same sum for which a bottomry bond is given by the master does not invalidate the bond, but is collateral thereto, and subject to the same contingencies..... 951
An acquittance written on a bottomry bond by a son-in-law of the vessel owner, to whom it was sent for collection, who substituted himself as debtor, *held* fraudulent, and not available to one who purchased with notice of the lender's claim... 63
Such bond is not waived by bringing suit and recovering judgment against the person to whom it was sent for collection, in ignorance of the facts constituting the fraud 63
A bottomry bond given by the master, though invalid as such, may create a lien on the vessel where the master had power of attorney from the owner to borrow money upon the vessel.....1015
Insurers, having satisfied a bottomry claim where the vessel is lost, are entitled to the salved freight, as against a subsequent assignee of the master and owner, who advanced money on the freight for the benefit of the ship and cargo..... 313

BOUNDARIES.

See, also, "Public Lands."

The line of a creek *held* the proper boundary, though not corresponding to the straight lines, of courses and distances run along the general course of the creek.. 193

CARRIERS.

See, also, "Affreightment"; "Average"; "Bills of Lading"; "Charter Parties"; "Demurrage"; "Shipping."

The owners of a steamboat employed in carrying passengers and merchandise on a regular route are responsible as common carriers 984
Manuscript books, the property of a student, and necessary to the prosecution of his studies, are to be regarded as baggage. 495
A baggage-transfer company, by conditions printed upon receipts given for baggage checks, may limit its liability for certain goods, and in certain amounts, unless specially agreed otherwise..... 495
A person who delivers his baggage check to a transfer company for delivery to his house, and receives a receipt therefor, is chargeable with notice of a printed condition therein limiting the liability of the transfer company in case of loss..... 495
Construction of the words "any article," in a clause limiting liability in a receipt given by a transfer company for a baggage check 495
Under a bill of lading silent as to the method of delivery, the carrier must at least give notice of the time and place of unlading, or the place of deposit..... 659
A usage or custom, to excuse such notice, must be so clear and notorious as to afford a presumption that all parties acted with an understanding of its character and application 659
Where goods were to be shipped by water, the mere transshipment by rail and deposit in warehouse, subject to charges, and without notice to the consignee. is not a conversion entitling him to recover the full value 659
In the case of a horse, in apparent good condition when shipped, delivered in a dying condition, but without any fractures or external or visible injury, the shipper must show some negligence of the carrier, to charge him with liability 1066
Common carriers are liable for a loss caused by a wrongful delivery of goods.... 984
Where a misdelivery is caused by the failure of the owner to properly mark the goods, or to present them to the carrier or his servant, the carrier, if without fault, is not liable..... 984

Page

The delivery by the carrier to the actual owner is a good defense to an action by the shipper, who had no title.....1157, 1160
A carrier in possession may maintain a suit to recover damages to the goods transported, resulting from the wrongful act of a stranger..... 608
Payment to a carrier, by an insurance company, of damages to a cargo by a collision, will not prevent the carrier from maintaining a suit against the wrongdoer for the full amount of the damage..... 608

CERTIORARI.

See, also, "States."

Certiorari may be issued by the circuit court of the District of Columbia to a justice of the peace, in a case of forcible entry and detainer..... 391

CHARTER PARTIES.

See, also, "Admiralty"; "Affreightment"; "Average"; "Bills of Lading"; "Demurrage"; "Shipping."

Where there was a failure to give security as required, *held*, that the charter was not completely executed, though the vessel had gone to take in coal for the voyage 1104
A charter to carry Chinese coolies between foreign ports is not void on the ground of immorality, when made before the law prohibited American vessels from engaging in such business..... 590
Construction of charter of a ship to carry Chinese coolies from China to a foreign country, as to the number that might be carried, where it was the custom of the business to overcrowd the vessels..... 590
A vessel, under a charter containing no exception of restraints of princes, *held* liable where she failed to take in a cargo of barilla at the Canary Islands, where the authorities required that she should first go to Spain, to quarantine..... 440
As between the charterer and the owner, the charter party, and not the bills of lading, controls, where their terms are conflicting 132
After the cargo had been loaded the charterer took it out of the vessel, and refused to fulfill the charter party. *Held*, that the owner had a lien on the cargo for the breach 27
Where the meaning of the charter party is clear, a mistake cannot be alleged in defense to a suit in rem for a breach..... 27
On a libel for freight under a charter, the charterers can recoup damages for a breach only to the amount of the freight..... 440

Chattel Mortgages.

See, also, "Bankruptcy."

Chinese.

See, "Constitutional Law."

CITIZEN.

Defendant, born in New York, in 1760, of Irish parents, left in 1771, and resided in the British dominions until his return to America, in 1795. *Held* not a citizen of the United States..... 356

Cloud on Title.

See "Quieting Title."

COLLISION.

Page

See, also, "Admiralty"; "Pleading in Admiralty"; "Practice in Admiralty"; "Towage."

Nature of liability—Contributive fault.
It is a fault for the entire crew of a sail vessel, including the lookout, to be engaged in handling the sails..... 771
The owners of a vessel whose master gave the order, obedience to which by the mate of the other vessel caused a collision, cannot sustain a claim for damages..... 982

Between sail vessels.
A bark sailing almost directly before the wind will be *held* in fault for collision with a schooner to leeward, sailing within two points of closehauled. (Rev. St. § 4233, Rule 17.) 124
A bark closehauled upon the starboard tack, approaching a schooner closehauled upon her port tack, at an angle of about six points, has the right to keep her course 771
'The fact that the vessel whose duty it was, under the rules, to give way, was disabled and partly unmanageable, does not impose upon the other vessel the duty to avoid her, unless the disability was manifest 771
Where the fault of luffing is induced by the wrongful act of the other vessel, in not giving way, it will not render the vessel liable for damages caused by the collision. 196

Between steam and sail.
The steamer will be *held* in fault for the collision, for not slacking speed, stopping, or reversing, on discovering the sail vessel, until she learns her course..... 24
A steamer which loses sight of an approaching sail vessel's light must check her speed or stop until she again discovers it..1169
The sail vessel will alone be *held* liable, where she changed her course without reason, and when not in danger, if the collision would not have happened, had she held her course.....1008

Overtaking vessels.
A vessel sailing closehauled, upon being overtaken by another sailing the same course slightly to windward, is at fault in luffing so as to cause collision..... 532
The overtaking vessel must keep clear, but has a right to assume that the forward vessel will hold her course..... 532

Tugs and tows.
A tug with a tow drawn by a hawser is bound by the rule requiring vessels meeting to pass to the starboard..... 31
A steam tug and canal boat lashed alongside are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel..... 7

Speed: Fogs.
Where, in a thick fog, dangerous proximity is first discovered by the noise of each other's paddles, a vessel will be *held* at fault for not immediately reversing, where the collision might thereby have been avoided..... 602

Lights: Signals, etc.
It is an act of blamable misconduct for a vessel to run through a harbor at nighttime without exhibiting the lights prescribed by law 548
A sail vessel will be *held* in fault in presenting a confusion of lights to a steamer, where due to want of proper screens or faulty positions 994
Schooner sailing in James river on a clear night *held* not in fault in not exhibiting a signal light..... 553

Particular instances of collision.
Between yacht, after passing under the stern of the tow, and steamer in Chesapeake Bay without a lookout, and whose officers were strangers to the locality.... 386

Page

Between steamer and sail vessel, where the latter presented a confusion of lights, and the former failed to slacken her speed, and both were *held* in fault..... 994

Between ship towed to sea on a hawser, and schooner coming into the harbor, which came about, instead of keeping her course, and, missing stays, fell across the hawser. 111

Between tug, with canal boat lashed alongside, and schooner, near Blackwell's Island, where the former crossed the latter's course 7

Between steamer coming down the East river, and turning on the Brooklyn side so as to make her berth on the New York side, and schooner running free, close to the New York shore, where the latter was *held* in fault for not taking any measures to avoid the collision 1013

Between steamer, at anchor in the track of a ferry, and the ferryboat, in a fog, where the former failed to ring a bell, and was *held* solely in fault..... 803

Procedure.

The libel must state the facts constituting the fault in navigation. A mere general allegation that the vessel "was so carelessly, negligently, unskillfully, and recklessly navigated," etc., is not sufficient..... 770

The testimony of persons on board a vessel as to her movements is entitled to greater weight than that of persons on board of another moving vessel..... 7

The rule that the testimony of those on a vessel should prevail, as to what takes place on board her, does not obtain in all cases.. 532

Steamer *held* not in fault, on the testimony of four witnesses that they were keeping a sharp lookout, and, because of the excessive darkness, did not see the sloop until too late to avoid the collision..... 57

Rule of damages.

A charge for lay days in a charter party furnishes no test to determine the damages for detention during the repair of a vessel. 24

The net freight which the injured vessel was earning, and has lost, is allowable as an item of damage..... 38

The expenses which the vessel would have incurred in successfully performing the voyage must be deducted from the gross freight 38

Division of damages.

The vessel solely at fault must bear the loss occasioned to the other, as well as her own 498

Review.

The circuit court, on appeal, will not reverse the decree of the district court, except on a preponderance of evidence..... 39

Compositions.

See "Bankruptcy."

Compromise.

See "Bankruptcy."

CONGRESS.

Congress may, within the limits of federal jurisdiction, modify or repeal the existing rules of evidence..... 898

CONSTITUTIONAL LAW.

Page

The equality of protection assured by the fourteenth amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that, in the administration of criminal justice, one person shall suffer for his offenses no greater or different punishment than another 252

The inhibition upon the state applies to all instrumentalities and agencies employed in the administration of its government, and to the subordinate legislative bodies of its counties and cities..... 252

A city ordinance requiring that prisoners shall have their hair clipped *held* invalid, as directed against the Chinese only, and imposing upon them a degrading and cruel punishment 252

A grant by the state of immunity from taxation cannot be abrogated without impairing the obligation of the contract, unless the right so to do was reserved as a part of the contract..... 75

CONTEMPT.

Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment 359

A rule to show cause why an attachment should not issue for a contempt must be served personally, but in a proper case the court will order that service at the last place of abode shall be deemed sufficient..... 367

CONTINUANCE.

The refusal of one of the parties in an action at law to file an answer to a bill seeking discovery of facts essential to the case of his opponent is a ground for continuance.....1028

A newspaper publication of the evidence, arguments of counsel, etc., in a case depending upon the same facts and principles, is no ground for a continuance.....1046

Cause continued in favor of an administrator who, a few days before, discovered material testimony among intestate's papers. 596

Cause not continued on affidavit of defendant, made at the trial, that he has heard of one who could be a material witness for him. 355

An affidavit for continuance on the ground that defendant's receipts have been mislaid must state their amount and date, and set forth facts showing reasonable diligence in searching for them 1112

The circumstances of diligence used to obtain the testimony of an absent witness may be proved ore tenus..... 133

CONTRACTS.

See, also, "Assumpsit"; "Sale"; "Vendor and Purchaser."

Matters incidental to the performance of a contract are governed by the law of the place of performance, while matters which go to its execution or validity are determined by the law of the place where it is made 710

Contracts are to be construed to effectuate the intention of the parties, where that is consistent with the principles of law..... 378

Ambiguous terms are to be explained by the common use of such terms in the country where the contract, etc., was made..... 984

If a written instrument be so expressed as that a reasonable construction can be given to it, and, when so given, it does not plainly appear to be at variance with the agreement, the latter is not to be regarded..... 309

Where the time of payment is made a substantial, and not a mere formal, circumstance, it enters into the essence of the contract, and must be observed..... 378

An action will lie for breach of an agreement by B. that if A., who had a claim

Page

against B. and C., would obtain judgment against C., and levy on his property, B. would bid the amount of the claim, though the claim was not valid as against B..... 525

Conversion.

See "Trover and Conversion."

CORPORATIONS.

See, also, "Banks and Banking"; "Counties"; "Insurance"; "Marine Insurance"; "Municipal Corporations"; "Railroad Companies"; "Receivers."

Certain persons formed a corporation under Act Cal. April 11, 1862, and before transacting any business, but without a formal disincorporation, reincorporated themselves under Act 1853, under which all their business was done. *Held*, that the validity of their acts must be determined by Act 1853 1109

A corporation has power to make commercial notes, without express authority..... 12

A corporation may borrow money, or deal in credits, or become a party to negotiable paper, in the transaction of its legitimate business, unless expressly prohibited..... 881

The president of a turnpike company, without the authority of the directors, *held* to have no power to issue certificates of stock without consideration..... 322

Authority under seal or under order entered on the corporate books is not necessary to charge the corporation for an injury done by its agent 461

The validity of the incorporation cannot be questioned after a party has been impleaded, and recognized in decrees made in the cause, as a corporation..... 641

A purchaser of bank stock becomes its legal owner on its full sale to him, without waiting the formal transfer on the books of the bank 777

The court will compel a bank to permit a transfer of shares of its stock to be made upon the proper books to the rightful owner, regardless of the by-laws on that subject. 777

Trustees in an attachment suit, who unsuccessfully contest a transfer of bank stock on the books of the bank on the ground that the sale by the debtor was fraudulent as to the attachment creditor, are liable for costs. 777

The fact that a corporation is insolvent will not authorize it to apply for a receiver to wind up its affairs..... 829

Service upon a corporation of process from a federal court must be made under the United States, and not the state, statute.... 870

A corporation cannot be served with process outside of the state where it was created 870

COSTS.

In actions for slander, or trespass vi et armis, the plaintiff, recovering less than $10, can recover only two-thirds of the costs of suit. (Geyer, Dig. Ark. 260.)..... 176

Full costs allowed upon a verdict of nominal damages in an action upon the case against a city for injury done by raising the level of a street..... 462

The rules for the guidance of the court in allowing or disallowing costs in equity stated by Woodbury, J..... 615

Costs in equity are given to the prevailing party, except where such a course would be inequitable 957

Costs are in the discretion of the court, in admiralty cases 178

Costs will not be imposed upon seamen, in admiralty, when they establish probable cause for instituting suits for redress..... 730

Page

Costs allowed seamen for an underpayment by mistake by the master, who refused to correct the error, though they failed on their main contention..... 307

It is the duty of each party to pay his own costs as they arise in the course of proceedings. Its performance the court will compel by attachment, if necessary..... 761

A consent to a taxation of costs equitably made by the clerk cannot be withdrawn upon the coming in of the master's report.... 325

The supreme court has power to diminish any fees fixed by statute, but not to increase them. 588

In ordinary cases an independent charge for costs of a reference to a commissioner in a suit for seamen's wages is not allowed... 403

The expenses of plaintiff and his counsel in attending court at a distance, on a motion to modify a decree in equity, cannot be taxed as part of his costs on a decree in his favor on final hearing.....1059

Nor are expenses for printing pleadings, testimony, and briefs, and of making drawings used on the final hearing, and of reporting arguments of counsel for the court, proper items of taxation, unless so stipulated...1059

The amount paid for telegraphic dispatches is allowable, if shown by affidavit to have been properly and necessarily expended in the suit 1059

The amount paid for copying papers to be used in the suit is not allowable.....1059

In a patent suit, the expense of models which are copies of those on file in the patent office, and are properly procured for use in evidence, is allowable, but not that for other models 1059

A bond for "all costs that may accrue in this suit, and be adjudged against the plaintiff," is sufficient, under a rule requiring a bond "for all costs for which the plaintiff may be liable in the suit."..... 761

A surety for fees and costs is not liable to attachment for not paying plaintiff's witnesses for their daily attendance.....1121

COUNTERFEITING.

It is a crime to photograph a United States treasury note, though the similarity between the photograph and the original be not such that it is calculated to deceive the public.. 328

It is a crime to manufacture a coin adapted to be used to circulate as money, though of original design..... 328

COUNTIES.

See, also, "Municipal Corporations"; "Railroad Companies."

Irregularities in the election authorizing the issue of bonds is no defense against bona fide holders for value, without actual notice, where public officers are to decide whether the requisite sanction has been given, and the bonds recite it..... 838

COURTS.

See, also, "Admiralty"; "Bankruptcy"; "Equity"; "Judges"; "Justices of the Peace"; "Maritime Liens"; "Removal of Causes"; "States."

In general.

The courts of the United States are bound by the decision of the executive of a question as to the existence or validity of an organization claiming to be the lawful government of a foreign country..... 529

In the case of a civil war in a foreign country, the old established government must be considered as the lawful organiza-

Page

tion until the executive publicly recognizes the new government..... 529

Federal courts—Jurisdiction in general.

As to the meaning of the words "admiralty" and "maritime," as used in the constitutional grant of judicial powers..... 984

The grant of jurisdiction in patent cases is as full in equity as it is at law..... 290

Jurisdiction cannot be acquired in equity by a substituted service, although defendants, who are not inhabitants of the district, remain continually absent therefrom to avoid service of process.....1141

A deed executed for the purpose of giving jurisdiction is ineffectual to sustain jurisdiction 1039

The court will, of its own motion, refuse to proceed, where a want of jurisdiction appears at any time before trial..... 16

—— Jurisdictional amount.

In an action for tort, the amount of damages laid in the declaration fixes the jurisdiction 868

—— Grounds of jurisdiction.

The federal court has jurisdiction of an action involving the title to land held under patents issued upon confirmed Mexican grants, and depending upon a controverted construction of such patents..... 193

The federal court has no jurisdiction, on the ground of subject-matter, of a suit by the licensee of an exclusive territorial right to use a patented article, to enjoin a use by one to whom the patentee sold the patented article in violation of his contract..... 182

The federal court has no jurisdiction where both plaintiff and defendant are aliens. 194

The federal court has jurisdiction between a citizen of a state and an alien, without reference to which of them is plaintiff or defendant 194

A bill in equity describing complainants and part of respondents as of one state, and the respondents on whom service is made, and who appear, as of the state where the suit is brought, is not demurrable for want of jurisdiction 16

The federal courts have no jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state..... 185

The rule that a promissory note payable to bearer is excepted from the prohibition of section 11 of the judiciary act does not apply to an accompanying mortgage 185

No civil suit can be brought before a United States circuit or district court in any other district than that whereof defendant is an inhabitant, or in which he shall be found. 348

The case will proceed against the person appearing and notified, without prejudice to the others, where their interests can be severed and tried separately..... 16

The want of an averment of citizenship, if not made in the bill or declaration, or where falsely alleged, is available only where raised by pleading..... 188

—— Circuit courts.

The circuit courts have no jurisdiction save such as is expressly conferred by act of congress 781

The circuit court for the Southern district of New York has no original jurisdiction of a suit for the infringement of a patent which occurred within the Northern district of New York. 272

The proceedings on bonds for value or stipulations in admiralty are incident to the principal cause, and the circuit court has no jurisdiction except on appeal from the final decree 344

—— District courts.

The federal jurisdiction in admiralty in South Carolina extends to all cases whereof the state admiralty courts, by statute or otherwise, had jurisdiction before the federal constitution was adopted..... 996

—— Administration of state laws.

A state statute allowing defendant in ejectment a new trial on payment of costs is binding in the federal court..... 187

The federal courts follow the state law and the precedents of the state courts in deciding questions as to the validity of transfers of property as against creditors.....87, 650

Whatever is conclusive as to title of land in the state court is equally conclusive in the federal court. 187

—— Following state practice.

The authority to stay proceedings against an insolvent debtor given to the supreme court of a state, *held*, cannot be exercised by a federal court..... 489

A person discharged under a state insolvent law in operation at the date of the process act of May 19, 1828, cannot be imprisoned under final process of the federal court for debts contracted prior to the filing of the petition 489

COVENANTS.

See, also, "Landlord and Tenant."

A covenant to pay rent runs with the land. 1044

CREDITORS' BILL.

In Michigan a creditors' bill may be filed on the return of an execution nulla bona before the return day named in the writ..... 658

On a creditors' bill, assignees under an alleged fraudulent assignment, made defendants, may show that defendant in execution had property 658

Criminal Law.

See "Arrest"; "Bail"; "Habeas Corpus."

CUSTOM AND USAGE.

Regulations prescribed by merchants to define and control the usages or customs which shall prevail in their intercourse have not the effect of positive statutes.....1178

CUSTOMS DUTIES.

Customs laws.

General terms in a customs act, although sufficiently broad to comprehend a certain article, are not applicable if it is specifically designated therein.....1099

Rates of duty.

Shawls, in part woolen, *held* dutiable at 50 per cent., under Act 1832, § 2, art. 2..... 836

Invoice: Entry: Appraisal.

The charge for "costs and charges" must include only those actually paid.....1095

A charge for commissions at "the usual rates" forms part of the dutiable value, though the importer has paid no commissions or a higher rate.....1095

Charges for inland or coastwise transportation to the place of shipment cannot be added to the invoice, as forming part of the dutiable value.....1095

Where goods are to be valued "at the place from whence exported," the value of goods manufactured in one city, and sent to another for exportation, will include the costs of transportation between such places 306

A penalty for undervaluation cannot be imposed on the importation of goods by

Page

their producer, where a corrected invoice is handed in before any action is taken to determine the value of the goods..... 742

Payment: Protest.

The protest must point out the particulars in which there was an overvaluation, to entitle the importer to claim any overvaluation 59

A protest against paying duties on costs and charges, because the goods were invoiced "free on board," is insufficient, unless those words are found in the invoice..1095

A protest stating that it is intended "to apply to all future similar importations" is valid as a prospective protest. (Act March 3, 1857.) 1095

Actions for duties paid.

Act March 3, 1857, § 5, providing that the decision of the collector, unappealed from, shall be final as to "liability to duty, or exemption therefrom," does not apply to a case of additions to the invoice of illegal charges 1095

The meaning of "delaines," as used in Act 1857, is a question for the jury, to be determined upon evidence showing how such term was used by dealers at the date of the passage of the act.....1099

The presumption of the correctness of the decisions of customs officers must be overcome by a fair preponderance of proof as to the commercial use of the term at the date of the act.....1099

Remedies for recovery—Lien.

Imported goods may pass by sale, though duties are due thereon. They are not liable for other duties due from the consignee, but only for the duties due on such goods.. 734

Customs officers.

Inspectors of the customs are public officers, and not the mere servants and agents of collector 465

The amount received by officers of the customs for forfeitures constitutes no part of the emoluments to which the limitation of the maxim of compensation allowed by law applies 465

Commissions on duty bonds are a part of such "emoluments"..... 762

DAMAGES.

See, also, "Contracts"; "Collision"; "Death by Wrongful Act"; "Patents."

No damages are given for fright or mental suffering resulting from mere risk or peril, where no actual injury has been sustained, nor for the result of mental or nervous disturbance, where no bodily harm is sustained 386

DEATH BY WRONGFUL ACT.

Damages are recoverable by a libel in rem in admiralty, for the wrongful death of a person, independent of statutory remedy 386

A right of action for a death caused by wrongful act, given by a state statute, may be enforced in admiralty..... 138

The widow and son of a hand killed on a steamboat by the negligence of the engineer have a remedy against the owners of the vessel, but not in rem against the vessel. (Acts 1838, 1852.)..... 138

Act July 7, 1838, § 13, makes the fact of the injurious escape of steam full prima facie proof of negligence to charge the defendant in all actions against proprietors of steamboats for injuries occasioned by injurious escape of steam..... 138

Only the pecuniary loss is considered, in computing damages. Nothing will be allowed by way of punishment, or for the sufferings of the deceased, or for bereavement of his relatives..... 386

In the case of a minor son, 18 years old, who earned less than the cost of his support, $700 were allowed his widowed mother 386

DEBT, ACTION OF.

Debt will lie by an indorsee against the drawer of a bill of exchange, where intermediate indorsements are stricken out.... 447

DECEIT.

No action will lie for false representations as to credit made in a letter to defendant's agent, marked "Confidential," without proof of authority from the writer to exhibit it.....*1147

Dedication.

See "Municipal Corporations."

DEED.

See, also, "Vendor and Purchaser."

A conveyance to "P. H. & Son," a mercantile firm, is a sufficient description of the son to enable him to take under the deed 304

The assent of the grantor to a deed clearly for his benefit may be presumed, unless a consideration is to be paid, when it must be proved 1039

The general description, "being the same land," given by the grantor's mother to the grantee by will, will not control specific boundaries in the deed..... 706

The deed, though acknowledged and recorded, may be shown to have been fraudulently antedated, on the testimony of the grantor 326

DEMURRAGE.

See, also, "Bills of Lading."

An ordinary bill of lading implies an agreement that the goods shall be received within a reasonable time after the arrival of the vessel at her port of destination....1138

The master has a lien upon the cargo for demurrage, enforceable in admiralty, though not expressly stipulated for in the bill of lading 1138

DEPOSITION.

Affidavit of service of notice of taking of deposition by leaving it at defendant's lodging *held* insufficient, where the place of lodging was not specified..... 174

When notice is given that a deposition will be taken between certain hours, it is not necessary to wait until the last hour.. 598

A witness casually absent from home, although found at a place more than 100 miles from the place of trial, unless he is aged and infirm, etc., cannot be subjected to an examination de bene esse..... 872

Objection to parts of depositions should be made before the final hearing, by motion to strike out..... 240

An agreement to admit certain depositions *held* to extend to the final determination of the cause..... 197

Deposition excluded in a trial at Philadelphia; it appearing that the witness generally lived in his boat, but, when on land, stayed in Jersey City,—less than 100 miles from the place of trial..... 486

DESCENT AND DISTRIBUTION.

Page

A citizen of another state is not deprived of the right to sue the administrator in the federal court by a representation of insolvency 906

In Rhode Island, commissioners of deceased insolvents have not jurisdiction of merely equitable claims..... 906

The presentation to the commissioners of an insolvent estate, and the adjudication of a claim of which they have not jurisdiction, is not a bar to a suit thereon..... 906

Discharge.

See "Bankruptcy"; "Insolvency."

DISTRICT OF COLUMBIA.

Distress for taxes due to the corporation of Washington is not barred by the statute of limitations 311

The original by-laws of Georgetown need not be made under the seal of the corporation 390

The mayor of Georgetown may, in that town, do any act which a justice of the peace of the county can do..... 286

Appointment of constables for Georgetown 390

An attachment under Act Md. 1795, c. 56, will lie against lands and tenements in Alexandria county, D. C..... 581

Confession of judgment in the District of Columbia,—form and effect..... 286

DOMICILE.

See, also, "Courts"; "Removal of Causes."

What will constitute residence, in contradistinction to temporary domicile.....1123

DOWER.

A feme covert is not entitled to dower in real estate which was held as partnership assets 213

Where property is covered by a mortgage, inchoate dower attaches only to the equity of redemption 213

EJECTMENT.

See, also, "Adverse Possession"; "Real Property."

In Michigan the action must be brought against the tenant in possession. If no one be in possession, it must be brought against any one exercising acts of ownership over, or claiming title to, the premises.....1112

On a bill by the owner to enjoin ejectment, the tenant in possession must be named as co-complainant.....1112

The same length of possession by defendant which will bar a recovery is sufficient, if had by plaintiff, to sustain a recovery.. 430

To avoid the bar of a statute by entry, it must be shown that the entry was made with intent to claim possession, and some act done indicative of such intention..... 430

An objection to the jurisdiction over a certain defendant is personal to him..... 194

Plaintiff cannot proceed with a second trial in ejectment where the costs of the former ejectment, which had been non pros'd, were not paid.....1036

ELECTIONS AND VOTERS.

Page

A suit will not lie in the federal court to enjoin state election officers from registering voters or holding an election in pursuance of a state law on the ground that the same is unconstitutional..... 421

EMINENT DOMAIN.

The legislature only can determine when and in what cases private property shall be taken for public use. Its determination is final on such question, but not on the question of what is a public use..... 539

EQUITY.

See, also, "Courts"; "Pleading in Equity"; "Practice in Equity."

A bill in equity will lie by a feme covert to recover money held to her separate use. 906

Equity will not entertain a suit to cancel a policy of insurance, and enjoin the insured from bringing action thereon, on the ground of fraud in obtaining it, which may be set up in defense of an action at law..... 449

A mistake in supposing the terms of an agreement reduced to writing, and read by the parties, to be in legal effect the same as those orally agreed on, is no ground of equitable relief 480

Where a loan is made on agreement to give collateral security on property, and by mistake a power of attorney only is taken, equity will relieve the creditor, after the death of the debtor insolvent, by enforcing the original agreement against his administrator 913

Equity will not enforce, as against general creditors of an insolvent estate, an agreement for a lien or security for a debt, where the lien or security has failed by a mistake of law..... 933

Nor will it direct a new security to be given where an old one, chosen by the parties, has, from a mistake of law, become a nullity 933

Equity will not relieve a party who takes personal security for money, instead of a mortgage on property, under a mistake of law, by all parties, that the former was as safe as the latter, and substitute for it a lien or mortgage on the property.....*938

Material misrepresentations in a treaty for the sale of property, by which the purchaser, having no means of knowing the truth, is deceived, to his injury, is ground for rescission of the contract subsequently made, whether they be the result of mistake or fraud..... 566

Equity will not relieve a purchaser, having full means of knowledge within his reach, where he relies upon his own judgment, uninfluenced by any misrepresentations 566

A bill in equity will not lie to rescind a sale of timber land, for misrepresentations as to quantity, where the vendees, after exploration of the land, have cut large quantities of timber therefrom..... 566

A bill in equity will lie for the specific performance of a contract for the sale of three-eighths of a vessel being built, with a right of the purchaser to command, and to enjoin a sale of any interest therein, except with notice of such contract, and to prevent the appointment of any other person as master..... 127

A trespass by an officer of the Freedmen's Bureau, in the levying of an execution upon personal property, cannot be enjoined by a court of equity..... 56

Where inadequacy of price is so great that the mind revolts at it, slight additional circumstance of advantage or oppression will be sufficient to set aside the sale, though mere inadequacy of price is not alone sufficient 405

ESTATES.

Page

The freehold estate which vests in a relessee under deed of lease and release by enlargement is an estate at common law, which does not require the aid of the statute of uses to execute the possession to the usee 1039

A mortgagee purchased the mortgaged premises at a sale under a judgment obtained by him on his mortgage bond. *Held*, that the equity of redemption was merged in the legal title..... 177

Estoppel.

See "Judgment."

EVIDENCE.

See, also, "Appeal"; "Deposition"; "Trial"; "Witness."

Hearsay.

Statements by the parties at the time of making an agreement *held* admissible as evidence of the agreement..... 957

Affidavits made ex parte, several years before, to prove pedigree, *held* admissible as hearsay 1036

Depositions taken in another suit for freedom of a slave, by one of the same family, are inadmissible, as hearsay, in relation to the common ancestor..... 883

Declarations and admissions.

Declarations of inhabitants of a town, when made as individuals, and not in the capacity of agents or officers, are not competent to bind the town..... 957

Declarations of a party, made before a dispute arose, in connection with acts, may be competent evidence for him to prove the intentions existing at such time..... 609

In an action upon a joint promissory note, brought against one maker only after the bankruptcy of the other, the admissions of the latter are admissible against defendant 636

Conversations as to the ownership of property, between the ancestor of plaintiff and a third person, *held* admissible in evidence for plaintiff 389

Opinions.

The opinion of a witness, who has seen the party sign a paper, that another paper is also in his handwriting, is competent, although his opinion is the result of comparison 494

Documentary.

An instrument of 30 years' standing, not impeached, need not be proved by the subscribing witness 197

A certified copy of a deed, not authenticated by the seal of the recorder, is not admissible in evidence..... 551

Original entries made in testator's books by a clerk who subsequently became executor are competent evidence in an action by him for goods sold and delivered by testator to defendant 272

Parol evidence.

Parol evidence cannot be given of the understanding of the parties as to the obligation of a written contract..... 1015

Plaintiff may show by parol that an agreement in writing made by a member of a firm was made by him as agent of the firm 1088

Competency, materiality, and relevancy.

The record of a trial and verdict against plaintiff in a suit by him against another cannot be given in evidence by another defendant 1039

The testimony of a tax assessor as to whom property is assessed on the books *held* admissible to prove payment of taxes by such party 389

EXCEPTIONS, BILL OF.

Bill of exceptions not allowed after lapse of 2½ years, where writ of error was pending in the supreme court..... 3

Exchanges.

See "Bankruptcy."

EXECUTION.

See, also, "Admiralty"; "Attachment"; "Bankruptcy"; "Garnishment"; "Judgment."

As between two executions,—one in the hands of a constable, and the other in the hands of a sheriff,—the one first levied has the prior right..... 833

Personal notice of the time and place of sale of land must be given by the sheriff, under Act Pa. 1705, c. 153, § 4.....1044

An equity of redemption, at common law, cannot be sold on execution..... 177

EXECUTORS AND ADMINISTRATORS.

See, also, "Arbitration and Award"; "Descent and Distribution."

An administrator of a deceased partner may settle with the survivor on such terms as, in the exercise of good faith and reasonable diligence, he may choose to accept.. 766

Outstanding judgments cannot be given in evidence on plene administravit, but must be specially pleaded..... 204

Exemptions.

See "Bankruptcy"; "Homestead."

Factors and Brokers.

See "Principal and Agent."

FISHERIES.

See, also, "Seamen."

Act July 20, 1790, c. 29, which allows to seamen shipped without a written contract the highest rate of wages, does not apply to fishing voyages.....1145

Fishermen who ship without a written agreement are not within Act June 19, 1813, c. 9.....1145

FIXTURES.

A mortgage of a mill covers machinery afterwards purchased and put into the mill 335

FORCIBLE ENTRY AND DETAINER.

An inquisition, describing the property as "one tenement or storehouse, with the appurtenances, in the county aforesaid," will be quashed for uncertainty..... 391

FORFEITURE.

See, also, "Customs Duties"; "Informers"; "Internal Revenue"; "Shipping."

After a final decree of condemnation, unappealed from, in a cause of seizure by a col-

Page

lector for a breach of the revenue laws, the collector's share of the forfeiture is a vested right, which the secretary of the treasury cannot remit.. 344

FRAUD.

In Texas a charge of fraud should point out, at least in general terms, the acts relied upon to sustain it..... 225

FRAUDULENT CONVEYANCES.

See, also, "Assignment for Benefit of Creditors"; "Bankruptcy."

The possession by the seller, after the sale, of fixtures used in a tobacco factory, *held* not fraudulent in Virginia..... 650

A mortgage to secure the payment of $90,000, where but $4,000 were due the mortgagees, is fraudulent as to creditors.. 783

A deed is not fraudulent, if procured to be made by a father to his infant son in payment of a just debt, though the father be in embarrassed circumstances..... 197

A reasonable advancement made by a person of ample fortune, though at the time indebted, is not fraudulent as to existing creditors, where he subsequently becomes insolvent 513

A debtor divided his estate between three sons, on condition that they give their bonds in certain amount to the husband of his daughter. *Held*, that the latter was liable to the creditors for the amount received by him on the bonds thus given..... 513

Donees will not be *held* liable only for the proportions which their respective gifts bear to the donor's debts, but the whole of every gift will be subjected to the payment of the debts 513

GARNISHMENT.

See, also, "Attachment."

A judgment against a garnishee, obtained at a former term by surprise, will be set aside, and the execution quashed..... 443

Grant.

See "Boundaries"; "Public Lands."

GUARANTY.

See, also, "Bills, Notes, and Checks."

Where the guarantors of a note are the holders, their guaranty will be considered a part of the transfer, and as importing a consideration 622

GUARDIAN AND WARD.

A state may lawfully authorize the appointment of a guardian of the property within the state, of nonresident minors.... 766

A sale by the guardian of his ward's land is void as against the ward, or those claiming under him, unless it appears that the same was made at public auction, after due notice. (Act Or. Dec. 16, 1853.) 259

HABEAS CORPUS.

The writ will not issue out of the federal court to inquire into the detention of a person arrested in one state, charged with a crime committed in another state, to await the requisition of the governor of the latter

Page

state, and the issuance of a warrant of extradition 753

A soldier in the regular service, convicted in a state court, and sent to state prison, for murder, in firing upon and killing a bushwhacker while acting under orders of his superior officer, will be discharged on habeas corpus.....1024

The district court may release on habeas corpus a prisoner sentenced by a military commission under the reconstruction acts to a longer term of imprisonment than provided by the law of the state..... 73

HIGHWAYS.

See, also, "Towns."

The highway, as laid out, must have a certainty of limits and direction. A direction that it shall run from a certain point, "as it may be found the most convenient way," is insufficient..... 116

The use of a certain highway from 40 to 60 years raises a presumption that it was legally laid out as used..... 116

Use of a road for more than 20 years is evidence of its being a public highway.... 864

HOMESTEAD.

See, also, "Bankruptcy."

Liability on the official bond of a public administrator at the time of receiving personal property *held* within the meaning of a homestead exemption statute providing that it shall not apply "to any debts or liabilities contracted before" it took effect 463

HUSBAND AND WIFE.

See, also, "Marriage."

A feme covert, by charging her inchoate right of dower for her husband's benefit, does not thereby become a surety for him.. 213

Trover will not lie against a husband and wife for a conversion to her use only.. 346

INDIANS.

The patents to Wyandot Indians under the treaty of January 31, 1855, conveyed to the head of the family the land in fee.. 114

INFANCY.

See, also, "Guardian and Ward."

On a contract made with an infant for necessaries, plaintiff can only recover the value of the articles furnished. All other contracts are voidable.....1117

Acknowledgment by defendant, when of full age, of a contract made by him while an infant, if made after suit brought, will not avail plaintiff.....1117

INFORMERS.

Where a seizure is made by a collector in pursuance of information given by an inspector of customs, the latter is entitled to the informer's share of the forfeiture.. 465

Injunction.

See "Equity"; "Patents."

INSANITY.

The presumption is in favor of mental capacity, and, in order to affect the va-

Page

lidity of a deed or will, incapacity must be proved. 314

If general derangement of a grantor is proved at any time prior to the execution of the deed, the grantee must prove capacity at the time of the execution..... 314

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors"; "Bankruptcy."

A prior application and conviction is no bar to a subsequent application for the benefit of the insolvent act, on a subsequent execution 439

Act 1797, c. 74, giving a priority to the United States, applies to equitable as well as legal debts; but such priority cannot be enforced in a suit at law brought in the name of a private creditor, who has assigned his claim to the United States..... 672

A discharge of the person and present estate, under the insolvent acts of Maryland, cannot be pleaded in bar of a suit in Massachusetts, so as to discharge the party from the common execution..... 205

Inspection.

See "Practice at Law"; "Trial."

INSURANCE.

See, also, "Marine Insurance."

The contract.

Unrestricted authority to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such issue..... 884

The receipt of a premium by the agent binds the company, though the agent convert it, and the policy is never issued....1168

An action at law will lie for breach of a contract to issue a policy insuring against fire, and the same damages may be recovered as in an action on the policy agreed to be issued.....883, 884

A parol contract of insurance is not merged in a policy issued, which does not conform thereto..... 884

Insurable interest.

In an action on a policy in favor of a wife, upon the life of her husband, plaintiff must prove the marriage, to show an insurable interest..... 315

A covenant by the lessee to pay the cost of insurance, in addition to the rent, confers no authority upon him to insure for the benefit of the lessor..... 121

A lessee who has insured his leasehold interest cannot recover upon the policy, where he has parted with all his interest in the premises before the loss..... 121

Premiums.

Where, by the terms of the policy, the premium is payable half in cash and half in note, a notice that the entire premium must be paid in cash will excuse formal tender of the premium..... 140

Warranties: Representations.

A statement in the application that there was being constructed a force pump, etc., is not a warranty..... 700

A misrepresentation, to avoid the policy, must have been in relation to a material fact that would have probably induced the insurer to decline the risk..... 383

A declaration that the insured had not previously had a severe disease *held* not to include those ordinary diseases which yield readily to medical treatment, and do not tend to shorten life, such as a disease of the bowels which lasted three weeks.... 383

Page

Conditions of policy.

Construction of clauses in fire policy respecting subsequent insurance and termination of interest..... 319

Insurance made by a mortgagee at the expense of the mortgagor is subsequent insurance by the mortgagor..... 319

A conveyance which equity will treat as a mortgage does not terminate the interest of the assured..... 319

A deed from the insured, where there is no evidence that it has been recorded or delivered, or possession taken under it, is not admissible to sustain the defense of a change in title or possession..... 883

Where the insurance agent knew that a mill was not in use as such when the contract was made, its continuance in such state is not a breach of a condition that the policy shall be void if the mill shall cease to be operated as such..... 884

Where the policy is conditioned to be void if any of the representations contained in the application are untrue, it is immaterial that they were not intentionally untrue, and had no effect upon the risk.. 315

Cause of loss.

Loss sustained by the removal of goods in imminent danger from fire is recoverable under a policy insuring them from loss or damage by fire while they "shall be and remain in" a certain building..... 438

Proof of loss.

The company's local agent may bind it by waiver of a clause requiring formal proofs of loss, and barring suits not brought in one year.....1168

Statements that the proofs were "all right," and that the company would pay, amount to such waiver.....1168

Insurers cannot complain that the proofs of loss were not verified by the books of account of the insured, as provided by the policy, where, supposed by the insured to be lost, they were in fact in the insurer's possession 795

The insured forfeits his right where, with intent to defraud, he makes claim for a larger loss than he actually sustained... 793, 794

The insured does not forfeit his rights by an overstatement of his loss, when made from his best recollection, without intention to deceive..... 794

Actions.

The "sixty days after due notice and proof of loss," before right of action accrues, begin to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company 793, 795

Where the loss is payable to the mortgagee on a policy issued to the mortgagor, any defense admissible against the mortgagor is available against the mortgagee; otherwise where the contract is made with the mortgagee. 884

The burden of proof is upon plaintiff to establish insanity, when set up in reply to the defense of suicide in an action on a life policy. 94

The examining physician is the agent of the insurer, and not of the insured, and the company cannot show that he was incompetent. 383

The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive, unless his opinion was influenced by fraudulent representations or concealment of material facts. 383

The question of fraud on the part of the insured, which, under the terms of the policy, works a forfeiture, is to be decided by the preponderance of evidence, under the rule in civil cases..... 700

Page

The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. The evidence must be either direct and positive, or the circumstances must be convincing, admitting no other natural conclusion.....793, 794

Weight and sufficiency of evidence to show that the insured caused his property to be burned determined..... 700

Fraud in the valuation of the property insured will vitiate the policy..... 700

On a bill of interpleader filed by an insurance company, where the widow of deceased, his son, and a foreign administrator all claimed the fund, *held* that it should be paid to the foreign administrator, on his giving bond to hold the same for the benefit of whom it may concern.....1209

Interest on the amount of the loss, from the commencement of the action, should be allowed. 793

INTEREST.

See, also, "Usury."

A bond payable on a certain date, with interest thereon "at the rate of 10 per cent. per annum," draws such rate until maturity, and only the statutory rate thereafter, as in cases where interest is not specified. 892

The authorities on the subject of compound interest reviewed..... 352

INTERNAL REVENUE.

See, also, "Forfeiture"; "Informers."

A tax upon a dividend declared in January, 1870, of earnings for the past year, made payable on or before March 15, 1870, cannot be collected from the corporation.. 454

Act March 2, 1867, § 10, prohibits a suit to restrain the collection of any sum by authority of the United States, having the form and color of a tax, by any means authorized by law for the collection of taxes.. 743

JUDGE.

See, also, "Courts"; "Justices of the Peace."

Where the aspect of the case is substantially changed by new evidence, a district judge sitting alone in the circuit court may review or set aside the action of the court, when presided over by the circuit justice..1067

JUDGMENT.

Rendition and entry.

The judgment cannot exceed the amount claimed in the declaration..... 314

A supersedeas judgment must recite the original judgment correctly..... 402

Operation and effect.

In Pennsylvania the judgment operates, as against bona fide purchasers or mortgagees, only from the time of the entry..1031

A judgment against joint debtors *held* not a lien, either at law or in equity, on real estate standing in the name of one who had not been served with process, and did not appear in the suit, though purchased with funds belonging partly to the other debtors 202

A judgment prior in point of time is paramount to a later judgment, though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party 645

Page

In such case the junior judgment creditor will, in equity, be allowed to redeem, even after the statutory period of redemption has expired..... 645

In Pennsylvania a judgment must be revived every five years, by sci. fa., to preserve its lien, as against bona fide purchasers or mortgagees.....1031

The fact that the declaration in an action at law is not sufficient to withstand a demurrer will not prevent the judgment in the action from being a bar to any other suit for the same cause of action..... 834

Relief against: Opening: Vacating.

Judgment by confession taken against one defendant set aside for irregularity where the other had been served with process 1117

Of different jurisdictions.

A state-court judgment is conclusive in the bankruptcy court of a fact ascertained by it, and binding therein until reversed in due course of law.....1073

The sentence of a foreign court of admiralty, being full, and showing the ground of condemnation, no other part of the record need be produced..... 593

Actions on judgments.

In an action upon a judgment of another state, the record recital of service of process is not conclusive..... 950

But the burden is in all cases upon defendant to overcome the recital by competent evidence..... 950

JURY.

Alienage of a juror is cause of challenge, but not per se sufficient to set aside a verdict, whether the party complaining knew the fact or not. The objection should be taken at the time of impaneling the jury.. 370

In a suit on a life insurance policy, where the defense is suicide, it is a good cause of challenge that the juror considers the fact of suicide conclusive evidence of insanity.. 94

JUSTICES OF THE PEACE.

Justices of the peace in Pennsylvania may receive proof of the service of process of ejectment, issuing out of the circuit court of the United States..... 850

Plaintiff may relinquish interest upon his demand, so as to bring it within the jurisdiction of the justice..... 445

No appeal lies from a judgment of the justice, imposing a fine for profane swearing in his presence..... 652

The surety on a bond on appeal from a justice of the peace (Act Ark. 1818, p. 27) is equally subject to judgment with appellant; but a sci. fa. against the surety is irregular where judgment was taken against the principal only..... 280

LANDLORD AND TENANT.

A holding over on an annual rental is evidence of a new demise for a year.... 462

A covenant in a lease to pay for new erections on the land runs with the land, and an assignment by the lessee of all his right, title, and interest conveys his right to compensation therefor..... 906

The owner of a race track, who lets it for races, and for booths and stands for gambling, and for grossly immoral purposes, cannot recover rent..... 391

A casualty happening against the will, and without the negligence or other default of the tenant, is, as to him, an inevitable casualty 283

Page

A re-entry and reletting by the landlord for breach of covenants terminates the tenancy, and the landlord cannot recover for the loss sustained by reletting at a lower rent..... 584

Goods in the officer's hands under a distress for rent are liable to attachment, at the suit of the same landlord, for the rent not yet due..... 6

Upon the plea of no rent arrear, in replevin, the whole burden of proof is on the party pleading it..... 892

LIBEL AND SLANDER.

Facts in justification stated in plaintiff's testimony are available to defendant, though he failed to plead them..... 309

License.

See "Patents."

LIENS.

See, also, "Admiralty"; "Bankruptcy"; "Maritime Liens"; "Mechanics' Liens"; "Shipping."

Hauling quartz to a quartz mill is "performing labor for carrying on the mill" within St. Nev. 1869, p. 61..... 487

The lien is acquired by the performance of the work, and not by filing the notice, etc 487

LIMITATION OF ACTIONS.

See, also, "Adverse Possession"; "Ejectment"; "Equity."

An amendment asserting a new title will be considered, as regards the statute of limitations, as a new bill..... 424

The exception in Act Or. Dec. 16, 1853, in favor of persons out of the state when the cause of action accrued, *held* to apply as well to persons who are never in the state as to those who were temporarily absent 258

MANDAMUS.

The writ of mandamus is an original writ, and incident to original jurisdiction; and the superior court of the territory of Arkansas, which, under Act Oct. 22, 1828, is an appellate court only, has no power to issue it..... 698

MARINE INSURANCE.

See, also, "Average."

The contract—Generally.

A policy of insurance will be reformed so as to conform to the order or agreement under which it was executed..... 309

—— Interpretation.

In the case of contradiction, the written words in a policy will control the printed ones. 34

The printed words insuring against loss of the goods, "or any part thereof," do not control the printed words in the memorandum clause, "Free from average, unless general." 34

An insurance on boxes of lemons *held* a single contract of insurance on the entire number, and not an insurance against the loss of any portion less than the whole, though the lemons were valued at a certain sum per box.....34, 34

Representations: Concealment.

A misrepresentation as to the size and age of the vessel, though material to the risk, is no defense to an action upon a valued policy. *284

A representation as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed 779

Where the policy authorizes the vessel to stop at a particular port, the assured need not disclose that the vessel will call there.. 779

The risk.

A policy without warranty of neutrality covers belligerent risks..... 284

A loss by embezzlement of the crew *held* not within the term of the policy..... 117

There can be no recovery where stranding was due to want of care or skill of the master, or where, after the stranding, he failed to use all reasonable means to save the vessel. 741

Total loss.

When the loss is total under a policy insuring freight on a cargo of jerked beef, part of which arrives at a port of distress, and is there sold to prevent further loss.. 821

Insurers are not bound by a sale by the master as under a necessity, unless the circumstances were such as to authorize an abandonment 706

A vessel, meeting with disasters, put into a port of distress, where her repairs exceeded half her value, and a bottomry bond was given for the amount. Her owner, having no information, abandoned just before her safe arrival. The vessel was sold under the bottomry bond. *Held*, that the loss was not total..... 876

The insurer, in such case, is entitled to have the usual deduction on the repairs, of one-third new for old..... 876

In an insurance on "cargo," composed principally of lemons and oranges, where the underwriter is warranted free from particular average on "fruit," he is not liable where all the oranges are lost, and the lemons arrive safely..... 876

Abandonment.

There is no right to abandon under a valued policy when the estimates of the repairs do not exceed one-half the value.. 706

The mere stranding of a ship on a bar will not justify her abandonment, until the master and crew have used their best exertions to get her off..... 741

A seizure of the vessel by a privateer, and a prohibition to carry the cargo to the port of destination, *held* a complete destruction of the voyage, authorizing an abandonment of the cargo.....1047

The sale of the cargo by the supercargo, where he acted for the interest of all concerned, *held* proper, and effectual to convert a partial into a total loss.....1047

A vessel captured and detained until she should give security that the cargo will not be carried to the port of destination cannot be abandoned as a total loss.....1047

A refusal to give a deed of cession of the cargo unless the company would accept the abandonment of the vessel, insured in another policy, will not vacate the abandonment of the cargo.....1047

In case of abandonment the insurer is entitled to all the proceeds of the thing abandoned, and to all the profits arising from the investment thereof.....1047

Actions.

Upon a valued policy, by which "A., on account of himself and B.," caused a vessel to be insured, A. may alone maintain action, and recover the whole amount insured. 741

It is no defense to an action of covenant

Page

on a policy that the premium has been perpetually enjoined..... 284
In an action by an agent on a policy procured by him for the benefit of whom it concerns, defendant cannot set off debts due from the agent in his own right....1009
The provision that all sums due to the company from "the insured" shall be deducted from the loss *held* to apply to the person for whose benefit the insurance was made, and not the agent who procured it. 1009
The actual cost of repairs, at their true value, and not as estimated in a depreciated currency, will determine the liabilities of the insurer..... 876

Maritime Law.

See "Admiralty."

MARITIME LIENS.

See, also, "Admiralty"; "Affreightment"; "Bottomry and Respondentia"; "Charter Parties"; "Demurrage"; "Salvage"; "Seamen"; "Shipping."

The right to a lien.
A shipbuilder may make a valid contract hypothecating his interest in the vessel before he commences building..... 860
A floating elevator used in the harbor of New York, though without motive power or capacity for cargo, *held* a vessel subject to a maritime lien..... 93
The services of divers and wreckers on board of a seagoing vessel, are maritime, and they have a lien upon the vessel therefor. 136
Money furnished to a vessel is not a lien, unless furnished to pay claims which would themselves be liens..... 446
Either the owner or the master of a ship may bind her, by a direct hypothecation, for repairs or supplies made or furnished in a foreign port, although a note or other obligation is given for the demand..... 142
There is no lien by the general maritime law for materials or supplies furnished a vessel in the home port..... 155
The law of the place governs in determining whether a lien exists for supplies furnished in the home port..... 142
The foreign or domestic character of a vessel is determined by the residence of her owners, and not her port of enrollment.. 155, 168
Charterers navigating and having exclusive control of the vessel are to be deemed the owners pro hac vice.....155, 168
Premiums of insurance are a lien.....1178

Priority and enforcement.
Seamen's wages take precedence of an hypothecation for supplies..... 142
Supply liens under a local law belong to the same class as supply liens under the general maritime law, and will share with them. 1178
The lien under the state law of a material man, for repairs, has priority over that of a mortgagee under a prior mortgage duly recorded.....110, 1178
A mortgage will be paid after lien claims, and before general creditors.....1178
Insurance premiums on policies issued prior to a mortgage on the vessel will be preferred to it, but those on later policies will be postponed.....1178
The lien created by the hypothecation of a vessel to be built for advances, *held*, should be postponed to those of material men and laborers. 860
Nor is the hypothecary creditor subrogated to their privilege merely by paying their claims on orders drawn by the builder. 860

Page

All the privileged creditors may unite in one libel, or, if the libel is filed by one, the others may be made parties by petition 860
An hypothecation of vessel by way of a mortgage, for supplies furnished in a foreign port, may be enforced in rem... 142

Waiver: Discharge: Extinguishment.
The taking of notes or a deed of trust for the debts does not waive the lien....1178
The lien created by an hypothecation by way of a mortgage for supplies in a foreign port is not lost by taking other security for the claim..... 142
Creditors of vessels on the Great Lakes must enforce their liens, as against bona fide purchasers without notice, during the current season of navigation, or at the commencement of the next season..... 8
The statement of the seller that there were some small claims against the vessel, which he would pay, *held* not sufficient to affect the purchaser with knowledge of any particular claim..... 8
The taking of a mortgage upon another vessel to indemnify the purchaser against claims upon the vessel purchased does not operate to extend the time within which creditors should enforce their claims..... 8
Nor can mere notice of the existence of a certain claim affect his rights, unless such notice be had at the time of purchase or of payment..... 8
A lien accruing in August, 1873, against a vessel on the Great Lakes, *held* waived, as against one who purchased it in January, 1874, where the libel was not filed until September, 1874..... 8
The lien for supplies sold the charterer upon the credit of the vessel is not discharged by the bankruptcy of the charterer, and the composition accepted, though the material man voted to accept the composition. 446
A general maritime lien cannot be divested by a sale under judicial proceedings in a state court, under the state laws.... 155
A sale in a proceeding in rem in admiralty will discharge maritime liens, whether general or statutory, in whatever jurisdiction it may be decreed..... 155

Liens under state laws.
A lien for repairs and supplies given by the local law may be enforced in admiralty. 93, 860, 1195
The remedy for the enforcement of a lien under the local law for supplies in the home port (Code Tenn. §§ 3550, 3562), whether valid or invalid, will not defeat the lien, or the jurisdiction of the admiralty court to enforce it.....1178
The lien given by Code Tenn. § 1991, attaches to all contracts for supplies, whether credit was given to the vessel or owner, and continues for 90 days.....1178
An agreement to give a time note for the last installment of the contract price of repairs to a vessel, not complied with, will not displace the lien under 2 Rev. St. N. Y. 493, §§ 1, 2..... 135

MARRIAGE.

See, also, "Husband and Wife."

Oregon and California laws as to the requisites of a valid marriage..... 405
Marriage, in Missouri, may be had by the mutual, present consent of two competent persons, made in good faith, and followed by cohabitation..... 315
A contract of marriage, made between citizens of the state, not in accordance with its laws, who purposely go beyond its jurisdiction, and not within that of another state,—as at sea,—is void..... 405

Page

Living together as man and wife, in exclusive cohabitation, long continued, although evidence of a previous marriage, cannot make the parties man and wife.. 405
Marriage may be proved by general reputation, cohabitation, and the express recognition of the wife in the will of the husband 197
A person claiming as wife of another must allege the marriage, with circumstance of time and place..... 405
A state marriage law prohibiting marriage between negroes and white persons is not annulled or affected by the civil-rights bill, or the fourteenth amendment.. 262

MARSHAL.

If the marshal, upon a ca. resp., be amerced debt and costs nisi, the defendant may, on or before the next term, give bail, and exonerate the marshal..... 90

Martial Law.

See "War."

MASTER AND SERVANT.

See, also, "Apprentice."

An engineer and brakeman on the same train are fellow servants, and the latter cannot recover from the company for an injury caused by negligence of the former unless he show negligence, or want of reasonable care, in his employment or retention. 205

MECHANICS' LIENS.

As between mechanics, there is no priority in liens..... 758
In Wisconsin the lien relates back to the commencement of the building, without reference to the time when the work was actually done, or materials furnished..... 758
The mechanic's lien takes precedence of a mortgage given after the commencement of the work..... 758
The lien of a builder under Act Md. 1791, c. 45, § 19, is a remedy in rem only, and not in personam..... 444
Such lien commences with the recording of the contract for building, and does not overreach prior incumbrances..... 444

Merger.

See "Estates."

MORTGAGES.

See, also, "Bankruptcy"; "Chattel Mortgages"; "Fixtures."

An absolute deed by a husband to a trustee, in trust for his wife, in consideration of a sum advanced out of her separate estate, will not be deemed a mortgage by reason of the property exceeding in value the amount advanced..... 912
A notarial act recognizing a mortgage *held* to be itself a mortgage, and its inscription effectual, under the law of Louisiana, to preserve its lien for 10 years.... 922
An indorsement by one joint obligor on a bond of an agreement to pay a greater rate of interest, as an inducement to forebear its collection, does not invalidate the bond, or the lien of a mortgage given to secure it, but the extra interest is not recoverable, as against junior incumbrances 1082

Page

In Illinois, bonds and mortgages are placed upon the same footing as bills of exchange. 783
An assignee of a mortgage, having no notice of an equitable lien on the mortgaged premises, is not affected thereby.. 783
A set-off or mutual credit against the mortgagee is not affected by an assignment of the mortgage 783
A payment to the mortgagee, made after assignment of the mortgage, but before the mortgagor has notice of it, is good, against the assignee. 783
A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor.. 783
Where the mortgagor induced a third person to purchase the mortgage by promising in writing to pay, with interest, the whole sum advanced, the assignee of the equity of redemption will be allowed to redeem only by paying what his assignor must have paid..... 326
A consent decree made in a case brought to enjoin the enforcement of a mortgage, in which the mortgage was recognized and its terms changed, *held* not to have the effect of extinguishing the mortgage, or merging it in the decree..... 922
A statement by the mortgagee that his purpose in foreclosing was to protect the title, and that he would carry out a previous agreement to pay the debt out of the income, will not make an absolute deed obtained on the foreclosure a conditional one. 728

MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Railroad Companies."

Powers: Ordinances.

Under the power "to lay and collect taxes upon personal property within the city," the corporation may require persons bringing slaves within its limit to record them. 181
A municipal corporation, unless specially restricted, may make an irrevocable dedication of property to the public for the use of a public wharf.....1199
On property thus dedicated the city may authorize the erection of a grain elevator to facilitate the handling of grain at the wharf. 1199
An ordinance surrendering to a private person control over a public wharf for a fixed period, for the purpose of erecting a grain elevator, without reserving the right to resume possession and regulate charges, is void, unless specially authorized by law. 1199
An ordinance of the city and county of San Francisco, requiring that prisoners shall have their hair clipped immediately upon arrival at the jail, *held* invalid, and no justification to the sheriff acting under it. 252

Contracts for improvements.

Contract for laying pavements construed, and *held* that the obtaining of the consent of the property holders was a condition precedent. *218
A notice to abutting owners, to construct sidewalks in front of their lots, is a condition precedent to the right to contract for such construction under an ordinance authorizing such a contract, where the owners, after notice, have failed to do the work. 225
An advertisement for bids, directed by the ordinance, authorizing a contract for street improvement, *held* a condition precedent to the making of a valid contract.. 225
The fact that the contract did not conform to the advertisement for bids did not

Page

make it void, provided the contract was within the scope of the ordinance which authorized it. 225

A contract for filling and grading sidewalks is not void because at the date of the contract no grade for the sidewalks was established. 225

A contract for sidewalk improvement *held* not invalidated by the fact that there were no specifications on file at any time as stated in the advertisement for bids for the work..... 225

The fact that there were no specifications will not invalidate the contract for uncertainty, where there was a well-known process of doing the work..... 225

The fact that a contract has been vacated, and a new one adopted in its place, is a good defense to an action on the original contract. 225

The city cannot avoid a contract for street improvement because it imposes a more rigid condition on the contractor than authorized by the ordinance under which it was made..... 225

Where a contract is established against all charges of fraud, etc., the profits lost by its breach may be recovered, though they are unreasonable..... 225

Bonds.

A municipal corporation has not inherent power to issue negotiable coupon bonds, which shall circulate as commercial paper, and be unimpeachable in the hands of a bona fide holder..... 218

The grant of special powers for the collection of the cost of sidewalk improvements, and to issue bonds for certain other purposes, *held* an exclusion of the power to issue negotiable coupon bonds to pay for sidewalk improvements..... 218

Const. Mo. art. 11, § 14, requiring a two-thirds vote to authorize subscription to railroad stock, *held* not to apply to railroad charters existing at its adoption..... 845

Actions.

Plaintiff must give notice to the inhabitants of the town before suing its treasurer for damages caused by defective highway, under R. I. Dig. 299..... 339

The omission of a city to put a street in condition to permit of its use for public travel is not such negligence as will support an action for personal injuries..... 834

Negligence.

See "Admiralty"; "Collision"; "Damages"; "Death by Wrongful Act"; "Master and Servant."

Negotiable Instruments.

See "Bills, Notes, and Checks"; "Bills of Lading."

NEW TRIAL.

The rules under which the court will exercise its power to set aside a verdict on the ground that it is against the weight of evidence..... 927

The separation of the jury after the cause is submitted, and before the verdict is agreed upon, is ground for setting it aside. 636

A new trial will be granted where the jury, without defendant's consent, take plaintiff's account with them to the jury room. 1087

Evidence of declaration of jurors that they assessed the damages by taking the average of the sums put down by each juror, respectively, is inadmissible..... 390

Page

Where a new trial is granted on payment of costs, and the costs are not paid by the second day of the following term, and judgment is entered, the court may set aside the judgment, and permit the cause to be tried. 663

NUISANCE.

A private person can have relief in equity against public nuisances only in virtue of special and individual injuries, and where the remedy at law is inadequate. 1199

OFFICE AND OFFICER.

See, also, "Judge"; "Justice of the Peace"; "Marshal."

Where an act is directed to be performed by the county commissioners, as the constituted authority of the county, a majority may act. 637

An officer acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under "color of authority," though the superior has transgressed his power, and the warrant be irregular..... 285

A public agent of the government, contracting for the use of government, is not personally liable, although the contract be under his seal..... 283

PARTIES.

All persons in interest must be made parties to proceedings in equity before a decree. 746

Where the interest of one is involved in that of another, and the former possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both parties before the court. 504

In a suit against the obligor in a bond paid in Confederate currency to an executor during the Civil War, to cause him to deliver it up and pay it again, the executor is a necessary party..... 738

The omission of mortgagees on a bill in equity in relation to the premises is no cause of abatement of the suit..... 746

Creditors are not necessary or proper parties generally in a bill between partners to wind up the partnership affairs..... 746

The defect of joining as a party plaintiff one who has no interest in the suit may be reached by a general demurrer for want of equity. 279

On the arrest of a vessel the mortgagee may intervene, to protect his interest and contest a forfeiture..... 448

The interest of a person in a suit, arising solely from his agreement to indemnify respondents against the result of the litigation, is not sufficient to give him the right to intervene in the action.....1155

Where there is a transfer of interest in premises pending a suit in relation thereto, a supplemental bill may be filed by or against the purchaser..... 746

PARTNERSHIP.

See, also, "Bankruptcy."

The recorder of the city of New York is a judge of the county court, within the contemplation of the New York statute, respecting special partnerships, and the certificate is properly acknowledged before him..... 780

Page

Where the names of all the partners are correctly given in a certificate of special partnership, the use of the words "and Company" in the firm name, as a collective appellation to designate the persons specifically named, does not render a special partner liable as a general partner.. 780

In the absence of fraud and breach of trust, property purchased with partnership funds does not, of necessity, become partnership property, if that is not the intention of the parties..... 746

Where property is necessary for the ordinary operation of the partnership, and be actually so employed, it will be *held* partnership property, when purchased with partnership funds..... 746

Real estate purchased with partnership funds, and on partnership account, will, in equity, be treated as personal estate, irrespective of the condition of the title.. 746

Real estate will be considered as partnership assets, and impressed with the character of personalty, when losses are to be sustained by the assets of the firm, and profits are credited thereto..... 213

Where the proceeds of a joint adventure are held for the joint account, both parties share the risks which attend them; but, where one party appropriates them to his use, he becomes debtor to the other for his moiety 593

The dissolution of a firm by agreement between its members will not affect the rights of its creditors..... 800

Upon a dissolution, each partner has a lien upon the partnership property, both for an indemnity against joint debts, and for his proportion of the surplus; but the creditors have no lien thereon for their debts.. 746

A bond and security given by the continuing partner to the retiring partner, to relieve him from payment of the firm debts and to assume their payment, is not merely an indemnity, but is an obligation to pay, and may be enforced by the creditors..... 459

The acceptance of the note of one partner on a loan of money for the use of the firm will prevent an action against the firm. 42

Though the lender was ignorant that the loan was for the firm, he cannot sue the firm after recovering judgment on the note 42

PATENTS.

Patentability.

The invention of a compound forming a new material is patentable..... 551

The making of an article, of a new material, by an old method, is not patentable.. 551

The application of a known combination to a new object is not patentable..... 603

The application of an old process to produce a new result is not a patentable invention 656

The production of an old result by a new process is patentable..... 656

The making in iron of a frame which had before been made in wood *held* not patentable 324

A combination of machinery for cooling meal in the process of converting grain into flour, with machinery for preventing the waste of meal, *held* patentable..... 47

The placing of two or more letters upon spelling blocks arranged systematically *held* not a patentable improvement..... 171

No degree of utility is required, but only that the invention shall not be frivolous or dangerous 290

A rejected application for a patent is not evidence that the thing described was ever used, nor is such description a patent or a publication, within the statute..... 47

Trials and experiments which led to no practical result, and were abandoned, will not defeat the patent to another..240, 242, 246

Page

An invention ending in experiment only, and laid aside as unsuccessful, will not invalidate a patent granted to a subsequent inventor who perfects the invention..... 678

Who may obtain patent.

A perfected invention, if diligently pursued, will date back to the time of the first conception, as against a later conception of another, first perfected..... 120

The person who first makes known the principle of the invention, so that another would be able, from his description, to put it in use, is the first inventor, though he did not put it into practical operation..... 151

Prior public use or sale.

A "public use" means a use in public, as distinguished from a secret use..... 918

A public exhibition of the invention by a person to whom a half interest has been sold is a public use with the consent of the inventor, within the rule..... 918

So is a public use for years by others of machines constructed upon substantially the same principle as that of the applicant, of which he might have had knowledge... 918

The continuity of an application is not necessarily destroyed by the withdrawal of the first application and the filing of a second one so as to render the patent void because of a public use or sale more than two years before the filing of the second application..... 670

The question as to whether the "continuity" of the application is destroyed by the filing of a new application is, in an action at law, one of fact, for the jury..... 670

Prior description or foreign patent.

The foreign patent, to invalidate a domestic patent, must have been granted before the invention here, not merely before the application for a patent..... 663

An English patent takes effect only from the date of its enrollment, and not from the date of the filing of the provisional specification 663

Abandonment: Laches.

Two years' delay to file a new application, after the rejection and withdrawal of the first one, caused by the delay of the patent agent, *held* not an abandonment..... 715

A delay of three years, during which the inventor was engaged in constructing a machine to produce the invented article, *held* not unreasonable..... 151

Twenty years between the date of the original application and the final grant of the patent, where the application was rejected and repeatedly renewed, will not invalidate the patent..... 635

A reissue is prima facie evidence that there has been no abandonment..... 290

A rejected application, of itself, *held* no evidence of the existence of a perfected invention at the date it was filed..... 715

Application and issue: Interference.

A commissioner has full authority to examine and adjudicate on the question of abandonment, and to compel the attendance of witnesses for that purpose. (Act March 3, 1839.)..... 918

The determination of the patent office as to whether two things are equivalents cannot be limited or restrained by the admissions or denials of the parties.....1087

The granting of an extension of time for the taking of testimony in an interference case is within the discretion of the commissioner, and no appeal lies from his refusal, except in the case of a plain abuse of discretion 492

Appeal from commissioner's decision.

The failure of the patent office to declare an interference when a patentee is seeking a reissue, pending an application by an-

Page

other, is not a decision that the claims are for different inventions..... 120

A patentee cannot appeal from the decision of the commissioner in an interference proceeding, awarded priority of invention to a subsequent applicant, and granting him a patent..... 491

An interested party will not be allowed to assign his interest immediately before the hearing, so as to make him a competent witness 151

Extent of claim.

A patent for an improvement must clearly distinguish the old from the new..... 615

It is immaterial what the claim in the summary is, if its foundation has not been made in the descriptive part of the specification 826

A claim for "said manufacture of printing type, made substantially as described," *held* a claim for the process, and not for the product..... 811

Equitable relief.

A bill in equity for relief will not lie on the ground that defendant has surreptitiously procured a patent for complainant's invention, for which an application for a patent was pending..... 289

Reissue: Disclaimer.

A reissue can be obtained only for that which was the original and true invention of the patentee, but which he failed to claim or describe in the original claim and specification 290

A patent for a combination of old elements may be reissued for a combination of fewer elements than were contained in the combination originally claimed..... *47

The invention must be shown in some part of the patent, specification, drawings, and model, to validate a reissue..... 290

Differences in the claims are consistent with the identity of the thing designed to be patented in both patents; it being one object of the surrender to correct by changing the description or claim, or both.....1063

The reissue furnishes prima facie evidence that everything necessary to justify the commissioner in granting the reissue had been produced before the grant was made 290

A legal presumption arises from the action of the patent office, that the reissue is for the same invention as the original.....1063

The commissioner, in deciding upon the question whether the invention claimed in the reissue is the same as that intended to be patented under the original application, should receive all legal proof offered.....1053

The decision of the commissioner is prima facie evidence, and can only be impeached for fraud.....1053

The prior use of an invention under a defective patent cannot take away the right to a reissue, or authorize its use after the reissue 1053

A disclaimer of a part, or a statement that it is old, will not prevent claiming the same in a reissue, if made by inadvertence, accident, or mistake.....1053

A disclaimer limited to the application in which it is made does not prevent the inventor from claiming the same matter in a subsequent application..... 151

Extension: Renewal.

A license to use the patented invention "during the term for which said letters patent are or may be granted," does not apply to an extended term.....272, 276

The licensee, under Act July 4, 1836, § 18, may use such patented articles as it has in use when the original term expires, until they are worn out..... 272

Assignment.

An assignment made before the patent is granted is valid..... 1

Licenses. Page

An assignment of all right and interest under a patent in certain territory, where the patentee reserved the right to sell machines of his own manufacture in such territory, *held* a mere license.....1067

The patentee, in such case, may sue to protect his rights without joining the licensee 1067

A license to use a patented brake "on any and all cars belonging to" the licensed company covers the use of brakes on trucks and running gear belonging to the company, although the superstructure belongs to another 272

A railroad company running its cars over the road of another under a permission to that effect cannot be considered as operating the latter, within the meaning of a license granting the right to use a patented invention 272

Infringement—What constitutes.

A machine which operates, or may operate, if the owner is disposed to use it so, in the manner pointed out by the patent, is an infringement..... 324

A patent for a combination and an entire process is not infringed by the use of a part of the process and combination..... 656

A patent for a combination consisting of several distinct inventions, which may be used separately, is not infringed by the use of one of such parts..... 826

—— Who liable.

A mere licensor under letters patent, who did not derive any profit from an infringing machine constructed thereunder by his licensee, is not liable.....1053

It is no justification that respondent constructed and used his machine before complainant took out his patent, where he copied it from complainant's invention.... 609

It is no justification of the infringement of a reissued patent that the infringer had used the invention with impunity before the patent was amended..... 689

—— Remedy, generally.

Either a suit in equity or an action at law may be maintained after the patent has expired, where the infringement took place during the term of the patent..... 725

—— Preliminary injunction.

Where there has been no trial of the right at law, plaintiff must show a long-continued, exclusive possession, and exercise of the right granted, to show his right to the injunction.....269, 609

Where the patent is of long standing, and the inventor has exclusive possession under it, the writ will be granted without a trial at law..... 689

Notwithstanding complainant's right to an injunction is clear, defendant will be allowed to continue the use of the patented invention, where plaintiff exercises his monopoly by selling licenses, and defendant is willing to pay a reasonable license fee.... 276

The fact that plaintiff grants licenses at a fixed sum, and that defendant is a mere user, is not alone sufficient reason to refuse the writ..... 670

Where the validity of a patent is fully established, and its infringement is clear, the patentee has a right to protection by injunction, although great injury may thereby be caused to the infringer..... 276

Unless the balance of inconvenience be clearly on the side of the complainant, or if the case be at all doubtful, an injunction will not be granted against a mere user 670

Where plaintiff would suffer little, and defendant great, inconvenience and expense, an injunction was denied..... 269

The fact that defendant is suffering serious injury from the stoppage of his manu-

Page

factory by an injunction is no reason for departure from the settled rules of equity practice in patent cases.....1067
A delay of 18 months after knowledge of infringement is good ground for refusing an injunction 269
Where the question of the right to the injunction depends only on the interpretation of a license, the question will be settled on motion for the injunction..... 276

—— **Procedure.**
A suit for an infringement after the making of an assignment must be brought by the assignee..... 1
The licensee of a territorial exclusive right to use, rent, and vend a patented article cannot maintain a suit against persons using the article in violation of the license..... 182
The next of kin of a patentee cannot be united as parties plaintiff with the personal representative in a bill to enjoin infringement and for an accounting..... 279
Upon the death of the patentee the personal representative at his domicile may sue for infringement in any federal court having jurisdiction, without taking out letters in the state in which the suit is brought... 279
Defendant cannot avail himself of the defense that he has not marked or labeled the infringing machines as patented..... 44
Grounds upon which presumptions of novelty of a patented invention may arise....1067
The defense of invention by and patent to a third person may be met by producing the application of and the patent to such third person, with his accompanying or contemporaneous declarations..... 240
It is no ground of demurrer to a bill for infringement of two patents by the use of the devices in one apparatus that the bill does not allege that the devices were used conjointly, or connected together..... 527
A reissue to defendant of later date than plaintiff's patent, but of an original of earlier date, will control in a suit for infringement 598
The decision of another circuit on the same points and the same state of proofs is entitled to great consideration..... 240
A patentee who claims both old and new things must disclaim what is old before he is entitled to recover..... 609
The reissue, after the first hearing, of a patent prior to plaintiff's, which was in evidence, is no ground for granting a rehearing 246
The want of proper expert testimony is no ground for granting a rehearing, where no sufficient excuse is shown for not applying, prior to the first hearing, for opportunity to introduce the same..... 246

—— **Evidence.**
Machines not set up in the answer cannot be introduced in evidence or considered upon final hearing..... 689
As bearing on the art, the testimony of persons skilled in the business that no such improvement as that covered by the patent had previously come to their knowledge is inadmissible..... 240
Proofs furnished by practical operation and experiment are entitled to greater weight than the opinion of an expert..... 811
A patent can only be overthrown, on the question of novelty, by clear and satisfactory proof..... 47

—— **Bond for damages.**
A patent having but six months to run, defendants were allowed to give bond to account, in lieu of a preliminary injunction 663
Defendant will be allowed to give bond with security to account, etc., when his machine embraces improvements which could not be used without using the original invention of the patentee, upon which they were ingrafted..... 663

—— **Accounting: Damages.** Page
The saving to defendant made directly by using the patented device, and not that which he might have made if he had used any or all of various other devices, *held* the proper measure of damages..... 44
Interest on the cost of a device, and the cost of power, are to be allowed as deductions from profits only when it is shown they have been paid or incurred as debts.. 44
The whole profits may be awarded against defendants, though made while they were using the patented invention in conjunction with a person not a defendant..... 44
The general expenses of conducting defendant's entire business, *held*, should be divided in the proportion that the amount of sales of the infringing device bore to the sales in the entire business..... 244
No part of the expenses of the litigation should be assessed as damages, nor should interest be added to the profits..... 325
The court cannot treble the amount of profits under the authority conferred by Rev. St. § 4921, to treble the damages.... 325

Various particular inventions and patents.
Bottle stopper. No. 48,300, for improvement, *held* not infringed..... 118
Door knobs. No. 2,197, for a porcelain knob, *held* invalid..... 551
Flour. Reissue No. 4,712, for improvement in cooling and drying meal, *held* valid *47
Grain separators. Reissue No. 4,793, for improvement, *held* valid and infringed.... 715
Horse rakes. Reissues Nos. 1,912–1,915, for improvement, *held* valid and infringed.. 290
Millstones. Hoyt's invention of improvement by uniting segments by molten metal, *held* patentable..... 755
Organs. Reissue No. 3,665, for tremolo attachment, *held* valid and infringed...240, 242
Paper collars, No. 45,998 (reissued, No. 2,034), for improvement in turn-down enameled paper collars, *held* valid and infringed.....299, 305
Patent rollers. Hutchinson's improvement, *held* patentable.....1087
Printer's galleys. No. 60,151 (reissued, No. 6,326), for improvement, *held* valid and infringed..... 288
Reaping machine. Reissues Nos. 449,450, 451, 742, 917, for improvements, *held* valid and infringed.....1053, 1063
Sash lock. Reissue No. 6,693, for improvement, as construed, *held* not infringed 499
Seed sowers. Nos. 88,971, 91,144, for machines for sowing seed, *held* valid and infringed..... 324
Sewing machines. No. 4,750, to Howe, for improvement, *held* valid and infringed 663, 678, 689
Spelling blocks. No. 59,603, for improvement in cubical blocks, *held* not infringed.. 171
Topsail yard. No. 11,125, for "extra yards for topsails," *held* valid and infringed 725
Truss. Patent to Hull, *held* valid and infringed..... 864
Type. No. 55,299, for improvement in the construction and manufacture of printing type, *held* not infringed..... 811
Water-pumping machinery. Holly's patent, No. 87,413 (reissue No. 5,132), for a device for supplying city with water, *held* valid and infringed..... 385

PAYMENT.

See, also, "Bills, Notes, and Checks."

A bank held a note for collection, and, before it was due, received a deposit of money from one of the makers to pay it. *Held*, that the note remained unpaid, where the bank failed on the day on which it fell due, where the money was not actually applied to its payment..... 851

Page

Payment in Confederate bonds of a balance of account with the bank of North Carolina, accepted by the depositor, *held* valid 341

An executor who receives payment during the Civil War, in Confederate money, of a bond given before the war, if liable at all, is only liable for the value of the Confederate currency, as of that date..... 738

New York creditors were given notes payable in Illinois for collection, to apply the proceeds in payment of their debts. *Held*, that Illinois currency received in payment thereof was to be applied only at its value in New York..... 687

Under a stipulation for payment in New York of an amount expressed in English money, "at the current rate of exchange" for bills on London, the amount payable is not calculated in gold, but in currency, at the current rate of bills on London, with interest at the New York rate.....1052

A presumption of payment, arising from lapse of time, may be rebutted by accounting for the time, and showing the improbability of payment..... 504

A note given by an agent for goods sold to enable the seller to raise money at the bank, where no settlement is made, and the account is not receipted, will not be presumed to be in payment..... 808

The words, "received in full payment" or "satisfaction," do not necessarily mean absolute satisfaction, when a note or other security is taken.....1020

The purchaser of a vessel, who has paid expenses of a previous voyage upon the master's order, under a mistaken expectation that he was to be reimbursed out of the freight, cannot recover them from the master 282

PILOTS.

See, also, "Admiralty."

The limits of pilot ground are not fixed by any rule of law, but depend upon usage or custom; and that usage is not settled and uniform, but varies according to circumstances 483

Act N. Y. 1865, giving half pilotage on a tender and refusal of services, *held* applicable to a tender made as far east as Sand's Point, to a vessel bound to New York.... 538

PLEADING AT LAW.

See, also, "Abatement and Revival."

Plaintiff need not set out the facts or process by which the liability of defendants is to be established under the decree..... 268

A declaration on a note averred that it was presented to the bank "when due, to wit, July 23, 1841." *Held*, that the words "to wit," etc., were surplusage.....1142

If a party partially states a deed, which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set rorth the whole, and then demur..... 268

An allegation in a plea of abatement that all of defendants in the action are not citizens of the state is bad on demurrer, for uncertainty 194

In an action ex delicto, the objection that the court has no jurisdiction of a certain defendant is personal to such defendant... 194

Defendant allowed a repleader where a mistake is made in a plea of puis darrein continuance through inadvertence of his attorney 90

A replication to a plea of discharge in bankruptcy is defective where it does not state that the debt sued for had been placed on the schedule..... 459

Page

The plea of non est factum in a suit on a contract alleged to have been made by defendant city, by its mayor, is properly sworn to by members of the common council on information and belief..... 225

An agreement that an answer may be sworn to in France, before any person authorized to administer oaths by the laws of France, is not complied with where the answer is sworn to before the American consul..... 23

On an issue joined on a plea of want of title in an action on a bond expressed to be given for the purchase money of land, plaintiff has the burden of showing title.. 550

A variance between the writ and declaration can only be taken advantage of by plea in abatement or special demurrer..... 625

PLEADING IN ADMIRALTY.

See, also, "Maritime Liens"; "Salvage"; "Seamen."

A libel sufficient under the general maritime law is sufficient in cases arising upon the Lakes, and no averment is required to bring it within the act of 1845.....1177

It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed.....1177

The answer need not be overcome by the testimony of two witnesses, as in equity cases 1089

How far the answer is considered evidence. Extended opinion and note by Ware, J.....1089

An allegation founded on an hypothecation of a vessel implied by law for money advanced for repairs, may be united with an allegation on a bottomry bond given for the same consideration..... 951

Both the libel or the claim and the answer must be verified by the party.....1089

Permission to amend a libel to enforce a general admiralty lien for supplies, so as to claim a lien under the local statutes, granted on condition that libelant's lien should be postponed to that of others..... 819

PLEADING IN EQUITY.

Several causes of action may be joined in a single bill, but not when the effect would be to embarrass the defendant, or introduce unnecessary confusion..... 527

A demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded on, the allegations of the bill, would make the subject-matter of the suit a proper case for equitable interference..... 543

On demurrer, multifariousness of bill can only be taken advantage of by the party suffering therefrom..... 150

An admission, in an answer to a bill in equity, that a deed bears a certain date, does not estop the defendant from showing the deed was not then delivered, and was fraudulently antedated..... 326

An answer to facts charged in the bill is to be taken as true until the contrary is clearly established..... 566

A bill whose allegations are denied by the answer must be supported by at least the testimony of one witness and corroborating circumstances.....126, 834

Upon a hearing on an issue on a plea in bar, no question arises as to its sufficiency in point of law. It is only necessary to be proved in point of fact..... 834

Query, how far the court will decree upon proof by a single witness, where the answer puts the matter in issue, although only by a declaration of ignorance, etc., by administrators 933

Page

The defendant has a right to make his answer under oath, although an answer under oath is waived by the bill..... 322
The court may allow an amendment of the bill after deciding against the bill on demurrer 938

PLEDGE.

One to whom the note of a third person is loaned is liable where the amount is lost through his failure to use reasonable diligence to collect it..... 126

POWERS.

A power coupled with an interest does not expire with the death of the person creating it..... 913
Where a naked power is necessarily such as can be exercised only after the death of the grantor, it does not expire with his death 913
A naked power which expires with the death of the party creating it is such as requires the power to be executed in the name and as the act of the grantor..... 913
A power of attorney given as collateral security is irrevocable by the grantor, but it dies with him..... 913

PRACTICE AT LAW.

A plea of the general issue, tendered in court after a continuance, should be received 142
Where the summons is served 10 days before the return day, plaintiff, on filing his declarations, may enter up judgment at the rules by nihil dicit..... 204
Where a motion made but not decided was not continued to the next term, *held* that a continuance should be entered nunc pro tunc, but that the opponent would not be required to take it up at that term.....1009
After defendant in ejectment has appeared and entered into the common rule, he may rule plaintiff to proceed to trial or be non pros'd, although the declaration has not been changed so as to bring in the real defendant 1038
Plaintiff must enter a nolle prosequi as to one of the joint defendants, against whom there is a stay of proceedings pending action upon his discharge in bankruptcy, before he can proceed against the others.... 206
The dismission of a suit agreed does not amount to a retraxit, and is no bar to a future suit for the same cause of action... 304
The penalty of a nonsuit or default is inflicted for failure to produce a paper as ordered by the court.....1146
A prima facie case of the existence of the paper and its materiality must be made out, when an order nisi will be granted, leaving the opposite party to produce or show cause at the trial.....1146
The fact that a bill of discovery has been filed and answered, where the papers were not produced, is no bar.....1146
Before the jury are sworn and the trial commenced, a party cannot call for a paper which his opponent has received notice to produce on the trial.....1123
Defendant in ejectment need not show title to the land before he can call upon plaintiff to produce title papers to defeat his title. (Reversing 1123.).....1129
A suggestion that the opposite party is in possession of the paper which the other has given him notice to produce will put the burden upon the former of producing it, or showing by affidavit that he is unable to do so 1123
A paper produced by one party on notice from the other does not become evidence unless, from its legal character, it is entitled to admission as such.....1129
On a plea in abatement, if the jury find against the plea, they ought to assess the damages on the plaintiff's declaration. If this is omitted, a venire de novo must be awarded 356

PRACTICE IN ADMIRALTY.

See, also, "Admiralty."

A vessel discharged from arrest upon giving the required bond or stipulation is forever discharged from the lien which was the foundation of the action, and the court has no jurisdiction over her for the same cause of action..... 448
The principal and surety on the bond or stipulation given upon an arrest in personam stand upon the same footing..... 403
A special notice to the surety, of application for execution against him, is not necessary 403
In the case of three litigations against a vessel or its owners, involving title to the same property, brought in different courts, the proceedings in one were stayed unless libelant should elect to stay proceedings in the others.....1155
The mere fact that plaintiff has discontinued his action is no bar to a subsequent suit 419
A court of admiralty has no general power —at least, after expiration of the term—to set aside a final decree on the ground of oversight, inadvertence, or mistake.....1170
The 10 days allowed by rule 40 for setting aside a decree are restrictive, and a motion made after such time cannot be entertained 1170
An objection to a clerk's report on a reference to ascertain the amount of damages cannot be taken by argument, but must be by formal exception..... 662
A party cannot, by exceptions to the report of a commissioner to compute damages, raise a question on the merits which was previously decided by the court..... 608
The conclusion of the commissioner upon a disputed fact will be accepted by the court, unless there is a palpable preponderance of evidence against it..... 403
Publication of notice of sale in cases of condemnation of vessel..... 528
An officer who, in executing admiralty process in rem, does not take and hold actual and manifest possession, cannot charge custody fees, although he may be liable for the safe-keeping of the vessel..... 112

PRACTICE IN EQUITY.

Where a party not within the jurisdiction files his answer, disclaiming all interest, the bill may be dismissed as to him and continued as to the others..... 197
The demurrer to a cross bill having been sustained, defendant's motion to stay proceedings under the original bill will be denied 926
No enlargement of the time for taking testimony in equity before the master can be made unless notice of the application be given to the opposite party..... 926
The failure of counsel to properly apply the testimony or to give it due weight, in argument, is not ground for a rehearing..... 957
An application for a rehearing must state some reason which would constitute good ground for a new trial at common law.... 957

PRINCIPAL AND AGENT.

Page

See, also, "Master and Servant"; "Powers."

A person acting under a power of attorney from the partner of a deceased consignee of goods *held* to be agent of such partner, and not of the shippers, and liable for the proceeds of the goods turned over to such partner without the approval of the shippers. 429

Where an agent or factor keeps the proceeds of his principal's goods separate, the principal may claim the same, or the profits thereon, as against the agent or his general creditors 593

The principal is chargeable with the knowledge of his agent..... 566

The principal is liable for the conduct of his agent while acting in the scope of his employment, though contrary to his orders.. 462

The owners of land, who give to another a bond to convey to him, or to give him all over a certain price, if he should make a sale, are bound by his representations to a purchaser procured by him..... 566

PRINCIPAL AND SURETY.

See, also, "Bail."

A surety upon a bond is not discharged by a mere delay to demand payment after it becomes due, unaccompanied by fraud or an express agreement with the principal to allow the delay..... 948

Sureties on the bond of a collection agent *held* released to the extent of a balance due shown on a fraudulent account rendered by the collector, where the obligee promised to surrender the bond on execution of a deed to secure the balance shown thereon, but are liable for the amount fraudulently concealed ..... 501.

The principle that the creditor loses recourse against security, where his debtor, to whom indulgence is extended, becomes insolvent, does not apply in favor of a mere donee 513

PRIZE.

The district courts of the United States have exclusive jurisdiction in prize cases, without restriction to cases of seizures within their territorial dimensions, or on the high seas 95

But they will not assume jurisdiction of prize matters of foreign nations occurring upon the high seas flagrante bello..... 33

Persons abiding within the authority of citizens levying war against the government become enemies, because of their residence, without regard to their private sentiments, or the locality of their property.... 95

An American vessel trading at a neutral port is not subject to capture by an American privateer because carrying a pass or license from the enemy, though it is intended to remit the proceeds of the cargo to the enemy country.....*469

The acts of July 13, 1861, and August 6, 1861, did not affect prior proceedings of the president in authorizing acts of war, in establishing blockades, and making captures of enemy property..... 95

A notice of a blockade, to the officials of a neutral government, is a sufficient notice of it to the subject of such government.... 95

The act of egress is as culpable as the act of ingress, when done in fraud of a blockade 95

On notice of a blockade, a neutral vessel may withdraw from the port, with all the cargo honestly laden on board before the commencement of the blockade..... 95

Page

The acts of a master in breach of a blockade affect the cargo equally with the vessel, if the cargo is laden on board after the blockade has become effective as to the vessel 95

A warning on the register of a vessel is not necessary to establish notice of a blockade, where actual notice of it to the master or owner is satisfactorily made out otherwise 95

An American ship captured by a French privateer, with a neutral cargo on board, and brought into an American port for condemnation, will be restored, and damages awarded against her captors..... 348

Where the cargo captured is in a perishable condition, it will be ordered to be sold by the circuit court pending an appeal to the supreme court..... 108

Of the rule for apportionment of costs among the several claimants in prize causes. 210

Vessel and cargo condemned as enemy property, and for a violation of the blockade of Charleston..... 70

PUBLIC LANDS.

Pennsylvania proprietary lands.

One person may take out any number of warrants in the names of different persons, who will be considered trustees for him.... 840

Uncertainty of description in the warrant is no objection where the land is surveyed before an adverse title accrues to a third person 840

Where the outlines of a tract are legally surveyed, a third person cannot question the survey of one of the inside warrants..... 840

A located warrant may be lifted and relocated on another tract, if no person has acquired the title in the meantime..... 840

As to the meaning of "a persistence in his endeavors to make such actual settlement," as used in Act Pa. 1792.....840, 847

A warrant taken out for certain land, which is subsequently found to have been previously taken up, may be laid upon adjoining lands..... 848

Upon a forfeiture for noncompliance with the terms of the warrant, no third person can enter on the land..... 848

The words used in an entry should be construed in reference to their proper signification, rather than to their grammatical arrangement 424

The contract for liberty land did not constitute the purchasers tenants in common..1024

Persons entitled to liberty lands were bound to have them laid off by surveyors regularly appointed, the same as other lands 1024

The proprietary is neither an agent nor a trustee for the first purchasers.....1024

The proprietary, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia....1024

A warrant without a survey, made under a legally authorized surveyor, does not give a right of entry to support an ejectment..1024

A warrant holder for lands in "the new purchase" loses his right of possession by failure to comply with the requisites of the law 848

A patent for land is only prima facie evidence of title, and proof of the omission to take the preliminary steps for vesting title will defeat it..... 840

The rights of settlers and warrant holders in cases of abandonment, improvement, etc., and delay to protect such title, stated.. 430

Sufficiency of proof in ejectment.....1122

A warrant and survey of lands within the "new purchase," without a compliance with the terms thereof enjoining a settlement on the land, is not sufficient to sustain ejectment 840

Page

A variance of 40 poles, on a straight line, in running a two-mile line, *held* not unreasonable 424

QUIETING TITLE.

Equity will enjoin a sale for taxes when the assessment is void, and the deed given in pursuance of the sale would cast a cloud upon the owner's title..... 974

A tax deed in California is prima facie evidence of the regularity of the tax proceedings, and therefore prima facie evidence of title, and, if executed in pursuance of a void sale, casts a cloud upon the title..... 974

A deed fair upon its face is not objectionable, as a colorable conveyance to give jurisdiction, unless proof be shown aliunde.... 551

RAILROAD COMPANIES.

See, also, "Carriers."

Construction of the land grant to the Burlington and Missouri River Railroad Company 893

Taxability of such lands..... 893

Under the reservations in the constitution and statutes of the state of New York, *held* that the charter of the New York & Oswego Midland Railroad Company may be amended by repealing a grant of immunity from taxation..... 75

The St. Paul & Pacific Railroad Company is not in law the same corporation as the Minnesota & Pacific Railroad Company, and cannot be sued at law on the bonds and coupons made by the latter..... 494

The submission to a vote of the people of the decision of the grand jury in favor of a subscription by the county to railroad stock, authorized to be made upon the recommendation of a grand jury, will not affect the validity of the subscription..... 637

The omission of a condition in county aid bonds, where the liability would not be changed if it had been inserted, will not prevent a recovery thereon by a contractor who received them in payment for work done.. 637

A mortgage given to secure bonds issued under legislative authority is valid between the parties without registration.....1207

A junior mortgagee in a suit to foreclose his mortgage may, on sufficient cause shown, have a receiver appointed, but without prejudice to the rights of the senior mortgagee 1207

Where a junior mortgage covered the whole road, while the senior mortgage covered only a portion, and a receiver was appointed on foreclosure of the former, *held*, that the property should be divided, and another receiver appointed for that portion covered by the senior mortgage.....1207

A receiver may be appointed where trustees under a prior mortgage attempt to execute the trusts prejudicially to subsequent incumbrancers, or equity may enjoin improper execution.....1207

REAL PROPERTY.

See, also, "Adverse Possession"; "Boundaries"; "Deed"; "Ejectment"; "Estates"; "Public Lands."

Plaintiff in ejectment can recover mesne profits only from the time of the ouster laid in the declaration, where he proves no title prior thereto.....1133

The value of defendant's improvements will be first set off against mesne profits received prior to the actual ouster.....1133

RECEIVERS.

Page

See, also, "Corporations."

A party having, as security for a large debt, a lease of a railroad, from whom possession has been taken by a receiver appointed in a suit by another, is, upon his discharge, entitled to have possession restored to him..... 641

RECORDS.

Official re-establishing under legislative act of records which have been burned.... 922

REFERENCE.

The circuit court of the United States has no authority to refer a suit at common law to a referee for trial, without the consent of both parties, although, in the state court, such a suit is referable without consent.... 708

Plain mistakes in facts appearing on the face of the award, or from the evidence submitted, are no ground for relief in equity from the judgment entered upon the award..1035

REMOVAL OF CAUSES.

See, also, "Courts."

Right of removal.

When a defense depends wholly on the construction of the constitution of the United States and acts of congress, the courts of the United States have jurisdiction of the subject-matter, without regard to the citizenship of the parties..... 285

An action of trespass is removable where defendant justifies the alleged trespass under the authority of a court and of the laws of the United States..... 600

Foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit..... 60

The fact that plaintiff, who was an alien when the suit was brought and petition for removal filed, has since become a citizen, will not prevent the removal..... 600

To authorize a removal on the ground of diverse citizenship under Act Sept. 24, 1789, § 12, all the plaintiffs must be citizens of the state in which the suit is brought, and all the defendants must be citizens of some other state or states..... 781

In a suit commenced in the state court of Vermont by two plaintiffs, one was a citizen of that state, and the other of New Hampshire, while defendant was a citizen of New York. *Held*, that the cause was not removable..... 781

Nominal parties, having no actual interest, will not affect the question of removal.. 60

The case must be so removed that the controversy can be fully determined..... 60

Time for removal.

A cause may be removed before answer, on the petition of defendants brought in on order of interpleader..... 287

After a reversal on an appeal pending, when Act March 3, 1875, was passed, the cause is removable at the first term of the lower court at which a new trial could be had after filing the remitter..... 250

The mere fact that a cause is ready for the ex parte execution of a writ of inquiry by plaintiff after an office judgment is not equivalent to its being ready for trial on issues joined. (Act March 3, 1875, § 3.).. 972

The fact that the cause is not actually tried at the first term at which it is at issue and legally triable, because the parties failed to put it upon the trial list, does not preserve the right of removal until a subsequent term..... 799

Page

Proceedings to obtain.
The circuit court has no power to issue a writ of mandamus to a state court for the removal of a cause..... 581
The petition for removal is not required to be verified, by Act March 3, 1875..... 600
The petition for removal may be amended. 600
The circuit court cannot review the decision of the state court on questions arising under the petition for removal. The remedy is by appeal to the supreme court of the state, and thence by writ of error to the supreme court of the United States. (Act 1789, § 12.)..... 581
The order for removal need not be made before appearance by defendant. (Act March 3, 1875.)..... 600

Effect of removal: Subsequent proceedings.
Where the defendant removed the cause, but failed to have the transcript from the state court filed, plaintiff will be given leave to have the same filed and the case docketed 1113
The defendant in a case removed as one arising under the constitution or laws of the United States will be confined substantially to the ground of defense indicated in the petition for removal..... 600
Special bail, given upon removal, can only surrender the principal in open court..... 324
The state statute in reference to the recovery of costs will govern where the action is removed to the federal court..... 635

SALE.

See, also, "Vendor and Purchaser."

The purchaser of goods sold while at sea acquires, without actual possession, a constructive possession, sufficient to maintain trespass against any wrongdoer..... 734

SALVAGE.

See, also, "Admiralty."

Right to salvage compensation.
Unsuccessful efforts to save imperiled property are not grounds for an award of salvage 996
Whether the towing into port of a rudderless vessel is to be considered a salvage service depends upon whether the loss of the rudder rendered the vessel unnavigable.... 483
A steamer which went to the relief of a sloop drifting towards a dangerous reef in Hell Gate after floating off a rock on which she had struck, and took her in tow, *held* entitled to salvage, though the crew, which had been watching her from the shore, had put out in their boat to board her..... 417
A tug which gets a burning vessel afloat, and tows her to a place where other parties put out the fire, renders salvage service, although both sets of salvors deny co-operation 996
A vessel which, by a signal of distress, secures the aid of salvors, will not be heard to say that she could have saved herself without assistance..... 996
Pilots acting under an agreement for extra compensation will nevertheless be allowed salvage compensation, where there has been extraordinary personal merit or effort, or unforeseen exertion and hazard, in the performance of the service..... 483
The crew of a ship wrecked on a desert island, who rescue, with great labor, part of her cargo, *held* not entitled to compensation as salvors..... 331
Public servants may recover salvage for assistance of great merit, rendered in the line of their regular duty, but in excess of the official requirements thereof..... 996

Page

The mayor of Charleston has power to forbid the coming of a burning ship from sea to the city wharves; also, to make her coming conditional upon her paying all the expenses of saving her..... 996
A city fire department may recover salvage for saving a burning ship, brought, by permission of the city authorities, within the city jurisdiction..... 996

Contracts for salvage services.
A contract for compensation at all events is no bar to salvage, unless it is express, explicit, and clearly proved..... 996
An agreement to pay $2,500 for pulling off a brig aground on Romer Shoal *held* exorbitant, and $1,250 was allowed..... 454

Forfeiture or reduction of salvage.
A tug carelessly ran her tow aground. *Held*, that her share in the salvage allowed for pulling the tow off should be forfeited to the tow..... 454
Stores found on board a derelict may be used by the salvors for necessary subsistence during the course of the service.....1163
In the case of illiberal conduct of salvors in dealing with a vessel in distress, liberal compensation will not be awarded..... 630

Amount.
One-half decreed by way of salvage, in case of a vessel found derelict on the high seas 201
Salvage of derelict property is compensated by the same rules that obtain in respect to property not derelict.....1163
The rule allowing a moiety to salvors in cases of derelict is not inflexible..... 745
Salvors cannot found a claim for increased compensation upon the use of a steamer furnished by underwriters free of charge.....1163
The fact that salvage services were rendered by a steam vessel to a steam vessel is a ground for larger compensation than if both had been sailing vessels..... 996
An apparently empty chest was found floating on the high seas. On being broken up, 70 doubloons were found concealed therein. *Held*, that the finders were entitled to a moiety only, though there were no claims or marks of ownership..... 380
One-third of net value, of $14,500, allowed for floating vessel aground on Loo-Key Shoals by discharging 130 tons of ballast, carrying out anchors, etc.....1154
One-fourth allowed where an American brig, on the northwest coast of Africa, whose officers were dead or dying from coast fever, was rescued by a British naval vessel, and sent home in charge of one of its officers 979
One-fourth awarded upon a valuation of $35,391, for rescuing, in a partially damaged condition, a vessel and cargo stranded upon Florida Reef..... 630
$800 awarded for navigating disabled vessel to port after she had got inside the Florida Reefs..... 23
$2,000 allowed 36 salvors, on a net value of $12,000, for services rendered derelict vessel stranded in Boston harbor.....1163
$5,740 allowed, on valuation of $6,740, for saving oil and materials from a vessel abandoned at a distance of 1,000 miles from any country where assistance could be procured. 745

Remedies for recovery.
All cosalvors should be made parties to a libel for salvage..... 67
Where salvors conceal from the court the names of other persons who participated in the salvage service, their libel will be dismissed 67
A libel in the name of a British naval officer and the British consul, joining with him "for all other interests," where the vessel, rescued by a British naval vessel, was sent home in charge of the officer, *held* not fatally defective..... 979

Page

A person claiming as a salvor will be permitted to testify in his own behalf without determining, by technical refinements, whether the service was strictly a salvage service or not..... 979

Libelants will be decreed to pay costs out of their distributive share, where a fair and liberal allowance has been tendered to them or their proctors..... 67

Right to property or proceeds.

Salvors of a derelict have a right to retain possession until the salvage service is completed, but if their own means are inadequate they are bound to accept additional assistance, if offered.....1163

SEAMEN.

See, also, "Admiralty"; "Fisheries"; "Maritime Liens."

Protection and relief.

The crew may demand a survey in a foreign port, where they have reasonable grounds to believe the vessel to be unseaworthy 112

Where a survey is refused, and resisting seamen are imprisoned on shore and left there, they will be allowed full wages..... 112

Extra wages are allowed for a short allowance of bread, where an insufficient quantity was provided, though the immediate cause of the deficiency was the spoiling of part of it by a sea peril..... 29

The contract of shipment.

A contract for a voyage, which has not a definite time and place of termination, is void 526

The contract of a minor is voidable at any time, but he can only recover the value of his services after an allowance to the owner for any injury sustained by reason of its avoidance..... 562

Specifying the places to which the voyage might extend, *held* an implied agreement that it was not to extend to any other, and a sufficient compliance with the English merchant shipping act of 1873..... 24

Where the duration of the voyage is described as probably 12 months, the seaman, under the British merchants' shipping act, is absolutely bound to make the voyage, if the master endeavors, in good faith, to accomplish it within the time mentioned.... 562

A steward disrated for wasting provisions, and put before the mast, may accept the change as a rescission of contract, and claim his discharge at the next port..... 562

A seaman cannot be discharged for slight offenses, nor for a single offense, unless of a very aggravated character.....1083

Notwithstanding a sufficient cause for discharge, if the seaman repents, and offers to return to duty, the master is bound to receive him.....1083

A seaman disabled by an accident, in the discharge of his duty, is to be cured at the expense of the ship..... 416

The expenses of medical attendance necessary for the safety of the life of a seaman who has contracted an ordinary disease in a foreign port will be deducted from his wages, where the vessel is properly provided with a medicine chest..... 416

Conduct of master or mate in respect to seamen.

The owners are not liable for the act of the master in wrongfully detaining seamen's clothing, unless they have ratified his acts.. 112

Where a seaman is wrongfully left by the master in a foreign port, the owners are liable for all damages sustained thereby..... 905

Wages—Right to.

Quantum meruit compensation..... 24

A hiring at monthly wages imports that the engagement is by the month, and the seaman loses the month's wages where he quits, and recovers the whole wages where he is discharged, before its expiration..... 805

Where a vessel had been captured and condemned, and, pending an appeal, was restored, *held*, that the seamen were entitled to full wages..... 247

A seaman carried away on the capture of the vessel is entitled to full wages, where the vessel is recaptured, pays salvage, and earns freight..... 739

The discharge of the crew by sale of the vessel on execution is of the same effect as to their rights as the breaking up of the voyage or discharge of the crew by act of the master..... 805

Evidence *held* insufficient to show that the voyage was broken up by the fault of the owner, where the vessel was run on a reef in a well-known channel, where there was plenty of room, and the master was a man of experience..... 174

A seaman refusing to proceed in a vessel provided for the further transportation of the cargo, where the first vessel became unseaworthy during the voyage, *held* not entitled to wages to the end of the voyage... 200

The two-months extra wages, and the expense of returning home, are not allowed the crew of a vessel condemned in a foreign port as unfit for service, where she was seaworthy when she sailed..... 307

A foreigner shipped at a foreign port, and discharged at a foreign port in accordance with his contract, is not entitled to two months' extra pay..... 29

Extra wages allowed seamen who left the ship in a foreign port with the connivance of the master, where a discharge was refused by both master and consul..... 29

An arrest and imprisonment under a criminal charge by the master *held* equivalent to a discharge..... 178

Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside or disregarded by courts of admiralty, if inequitable 24

The measure of damages for a wrongful discharge is full wages to the return of the vessel, and the expenses of the seaman's return 1083

The intermediate earnings of the seaman may be deducted from the expenses of his return, but not from the wages due.....1083

The certificate of a consul that the seaman consented to the discharge is not conclusive 1083

—— Remedies for recovery.

Renunciation of the lien by agreement is ineffectual unless fully understood by the seamen, and adequate compensation is made therefor 136

The lien is not defeated by a previous attachment of the vessel, at common law, in a state court, abandoned before the filing of the libel..... 136

A forbearance to sue for nine months, even though the vessel and libelant were within the jurisdiction the entire time, does not raise a presumption of payment..... 419

The lien for wages will not be enforced, as against a bona fide purchaser, where the libel was delayed for many months, and the vessel was repeatedly in port, and her owner had advertised for claims against her..... 1

When the 10 days commenced to run, after which seamen may sue for wages... 402

The defense that the suit is prematurely brought is waived, if not specially pleaded.. 178

The value of the seaman's clothing, detained by the master, may be recovered in the same libel with a claim for a wrongful discharge 1083

—— Deductions: Extinguishment, etc.

Where a whaling voyage is broken up in a foreign port, from necessity, the master,

Page
on the request of the seamen, may pay their shares by delivering portions of the oil taken 1061
Respondent has the burden of showing that the shipping agent to whom the alleged payment in advance was made was authorized by libelant to receive it..... 403
A settlement deliberately made by a seaman with the advice of his proctor will not be opened..... 29
Wages are not, as a matter of course, wholly forfeited for smuggling..... 526
A forfeiture of half wages decreed for misbehavior making it necessary to dismiss the seaman when the voyage was about half performed 874
Seamen may recover wages and claims for short allowance, although guilty of mutinous and disobedient conduct, where they had afterwards returned to duty and been criminally prosecuted for the offense..... 178
No wages will be allowed a seaman, though criminally punished for the offense of mutinous conduct, who has been guilty of embezzlement and desertion..... 178
Seamen are guilty of desertion where they leave the vessel before the voyage is completed, without the master's consent, though with his knowledge, and upon his promise that they shall not be arrested therefor... 24
An entry upon the log book stating the name of the seaman, and that he was absent from the ship at least 48 hours, is essential to the statutory desertion. Such entry may be controlled by parol evidence.. 11
Though the entry in the log book of a desertion is defective, a forfeiture may be decreed, under the general maritime law, upon other evidence..... 55

SET-OFF AND COUNTER-CLAIM.

Unliquidated damages cannot be pleaded as a set-off..... 445
The right of set-off is limited at common law to cases of mutual, connected debts, and does not extend to debts which are unconnected 1009
Equity follows the law in regard to matters of set-off, unless there is some intervening natural equity, going beyond the statute of set-offs..... 675
Joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity..... 675
A separate debt due from a partner cannot be set off from a joint debt due to the partnership, though the partner is insolvent. 675
Quaere, whether the debt of one partner in a joint concern with others, not yet closed, can be set off in an action between partners 1028
The right of set off, either in law or in equity, of mutual debts, is extinguished by a bona fide assignment of one of the debts.. 675

SHIPPING.

See, also, "Admiralty"; "Affreightment"; "Average"; "Bills of Lading"; "Bottomry and Respondentia"; "Carriers"; "Collision"; "Demurrage"; "Maritime Liens"; "Pilots"; "Salvage"; "Seamen"; "Towage."

Public regulation.

A foreign vessel, which, after being wrecked, is rebuilt by a citizen of the United States, and enrolled as a new domestic vessel, is liable to forfeiture, as fraudulently enrolled, though she might have been enrolled as a foreign vessel wrecked in the United States and purchased and repaired by a citizen..... 797

Page
Title to vessel.
The grantor in a bill of sale cannot be prejudiced by the grantee's neglect to record it, and cannot be made personally liable for negligent navigation after his interest has ceased 1008
The owner of a vessel wrecked on a desert island has no title to a small vessel built from her remnants by the master and crew, as the only means of escaping from the island..... 331
For conveying materials of the wrecked vessel in such small vessel, *held* that the master and crew were entitled to compensation for transportation..... 331

The master.
Where the vessel owners have no agent in a foreign port, the master has power to make a charter party..... 1015
The master has no power to enter into a charter in a foreign port for the purpose of giving a creditor of the vessel owner a security for his debt..... 1015
A vessel which put into St. Thomas in distress, whose cargo of wheat was reshipped in bags, was not able to take in the entire amount, by reason of the increased bulk. *Held*, that the master was justified in selling the wheat necessarily left behind..... 475

Liabilities of vessels or owners.
The vessel is not liable in rem for breach of a contract for rent of bar privileges thereon 1178
Bills of lading "C. O. D." are not a lien on the vessel to secure payment of the money collected from the consignee on delivery of the goods..... 1178
The contract of the master to sell the cargo, and transmit the proceeds to the shipper, will not bind the vessel, where the proceeds are not actually placed on board the vessel 4
The remedy in rem for injuries from injurious escape of steam on steamboats is confined to injuries to passengers. Other persons on board have only a remedy in personam. (Acts 1838, 1852.)..... 138
A material man cannot maintain an action in personam in admiralty, where a note or other obligation has been taken for the demand 142

Slander.

See "Libel and Slander."

SLAVERY.

Right to freedom on a sale in the District of Columbia, of a slave brought from Maryland 265
Action for penalty for obstructing the arrest of a fugitive slave..... 172

SPECIFIC PERFORMANCE.

Part performance will take an oral agreement out of the statute of frauds, and the residue will be enforced by a decree for performance 957
Length of time is no objection to a decree, if not pleaded in the answer, where the condition of the parties and property remains substantially the same..... 957
The failure to tender money due under a contract until five years after the time limited by the contract for payment is such laches as will justify the dismissal of the plaintiff's bill..... 378

STATES.

See, also, "War."

The United States circuit court has no jurisdiction of a writ of certiorari to a state

Page

court to remove proceedings by the state against a railroad company under Act Ill. May 2, 1873.....1197

STATUTES.

The nature of a proviso in a statute.... 840
The legislative construction of a statute cannot have a retroactive operation..... 454
The statements of members of a legislative body in debate on the passage of a law may be resorted to to ascertain its general object, though not for the purpose of explaining the meaning of the terms used... 252
The construction given to the statutes of a state or country by its courts will be followed by the courts of other countries..... 881
The repeal of a lien law after the lien has attached by performance of work does not defeat the lien..... 487

TAXATION.

See, also, "Internal Revenue."

The Central Pacific Railroad Company is not exempt from state taxation, as an instrumentality created by congress, and employed for transportation of mails, armies, etc., of the United States..... 974
In California a railroad must be taxed as real estate, and assessed in the counties in which each portion lies, at its cash value as so much land..... 974
The lands and improvements thereon must be assessed separately, like other real estate 974
An assessment of a tax, not made in the mode or on the principle prescribed by the statute, is void..... 974

TENDER.

A tender made after suit brought, where it does not include interest and costs, and the money is not deposited in court as required by the rules, is unavailing.....1051

Torts.

See "Admiralty"; "Death by Wrongful Act."

TOWAGE.

See, also, "Collision"; "Salvage."

The tug, unless wholly under the command of the tow, and implicitly obeying its orders, is bound to use all necessary care, foresight, and skill to provide for the safety of the tow.....1143
The refusal of the master of the tow to go on board after she had broken adrift, to aid in her rescue, will prevent a recovery for her loss, if it contributed thereto, unless such refusal was based upon a well-grounded fear of endangering his life..... 486

TOWNS.

The town must have so much of its roads passable as not to delay travelers, or endanger them in getting by, at places not very remote or very inconvenient..... 864
Notice to town to pay damages for neglect in repairing highway, under the Rhode Island statute, before bringing suit, *held* not applicable to claims ex delicto..... 864
Damages for injury from defect in a highway will not be aggravated where the road existed for many years in the condition complained of, and had never before been the subject of complaint..... 864

TRADE-MARKS AND TRADE-NAMES.

Page

Equity will protect the owner of a trademark by an injunction against an infringer and a decree for damages, which is ordinarily the loss of profits from the infringement 546
The imitation of a manufacturer's label, where the only change was "Holsteter" and "Holsteter & Smyte," for "Hostetter" and "Hostetter & Smith," *held* to be illegal.... 546
Where complainants' sales fell off in an amount at least equal to sales made by defendant of the imitated article, damages were awarded to the extent of the profits they would have made on the number sold by the defendant..... 546

TREATIES.

The operation of a treaty before ratification by the governing powers of the state by whose agents it has been signed.....1129

TRESPASS.

Possession taken by a customs officer of imported goods, before they are unladen, to secure the lien for duties, will not prevent one who purchased them while at sea from maintaining trespass against a wrongdoer.. 734
Plaintiff cannot give evidence of trespasses committed on land not within his location at the time of the trespass..... 390

TRIAL.

See, also, "Appeal"; "Continuance"; "Evidence"; "Exceptions, Bill of"; "Judgment"; "Jury"; "New Trial"; "Practice"; "Reference"; "Witness."

An offer to allow the jury to examine, with a microscope, papers whose genuineness is doubted, is too late, when made during the argument..... 700
The jury cannot be allowed to take to the jury room a letter, the genuineness of which is denied, for the purpose of comparing it with a genuine letter. Such comparison must be made in the progress of the trial.. 699
A motion in arrest of judgment because the ejectment against the casual ejector was wrongly entitled, and for other defendants, will be overruled where the declaration to which the real defendant pleaded was right 845

TROVER AND CONVERSION.

Trover will not lie against the master of a vessel for the cargo, unless the freight is paid or tendered or waived, or where the goods were lost..... 287

TRUSTS.

See, also, "Executors and Administrators"; "Guardian and Ward."

Rules as to the creation of resulting trusts, by Story, J..... 746
A declaration of trust not recorded is inoperative, under Act Ill. Jan. 31, 1827.... 783
A feme sole created a trust for herself for life, with remainders, reserving a power to revoke or declare new trusts. *Held*, that an instrument to "renew the trust for five years" was a complete execution of the power, and operated as a revocation at the end of five years..... 122

Page

A trust *held* extinguished by the cestui que trust conveying the land, though the grantee failed to fulfill its agreement on which the conveyance was made; the remedy of the cestui que trust being at law, for damages, or by bill in equity, for specific performance 957

The remedy of the cestui que trust against the trustee for negligence is in equity, not at law..... 850

Equity will not lend its aid to enforce a trust made to defraud creditors..... 957

Where a trust made to defraud creditors is executed by the trustee conveying the property to a third person to secure a loan to the cestui que trust, whose rights the grantee distinctly recognizes, the trust is enforceable 957

What is sufficient evidence of the trust, and its recognition by the grantee..... 957

A state legislature may authorize a change of investments by trustees..... 766

A trustee cannot attack the validity of a deed under which he took possession, unless he was deceived into taking title, not knowing that the property really belonged partly or wholly to himself..... 912

United States Officers.

See "Marshal."

USURY.

The purchaser of checks payable to bearer, though bona fide and without notice, is affected by usury therein..... 176

In an action to recover on a note given for a usurious loan, the burden is on plaintiff to show the actual amount lent..... 176

VENDOR AND PURCHASER.

See, also, "Bankruptcy"; "Boundaries"; "Deed"; "Fraudulent Conveyances"; "Sale"; "Specific Performance."

The vendees are not entitled to rely upon the opinion of the vendor's agent, where they have the means of ascertaining the facts 566

A vendor of property is not liable to the vendee for taxes for the current year, not then assessed, and not payable until January 1st, following..... 947

A purchaser who has notice of such facts as, with ordinary diligence, would lead him to a full knowledge of an outstanding equity, is a purchaser with notice..... 197

Real estate purchased with actual or constructive notice that it is partnership property is chargeable, in the hands of the purchaser, with the payment of the partnership debts, of whose existence they had no knowledge 746

The doctrine of a purchaser without notice applies only to equitable rights. In the case of legal titles the rule is, "Caveat emptor." 1039

WAR.

See, also, "Habeas Corpus"; "Payment"; "Prize."

Under the law of nations, the rights incident to a war waged by a government to subdue an insurrection or revolt of its own subjects or citizens are the same, in regard to neutral powers, as if the hostilities were carried on between independent nations.... 95

A blockade of the enemy's ports is as lawful a means of war in civil warfare as it is in a war between nations foreign to each other 95

Page

No formal declaration of war by the president, in the case of the war of the Rebellion, was necessary to render lawful the means adopted by him to repel the warlike measures of the enemy..... 95

Trials under the reconstruction acts, by military commission, could only be for the violation of some known law in force in the state, and the punishment inflicted only that provided by law..... 73

A military commander, under circumstances of actual, urgent, immediate, and pressing public necessity, may take private property 422

Where a person in an Indian country induces Indians to steal cattle for him, with which to fulfill a government contract for army supplies, the major general commanding in that country may order his arrest and the seizure of the cattle..... 422

Army contractors and their subordinates are liable to arrest by the military commander for frauds against the government under their contracts, but must be brought to trial with reasonable diligence..... 422

WILLS.

See, also, "Descent and Distribution"; "Executors and Administrators."

A will concerning land in Pennsylvania, no matter where made, must be proved by two witnesses.....1123

WITNESS.

See, also, "Bankruptcy"; "Costs"; "Deposition"; "Trial."

Privilege.

Neither the jurors, nor the officer to whose care they were committed, can be compelled to testify to the fact that the jury separated after the cause was submitted, and before the verdict was agreed upon..... 636

Competency.

Inhabitants of towns are competent witnesses in actions where the towns are parties 957

On a libel in rem upon a bill of lading, the clerks and agents of the transportation company claimant, having personally no interest in the business, and not responsible for its defaults, are competent witnesses.. 662

The master of a vessel is a competent witness for the owners, in a suit in rem for wages of a seaman..... 805

The master of a ship is not a competent witness in an information in rem for a forfeiture occasioned by his misconduct..... 482

In replevin for goods taken by defendant, a constable, he may testify for himself, upon being indemnified by plaintiff in execution.. 194

A person who borrows checks payable to bearer, to raise money upon for his accommodation, but has not indorsed them, is a competent witness for the defendant, to prove usury..... 176

A creditor of an insolvent debtor is not competent, in a suit by his trustee..... 3

One of several defendants, who has judgment upon demurrer to his separate plea of bankruptcy, may be a witness for the others, upon releasing all rights in his estate.....1015

Credibility: Impeachment.

A witness may be impeached by proof of declarations made by him out of court, contradictory to his testimony, without requiring that he should be first examined with reference to them.....*730

Attendance and fees.

An attachment may issue against a witness for failure to attend before a commissioner for examination de bene esse, in obedience to a subpoena..... 872

Page

The circuit court of the District of Columbia will grant a rule on a witness residing in Baltimore, Md., to show cause why he should not be attached for not attending according to summons..... 282

A witness who, for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment..... 132

WRITS AND NOTICE OF SUITS.

Sufficiency of service of declaration in ejectment 850

Page

A subpoena on a bill in equity in the district court by an assignee in bankruptcy is properly made returnable on the first Tuesday of the month, where there is a new term on that day.....1139

A subpoena on a bill in equity by the assignee is not properly served when left at a dwelling house which the parties have not occupied for over two years.....1139

The service of a subpoena in equity on the attorney of a nonresident plaintiff, in a judgment at law, will be deemed good where the subject in controversy is the same as that in the suit in which the judgment was rendered 249

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